Law society of Kenya v Centre for Human Rights and Democracy & 13 others (Civil Appeal 308 of 2005) [2013] KECA 172 (KLR) (18 October 2013) (Judgment) (with dissent - AK Murgor & F Sichale, JJA)

Law Society of Kenya v Centre for Human Rights and Democracy & 13 others [2013] eKLR

Neutral citation: [2013] KECA 172 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 308 OF 2005

PO KIAGE, AK MURGOR, F SICHALE, J MOHAMMED & JO ODEK, JJA

OCTOBER 18, 2013

BETWEEN

LAW SOCIETY OF KENYA ..... APPELLANT

AND

CENTRE FOR HUMAN RIGHTS AND DEMOCRACY ..... 1ST RESPONDENT

RICHARD ETYAN'GA OMANYALA ..... 2ND RESPONDENT

FRANCIS RANOGWA OZIOVA ..... 3RD RESPONDENT

JUDGES AND MAGISTRATES VETTING BOARD ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 6TH RESPONDENT

MOHAMMED IBRAHIM ..... 7TH RESPONDENT

ROSELYN NAMBUYE ..... 8TH RESPONDENT

JEANNE GACHECHE ..... 9TH RESPONDENT

RIAGA OMOLO ..... 10TH RESPONDENT

SAMUEL BOSIRE ..... 11TH RESPONDENT

JOSEPH NYAMU ..... 12TH RESPONDENT

KENYA MAGISTRATES AND JUDGES ASSOCIATION ..... 13TH RESPONDENT

E. O' KUBASU ..... 14TH RESPONDENT

(Appeal from theRuling& Orderof the High Court of Kenya at Nairobi (Havelock, Mutava, Nyamweya, Ogola & Mabeya, JJ) dated 30th October, 2012 in ELDORET CONSTITUTIONAL PETITON NO. 11 OF 2012)

Supervisory jurisdiction of the High Court over the Judges and Magistrates Vetting Board.

Reported by Andrew Halonyere, Lynette A Jakakimba, Beryl A Ikamari, Cynthia Liavule and Victor Andande

Constitutional Law *– jurisdiction – supervisory jurisdiction - High Court's review and supervisory jurisdiction over independent tribunals - where the Constitution provided that the removal of a judge by operation of legislation would not be subject to question or review by any court - whether the High Court had jurisdiction to review decisions of the Judges and Magistrates Vetting Board despite the ouster clause in the Constitution – Constitution of Kenya, 2010; article 20, 165(6,)165(7)and section 23 of sixth schedule, and Vetting of Judges and Magistrates Act, No. 2 of 2011; section 22.*

Constitutional Law*-interpretation of constitutional provisions-the effect of the ouster clause in section 23(2) of the sixth schedule to the Constitution of Kenya, 2010-whether the ouster clause would oust the High Court's jurisdiction to review the decisions of the Judges and Magistrates Vetting Board-Constitution of Kenya, 2010; articles 165(6), 259(1), 262 & section 23 of the sixth schedule, and Vetting of Judges and Magistrates Act, No. 2 of 2011; sections 19, 21 & 22.*

Constitutional Law*-interpretation of constitutional provisions-transitional and consequential provisions-whether transitional and consequential provisions found in the schedules to the Constitution of Kenya, 2010, were of an inferior hierarchical status as compared to other provisions found in the body of the Constitution-Constitution of Kenya, 2010; articles 165(6), 259(1), 262 & section 23 of the sixth schedule.*

Constitutional Law*-separation of powers-doctrine of political question-whether the doctrine of political question would apply to the vetting process carried on by the Judges and Magistrates Vetting Board.*

Brief facts

An appeal was lodged against the High Court's decision on the court's supervisory jurisdiction as concerned the proceedings and decisions of the Judges and Magistrates Vetting Board. The High Court's judgment was to the effect that the Judges and Magistrates Vetting Board (Vetting Board) had a legal or juristic character, which was akin to that of any tribunal, and was susceptible to the supervisory jurisdiction of the High Court under article 165(6) of the Constitution of Kenya, 2010.

Initially, within the appeal, applications for recusals and disqualification of various judges were made. In the end, a bench of five was constituted to hear and determine the appeal.

Issues

i. Whether the High Court had jurisdiction to review the decisions of the Judges and Magistrates Vetting Board despite the ouster clause in section 23(2) of the sixth schedule to the Constitution, which provided that the Vetting Board's decisions would not be subject to question or review by any court.
ii. What was the scope of the mandate of the Judges and Magistrates Vetting Board?
iii. Whether the Judges and Magistrates Vetting Board was a subordinate court or tribunal contemplated under article 169 (2) of the Constitution of Kenya, 2010.
iv. Whether the concepts of political doctrine and residual jurisdiction were recognized in Kenya and would be applicable to the decisions of the Judges and Magistrates Vetting Board.
v. What was the constitutional underpinning of the finality clause under section 22 of the Vetting of Judges and Magistrates Act, 2011, which provided that the review of the decision by the Vetting Board was final?
vi. Whether the principles applicable to ouster clauses found in statutes would apply to ouster clauses found in the Constitution.

vii. Whether transitional and consequential provisions found in the schedules to the Constitution of Kenya, 2010 were of an inferior hierarchical status as compared to other provisions found in the body of the Constitution.

Relevant provisions of the Law

Constitution of Kenya 2010

Article 165 (6) and (7)

(6) The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or *quasi judicial* function but not over a superior court.

(7) For the purposes of Clause (6) the High Court may call for the record of any proceedings before any subordinate court or person.

Section 23 of sixth schedule to the Constitution

(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.

Vetting of Judges and Magistrates Act, No. 2 of 2011

Section 22

(1) A judge or magistrate who has undergone the vetting process and is dissatisfied with the determination of the Board may request for a review by the same panel within seven days of being informed of the final determination under section 21(1).

(2) The Board shall not grant a request for review under this section unless the request is based—

(a) on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the Judge or Magistrate at the time the determination or finding sought to be reviewed was made, provided that such lack of knowledge on the part of the Judge or Magistrate was not due to lack of due diligence; or

(b) on some mistake or error apparent on the face of the record.

(3) The decision by the Board under this section shall be final.

Held

1. Section 23 of the sixth schedule to the Constitution of Kenya, 2010 did not create the Judges and Magistrates Vetting Board. It directed parliament to enact legislation within a year, which would establish the mechanism, procedures and time frame for vetting the suitability of all judges and magistrates sitting at the effective date. Accordingly, the Vetting of Judges and Magistrates Act, No. 2 of 2011, was enacted.
2. Article 162 of the Constitution established the system of courts in Kenya. The Vetting Board was neither part of the court system in Kenya nor was it a local tribunal; it was a *sui generis* quasi-judicial organ with a precise mandate, time frame and distinct legislative framework. The Board was neither a superior court as defined in article 162 (1) of the Constitution nor a subordinate court as stipulated under article 169 (1) of the Constitution. The Vetting Board as established was unique, transitional in nature with a life span determinable by parliament and it fulfilled the exceptional transitional constitutional role of restructuring the judiciary. That exceptional transitional role was not vested on the courts.

3. There was a misconception that the supervisory jurisdiction of the High Court was only exercisable over inferior tribunals and this had given rise to the unmerited preoccupation and undue emphasis on the submission as to whether the Vetting Board was subordinate or inferior to the High Court. The correct legal position was captured in article 165 (6) of the Constitution wherein the High Court's supervisory jurisdiction was exercisable not only in relation to inferior tribunals but also over any person or body or authority exercising judicial or quasi-judicial powers.
4. The fact that honourable judges of the High Court and Court of Appeal appeared before the Vetting Board did not elevate the Board to a status equivalent to the High Court or make it equal in stature to a superior court.
5. The Vetting Board fulfilled the constitutional criteria in article 165 (6) of being a person, body or authority and it was evident from its mandate that the Board exercised quasi-judicial power. The Board had the responsibility of a body charged by statute with a duty of deciding the suitability of Judges and Magistrates to continue holding their offices. The Vetting Board was under a duty to act judicially and was subject to the supervisory jurisdiction of the High Court within the meaning of article 165 (6) of the Constitution. General Medical Council v Spackman [1943] AC 627, 641 & Board of Education v Rice [1911] AC 179,182.
6. It was elementary law that a statutory provision could not oust an express constitutional provision. A statute could neither be used to interpret a constitutional provision nor could it override a constitutional provision. Section 22 (2) of the Vetting of Judges and Magistrates Act could not be used to interpret a constitutional provision, *to wit,* section 23 (2) of the sixth schedule to the Constitution. In the same vein section 22 (2) of the Vetting of Judges and Magistrates Act, being a statutory provision, could not supersede the provisions of article 165 (6) of the Constitution and neither could it override section 23 of the sixth schedule to the Constitution. A schedule to the Constitution could neither be utilized in interpreting the main provisions in the body of Constitution nor could a schedule be used to oust main provisions in the body of the Constitution.
7. The "review" contemplated under section 22 (2) of the Vetting of Judges and Magistrates Act was not the same kind of "judicial review" that the High Court exercised in a supervisory jurisdiction under article 165 (6) of the Constitution and order 53 of the Civil Procedure Rules. The High Court in its supervisory jurisdiction exercised the power of "Judicial Review" and not "review". Section 22 (2) of the Vetting of Judges and Magistrates Act was on the same subject matter as order 45 rule 1 of the Civil Procedure Rules and the two provisions were to be construed in the same way. Just as order 45 rule 1 of the Civil Procedure Rules was different from order 53 of the Civil Procedure Rules, it followed that the meaning, purport and object of section 22 (2) of the Vetting of Judges and Magistrates Act had to be construed differently from order 53 of the Civil Procedure Rules which governed Judicial Review.
8. Section 23 (2) of the sixth schedule was a constitutional ouster clause. However what was ousted by the constitutional ouster clause was the jurisdiction of any court to question and review the decisions of the Vetting Board. The word "review" in that constitutional ouster clause had to be interpreted as a term that had the same meaning as the term "review" as used in article 50 (2) (q) of the Constitution, section 22 (2) of the Vetting of Judges and Magistrates Act and order 45 Rule 1 (b) of the Civil Procedure Rules.
9. The control which was exercised by the High Court over inferior tribunals was of a supervisory nature but not of an appellate nature. It enabled the High Court to correct errors of law if they were revealed on the face of the record. The control could not, however, be exercised if there was some provision which prohibited its exercise. But it was well-settled that such a clause would be of no avail if the inferior tribunal acted without jurisdiction, or exceeded the limits of its jurisdiction.
10. Strict approaches to constitutional ouster clauses could not be applied to every case. In fact, an ouster could be usurped where strong and compelling reasons existed. Breaches of fundamental human rights

and breaches of the rules of natural justice were enough to satisfy the test of strong and compelling reasons and where such breaches were alleged, an ouster clause could be ignored.

11. Apart from being a fundamental right enshrined in the Constitution, the right to a fair hearing was one of the more far-reaching principles of natural justice. A breach of the principles of natural justice opened up the decision of the tribunal to review even if there was an ouster clause. The violation of a principle of natural justice amounted to an excess of jurisdiction.
12. The preclusive section of the Constitution was inefficacious and ineffective in ousting the section of the Constitution that provided for the right to apply to the High Court for the enforcement of fundamental rights and freedoms. The question as to whether a tribunal or body had exceeded its jurisdiction or breached the rules of natural justice was for the courts to decide. Further, the right to a judicial remedy under those circumstances could not be precluded by the ouster clause.
13. There was nothing in the ouster clause that suggested, even remotely, that any of the rights and fundamental freedoms of the Judges were to be alienated, diluted or limited. Moreover, by virtue of article 20(1) of the Constitution, the Bill of Rights applied to all law and bound all state organs and all persons.
14. The right to enforce one's fundamental rights and freedoms through the courts was so basic and so essential a feature of the rule of law, in a democratic society, that it could not be suggested that any group of persons, senior judges no less, could be shut out from exercising it.
15. The fact that the court heard and determined the application was proof that the filing of applications by the judges *per se* could not lead to the chaos that the appellant seemed to fear. It was not reasonable to expect, nor was it borne out by experience, that every complaint on violation of rights would find favour with the High Court.
16. Article 25 trumped every other provision of the Constitution including section 23 of the sixth schedule. The importance given to the Bill of Rights was such that even when there was a justification for limiting or derogating from rights, the process for lawfully doing so was carefully and closely circumscribed under article 24 of the Constitution. Even then, it was still recognized that some rights, could not, under any circumstances be limited. The non-derogable rights would include the right to a fair trial. That right was provided for in article 50 of the Constitution and it would include the right to have a dispute capable of being settled by application of law tried by a fair and impartial court or tribunal.
17. The High Court was right when it decided that it was possessed of the jurisdiction necessary to handle the matters pending before it and it was proper for it to proceed to hear and determine the matter.
18. The Vetting Board remained the only statutory body clothed with the mandate to determine the suitability of a judge or magistrate to continue serving in the judiciary. The vetting had to be carried out in accordance with the Constitution and the Vetting of Judges and Magistrates Act.
19. There was a legitimate expectation that the Vetting Board would carry out its mandate in accordance with the Constitution and the Vetting Act. The supervisory jurisdiction of the High Court only came in when there were allegations that the Vetting Board was not carrying out its mandate in accordance with the Constitution and the Vetting Act.
20. The Vetting Board was given finality in that it was the only body that could determine the suitability of judges and magistrates to continue serving in the judiciary. The judiciary or any other body did not have that jurisdiction.
21. The doctrine of "political question" emanated from the concept of separation of powers. The political question doctrine was to the effect that certain issues could not be decided by courts because their resolution was committed to another branch of government or because those issues were not capable, for one reason or another, of judicial resolution. Its purpose was to distinguish the role of the judiciary from that of the legislature and the executive, preventing the former from encroaching on either of the latter. Under that rule, courts could choose to dismiss cases even if they had jurisdiction over them.

Baker et al v Carr et al 369 US 186 [1962], R v Cambridge Health Authority ex PB [1995] 2 ALL ER 129.

22. The Constitution itself was a political document and yet it was justiciable and enforceable. Therefore, not all political issues were non-justiciable and the political question doctrine did not confer blanket immunity from court inquiry to all political issues. In the context of the instant appeal, the political question doctrine was inapplicable as the Vetting Board was not one of the arms of government. Political issues were subject to the rule of law, good governance and the supervisory jurisdiction of the High Court. Upon inquiry, the courts could decide on whether an issue came under the ambit of the political question doctrine.
23. Where the High Court had exercised its supervisory jurisdiction and made a finding that the Vetting Board exceeded its power or jurisdiction, the High Court would be required to remit the matter back to the Vetting Board for a determination on the suitability of judge or magistrate, to continue serving in the judiciary. Such a remittal would discard the perception that the exercise of supervisory jurisdiction by the High Court would hijack the vetting process, by allowing High Court judges to serve as judges in their own cause.
24. There would be no *lacuna* in the event that the Vetting Board ceased to exist or in the event that the time frame provided for the vetting process lapsed. Any individual judge or magistrate whose finding and determination by the Vetting Board was be quashed through the supervisory jurisdiction of the High Court would be deemed not to have been vetted. The relevant constitutional provisions for a judge or magistrate who had not been vetted would accordingly apply to such a judicial officer.

Dissenting opinion

1. Pursuant to the provisions of article 259(1) of the Constitution of Kenya, 2010, in interpreting the provisions of the Constitution, the courts were obliged to promote the Constitution's purpose, values and principles, the rule of law, the Bill of Rights, the development of the law and good governance.
2. The plain and ordinary meaning of section 23(2) of the sixth schedule to the Constitution was that the court's jurisdiction to review the decisions or process of the Judges and Magistrates Vetting Board was emphatically ousted.
3. Furthermore, section 23(1) of the sixth schedule to the Constitution provided that the legislation to be enacted, for vetting judges and magistrates, would operate in a different context from other provisions which dealt with the judiciary and the tenure of office for judicial officers. Article 168 of the Constitution which dealt with the removal of a judge from office would apply in respect of those not serving before the effective date while section 23(2) would apply in respect of those who were serving before the effective date.
4. The intention expressed in section 23 was that the process of vetting judges and magistrates was to be carried on by a body distinct from the courts. The vetting process was to be carried on within a limited time-frame and the vetting of each judge was to be carried on with the result being a final decision which the courts could not review.
5. The purpose of including the ouster clause which excluded the jurisdiction of the High Court, over matters handled by the Judges and Magistrates Vetting Board, was to prevent and avoid the mischief whereby the judges and magistrates through the courts, would become the judge and jury in their own cause. If the vetting process had not been insulated from the supervision of the High Court, then there would have been clear issues of conflict of interest.
6. The promulgation of the Constitution of Kenya, 2010, entailed the creation of a new constitutional order, in which the will of the Kenyan people and sovereignty of the people was recognized. The vetting of judges and magistrates was a response to public perceptions concerning the need for reform within the judiciary. There were perceptions of delays, rampant corruption, incompetence and lack of independence, in the dispensation of justice.

7. Article 1(1) of the Constitution of Kenya, 2010, provided that all sovereign power belonged to the people of Kenya and had to be exercised in accordance with the Constitution. Further, article 2(3) of the Constitution stated that the validity or legality of the Constitution was not subject to challenge by or before any court or other state organs. Article 3 obliged every person to respect, uphold and defend the Constitution. The inclusion of section 23(2) of the sixth schedule to the Constitution was an exercise of the people's constituent power and by dint of article 2(3) of the Constitution, its validity or legality was not to be challenged.
8. Section 23 of the sixth schedule, was part of the transitional and consequential provisions found in the schedules to the Constitution of Kenya, 2010. In article 262 of the Constitution such provisions were deemed to be an integral part of the Constitution. Transitional clauses were placed in the schedules because their usage was to be for a limited period of time and such placement would prevent the existence of numerous provisions whose applicability was temporary within the body of the Constitution. The placement of transitional provisions in schedules was not intended to relegate the provisions to a status that was inferior to other substantive provisions of the Constitution.
9. In a situation of conflict between the provisions in the schedules to the Constitution and the other constitutional provisions, article 262 of the Constitution of Kenya, 2010, did not specify which of the provisions would prevail. However, during the transitional period, any substantive constitutional provision which created a challenge to a transitional measure would be suspended in order to enable the transitional process to be dispensed of expeditiously, and to aid the full operationalization of the Constitution, including its values and principles.
10. The suspension of constitutional provisions, as a transitional measure, could include the suspension of fundamental rights and freedoms. Whether the suspension of a right was justified, would depend on the nature of the right in question.
11. There were complaints that the right to a fair trial was negatively impacted in the vetting process in question. However, the Vetting of Judges and Magistrates Act, No. 2 of 2011 made provisions safeguarding the right to a fair trial. Section 19 of the Act provided for the procedure to be followed in vetting a judge or magistrate and section 21 provided for determinations concerning the suitability of the vetted judicial officer to continue serving in office. Further, section 22 provided for review as concerns the first decision made on the suitability of a judge. It provided that the review decision would be final.
12. The Judges and Magistrates Vetting Board was established by statute, with constitutional authority prescribed by section 23 of the sixth schedule to the Constitution of Kenya, 2010. It was to be an independent judicial body, *sui generis*, of unusual hierarchical status, arising from its origins in section 23 of the sixth schedule.
13. The Judges and Magistrates Vetting Board had special and extensive jurisdiction to vet judges and magistrates and such jurisdiction was akin to the jurisdiction of the Industrial Court and the Environment and Land Court. The Judges and Magistrates Vetting Board, for purposes of article 165(6) of the Constitution of Kenya, 2010, would not be a subordinate court over which the High Court could exercise supervisory jurisdiction.
14. The House of Lords decision in the *Anisminic* case entailed the *locus classicus* on statutory ouster clauses. The House of Lords held that despite the existence of an ouster clause in section 4(4) of the Foreign Compensation Commissions Act 1950, the court's jurisdiction would not be ousted where the determination of a tribunal was considered a nullity. (Anisminic v Foreign Compensation Commission [1969] 2 AC 157).
15. The jurisprudence in the United Kingdom and the West Indies was that the principles espoused in the *Anisminic* case were applicable irrespective of whether the ouster clause in question was a statutory provision or a constitutional provision. However, it was noteworthy that the United Kingdom had an unwritten Constitution and the West Indies, which continued to prefer its appeals to the Judicial

Committee of the Privy Council, would follow the House of Lords decision as a precedent. Such a historical context and circumstances were not applicable to Kenya.

16. In Kenya, the decision made in the *Anisminic* case would not apply to an ouster clause, such as section 23(2) of the sixth schedule to the Constitution of Kenya, 2010, found in a constitutional provision. The principles applicable to statutory ouster clauses would not automatically apply to constitutional ouster clauses

Appeal dismissed by majority holding.

Orders

Each party to bear its own costs.

JUDGMENT

JUDGMENT OF KIAGE, J.A.:

A. BACKGROUND

1. This appeal and the litigation that preceded it brings into sharp relief the paradox of judicial reform and the clash of two competing visions of what it truly entails. It pits on opposing sides parties who have made great contributions to the legal and judicial mosaic of this country through some of the most turbulent times the nation has known. Both sides of this veritable jurisprudential Armageddon are convinced of the justice of their cause, each espousing their positions as epitomizing legal and societal desiderata. At the centre of dispute, on which we must pronounce, is the question whether in their quest for a brand new Judiciary birthed by the new Constitution, the people of Kenya intended that what measures would be designed in their name were completely and finally immunized from judicial inquiry.

2. By separate judicial proceedings filed before various divisions and registries of the High Court of Kenya, questions were raised touching on the work of the Judges and Magistrate's Board (hereafter 'the Board'). The said proceedings are as follows;

    1. H.C. J.R No. 295 of 2012 filed by Hon. Lady Justice Jeanne W. Gacheche against the Board and the Judicial Service Commission (JSC). That suit had four parties named as interested parties namely;

        (a) The Attorney-General

        (b) The Law Society of Kenya

        (c) The Kenya Magistrates and Judges Association (KMJA)

        (d) Hon. Justice E.O. O'Kubasu

    2. Eldoret H.C. Constitutional Petition No. 11 of 2012 by the Centre for Human Rights and Democracy and two others against the Board and the JSC. It had two interested parties namely;

        • Hon. Justice Mohammed Ibrahim and

        • Hon. Justice Roslyne Nambuye.

    3. Nairobi H.C. Constitution Petition No. 433 of 2012 by Justice Riaga Omollo against the Board, the Attorney General and the JSC

4. Nairobi H.C. Constitutional Petition No. 434 of 2012 by Hon. Justice S.E.O. Bosire against the Board, the Attorney General and the J.S.C.

SUBPARA 5.

Nairobi H.C. Constitutional Petition No. 438 of 2012 by Joseph G. Nyamu against the Board and the Attorney General with the J.S.C. named or enjoined as an Interested Party.

3. Other than the Eldoret Petition, it is to be noted that all of the proceedings aforesaid commenced by way of Petition were filed by Judges of the Court of Appeal. They held the office of Judge of this Court as at the effective date when the Constitution came into force, namely 27th August, 2010. The Applicant in the Judicial Review application and the 4th Respondent therein were Judges of the High Court and this Court respectively, on the effective date. The fact of being Judges of the mentioned Superior Courts as at the effective date is the nexus that gels all the foregoing pleaders in their suits against the Board, the J.S.C. and the Attorney-General seeking various orders and declarations touching on the process and/or determinations as to their suitability to continue to serve as Judges under the new constitutional dispensation. The substantive petitions enumerated above are still pending hearing and determination before the High Court. The Hon. Chief Justice in recognition of the gravity, complexity and public interest quotient of the application and the quartet of petitions, empanelled a five-judge bench of the High Court to hear and determine them all.

4. When the parties made their maiden appearance before the Bench comprising J. Havelock, J. Mutava, P. Nyamweya, E. Ogola and A.Mabeya, JJ.on 12th October 2012, the learned Judges directed that the matters be heard and determined separately except with regard to a preliminary jurisdictional issue touching on all the matters for which they were consolidated. That jurisdictional issue was raised by the Law Society of Kenya (LSK), the appellant herein, which had been the 3rd Interested Party in Petition No. 11 of 2012. It challenged the jurisdiction of the High Court to entertain and determine the matters pleaded before it vide a Notice of Motion dated 5.10.12.

5. That Notice of Motion had been provoked by the issuance of conservatory orders within that Petition on 25.9.12. The majority of the three-Judge bench that heard the interlocutory application (Mohammed Warsame, J. (as he then was) and G.V. Odunga J. (with G. Kimondo, J. dissenting)) had ordered as follows;

> 1. We direct that this matter be placed before the Hon. Chief Justice as soon as possible for purposes of enlarging the panel to five
>
> 2. In exercise of our powers under Article 23 (3) (c) of the Constitution and having addressed our minds to all the issues raised we grant an order directing or ordering that all matters or proceedings before the Board be and is (sic!) hereby stayed for a period of 14 days or until further orders ...."

6. The LSK saw this order as a pernicious and self-serving subversion of the vetting process and urgently besought the court to "nullify and/or review and vacate and or set [it] aside."The LSK was particularly outraged by what it saw as a clear case of conflict of interest in that one of the Judges constituting the majority that issued the conservatory order was scheduled to shortly appear before the Board for vetting. It therefore prayed for an order for his recusal or disqualification from further participation in the Petition.

7. The jurisdictional question was captured in a trio of specific prayers in the LSK Motion as follows;

> 7. That the Honourable Court do subsequently direct that substantive hearing of the Applicant's challenge to the jurisdiction of the Court on matters touching on the judicial vetting process be heard and determined on the merits prior to the grant of any further orders against the Respondents, whether interim, conservatory or of any other nature in the Petition herein or otherwise howsoever, designed to delay, hinder, supervise or affect the process of vetting of Judges and Magistrates as by law established pursuant to Section 23 of the sixth Schedule to the Constitution of Kenya 2010 and the vetting of Judges and Magistrates Act, No. 2 of 2011.
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> 8. That the Honourable Court do determine whether and if so, to what extent, it has jurisdiction to deal with matters touching on the judicial vetting process established under Section 23 of the Sixth Schedule of the Constitution of Kenya and the vetting of Judges and Magistrates Act, No. 2 of 2011.
>
> 9. That this Honourable Court do dismiss the Petition filed herein in limine on account of lack of jurisdiction and/or lack of demonstrable or prima facie merit."

8. The various parties filed responses, written submissions and copious lists of authorities before doing full battle by a stellar assemblage of learned and able counsel before the learned Judges who then crystallized the issues for determination on the preliminary point as follows;

> 1. Whether the High Court's general jurisdiction is subject to limitation.
>
> 2. Whether Section 23(2) of the Sixth Schedule to the Constitution ousts the jurisdiction of the High Court.
>
> 3. Whether the High Court has supervisory jurisdiction over the Vetting Board, and
>
> 4. Whether the conservatory orders made in these matters should remain in force."

9. After considering all of the pleadings placed before them and the submissions by Counsel, which were supported by a wealth of learning and judicial pronouncements from within our jurisdiction and further afield, the learned Judges pronounced themselves that the High Court is possessed of jurisdiction. They held that it was clear to them that the High Court has jurisdiction and must assume jurisdiction in the instances that are provided for in Articles 22, 23, 165 and 258 of the Constitution. They located the genesis and identified the progenitor of such jurisdiction as the people themselves in exercise of their sovereign rights;

> "It is therefore our finding that it is indeed the people of Kenya who, in their exercise of their sovereignty, have given the courts express authority to exercise jurisdiction by reason of the endorsement in a referendum of Articles 1(3), 22, 23, 159(1), 165 and 258 of the Constitution. These Articles will continue to be valid until the people or Parliament decides otherwise by amending the Constitution."

10. On the relationship and interaction between the High Court and the Vetting Board, the learned Judges were alive to it being a central and definitive issue and stated so themselves:

> "The question of whether or not this Court has jurisdiction over the Vetting Board's processes and decisions is arguably the single most important determinationthat we are required to make at this phase of establishing jurisdiction. Essentially, we are required to answer the probing question of whether or not Section 23(1) of the 6 Schedule of the Constitution (hereinafter called 'the ouster clause') in effect operates to absolutely unseat the jurisdiction of this Court as conferred by the Constitution of Kenya, 2010."

11. The learned Judges then analyzed and considered the rival arguments made on the issue before stating their favoured approach as follows;

> ".... it is clear that in considering the issue raised before us, the position to Section 23 of the Sixth Schedule to the Constitution, we should make an interpretation guided by the principles of giving effect to the rights and freedoms under the Bill of Rights, restricting the application of the ouster clause in favour of the rights, interpreting the Constitution as a whole, harmonizing the provisions of Section 23 with Articles 165 and, above all, give a purposive meaning of the Constitution in terms of Article 259 of the Constitution."

12. So moving, the learned Judges then made categorical findings as follows;

> "Ipso facto, therefore, we find that the High Court has jurisdiction to exercise any of the constitutional mandate conferred by the people of Kenya under Article 165 even in the face of Section 23 of the Sixth Schedule .... In effect therefore, we find the ouster clause incapable of eliminating this Court's jurisdiction over petitions cushioned upon alleged breaches of fundamental rights and freedoms including the right to a fair trial ... We find that this Court has the right to review a decision for error of law apparent on the face of record of the Vetting Board which may be an error going to jurisdiction thereof as distinguished from error with [in] it jurisdiction."

13. The High Court next proceeded to find that the Vetting Board in legal or juristic character was "akin to any Tribunal which is susceptible to the jurisdiction of this Court under Article 165 (6) of the Constitution." It was however quick to add an easy-to-miss but in fact a very critical caveat in the following terms;

> "The only exception is that while exercising its said Jurisdiction under Article 165 aforesaid, this Courtwill do so having in mind the strict directions set out in Section 23(2) of the Sixth Schedule to the Constitution as to the Vetting Board."

14. The learned Judges adverted to that caveat, which they expressed in reverse terms, when drawing the contours and delimitation of the jurisdiction they had found and declared for their court in the matter for the vetting process thus;

> "In our view therefore, we see it our duty to carve out a delicate balance that will ensure that the exercise of the court's jurisdiction does not undermine the substratum of the vetting process or whittle down the clear intention of the ouster clause of shielding the Vetting Board from judicial intrusion. That balance will have been created if this Court is able to ensure that the Vetting Board shall retain its place as the constitutionally mandated body to authoritatively, impartially and independently adjudicate upon matters relating to the removal or the process leading to the removal of Judges as contemplated by Section 23(2) of

the Sixth Schedule of the Constitution, with the only caveat that no aspect of the exercise of its function shall drift beyond the four corners of the mandate."

15. The learned Judges concluded their Ruling by vacating the conservative orders previously issued and directing that the Board proceed with the vetting notwithstanding the application and petitions that were pending and were to proceed and be determined separately. They also ordered that those Judges whose vetting was complete should not be de-gazetted pending the determination of the said application and petitions.

B. The Appeal

16. The LSK was dissatisfied with the Ruling of the Judges and immediately set in motion the process of appeal. It filed a Notice of Appeal on 1st November 2012 and also bespoke the proceedings on the same day. Finally, it filed a record of appeal. In the record is a Memorandum of Appeal. Bearing in mind that the ruling of the High Court that is the subject of this appeal was on the question of jurisdiction, its existence, extent and exercise; it is quite astonishing that the LSK preferred some forty-one grounds of appeal out of that single issue. Some of the grounds have as many six sub-grounds and, running into eight typed pages, the document contains arguments more suitable for submissions.

17. Purported memoranda of appeal that are repetitive, argumentative and replete with such material as excerpts and quotations from books and judgments, as well as historical and political background, do no favours to counsel who prepare them.Moreover, they serve only to obfuscate issues. It is time counsel practicing before this Court went back to basics and in particular re-acquainted themselves with the simple and straightforward provision of Rule 86(1) of the Court of Appeal Rules which stipulates in mandatory terms the contents of a memorandum of appeal thus;

> "A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."
>
> (Emphasis added).

18. The memorandum of appeal filed herein is a classic repudiation of the foregoing provisions. It is a worse version of what we recently decried in ABDI ALI DEREVs. FIROZ HUSSEIN TUNDAL& OTHERS Civil Appeal No. 310 of 2005 (unreported) as follows;

> "The appellant filed a long-winded and repetitive memorandum of appeal raising 26 grounds of appeal. With all due respect to the appellant who appeared to labour under the false impression that prolixity and repetition of issues would enhance the chances of his appeal, this appeal, in our view, turns on the following five issues only...."

19. This appeal, as well, really turns on a limited number of issues but which can all be handled globally, as I shall do hereafter, since the issue is really the single one of jurisdiction. They can be summarized as follows;

    (a) Whether the learned Judges of the High Court applied the wrong principles in interpreting the constitutional ouster clause.

    (b) Whether the learned Judges erred in holding that Article 165 of the Constitution conferred on them supervisory constitutional jurisdiction over the vetting Board.

(c) Whether the learned Judges fell into error in not treating the vetting process as a political question reserved to the Legislative and not to judicial enquiry.

(d) Whether the learned Judges erred in applying inappropriate common law judicial decisions on ouster or finality clauses.

(e) Whether the learned Judges fell into error in holding the High Court's jurisdiction to interpret the Constitution under Article 258 or to enforce fundamental rights under article 22 to be unlimited.

20. The prayers that LSK seek from this Court are few, namely that;

> 1. This appeal be allowed with costs October 2010 upholding the jurisdiction of the High Court as therein stated be reversed and set aside and an order be granted in favour of the Appellant varying and restating the Jurisdiction of the High Court and upholding the ouster previsions in the vetting clause in regard of the various petitions/applicants filed herewith.
>
> 3. The orders given on 30thOctober 2010 stopping the de-gazettement of Judges found unsuitable and ordering the determination of their petitions/ applications individually be set aside and replaced with an order dismissing the petitions/application on the ground of lack of jurisdiction and/or demonstrable or prima facie merit."

21. Whereas the record of appeal was lodged in this Court on 20.11.12, the hearing of the appeal itself did not take off proper until 8.7.13. Prior to that date the appeal became the victim of recusals and disqualifications offered and pleaded, of various judges. In the end, the current bench of five was constituted and we took full arguments from learned counsel for parties herein.

C. SUBMISSIONS SUPPORTING THE APPEAL

1. LSK

22. When he rose to urge this appeal, Mr. Kanjama, learned Counsel for the LSK, commenced his submissions by stating as follows, which is a key marker for what we must constantly bear in mind and ultimately decide;

> "The core issue is whether the High Court has jurisdiction to deal with review of decisions of the Vetting Board despite the ouster clause in Section 23 of the 6th Schedule. We are asking this Court to decide whether in each of the Petitions the facts as pleaded disclosed jurisdiction."

23. Before getting to deal with that core question, however, counsel first addressed us on a number of peripheral complaints including the High Court's failure to pronounce on the jurisdictional question on each particular case separately and specifically; its failure to consider and/or determine the question of the alleged real and apparent bias of Warsame J. (as he then was) when he constituted the majority in making an earlier order granting conservatory orders; and its failure to consider the appellant's oral submissions and refusal to allow the appellant to rely on its written submissions when making oral submissions in reply.

24. On the question of jurisdiction proper, Mr. Kanjama submitted that the learned Judges of the High Court fell into clear error when they held that judicial power was exclusive to the Courts. Counsel, to

buttress his argument, referred us to Article 1 of the Constitution which provides for the sovereignty of the people of Kenya, which is exercisable either directly or through specified organs to which it is delegated as follows;

> (3) Sovereign power under the Constitution is delegated to the following state organs, which shall perform their functions in accordance with the Constitution - ...
>
> (c) the Judiciary and independent tribunals."

25. The Courts do not, in counsel's view, possess a monopoly of judicial authority as this is dispersed to tribunals as well. He was quick to add, however, that whereas the decisions and actions of independent tribunals that are of statutory creation or origin were amenable to judicial review and other supervision by the High Court by virtue of Article 165(6) of the Constitution, the Board was not so subject. To him, the Board was a bodysui generis, and not an inferior tribunal to be supervised by the High Court, for to conceive it as such would "empty Section 23 of the 6th Schedule of essential content thereby voiding a substantive constitutional provision" a result that, he posited, could not have been the intention of the framers and the people. Mr. Kanjama submitted further that the Board is a constitutional body that limits the powers of the High Court in much the same way as do the Industrial Court and the Land and Environment Court that are provided for in Article 162 (2) of the Constitution.

26. Counsel argued that the special character of the Board was not lessened by its not being listed in Article 162 as one of the superior courts. Its absence there, he submitted, was due to a deliberate and well-informed decision by the Committee of Experts to commit it to the Transitional Clauses of the Constitution since its existence was time-bound and would shortly lapse so that to include it in the substantive part of the Constitution would have been 'to clatter' the Constitution. He argued that the 6th Schedule, far from being inferior to the substantive part of the Constitution did, in fact, supersede some of the substantive provisions.

27. It was argued that the Board, by its character and the process it was created to drive, was a middle ground arrived at by the people of Kenya in their quest for a reconstitution of the Judiciary. It was a fair compromise and a step back from total overhaul that would have been a perilous venture. It was arrived at in order to ensure a smooth and just transition from the old, much-vilified and unaccountable order and a new, responsive and confidence-inspiring Judiciary. It was necessary therefore, it was submitted, that the determinations of the Board on the suitability to serve of a judicial officer be invested with finality and placed beyond the jurisdiction of the ordinary courts to question or enquire. In the same way the decisions of the Supreme Court in the matters reserved to its exclusive jurisdiction cannot possibly be the subject of the High Court's judicial review powers, it was submitted, the Board was equally immunized from the High Court's intrusion. It was therefore not available to the High Court to discover, rediscover or invent a jurisdiction over the Board that was never intended.

28. Counsel assailed the decision of the learned Judges for going against the ratio of the binding decision of the Supreme Court in its Advisory Opinion rendered in RE: THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] eKLR on the limits of a court's jurisdiction thus;

> [30] The Lillian 'S' case [Owners of Motor Vessels 'Lillian S' Vs. Caltex Oil (Kenya) Ltd [1989] KLR1] case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of

> interpretation, or by way of endeavours to discern or interpret intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the constitution."

29. It was the argument of Counsel that in the matter of the process of vetting of judges, the High Court's jurisdiction was limited, nay, excluded, in such clear and unequivocal terms that for the learned Judges to purport to discover it for themselves amounted to untenable judicial craft.

30. Mr. Kanjama also faulted the High Court for its reliance on, instead of distinguishing, a number of decisions from other jurisdictions that have sought to address the issue of finality or ouster clauses. He contended thatthe learned Judges were wrong to apply the principles enunciated in what they called the undoubted leading authority [being] the former English House of Lords decision in THE ANISMINIC LTD Vs. THE FOREIGN COMPENSATION COMMISSION AND ANOTHER, [1969]2 A.C. 147; [1969]2 WLR 163; 113 S.J. 55; [1969] 1 ALL ER 208 House of Lords (hereafter 'ANISMINIC'). Those principles were summarized by the learned Judges as follows;

> "From the foregoing, it is discernible and does emerge that in the English jurisdiction, courts would not hesitate to invoke their jurisdiction and intervene where the decision of a tribunal is shown to have been made in contravention of the principle of natural justice and good faith; has acted ultra vires its powers; failed to do something in the course of the inquiry which is of such a nature that its decision was a nullity; made its decision in bad faith; made a decision which it had no power to make, misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it; refused to take into account something which it was required to take into account; or based its decision on some matter which under the provisions setting it up, it had no right to take into account. As the court underlined in the Anisminic case, the list is not exhaustive."

31. That position in the United Kingdom was mirrored by the Bahamas where, in ATTORNEY-GENERAL Vs. RYAN [1980] AC 718, the court, in discussing "the effect of the ouster clause", P 729 delivered itself as follows;

> " ... it is by now well-established law that to come within the prohibition of appeal or review by an ouster clause of this type, the decision must be one which the decision- making authority, under this Act, the Minister, had jurisdiction to make. If in purporting to make it he has gone outside jurisdiction, it is ultra vires and is not a 'decision' under the Act. The Supreme Court, in the exercise of its supervisory jurisdiction over inferior tribunals, which include executive authorities exercising quasi-judicial powers, may, in appropriate proceedings, either set it aside or declare it a nullity."

32. The appellant's grievance against the learned Judges' reliance on the English and Bahaman line of authorities is that they failed to draw the essential distinction that the ouster clause before them was a constitutional one while the decisions they relied on dealt with statutory finality clauses. That argument could not, however, be applied to the learned Judges' reliance on yet another line of foreign authorities, this time dealing with constitutional ouster clauses.

33. In the case of AUSTIN Vs. ATTORNEY GENERAL, CASE NO. 1982 of 2003, Judge William Chandler of the High Court of Barbados typically addressed constitutional ouster clauses as follows;

> "In my judgment these strict approaches to constitutional ouster clauses cannot be applied to every case. In fact, Hyatali, CJ, in his reasoning recognized that an ouster clause may be usurped if there are 'strong and compelling reasons'. In light of this, I am of the opinion that the breach of fundamental human rights and breaches of natural justice are enough to satisfy 'strong and compelling reasons' and that where such breaches are alleged on ouster may be ignored. There is sufficient authority to support this."

34. The "strong and compelling reasons" test as a basis for ousting an ouster clause finds reflection in the jurisprudence of other Caribbean States. Thus, in HARRIKISSON Vs. ATTORNEY GENERAL OF TRINIDAD AND TOBAGO, Civil Appeal No. 59 of 175, it is tacitly recognized, with Hyatali CJ, stating;

> "I am firmly of the opinion that a Court would be acting improperly if a perfectly clear ouster provision in the constitution of a country is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons."
>
> (Emphasis supplied)

35. Mr. Kanjama implored us to ignore and not apply, as the High Court did,erroneously, in his view, this line of authorities from the West Indies as to do so would be to subvert the doctrine of constitutional supremacy and to dilute the constituent power of the people of Kenya who have, by virtue of Section 23 of the 6th schedule, effectively disallowed those foreign precedents from jurisdictions the constitutional history of which is different from our own. Counsel referred to submissions he had made at the High Court and to the differences in the legal environment between those countries and Kenya as more particularly captured in Ground 28 of the Memorandum of Appeal as;

    a. Their constitutional history of adoption of an allochtonous constitution from their colonial master (United Kingdom), much like our previous but not current autochthonous Constitution.

    b. Their full dependence on English common law, as well as English Courts supremacy though the UK Privy Council (as a Superior Court) leading to their application of English common law without any distinction or reservation.

    c. Their constitutional structure, as small Islands with monarchic dependency, or republican subservience to the Queen or her representative the Governor General as Head of State.

    d. The fact that the ouster clauses referred to in the West Indies Cases had been introduced by amendments to the Constitution, but were not of original provenance.

    e. The fact that the Kenyan Constitution was introduced by full exercise of constituent power by Kenyans in a national referendum after extensive and intensive voter and civic education, preceded by generalized public participation, thus affecting the approach to be taken by the Courts in interpreting the Constitution.

f. The conflict of interest the ouster provision in Kenya sought to avoid, in relation to processes involving judicial removal or vetting, totally contrary to the West Indies cases.

g. The fact that the ouster provision in the Kenyan Constitution, as read together with the Vetting Act, reposed the mechanism for vetting in a judicial or quasi judicial body that would thus be competent to deal with jurisdictional issues, as opposed to the West Indies cases that dealt with ouster clauses in regard to administrative bodies.

36. The West Indies jurisdictions so sought to be distinguished are not alone in having constitutional ouster clauses which the courts have nevertheless, in appropriate cases, ignored. The learned Judges did advert with approval to the Pakistani case of KHAN Vs. MUSHARAF & OTHERS [2008] 4LRC 157, not peculiar in that jurisdiction, where the Supreme Court restated the reality that;

> "That Superior Courts of Pakistan have laid down that they retain the power of judicial review despite the ouster of jurisdiction which come either from within the Constitution or by virtue of martial orders or by legislation ... Thus visualized, the purported ouster in the proclamation and the provisional Constitutional Order No. 1 of 1999 of the jurisdiction of the Superior Courts is an exercise in futility and the power of judicial review remains intact."

37. The appellant was unimpressed by the learned Judge's adoption of this reasoning and was quite dismissive of the judicial authorities on constitutional ouster clauses emanating from Pakistan. Its criticism was, as it avers inground 32 of the Memorandum of Appeal;

> "... the learned Judges erred in law and in fact by quoting with approval the Pakistan decision in Khan Vs. Musharaf, without distinguishing the case on the grounds of the dictatorial nature in which the Pakistan Constitution had been imposed (by military coup), the political situation applying in Pakistan at the time including widespread violation of individual rights by the military Government, and the need of the Courts to act as the last bastion in regard to administrative decisions of the Pakistan Government."
>
> (Our emphasis)

38. Learned Counsel then turned to the relationshipbetween the transitional clauses and the substantive part of the Constitution arguing that the former are logically prior to the latter but conceded that the Bill of Rights of the Constitution took effect immediately. He, however, proceeded to add the rider that even were issues of alleged violation of fundamental rights to arise within the vetting process, the Board had jurisdiction to determine the issue. He was categorical, though, that no such violation of rights had in fact occurred. He took the view that it was open to the people, in exercise of their sovereignty, to adopt whatever method of re-engineering and reconstitution of the Judiciary they pleased. He then rhetorically posed, making allusion to the transitional provisions that had decreed that the immediate former Chief Justice do vacate office within a given time without contest;

> "Had the new Constitution provided that all the old judges go home, could they have gone to the High Court and sought redress?"

39. Mr. Kanjama further contended that the proper jurisprudential approach in matters jurisdiction is the conservative one and faulted the learned Judges for failing us to emulate the Supreme Court which had, in a number of decisions including SAMUEL KAMAU MACHARIA & ANOR Vs. KENYA COMMERCIAL BANK LTD & 2 OTHERS,[2012]eKLR; and PETER ODUOR

NGOGE Vs. FRANCIS OLE KAPARO & 5 OTHERS,[2012]eKLR; as well as fellow Judges of the High Court in MARY ARIVIZA Vs. INTERIM INDEPEDENT ELECTORAL COMMISSION & ANOR, 2010eKLR;and THE INTERNATIONAL CENTRE FOR POLICY AND CONFLICT & 5 OTHERS Vs. THE HON. ATTORNEY-GENERAL & 4 OTHERS [2013]eKLR; clearly enunciated a strict and narrow approach to their own jurisdiction.

40. Mr. Kanjama concluded his submissions by urging us to find that were we to hold that the High Court has a reversionary jurisdiction in the matter of vetting of judges, then we would be obliged to investigate the facts on a case by case basis to determine whether they reached the threshold for intervention. He then sounded an ominous word of caution that such a liberal interpretation of Article 165 of the Constitution with the attendant restrictive or voiding interpretation of the ouster clause would "lead to serious and substantial repercussions on the Judiciary"-presumably by opening the floodgates of litigation and the attendant uncertainties.

2. THE BOARD AND THE JSC

41. As the 4th respondent, the Judges and Magistrate's Vetting Board supports the LSK's appeal, Mr. Wilfred Nderitu, its learned counsel, was next to address us. He also held brief for Mr. Issa, learned Counsel for the JSC, the 6th Respondent. He commenced his address by attempting to offer an answer to a question we had posed to counsel preceding him namely, are independent commissions amenable to judicial review? Mr. Nderitu's answer was that, as such commissions do not have any insulating provisions akin to Section 23 of the 6th Schedule of the Constitution, they fall to be supervised by the High Court while, on its part, the Board stands alone and apart from them as a tribunal sui generis.

42. In answer to a related question that we posed, namely whether the Board can be impugned byway of the High Court's residual jurisdiction, Mr. Nderitu answered in the affirmative but qualified it with this rider;

> "It is only in clear circumstances where there has been a fundamental departure from the statutory remit of the Board that such can be allowed eg. if the Board vetted a medical doctor."

43. Mr. Nderitu implored us to bear in mind the historical context of the vetting process and provisions and evoked the 2003 purge which, he submitted, engendered numerous challenges to the removal of judges thereby clogging the judicial system. It was his view that the Board was created as a mechanism for avoiding the involvement of the High Court as it was untenable that judges should sit in judgment in matters involving their colleagues as that would raise obvious questions of conflict of interest or plain bias.

44. On the proper interpretative approach, Mr. Nderitu's submission was that the contested provision was part of the Constitution itself, not a statute and as such, we needed to bear in mind that it had both a legal and political content. A purposive interpretation was called for, but such as would give the intended political object as much effect as possible. He warned that failure to give full effect to Section 23 would be tantamount to invalidating the Constitution. In short, the 4th Respondent was in full support of the LSK's appeal and on all the grounds preferred.

3. THE ATTORNEY GENERAL

45. For the Attorney-General, the 5th Respondent, Mr. Njoroge, learned counsel, submitted in support of the LSK's appeal. He took the view that Section 23 of the 6th Schedule was the direct expression of the will of the people in exercise of their constituent power under Article 1 and the same remains unaffected by Article 159 which is the exercise of delegated authority by the Judiciary on behalf of the people. A

holistic interpretative process of harmonization of the various provisions in the Constitution should lead to the conclusion, in Mr. Njoroge's view, that Section 23 of the 6th Schedule is in fact superior to some substantive provisions for the Constitution especially those appearing to be inconsistent with it.

46. Alluding to and anticipating the complaint that the vetting process was unfair to those judges who were in office on the effective date, Mr. Njoroge submitted that the statutory criteria for vetting of those judges is the same one that the Judicial Service Commission employsto interview and vet those judges applying to join the Judiciary for the first time under the new constitutional provisions. The vetting process was therefore a valuable harmonizing tool that should not be blunted by judicial intervention. He lauded the vetting process as being in harmony with the Latimer House principles on the independence of the Judiciary and saw no fault in the ouster clause in Section 23 of the 6th Schedule. The clause had the full backing of the Constitution as an expression of the people's willuntil and unless amended. He concluded, as did his colleague before him, that "unless something is so out of place, so out of the way, the vetting process should be upheld without reference to the High Court."

D. SUBMISSIONS IN OPPOSITION

1. 1ST RESPONDENT

47. Going first among the learned counsel submitting in opposition to the appeal was Dr. Khaminwa, for the Centre for Human Rights and Democracy, the 1st Respondent, who lauded the judgment of the High Court as a correct and learned exposition of the law on constitution-based ouster clauses.He submitted that the learned Judges did well to consider and adopt the decisions from other common law jurisdictions as new concepts such as proportionality and certainty could not be ignored by Kenyan Courts.

48. Dr. Khaminwa repudiated the applicability of the political doctrine cited to us by Mr. Kanjama as excluding judicial review of the vetting process. Dr. Khaminwa was of the view that a proper reading of the decision of the U.S. Court of Appeals from the District of Columbia Circuit in NIXON Vs. UNITED STATES et al 506 U.S. 224 (1993), did not, in fact, preclude the assumption of jurisdiction by the judicial arm in all instances. He was categorical that the Board is an inferior Tribunal under the Constitution and the High Court was possessed of the jurisdiction to review proceedings before it.

49. On the question of the delegation of sovereign power to the Judiciary, Dr. Khaminwa maintained that the common mwananchi is neither judge nor lawyer and that reality informs the vesting of the authority to interpret the Constitution in the superior courts and specially so the High Court. That being so, there is no doctrinal offence or violation in the High Court finding it had jurisdiction herein.

2. 2ND RESPONDENT

50. Second to oppose the appeal was Mr. Katwa, learned counsel for the 2nd respondent, and he was emphatic that the Constitution did not oust the powers of the High Court to supervise the Board. According to Mr. Katwa, there are only four instances in which the Constitution has ousted the general jurisdiction of the High Court, namely;

    (i) The removal of the President ousted by Article 165 (3)

    (ii) Disputes relating to employment and labour relations and those relating to the environment and the use, occupation and title to land excluded by Article 165(5) (b)

    (iii) Matters reserved for the exclusive jurisdiction of the Supreme Court

    (iv) Supervision of Superior Courts.

51. Counsel contended that, absent an express provision that puts the Board beyond the High Court's supervisory jurisdiction, it would be an exercise of the very judicial craft the appellants deprecate were we to read that the High Court'sArticle 165 jurisdiction is ousted. He contended, further, that under Article 165 (3) the High Court is mandated to hear and determine complaints of violation rights from all citizens and it would be a grave abdication of duty for the High Court to shut out complaints by Judges, who are no less Kenyans.

52. Mr. Katwa then invited us to see the mischief and paradoxical emanations that had been spawned by the vetting process in that even judges who had been interviewed by the Judicial Service Commission, 'received accolades' and declared fit for higher office had been determined by the Board to be unfit to serve as judges. He attacked the Board for going outside the bounds of law by, among other things, having some of its members as complainants in the vetting of some judges and even soliciting publicly the support of members of the Law Society of Kenya for its contested determinations.

53. Other than the supervisory jurisdiction, Mr. Katwa argued, the High Court is possessed of yet another distinct and separate jurisdiction that extends to the Board, namely that of interpretation of the Constitution and any conflicts of law. Counsel averred that some of the decisions of the Board were outside the time established by law and further that Section 23(2) of the 6th Schedule is in conflict with Articles 165 and 258 with regard to the High Court's jurisdiction, as well as Article 27 of the Constitution on equality and freedom from discrimination. Taken together, it was contended, all of these issues testify to the plain necessity and reality of the High Court's jurisdiction over the vetting process and the Board.

3. 3RD RESPONDENT

54. For the third respondent, learned counsel Mr. Gicheru lambasted this appeal as being devoid of merit deserving only of dismissal. He pointed out that Section 23 of the 6th Schedule does not create the Board as the appellant had sought to persuade us. Rather, that Section merely directed the passing of legislation to deal with the vetting process. The constitutive law for the Board, he argued, is the Vetting of Judges and Magistrates Act, No. 2 of 2011, and the Board is created by Section 5 of the said Act. Being a creature of statute, it is not a constitutional body and falls directly under the High Court's supervisory jurisdiction under Article 165(6) of the Constitution.

55. Mr. Gicheru invited us to hold that the High Court was correct in its determination on jurisdiction based on an extensive consideration of common law jurisprudence from some seven jurisdictions which were unanimous that courts have always frowned upon ouster clauses and ignored them, especially when the bill of rights or natural justice were implicated. He rested by pointing out that the appellant and the parties in support of its appeal do, in fact, admit that the High Court does have jurisdiction, but on terms. He in particular pointed to the written submissions by the JSC before the High Court that court ''had a residual jurisdiction under Article 165(3) to determine whether the statute enacted by Parliament to govern the vetting process is inconsistent with, or in contravention of the Constitution."So saying, Mr. Gicheru urged us to uphold the finding of the High Court which he hailed in these superlative terms:"Rulings don't come better than this."

4. 10TH AND 11TH RESPONDENTS

56. For the 10th and 11th respondents, Mr. Oduol, their learned Counsel, took the peremptory view that this appeal was for dismissal since Article 259 of the Constitution is binding on courts and gives a mandatory matrix for constitutional construction that leaves no doubt that the High Court does have jurisdiction over the matter in question. He posited that Section 23 of the 6th Schedule needed to be construed with Articles 23 and 258 of the Constitution in mind. To him, in so far as illegality, fraud,

breach of rights are some of the matters the petitioners before the High Court complained of, that court was bound to intervene and had the jurisdictional wherewithal to do so.

57. Counsel submitted that the Board engaged in strange conduct and determinationsquite beyond the pale of its constitutive statute that mandated it to discharge its duties in accordance with the Constitution and the Act which set clear parameters for vetting. He castigated the Board for allegedly violating the fundamental rights of his clients and going against the rules of natural justice. By way of example, he stated that the Hon. Justice S. E. O.Bosire was confronted before the Board by two extra issues not contained in the Notice previously served on him which he considered an insufferable and unfair ambush. These included an allegation that the Judge had presided over torture of accused persons during the 1982 coup hearings notwithstanding that the Judge did not, in fact, preside over the military tribunals. Counsel expressed dismay that even after the Board found the accusation to be untrue it still proceeded to pronounce the Judge unsuitable on account of the same issue. Mr. Oduol also found it incredible and sufficient to invite the High Court's jurisdiction, the Board's decision to declare the Judge unsuitable on account of alleged disobedience of a court order which they found not to have been the case and even apologized to the Judge. It was counsel's submission that the Board's determination of unsuitability after finding all allegations against the Judge to be untrue was so aberrant and so outside jurisdiction and violative of natural justice as to warrant the High Court's intervention. He termed the Board's determination on Justice R.S.C. Omolo based on a decision in which he was one of a bench of five Judges to be tainted by discrimination in violation of the Constitution and therefore meeting the threshold for the exercise of the High Court's jurisdiction. He placed reliance on the ANISMINIC case as well as the decision of the Supreme Court of India in the case of KESAVA NANDABHARATI Vs. STATE OF KERALA & ANOR AIR [1973] S.C. 1461 to urge that an ouster clause, no matter where placed, is wholly ineffective against the infringement of constitutional or natural justice rights.

58. It was Mr. Oduol's contention that it was never available to Parliament to legislate any law that would have the effect of ousting the right to a fair trial which is non-derogable by virtue of Article 25 of the Constitution. He urged us to reject the notion that the people of Kenya ever decided or even intended to create a rogue institution in the name of the Board. He dismissed the appellant's reliance on the country's constitutional history injustifying such a body as no more than a clever cover up.

59. Mr. Oduol rested with the submission that the final word on the complaints raised by his clients lay with the High Court which was invested with an unqualified jurisdiction to do so under Articles 23, 165 and 258 of the Constitution. He rejected outright the appellant's view that the Board is comparable with the Supreme Court in being outside the High Court's supervision.

5. 12TH RESPONDENT

60. In his submissions in opposition to the appeal, Mr. Mugambi, learned counsel for the 12th respondent decried the notion propounded by the appellant and the supporting parties that the Board could violate the Constitution with impunity. He offered that the appeal before us was an attempt by an aggressive Law Society to intimidate everyone, in the name of the people. As far as the legalities of this matter are concerned, counsel submitted that the Board was a mere creature of statute and its "numerous and gross breaches" of rights attracted the High Court's supervisory attention. Mr. Mugambi was categorical that in going to court to challenge the Board's actions, the respondents were just inviting the High Court to examine the vetting process, not asking it to return the Judges to office as seemed to be feared by the proponents of this appeal.He asserted his client's right to be protected by the Constitution and the law.

6. 13TH RESPONDENT

61. In a succinct submission, Mr. Ochieng, learned counsel for the KMJA, the 13th respondent, lamented that his client's members' rights had been breached, and rejected the view that they were excluded from approaching the courts for redress and relief. He was of the view that finality can operate to protect only acts done within the Constitution. Anything else was amenable to the High Court's inherent powers exercisable to check breaches and violations of rights. He urged us to dismiss the appeal.

7. 9TH & 14TH RESPONDENT

62. Last in opposition to this appeal was Mr. Mwenesi, learned counsel for the 9th respondent and for Justice O' Kubasu, who is 14th Respondent. He started by asserting that the Board having itself ruled that it did not have jurisdiction to determine its own jurisdiction, a matter lying with the High Court, it was incredible that its advocate deigned to deny the High Court's jurisdiction before us. He also pointed out that the appellant had in fact acknowledged that ouster clauses can be ignored when, in Ground 27 of its appeal, it relied on an alternative line of West Indies authorities,positing that constitutional ouster clauses could be ignored where 'strong and compelling' reasons exist. Mr. Mwenesi submitted that the fact of the time for the vetting having run out, and absent any donated authority to anybody to extend time, was a valid and substantial point requiring the High Court's pronouncement thereon. He rested by arguing that the Judges' dignity had admittedly been violated and the High Court, whether or not it would agree with them, certainly had the jurisdiction to hear them.

E. APPELLANT'S REPLY

63. Mr. Kanjama made brief reply to the submission of his learned counterparts stating the High Court's residual jurisdiction did not extend to the process or decision of removal of a judge upon being vetted. He opposed the idea that the High Court should conduct a merit review of the vetting process which, he maintained, was a political issue not open to judicial scrutiny. Moreover, he countered, the Board was itself empowered to determine the constitutionality of any of its questioned acts or processes. Mr. Kanjama appealed to us to be guided by the history and dictates of reform and to hold that the people of Kenya are reasonable persons who passed the Constitution as it is including an ouster clause incapable of any other reasonable interpretation save that the courts are bereft of jurisdiction. To rule otherwise would be inject an unheard of conflict contrary to the principle of harmonization. He urged us to give effect to Section 23 for purposes of the transitional period.

64. Counsel for the appellant rested his submissions by urging us to eschew any detailed analysis of the case of Justice Bosire before the Board. He also asked us to resist a finding that a case of gross violation of the rights of the Judges had been made out, as to do so would be to invite the High Court to overthrow the Constitution. Mr. Kanjama's parting shot was that "were this Court to embark on a review of the determinations of the Board there would be chaos."

65. After hearing those extensive submissions, as well as a complaint by Lady Justice Gacheche and Justice Emmanuel O'Kubasu couched as a preliminary objection on the question of whether or not the JSC and the Attorney-General were in contempt of orders of this Court made on 20th November 2012, we reserved judgment on this appeal.

F. DISCUSSION AND ANALYSIS

1. THE REFORM CONTEXT

66. There can be no doubt that the apparent failure of the Judiciary to render impartial justice in an efficient and timely fashion was one of the main drivers for Kenya's search for a new constitutional dispensation. Widespread corruption, sloth and outright incompetence were seen to colour and dilute the decisions of the courts, which were believed to be not only weak and beholden to a rampant and unaccountable Executive, but themselves insular, unaccountable and largely insensitive and unresponsive to the people's desperate pleas for due justice. Integrity was seen to be lacking and it was common knowledge that way too many judicial officers were on the take and the hydra-headed monster of corruption and sleaze had its tentacles far and deep. Adisillusioned populace captured the futility of it all in the damning poser: "Why hire a lawyer when you can buy the judge?" Such a state of affairs could not long be tolerated even by a populace generally slow to defy authority, and it was clear that the judicial system was in dire and urgent need of radical and comprehensive overhaul. Several attempts were made to reform the Judiciary.The most notable was the so-called Ringera Purge immediately after the end of the KANU era but the process was fraught with conceptual and practical challenges best summed, albeit with a measure of cynicism, by the quip that the surgery was successful but the patient died.

67. The long awaited new Constitution promulgated in August 2010 provided the best, thought out, inclusive and exhaustive opportunity to right the wrongs at the Judiciary as with the rest of the country's body politic.With the new Constitution, the people had an opportunity to capture, in mandatory postulates, the principles by which they wished to be governed, and the terms of reference, so to speak, for the organs of state to which they delegated their sovereign powers. As part of that reconstitution and re-organizing of their governance, the people determined that the Judiciary was to be re-organized in certain critical respects not only by ensuring an open, competitive and merit-based appointment process for new judges to replace the hitherto opaque, secretive and often logic-defying sleight of hand that sometimes honoured personal, ethnic and political loyalties; but also sought to deal decisively with the extant malaise in the Judiciary through a process of vetting sitting judicial officers to determine their suitability to serve under the new constitutional dispensation.

2. CONSTITUTIONAL BASIS FOR VETTING PROCESS

68. In trying to achieve that reformist objective, the Constitution's framers and the people, in exercise of their constituent power, enacted Section 23of the Sixth Schedule to the Constitution. That part of the Constitution was dedicated to transitional matters and was designed to provide a bridge between the receding old and the dawning new era. The provision was as follows;

> 23. (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."

69. From the foregoing provision, it is immediately clear that the Constitution merely provided the foundation for the vetting process by commanding the enactment of the legislation thatwould establish the mechanisms,procedures and timelines for vetting of judges. The framers and the people were keenly aware of the far-reaching ramifications of such a peculiar process of dealing with judges hence the express statement that the vetting legislation would be enacted 'despite', or notwithstanding the existence of the stated articles in the Constitution.

70. The articles in question deal with the following issues that would be implicated in and affected by the vetting process;

    (a) Article 160 – Independence of the Judiciary including immunity of judicial officers from action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

    (b) Article 167 – Tenured nature of the office of Judge until mandatory or elective retirement, respectively, at the age of seventy years or sixty five unless by earlier resignation.

    (c) Article 168 – Removal of judges from office only for specified grounds and through an elaborate process starting with initial investigation by the Judicial Service Commission followed by appointment of a tribunal to determine the issue with a right of appeal to the Supreme Court.

71. It is plain to see that the process of vetting involves such a fundamental departure from the safeguards to a judge's tenure that the Constitution in Section 23(1) of the Sixth Schedule sought to expressly acknowledge that departure from the constitutional norm. It did not stop there though, for in sub-section (2) it declared that a removal of a judge through the specially-designed mechanism is beyond the reach of the courts' powers of enquiry or review meaningthat the jurisdiction of the courts was excluded, precluded or ousted.

3. OF OUSTER CLAUSES GENERALLY

72. Ouster clauses are always evocative of strong opinions for and against their propriety or very legality. The justification for ouster clauses is premised on the need for economy and efficiency in administrative actions so that finality and timeliness is treated as an inherent good. Under this thinking, Parliament or the Executive take the view that to save time and expense, actions and decisions taken by administrative bodies should stand final and not open to review and possible reversal by courts.

73. The argument on the other side is premised on the equally valid foundation of access to justice, judicial independence and autonomy as well as the dictates of the rule of law that reject the notion that the Executive or the Legislature can, by the instrumentality of ouster, clothe their decisions under a cloak of invincibility,thereby making decision-making bodies a law unto themselves. Since the decisions of administrative bodies are quasi-judicial and affect the rights of citizens, it is argued that any individual aggrieved by such decisions must, ipso facto, retain the right to challenge such decisions by approaching the ordinary courts whose very existence is to check the very abuses and ills that finality clauses seek to immunize. Ouster clauses therefore bring to the fore a clash between two principles namely, what was formerly known parliamentary supremacy (formerly because under the new Constitution, sovereignty belongs to the people not to Parliament) where the law-making power belongs to Parliament; and separation of powers which dictates that the function of determining rights and checking abuses must fall with the Judiciary which should not relinquish jurisdiction and institutional independence even when faced with pressure from the legislature and the Executive, to keep off.

74. Admittedly, most ouster clauses are found in ordinary legislation as opposed to constitutions and, quite beyond serious disputation, the ANISMINIC case remains the outstanding exemplar of the manner in which English and common law jurisdictions have dealt with such finality clauses. It was not the earliest example of judicial interpretation of such clauses which Lord Reid expressed as having 'a long history'. Indeed, it is in Lord Morris of Borth-y-Gest's dissent in the same case that mention is made to a decision made way back in 1829 which may well be the oldest such determination;

> " ...in Campell v Brown, this House upheld a decision of the Lord Ordinary (Lord Alloway) that although by the statute 43 Geo 3 c 54, s 21, the judgment of the prebystery is declared to be final without appeal or review by the court, civil or ecclesiastical, yet if the proceedings on which judgment was pronounced were contrary to law or if that court exceeded the powers committed to it by statute, they may be reversed and set aside by the court. Lord Lundhurst LC, in dealing with the argument that the court's power was ousted by the statute, said ((1829), 3 Wills & Sh at p 448):
>
> > 'But I apprehend that (particularly from the circumstances of the appeal being taken away) a jurisdiction is given in this case to the Court of Session, not to review the judgment on its merits but to take care that the Court of Presbytery shall keep within the line of its duty and conform to the provisions of the Act of Parliament. There is in the Court of Session in Scotland that superintending authority over inferior jurisdictions which is requisite in all countries, for the purpose of confining those inferior jurisdictions within the bounds of their duty, and the only question here is whether this case is of such nature and description as to justify the calling into action that authority of the Superior Court. Cases were cited at the Bar and mentioned in the printed papers now on your Lordships' table in which the Court of Session has exercised a superintending authority over inferior jurisdictions when they have been guilty of excess of their jurisdiction or have acted inconsistently with the authority with which they were invested.'"

75. It is noteworthy that even so long ago the approach of English courts was that the supervisory power of the superior courts over inferior jurisdictions was such a fundamental good that all countries ought to have them. I find it necessary to mention this nearly 200 year old statement if only to dispel the notion that a questioning of inferior tribunals is some strange or novel idiosyncrasy of but a few jurisdictions.

76. English courts have always taken it for granted that the existence of an exclusionary clause never takes away the jurisdiction of the superior courts to enquire into the proper limits of an inferior tribunal's powers and whether the tribunal has, in its acts and decision, kept within or exceeded those powers, which latter instance would render the acts and decisions a nullity. Lord Wilberforce dealt with this issue is ANISMINIC quite comprehensively from the point of view that tribunals from their very nature, still have limited scope of authority even when their prescribed authority may include the determination of certain questions of law; may have lawyers in their memberships; and have a learned chairman, in much the same way as the Board herein does. Said the Judge; (at P242-43);

> "In every case, whatever the character of the tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute, at some point, and to be found from a consideration of the legislation.The field within which it operates is marked out and limited .... Although, in theory perhaps, it may be possible for Parliament to set up

a tribunal which has full and autonomous powers to fix its own area of operation, that has, so far, not been done in this country.

77. The question, what is the tribunals proper area, is one which it has always been permissible to ask and to answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality or unquestionability on its decisions."

(My emphasis).

78. The rationale for the thinking that specialized tribunals of limited jurisdiction cannot be allowed to be the sole determinants of the true limits of their said jurisdiction is found in another English case, R Vs. SHOREDITCH ASSESSMENT COMMITTEE, EX PARTE MORGAN[1910] 2KB 880 where Farwell LJ. stated, and I respectfully agree;

> "Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it. It is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure – such tribunal would be autocratic not limited – and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non existence of its jurisdiction is founded in law or fact ..."

79. It would follow that were I to find that the Board is the creature of statute and were I to find further, that its jurisdiction is limited by law, then I would without the slightest hesitation reject the contention that it is for the Board to finally determine the full extent of its jurisdiction and the related question whether, whenever the issue arises, it has observed or breached the limits set to it.

80. As I have already observed, Section 23 of the 6th Schedule to the Constitution does not itself create the Board. All it does is direct Parliament to enact legislation within a year, which would establish the mechanism, procedures and time frame for vetting the suitability of all judges and magistrates sitting at the effective date. That legislation is the Vetting of Judges and Magistrates Act, 2011 which is;

> "An Act of Parliament to provide for the vetting of Judges and Magistrates pursuant to Section 23 of the sixth Schedule to the Constitution; to provide for the establishment, powers and functions of the Judgesand Magistrates Vetting Board, and for connected purposes."

81. The Board itself is established by Section 6 of the Act as "an independent board" which is a body corporate with perpetual succession and a common seal possessed of the usual capabilities to sue and be sued; to hold and dispose of property and to perform all such things and acts as may be lawfully done or performed by a body corporate. Its powers are more particularly set out under Section 14 of the Act while the vetting procedures are set out in Part III of the Act including the Panels, (S17) relevant considerations (S18); the vetting procedure (S19); the order of priority (S20); the determination (S21); review (S22); and time frame (S23); among others.

82. It is noteworthy that nowhere in the Act is there a provision, or a suggestion even, that the Board, as a statutory body, is possessed of a character other than that of an inferior tribunal and that it is beyond the reach of the High Court's review and other supervisory jurisdiction. There is nothing in the Act to suggest that the Board stands in pari passu with the superior courts as was contended before us. I have no difficulty whatsoever in finding that the Board, as conceived and established, is not the same in stature or character as a superior court and, being an inferior body, it is amenable to the High Court's

supervisory jurisdiction under Article 165 (6) and (7) which is expressed in broad and unambiguous terms;

> (6) The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi judicial function but not over a superior court.
>
> (7) For the purposes of Clause (6) the High Court may call for the record of any proceedings before any subordinate court or person."

83. That this supervisory power is available and efficacious as against the Board, in appropriate cases, is the logical conclusion to be drawn from the fact the Article 165 of the Constitution is not among the provisions that were essentially qualified, limited or relegated in express terms, by Section 23 of the 6th Schedule. The conclusion is inevitable that by listing the articles despite which the contemplated legislation would operate, any other provision in the Constitution not so listed cannot be affected or constricted by Section 23. The rule of construction expression unius est exclusio alterius is therefore apposite.

84. In practical terms, this conclusion then sets the stage for the classical clash between the superior courts' general powers of review and supervision as captured in Article 165 and the occasional exclusionary rules of ouster as embodied by Section 23 the 6th Schedule.

85. English courts seem to have tried to get around the jurisdictional bar that an ouster clause presents by engaging in a rathersophistic attempt to pierce it by resorting to a fine distinction whereby they have considered such decisions or determinations of tribunals that go outside the narrow competence limits of the tribunals to be nullities. Once so finding, the courts then had no difficulties in making appropriate orders without seeming to run afoul the ouster clause. Thus in ANISMINIC, for example, Lord Reid sought to make the distinction that when one questions the effective existence of a determination thereby positing that what exists is a mere nullity, he does not offend an ouster clause as opposed to when he admits the existence of a valid determination the correctness of which he questions, in which case the ouster clause forbids him. This is how the law Lord labored the point;

> "Let me illustrate the matter by supposing a simple case. A statute provides that a certain order may be made by a person who holds a specified qualification or appointment and it contains a provision, similar to S4(4), that such an order made by such a person shall not be called in question in any court of law. A person aggrieved by an order alleges that it is a forgery or that the person who made the order did not hold that qualification or appointment. Does such a provision require the court to treat that order as a valid order? It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

86. Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law

will hold purported decisions to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others, if that was intended it would be easy to say so."

87. Inevitably, the use of the term nullity as the entry point for piercing an ouster clause was bound to cause some confusion and Lord Reid, being aware of this, tried to dispel it by giving examples of situations that would amount to nullity sufficient to properly invoke the court's supervisory jurisdiction as follows;

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

88. The sentiments of Lord Morris of Borth-Y-Gest are worth keeping in mind for purposes of allaying fears such as seemed to trouble the appellant herein, that any holding that any enquiry into a matter about which an ouster clause exists is a negation of the will of the rule maker be he the legislature or the people by exercise of their constituent power. Said the Judge;

> "The control which is exercised by the High Court over inferior tribunals (a categorizing but not a derogatory description) is of a supervisory but not of an appellate nature. It enables the High Court to correct errors of law if they are revealed on the face of the record. The control cannot, however, be exercised if there is some provision (such as a 'no certiorari' clause) which prohibits removal to the High Court. But it is well-settled that even such a clause is of no avail if the inferior tribunal acts without jurisdiction, or exceeds the limit of its jurisdiction."

89. That pronouncement seems to me to be good law and is in keeping with what Lord Sumner had previously observed regarding the supervisory jurisdiction of the Superior Court in R Vs. NAT BELL LIQUORS LTD 1922 All ER 335 AT 351 which I would adopt as fully applicable to our own High Court while exercising its Article 165 powers;

> "Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points. One is the area of the inferior jurisdiction and the qualifications and conditions of its exercise, the other is the observance of the law in the course of its exercise."

90. English authorities going back to the 19th Century are emphatic that ouster clauses never preclude an enquiry by the superior courts on the question of jurisdiction. Examples are Ex BRADLAUGH [1878] 3 QB 513 where Blackburn stated that an ouster clause does not apply where certiorari is being

sought on the ground that the inferior tribunal exceeded jurisdiction while Mellor J, in the same case stated that;

> "It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan magistrate could make any order he pleased without question."

91. History is replete with examples of what havoc unchecked, unaccountable power can do, and if any lesson is to be learnt, it is that there really are no angels among mortals and all, left to their own designs while clothed with unbridled, unquestioned power, easily turn from democrat to autocrat. Lord Acton knew of it as he observed that power corrupts and absolute power corrupts absolutely and Montesquieu too, when he extolled the virtues of checks and balances to power. Courts in the common law tradition have for this reason sought to confine ouster clauses to very close quarters and they have seen this as a bounden duty that has nothing to do with any power struggles or turf wars between the judicial and the executive function of government. Lord Wilberforce captured that essential tension and balance appropriately as follows in ANISMINIC;

> "The courts, when they decide that a 'decision' is a 'nullity', are not disregarding the preclusive clause. For just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed (see the formulation of Lord Sumner in R V. Nat Bell Liquors Ltd ([1922] 2AC 128 at p 156; [1922] All ER rep 335 at p 351)]. In each task they are carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive. What would be the purpose of defining by statute the limit of a tribunals powers, if by means of a clause inserted in the instrument of definition, those limits could safely be passed?"

92. Before turning from ANISMINIC altogether to a consideration of other authorities in addressing, the appellant's complaints that the Judges erred in embracing foreign jurisprudence on the matter of ouster clauses, I find it meet to refer to a seldom-cited passage in the judgment of Lord Wilberforce which, to my mind, provides a critical bridge between the narrow, confusing and constricted twisting of the concept of nullity as determinative of a tribunal's jurisdiction to an acknowledgment of a wider selection of reasons for which the High Court may intervene notwithstanding the ouster clause;

> "Equally, though this is not something that arises in the present case, there are certain fundamental assumptions, which without explicit restatement in every case, necessarily underlie the remission of power to decide such as, ...the requirement that a decision must be made in accordance with the principles of natural justice and good faith. The principle that failure to fulfill these assumptions may be equivalent to a departure from the remitted area must be taken to follow from the decision of this House in Ridge Vs. Baldwin [1963] 2 All ER 66]"

93. The case of ATTORNEY GENERAL Vs. RYAN [1980] ac 718 referred to in the Judgment of the High Court as reflecting the Bahamas position on ouster clauses. In a decision of the Privy Council and, it is no surprise that it echoes exactly the English position as to thoroughly enunciated in ANISMINIC but with more overt acceptance of a departure from the narrow strictures of 'nullity' as the entry point

for supervisory intervention. I am unable to accept the view that the decision is any less persuasive by reason of its emanating from the Carribean. I accept as good law Lord Diplock's view at (p 730) that;

> "It has long been settled law that a decision affecting legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority."

4. OF CONSTITUTIONAL OUSTER CLAUSES

94. Since the ouster clause we are dealing with here is embedded in the Constitution as opposed to an ordinary statute, I do not consider if necessary to go into any further analysis of cases dealing with statutory ouster clauses as I am firmly of the view that ANISMINIC sets out the proper approach that courts should taken. It is a decision that has been lauded as standard setting in this area and has been applied in numerous jurisdictions apart from occupying a central place in learned discourse in public administrative and comparative law.

95. ANISMINIC, moreover, still ranks high in a consideration of constitutional ouster clauses themselves for the obvious though easily overlooked reason that in the English Constitutional set up, where there is no written constitution, the statutory ouster clauses such as was under consideration in the case are as effective and potent an emanation of parliamentary sovereignty as there can be so that judicial pronouncements embodied in ANISMINIC would reflect a constitutional determination. I am bolstered in this by the approach and conclusion reached by Professor Douglas E. Edlin in an excellent article titled "A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States" in American Journal of Comparative Law Volume 57, Issue 1/Winter 2009. The author observes that in constitutional cases, both the English Courts and American Courts seem ''unwilling to relinquish their jurisdiction and institutional position in the face of legislative pressure"; and explains this unified response, despite apparent or alleged constitutional differences on the basis of the connection between the fundamental right to access to the courts in England and a similar, but largely unstated recognition of this right in the United States. He ultimately challenges commonly offered explanations based on, inter alia, the written/unwritten constitution dichotomy before pitching tent on ''both nations' overarchingcommitment to the rule of law and judicial autonomy"as seen in their judicial decisions.

96. I am persuaded that the doctrinal and policy challenges that are posed by constitutional ouster clauses are not a new thing under the sun. They are not a Kenyan peculiarity and I am therefore totally unable to follows appellant's arguments that seemed to denigrate the High Court's consideration of judicial decisions from other common law jurisdictions. I deem it erroneous for counsel to purport to dismiss Carribean authorities on the rather spurious basis that those countries are beholden and subservient to the English Crown and those from Pakistan on the basis that the courts there needed to be more assertive in the defense of rights due to a history dictatorship that made the courts, as it were, the last refuge and bastion of liberty. I say without a qualm that courts everywhere must maintain a constant vigilance and our own courts must never be lulled into a false sense that fundamental rights are sufficiently secure to warrant a letting down of our guard. Such a stance would in due time lead to a grave diminution and debilitation of the foundations of liberty and justice.

97. I am at any rate firmly persuaded that in this day and age of internationalization and globalization of law, there is little room for judicial insularity. Superior courts of all countries can benefit from cross-pollination and sharing of ideas. This does not undermine their role or status but actually broadens their constitutional vision as they fully join the global community of courts. See, Ann-Marie Slaughter; A Global Community of Courts, 44 Harvard International Law Journal 191 (2003).

98. The High Court was perfectly entitled, therefore, to consider Caribbean (the Appellant calls then West Indies) authorities. In ANTONY LEROY AUSTIN Vs. THE ATTORNEY GENERAL OF BARBADOS (No 2161 of 2003), Justice William Chandler considered a clause in the Constitution of Barbados that provided as follows;

> "S.77(4) The question whether the Privy Council has validly performed any function vested in it by the Constitution shall not be enquired into any court."

99. It was accepted that by reason of the supremacy clause in that Constitution, that provision stood entrenched.The applicant nonetheless sought to challenge a decision of the very Council on the basis that their fair hearing rights had been breached when it commuted his death sentence to life imprisonment. On the question of the interpretation of the constitutional ouster clause, the rival arguments made before the Judge and were remarkably similar to those made before us, and the main authorities cited the same. I have read his approach to the issue and, as it accords with my own way of thinking, and is based on a broad look at several authorities, I will quote it in extensu and with approval as follows;

> "There is much debate about the way in which constitutional ouster clauses should be interpreted. It has long been thought that constitutional ouster clauses should be taken as they are and given a 'face value' approach since they are deemed to represent the clear intentions that certain questions should not be the subject of review by the courts.
>
> Thus the approach is taken that 'where the Constitution itself excludes such questions, the courts lose their jurisdiction to entertain these questions because they have no power to override the Constitution.' This is the view of Dr. Basu in his Commentary of the Constitution of India.
>
> This approach is taken by several authorities. In Jones V. Solomon Civil Appeal No. 85 of 1986, a case from the Court of Appeal of Trinidad and Tobago, Sharma J.A stated
>
> > 'When the court is called upon to deal with the effect of an ouster clause contained in a Constitution, ...it must so interpret the ouster clause that the supremacy of the Constitution is preserved.'
>
> Similarly in Harrikisson Vs. Attorney General of Trinidad and Tobago Civil appeal No. 59 of 125, Hystali CJ stated that he;
>
> > '... was firmly of the opinion that a court would be acting improperly if a perfectly...ouster provision in the constitution of a country which is its supreme law is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons.'
>
> In my judgment these strict approaches to constitutional ouster clauses cannot be applied to every case. In fact, Hyatali CJ in his reasoning recognized that an ouster may be usurped if there are 'strong and compelling reasons'. In light of this, I am of the opinion that the breach of fundamental human rights and breaches of natural justice are enough to satisfy the test of 'strong and compelling reasons' and that where such breaches are alleged an ouster clause may be ignored. There is sufficient authority to support this.
>
> The first case which is emanated from the Supreme Court of Sri Lanka was Public Service United Nurses UnionV. Minister of Public Administration [1988]1 Sri LR 229: (1989) 16Com LB 753 (No. 3 of July). In this case, a constitutional ouster because was declared

ineffective because, in the selected award of incremental benefits, there was a breach of the right to equality of treatment as enshrined by the Constitution.

The authority is consistent with the decision of the Judicial Committee of the Privy Council in Endell Thomas V. Attorney General of Trinidad and Tobago [1982] AC 113 where it was held that an ouster clause is not efficacious in the light of an infringement of the Bill of Rights. A similar sentiment was echoed in the landmark case of Hind, R(1977) AC 195.

Apart from being a fundamental right enshrined by the Constitution, the right to a fair hearing is one of the more far-reaching of the principles of natural justice. A breach of the principles of natural justice opens up the decision of the tribunal to review even if there is an ouster clause. The violation of a principle of natural justice amounts to an excess of jurisdiction".

100. The Court of Appeal of Barbados in JOSEPH (GOFFREY) & BOYCE (LENNOX) Vs. ATTORNEY-GENERAL & OTHERS [2005] 68 WIR 123 also had occasion to consider a constitutional ouster clause and it had no difficulty reaching the conclusion that the preclusive section of the Constitution was inefficacious and ineffective to oust the section of the Constitution that provided for the right to apply to the High Court for the enforcement of fundamental rights and freedoms. I respectfully accept the conclusions arrived at by that court to the effect that the question whether a tribunal or body has erred in jurisdiction or breached natural justice is for the courts to decide, and further that the right to judicial remedy under those circumstances cannot be precluded by the ouster clause;

> [58] It follows that in this case S24 of the Constitution providing for a right to apply to the High Court for the enforcement of the protection of fundamental rights and freedoms is not ousted by S77(4) of the Constitution. Further, it is plainly for the court to determine, on the true construction of the Constitution, whether there has been an error of jurisdiction or breach of natural justice or some misdirection which makes the ouster clause inapplicable; Ulufa'alu V. Attorney-General [2005] 1 LRC 698 at 708, per Lord Slynn of Hadley P, and Ward JA.
>
> [59] The Barbados Privy Council is an independent quasi-judicial body; it is not just an advisory body having a consultative role, but a decision-maker, as the Governor General is required by S 78(2) of the Constitution to act 'in accordance with the advice' of the Barbados Privy Council. It is now settled law that the court, in the exercise of its jurisdiction over bodies exercising quasi-judicial powers, such as the Barbados Privy Council, may, in appropriate proceedings, either set aside a decision of the body or declare it to be a nullity; Lord Diplock in Attorney-General V. Ryan at p 30. Excess of jurisdiction has been widely defined to include a violation of the principles of natural justice. To interpret s77(4) of the Constitution as ousting the jurisdiction of the court would be to deprive the appellants of their judicial remedy under s. 24 of the Constitution".

101. The foregoing case found its way to the Carribean Court of Justice which gave full consideration to the appeal by the Attorney-General of Barbados in AG & OTHERS Vs. JOSEPH AND ANOTHER [2007] 4 LRC 199, which I find to be a decision of great persuasive force.That powerful regional court considered arguments and authorities cited from many jurisdictions before arriving, after a process of

rigorous analysis, at the fundamental holding, with which I am in full agreement and adopt herein, that;

> "The power to confirm or commute a death sentence was too important to permit those in whom it was vested, freedom to exercise that power without any possibility of judicial review. Conceptual differences between mercy and justice could not justify denying to a man under sentence of death an enforceable right to have the decision whether he was to live or die arrived at by a procedure which was fair. The ouster clause in s 77(4) of the Constitution did not help the Attorney-General. Courts could still inquire into whether a body performed its functions in contravention of fundamental rights guaranteed by the Constitution, and, in particular, the right to procedural fairness. There was nothing to prevent the court from examining the procedure adopted by the BPC and testing it for procedural fairness by reference to the rules of natural justice and compliance with the fundamental rights and freedoms recognized in the Constitution. If the procedure adopted failed that test, there was a breach of the right to the protection of the law, a fundamental human right recognized in s 11 of the Constitution. The right of an aggrieved person to approach the court for redress was conferred by s 24 of the Constitution in respect of breaches that can ran foul of the provisions of ss12 to 23 thereof. However, the court quite independently of s24 had an implied or inherent power to give redress for any such violation. On the facts, the Court of Appeal had been correct to hold that the BPC was a decision-making body and that the court could set aside a decision of that body or declare it to be a nullity."

102. Before turning finally to the specific constitutional provisions that are implicated by the Ouster Clause in Section 23 of our 6th Schedule, I will refer to the Indian decision of KIHOTO HOLLOHAN Vs. ZACHILLHU AND OTHERS 1992 SCR (1) 686. There, the Supreme Court of India was called upon to decide whether an ouster clause seeking to impart a statutory finality on the speaker of Parliament or the chairman could yet be questioned by the Court. In a thoroughly well-reasoned judgment, that court arrived at the holding that;

> "Paragraph 69(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the speakers/chairman, is valid. But the concept of statutory finality embodied in paragraph 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and precocity, are concerned."

103. In arriving at that decision, and after considering many of its own and other courts' decisions, that court rejected the idea that the mere existence of a 'finality', 'no question' or ouster clause ought to have the effect of, to paraphrase, a scare crow, which, once waved should stop the courts in their tracks and so prelude any enquiry of whatever kind in these picturesque terms;

> "Does the word 'final' render the decision of the speaker immune from Judicial Review? It is now accepted that finality clause is not a legislative magical incantation which has the effect of telling off Judicial Review. Statutory finality of a decision presupposes and is subject to its consonance with the Statute."

G. DECISION

104. With all of the principles I have endeavoured to distil in mind, I now turn to the particular situation before us. There is no doubting the fact that a determination by the Board is judicial or quasi-judicial in nature, and involves determinations that touch on the rights of the affected Judges, their livelihoods, their reputations, their legitimate expectations and various of their rights under the Constitution.

105. On the other hand, the exclusion clause is couched in language simple, clear, direct and admitting to no equivocation;

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

106. In these words, I apprehend that the framers and the people essentially and effectively crafted the validity, legality and constitutionality of the vetting process and outcomes so that we must accord them due respect and deference. That must perforce, mean that only in exceptional and narrow circumstances must the courts interfere – and in the kind of situations that the authorities I have considered contemplate.

107. To assert this limited intervention is in no way contradictory of the view I have taken that the ouster clause is valid. It is only an appreciation that it may well be that exceptional and compelling circumstances may arise that reveal either a breach of jurisdictional limits, abuse of power or process, violation of fundamental rights, impulsion by mala fides or such other perversions that would render the process and determination of the Board in a particular case a legitimate target of judicial review.

108. This must be so for, whereas Section 23 of the 6th Schedule declares the operation of the vetting law and process despite certain Articles of the Constitution, it leaves intact and unblunted the High Court's supervisory jurisdiction. But that is not all. The Bill of Rights, captured in Chapter 4 of the Constitution, also remains intact as an integral part of Kenyan's democratic state and is the framework for social, economic and cultural policies. Art 19(1). Human Rights and fundamental freedoms are to be recognized and protected for the purpose of preserving the dignity of the individual and communities and to promote social justice and the realization of the potential of all human beings. (Clause 2). What is more, those rights and fundamental freedoms;

> "3(a) belong to each individual and are not granted by the state, ... and
>
> (c) are subject only to the limitations contemplated by this Constitution."

109. There is nothing in the ouster clause that suggests, even ever so remotely, that any of the rights and fundamental freedoms of the Judges were to be alienated, diluted or limited. Moreover, by virtue of Article 20(1) of the Constitution, the Bill of Rights applies to all law and binds all state organs and all persons. In interpreting the Bill of Rights a court, tribunal or other authority is enjoined to promote;

> (c) the values that underlie an open and democratic society based on human dignity equality, equity and freedom and
>
> (b) the spirit, purport and objects of the bill of Rights."

110. As far as the implementation of rights and fundamental freedoms is concerned, the Constitution does not leave it to the election or idiosyncrasies of persons that populate the state and its organs. Rather, it declares it to be a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

111. Article 21(1). That seems to me as peremptory a formulation of the duty that judges of the High Court have in this regard, as can be.

112. Article 22 also sets out in clear detail the centrality of rights in the constitutional culture and country that we gifted ourselves through the Constitution that threw wide open the pathway to justice as follows:

> (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened
>
> SUBPARA (2)
>
> In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
>
> SUBPARA (a)
>
> a person acting on behalf of another person who cannot act in their own name;
>
> SUBPARA (b)
>
> a person acting as a member of, or in the interest of, a group or class of persons;
>
> SUBPARA (c)
>
> a person acting in the public interest or
>
> SUBPARA (d)
>
> an association acting in the interest of one or more of its members".

113. The right of enforce one's fundamental rights and freedoms through the courts is so basic and so essential a feature of the rule of law in a democratic society that it is both baffling and disturbing that it should even be suggested that any group of persons, senior Judges no less, should be shut out from exercising it. It is the recourse to courts of law as opposed to the taking of the law into our own hands in settling our grouses, disputes and grievances that truly enthrones right over might, and guarantees our survival as a society of the free.

114. When proceedings are brought before the High Court for the enforcement of the Bill of Rights, that court, by virtue of Article 23 of the Constitution, has jurisdiction:

> (1) ...to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights."

115. The fact that the Court hears and determines the application is proof, if any were needed, that the filing of applications by the Judges perse, does not portend an eruption of apocalyptic chaos as the appellant seems to fear. It is not reasonable to expect, nor is borne out by experience, that every complaint of violation of rights will find favour with the High Court. There is nothing to suggest that were it to hear complaints or applications by the respondent Judges, it would, by some quirky, knee-jerk response steeped in caprice and arbitrariness, grant whatever prayers will be sought. In short, a constitutional exercise of the right to approach the courts need not terrify the appellant and the Board when justice remains our shield and defender.

116. But even after Article 22 applications have been heard by the High Court and found meritorious, it remains to bear in mind that the Court has a very wide panoply of reliefs from which it decides which is most appropriate for the case before, it including,

(a) a declaration of right

(b) an injunction

(c) a conservatory order

(d) a declaration of invalidity of any law that denies, violates infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24

(e) an order of compensation

(f) an order of judicial review."

117. Once the whole range of remedies and reliefs is kept firmly in mind, it ought to emerge that an exercise of jurisdiction by the High Court in the petitions and application still pending before it will not engender the crisis and confusion that Mr. Kanjama warned about. There is nothing in the number or in the eventual outcome of the said challenges that poses any foreseeable threat to the systemic integrity of the Judiciary.

118. The view I have taken that the High Court has a definite and undeniable jurisdiction to entertain the petitions and application notwithstanding Section 23 of the 6th Schedule is bolstered by a consideration of Article 25 of the Constitution which sets out in precise terms that;

"Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited –

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) Freedom from slavery or servitude;

(c) The right to a fair trial

(d) The right to an order of habeas corpus."

119. This provision, to my mind, trumps every other provision including Section 23 of the 6th Schedule. It has to be so because of the central place that we have given the Bill of Rights is not lightly to be taken and, even when there is justification for limiting or derogating from rights, the process for lawfully doing so is carefully and closely circumscribed under Article 24 of the Constitution.Even then,recognition remains that some rights, cannot, under any circumstances, be limited. Among these non-derogable, super rights, so to say, is the right to a fair trial. That right is expounded upon at Article 50 of the Constitution to include, the right to have a dispute capable of being settled by application of law to be tried by a fair and impartial court or tribunal. It is that right the respondent Judges are exercising before the High Court and it would be a grave abdication were that court to cower and cringe from doing their constitutional duty. It is for the High Court to decide whether the right to a fair trial, as well as the other non-derogable rights I see cited in some of the petitions, namely "freedom from ....cruel, inhuman or degrading treatment ..." have, infact been violated contrary to law as alleged. It is a duty the High court cannot lawfully shirk.

120. In coming at this conclusion that the High Court was perfectly right to decide as it did that it was possessed of jurisdiction in the matters pending before it, I am fully cognizant of the centrality of jurisdiction: it is 'everything' as famously put the late NyarangiJ.A. in LILLIAN 'S' (Supra). I am of the confident view that the High Court correctly found that it had jurisdiction and was right in not downing its tools in this critical issue.

121. I have taken the view, consistent with a long line of authorities, that when it comes to interpreting the Constitution, the proper approach is first a faithful adherence to the interpretative blueprint set out in Article 259 namely;

> (1) This Constitution shall be interpreted in a manner that –
>
> (a) Promotes its purposes, values and principles
>
> (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bills of Rights
>
> (c) Permits the development of the law; and
>
> (d) Contributes to good governance."

122. I am clear in my mind that the decision by the High Court declaring itself possessed of jurisdiction was correct and faithful to the constitutional edict as to interpretation. I would have absolutely no basis for disturbing or dislodging that finding and the order that is appealed from.

123. Before concluding this judgment I need to comment on the political doctrine relied on by the appellant in urging us to find that the vetting of judges is a no-go zone that the courts would do well to steer clear of. Having read the NIXON Vs. U.S. judgment cited as authority for that proposition, I am unable to agree that the vetting process is a non-justiciable political issue. I rather think it is both.There is nothing in our constitutional and legal set up that places any process or decision implicating the fundamental rights of citizens beyond the power of the courts to enquire and to redress. Without in any way belabouring the point, I find that the Nixonian principle does not itself absolutely preclude judicial inquiry as can be seen from Souter J's concluding words;

> "One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon summary determination that an officer of the United States was simply 'a bad guy' ... judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic saw great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. 'The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.'" P. 204

124. The decision of the High Court, which I would affirm and leave undisturbed, is in keeping with what professor Wade concludes, in probably the most authoritative text in this area of law, Administrative Law, 6thEdn at P 720;

> "Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the operation of judicial review. ... there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions on Judicial remedies are given

> the narrowest possible construction, structure are against the plain meaning of the words. This is sound policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. Finality is a good thing but justice is a better."

125. I could not agree more and would only add that whereas it is politically expedient, and proponents of public policy would urge, that the issue of the judges who were sent packing should not further trouble our collective consciousness, a more persuasive voice, that of principle, demands that the courts be faithful to law. We never should allow the signal good of judicial reform to justify any and every denial of rights even for those who may seem to have lost favour.

126. Neither the memory of how bad the Judiciary once was, nor the fear of unsettling the new order we are creating, should justify complicity in the abuse of rights and the creation of bodies, processes and enclaves that claim immunity from law. I call to mind Lord Atkin's memorable protest in his dissent when the majority of the House of Lords in LIVERSIDGE Vs. ANDERSON [1942] AC 206 had, by failing to control the Executive appeared more executive-minded than the Executive",

> "In England,amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments an his liberty by the executive, alert to see that any coercive action is justified in law."

127. It is to that principle that the High Court judges displayed fealty and I, on my part, would not fault them and would not endorse as valid or sound the challenge to their decision by way of the current appeal. I say this wholly mindful of the inherent good that the vetting process embodies, but equally aware that the road to hell is paved with good intentions.Our shared desire for a clean, efficient, and responsive Judiciary cannot justify a trampling underfoot of the rights of those who occupied the seats we occupy today. I think that tension between reform and fairness was captured by Shakespeare in dramatic fashion in The Tragedy of Julius CaesarAct II, Scene 1, when Brutus, one of the conspirators still finds it in him to say;

> "Let us be sacrificers but not butchers, Caius.
>
> We all stand up against the spirit of Ceasar;
>
> And in the spirit of men there is no blood,
>
> O, that we then could come by Ceasar's spirit,
>
> Ceasar must bleed for it. And, gentle friends,
>
> Let'skill him boldly, but not wrathfully;
>
> Let's carve him as a dish fit for the gods,
>
> Not hew him as a carcass fit for hounds ...."

128. Many are the authorities that were cited before the High Court and also brought to our attention by all the counsel on both sides of this appeal and I must express gratitude and appreciation for the industry, learning and professionalism that went into researching and presenting this appeal. If I have not cited some of the authorities, it is not for want of relevance but for an acknowledgment that no one judgment could ever capture all there would be to say.

129. The upshot is that this appeal fails in entirety and I would dismiss it. As J. Mohammed and O. Odek, JJA. agree, it is so ordered.

130. I would also dismiss the preliminary objection so-called having been overtaken by events for it sought to bar some of the parties from being heard herein over alleged contempt, but they had already been heard any way. All of us being so agreed, it is so ordered.

131. I would order that each party do bear its own costs. As all of us are agreed, it is so ordered.

JUDGMENT OF J. MOHAMMED, J.A.:

Introduction and Background

1. This appeal raises important points of law including the jurisdiction of the High Court and whether Section 23 of the transitional and consequential provisions set out in the Sixth Schedule of the Constitution ousts the supervisory and Judicial Review jurisdiction of the High Court.

2. The background facts to this appeal are well stated in the judgment of Kiage, JA and I adopt the facts as stated.

3. This appeal comes in the backdrop of the Constitution promulgated by the people of Kenya in 2010. The Constitution is a progressive and reformist Constitution and a radical departure from the former constitutional dispensation in many ways.

4. Notable features include the recognition of the sovereignty of the people of Kenya and that all sovereign power belongs to the people and shall be exercised in accordance with Article 1 of the Constitution; the declaration of national values and principles (Article 10) which include the rule of law, democracy, human dignity, equity, human rights, non discrimination and protection of the marginalized; and the recognition, protection and development of fundamental rights and freedoms in a Bill in a detailed and comprehensive Bill of Rights (Articles 19 to 59). The rights and fundamental freedoms include the following rights: right to life, right to equality and freedom from discrimination, the right to human dignity and the right to have that dignity respected and protected, the right to a fair hearing and the right to fair administrative action.

5. A notable feature of the Constitution of Kenya, 2010 recognizes and seeks to protect fundamental rights and freedoms.

6. It is notable that Article 25 of the Constitution expressly provides that some fundamental rights and freedoms may not be limited. It provides:

> "Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-
>
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
>
> (b) freedom from slavery or servitude;
>
> (c) the right to a fair trial; and
>
> (d) the right to an order of habeas corpus"
>
> [Emphasis added].

7. Article 19 clearly provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

8. Article 19(2) provides "The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and to promote social justice and the realization of the potential of all human beings."

9. The Constitution lays down the three main arms of government in Article 1(3):

> "Sovereign power under the Constitution is delegated to the following State organs, which shall perform their functions in accordance with the Constitution –
>
> a) Parliament and the legislative assemblies in the county governments;
>
> b) the national executive and the executive structures in the county governments; and
>
> c) the Judiciary and independent tribunals."
>
> [Emphasis added]

10. As has been succinctly stated by the Hon. Justice (Prof.) Jacton B. Ojwang', Judge of the Supreme Court of Kenya, in his book "Ascendant Judiciary in East Africa":

> "...What is special as regards the Judiciary as thebearer of the people#s mandate is that it is the primary and ultimate arbiter, when the operations of the several public bodies run into conflict; it is the dominant interpreter not only of the totality of the Constitution, but also of all other laws applying in the land... Notable as a central theme of the Constitution constantly falling within the judicial mandate, is its longest chapter, on the Bill of Rights. The Bill of Rights indeed, is the main bond in the Constitution that creates the integrality of the judicial function and the processes of governance...".1

11. The Bill of Rights (Article 22(1)) in the Constitution unequivocally spells out the judicial function of the Judiciary in the adjudication of rights as follows:

> "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened". [Emphasis added].

12. Article 27 of the Constitution further provides that:

> [27] Every person is equal before the law and has the right to equal protection and equal benefit of the law."

12. Article 259(1) clearly gives guidance on the interpretation of the Constitution:

> "This Constitution shall be interpreted in a manner that –
>
> (a) promotes its purposes, values and principles;
>
> FOOTNOTE 1 Jackton B. Ojwang, Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order (Nairobi: Strathmore University Press, 2013)

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and (d) contributes to good governance." [Emphasis added]

13. Article 259 (3) provides that:

> "Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking …."

14. Case law is replete with determinations that the Constitution should be read as an integrated whole. For example, the Ugandan case of TINYEFUZA V ATTORNEY GENERAL, CONSTITUTIONAL APPEAL NO. 1 OF 1997, the court held as follows:

> "The entire Constitution has [to] be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy (sic) of the written Constitution."

15. In addition to reading the Constitution as a whole, it must also be read in order to give effect to the purpose that was intended. In SMITHDAKOTA V NORTH CAROLINA, 192 U.S. 268 [1940] it was stated that:

> "It is an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument."

16. From the above authorities it is clear that a generous and purposive interpretation is to be given to constitutional provisions protecting fundamental rights enshrined in a constitution.

16. The Constitution of Kenya has bestowed on the Courts of Kenya a wide mandate and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Background

17. The previous Constitution was not as progressive and did not recognize and protect as many rights and protections as the Constitution of Kenya, 2010 does. Provisions had to be made to transition from one Constitution to another, as seamlessly as possible. The Transitional and Consequential Provisions in the Constitution are the bridge between the two constitutional dispensations.

18. The practice the world over is that a new constitutional dispensation requires that certain savings are provided for the purposes of smooth transition. For this reason, the Transitional and Consequential Provisions of the Sixth Schedule, were enacted pursuant to Article 262 of the Constitution. The Sixth Schedule made transitional and consequential provisions including, inter alia, suspension of some provisions of the 2010 Constitution; extension of application of certain provisions of the former Constitution; and interim provisions that will apply during the transition period.

19. Regarding the Judiciary, the new Constitution was promulgated in the background of widespread public concern over the performance of the Judiciary over the years. The people of Kenya aspired for an independent, efficient and impartial Judiciary. The outcome in this regard was the transitional

provisions in Section 23 of the Sixth Schedule which provide that all Judges and Magistrates, who were in office on the effective date of the Constitution (27th August, 2010) be vetted with respect to their suitability to continue to serve in the Judiciary.

20. Pursuant to Section 23 of the Sixth Schedule, The Vetting of Judges and Magistrates Act, No. 2 of 2011 (hereinafter the "Vetting Act") was enacted. The Act came into force on 22nd March 2011.

21. The Vetting of Judges and Magistrates Board, (hereinafter referred to as "the Vetting Board"), established under the Vetting Act, has been vetting Judges who were in office as at the effective date.

22. The appeal before us arises from a Judicial Review application and 4 Constitutional Petitions filed by Judges and other parties who were aggrieved by the decisions and determinations of the Vetting Board.

23. The learned Judges of the High Court (Havelock, Mutava, P. Nyamweya, Ogolla and Mabeya, JJ.), were empanelled by the Chief Justice to hear and determine all these matters. At the hearing, the Law Society of Kenya, which was the 3rd interested party in Petition No. 11 of 2012, raised the issue whether the High Court had jurisdiction to hear the matters against the Vetting Board. The learned Judges directed that the Judicial Review Application and the Petitions be heard separately but be consolidated for the purposes of determination of the LSK's application.

24. The learned Judges framed the issues for determination as follows:

> 1. Whether the High Court#s general jurisdiction is subject to limitation.
>
> 2. Whether Section 23(2) of the Sixth Schedule to the Constitution ousts the jurisdiction of the High Court.
>
> SUBPARA 3.
>
> Whether the High Court has supervisory jurisdiction over the Vetting Board, and
>
> 4. Whether the conservatory orders made in these matters should remain in force."

25. After a careful evaluation and consideration of the arguments made before it, the five judge bench determined as follows inter alia:

> 1. ...it is our finding however that having been given the jurisdiction to interpret the Constitution and resolve any inconsistencies that may arise therein, Courts cannot be said to be challenging the legality of the Constitution.
>
> 2. ... it is also our finding that an interpretation of the Constitution by the Courts does not amount to a change or amendment of the Constitution. This is because the Courts are given clear guidelines as to how to interpret the Constitution in Article 259(1).
>
> 3. Ipso facto, therefore, we find that the High Court has jurisdiction to exercise any of the constitutional mandate conferred by the people of Kenya under Article 165 even in the face of Section 23 of the Sixth Schedule.
>
> 4. In addition, we note that some of the Petitions over which the Vetting Board are sought to be challenged hinge upon breach of fundamental rights and freedoms of the affected judges, including the right to a fair hearing. In this regard, Article 23 (1) of the Constitution of Kenya gives the High

Court jurisdiction exercisable in line with Article 165 to hear and determine applications for redress of a denial, violation or infringement of a right or fundamental freedom in the Bill of Rights.

5. We observe that the ouster clause does not insulate the vetting process from the operation of Article 23 of the Constitution. We further and particularly observe that under Article 25 of the Constitution, the right to a fair trial is a right that the Constitution has decreed and classified as among the fundamental rights and freedoms that may not be derogated from under the Constitution.

6. .... In effect therefore, we find the ouster clause incapable of eliminating this Court#s jurisdiction over petitions cushioned upon alleged breaches of fundamental rights and freedoms including the right to a fair trial ... We find that this Court has the right to review a decision for error of law apparent on the face of record of the Vetting Board which may be an error going to jurisdiction thereof as distinguished from error with its jurisdiction.

7. ... We hold that the Vetting board is akin to any Tribunal which is susceptible to the jurisdiction of this Court under Article 165 (6) of the Constitution. The only exception is that while exercising its said jurisdiction under Article 165 aforesaid, this court will do so having in mind the strict directions set out in Section 23(1) of the Sixth Schedule to the Constitution as to the process and the decisions of the Vetting Board."

26. Having found that the High Court has jurisdiction over the vetting process, the learned Judges proceeded to determine the extent to which such jurisdiction is exercisable.

27. In determining this issue, the learned Judges rendered themselves thus:

> "In our view therefore, we see it our duty to carve out a delicate balance that will ensure that the exercise of the court#s jurisdiction does not undermine the substratum of the vetting process or whittle down the clear intention of the ouster clause of shielding the Vetting Board from judicial intrusion. That balance will have been created if this Court is able to ensure that the Vetting Board shall retain its place as the constitutionally mandated body to authoritatively, impartially and independently adjudicate upon matters relating to the removal or the process leading to the removal of Judges as contemplated by Section 23(2) of the Sixth Schedule of the Constitution, with the only caveat that no aspect of the exercise of its function shall drift beyond the four corners of the mandate."

28. The learned Judges categorically stated that the High Court has jurisdiction over the vetting process or decisions deriving from the vetting process.

29. Aggrieved by these findings, the LSK preferred the present appeal to this court raising forty one (41) grounds of appeal. The main issues for determination can be condensed to 3.

30. The Constitutional Petitions and Judicial Review application in the High Court were consolidated for purposes of determining the legal issues raised by the appellant in this appeal, the Law Society of Kenya (hereinafter referred to as "the LSK").

31. The position of the appellants was that the High Court's judicial review, or supervisory jurisdiction is ousted by section 23 (2) of the Sixth Schedule to the Constitution of Kenya and that the decisions and determinations of the Vetting Board are final and cannot be challenged in any court.

31. The main issues for determination:

    1. The Jurisdiction of the High Court;

    2. The mandate of the Vetting Board;

    3. Whether the provisions of Section 23 of the Sixth Schedule to the Constitution ousts the jurisdiction of the High Court

Analysis

1) The jurisdiction of the High Court

32. The Constitution of Kenya, 2010 gives the Constitution wide jurisdiction. An analysis of the jurisdiction granted to the Judiciary as the „ultimate arbiter# by the Constitution and the law is important to lay the basis for the determination of the instant appeal.

33. The scope of the exercise of any court's jurisdiction in Kenya is dictated by Section 3 of the Judicature Act which provides that:

> The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –
>
> (a) the Constitution;
>
> (b) ....

34. Blacks Law Dictionary, 8th Edition defines jurisdiction as:

> "... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

35. In, In the Matter of the Interim Independent Electoral Commission (2011) eKLR the Supreme Court of Kenya stated that jurisdiction by the courts in Kenya is regulated by the Constitution, statute law and by principles laid out in judicial precedent. Jurisdiction clothes a court with authority to make determinations on the matters before it.

36. The issue of jurisdiction was aptly stated in the case of THE OWNERS OF MOTOR VESSEL "LILLIAN S" V CALTEX OIL KENYA LTD, [1989] KLR 1:

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

37. Article 23 (1) of the Constitution expressly vests in the High Court the jurisdiction and authority to uphold and enforce the Bill of Rights.

38. It provides:

> 23 (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

39. The jurisdiction of the High Court is set out at Article 165 (3) of the Constitution:

> 165 (3) Subject to clause (5), the High Court shall have -
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
>
> (d) jurisdiction to hear any question respecting interpretation of this Constitution including determination of -
>
> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
>
> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
>
> (iv) a question relating to conflict of laws under Article 191; and
>
> (e) any other jurisdiction, original or appellate, conferred on it by legislation.
>
> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
>
> (iv) a question relating to conflict of laws under Article 191; and
>
> (f) any other jurisdiction, original or appellate, conferred on it by legislation.

Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice."

40. Article 165 (6) of the Constitution also gives the High Court supervisory jurisdiction over:

> "subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function ...".

41. The Constitution of Kenya 2010 also entrenches judicial review as one of the remedies that may be granted by the High Court determining a claim that a fundamental right or freedom has been, or is threatened to be, breached. Article 22 of the Constitution provides that:

> (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

42. The High Court has been granted jurisdiction to hear and determine matters touching on the infringement of the Bill of Rights.

> 23(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-
>
> (a) a declaration of rights;
>
> (b) an injunction;
>
> (c) a conservatory order;
>
> (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
>
> (e) an order for compensation; and
>
> (f) an order of judicial review."

43. In a democracy, one of the most important functions of the courts is to ensure that organs of government comply with the law and the Constitution - within the ambit of separation of powers. This jurisdiction is exercised by the courts by way of judicial review.

44. Article 165 (3) (b) provides thus:

> [165(3) (b)] Subject to clause 5, the High Court shall have-
>
> (a) .....
>
> (b) .....
>
> (c) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened."

45. Further, the supervisory jurisdiction of the High Court is guaranteed under Article 165(5) of the Constitution which provides thus:

> [165(5)]The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

46. It is, therefore, clear from the above constitutional provisions that the High Court has jurisdiction to hear and determine questions whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Further, that the High Court has jurisdiction to grant an order for judicial review and to supervise subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function.

2) The Mandate of the Vetting Board

47. Section 23 of the Sixth Schedule to the Constitution provides:

> 23 (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."

48. In furtherance of this mandate, Parliament enacted The Vetting of Judges and Magistrates Act, 2011 which came into effect on 22nd March, 2011 which is:

> "An Act of Parliament to provide for the vetting of Judges and Magistrates pursuant to Section 23 of the Sixth Schedule to the Constitution; to provide for the establishment, powers and functions of the Judges and Magistrates Vetting Board, and for connected purposes".

49. The Vetting Board is, therefore, a creature of statute and not a Constitutional body or superior court. It is therefore in my view, subject to the supervisory jurisdiction of the High Court.

50. The Vetting Act lays down the mandate of the Vetting Board. One of the notable provisions is Section 13 of the Vetting Act which provides that:

> 13. The functions of the Board shall be to vet judges and magistrates in accordance with the provisions of the Constitution and this Act." [Emphasis added].

51. Section 2 of the Vetting Act defines "vetting" to mean:

> "The process by which the suitability of a serving judge or magistrate to continue serving in the Judiciary is determined in accordance with this act." [Emphasis added]

52. Section 18 of the Vetting Act lays down the relevant considerations for vetting while Section 19 thereof stipulates the vetting procedures.

53. Section 19(3) provides that:

> "...every judge or magistrate to be vetted shall be given sufficient notice."

54. The Vetting of Judges and Magistrates (Procedure) Regulations, 2011, provide that their purpose is to:

> (2) ... regulate the procedures of the Judges and Magistrates Vetting Board for the better carrying into effect the provisions of the Act and to provide a fair and just vetting process for the judges and magistrates...".

55. The said Regulations further provide that "the purposes and principles of the Constitution and substantive justice to apply".

> 2) The Board shall be guided by the following principles in fulfilling its mandate:
>
> a) the purposes, values and principles of the Constitution shall be protected and promoted;(Emphasis added).
>
> b) justice shall be done to all, irrespective of status..."

56. The Vetting Board by the Vetting Act and the Regulations made thereunder are mandated to vet judges and magistrates in accordance with the provisions of the Constitution and the Vetting Act.

57. Allegations were made by counsel for the affected Judges that their fundamental rights were infringed by the 4th Respondent in discharge of its obligations and under the Constitution and the Vetting Act; that their rights to fair hearing were violated contrary to the Rules of Natural Justice and that their legitimate expectation was breached by the 4th Respondent.

58. This begs the questions: Which body has the Constitutional mandate to enquire and intervene when a judge or magistrate alleges that the purposes, values and principles of the Constitution were not protected and promoted. Which body will supervise the Vetting Board where there are allegations of breach of fundamental rights and freedoms?

59. The Vetting Act does not lay claim or provide in any way whatsoever that the Vetting Board has the status of a Superior Court or is not an inferior tribunal. The Vetting Board in its preliminary ruling as regards Hon. Justice Jeanne Gacheche had clearly stated as follows with regard to its jurisdiction:

> "The Board is aware of the fact that it cannot determine its own jurisdiction, which is given to it by statute. This is a matter that rests with the Court...".

60. Article 165(6) gives the High Court:

> "Supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court".

61. The purpose of Section 23 of the Sixth Schedule was, therefore, in my view to insulate or oust the Vetting Board's decisions on the suitability of the judges and magistrates from judicial or any other enquiry. Section 23 of the Sixth Schedule expressly precludes the operation of Articles 160, 167 and 168 thereby suspending the security of tenure of judges under Article 167 and the constitutional provisions for removal of a judge under Article 168. It is noteworthy that Article 165 was not ousted by Section 23 of the Sixth Schedule. Accordingly, I am of the view that the jurisdiction of the High Court stipulated in Article 165 is not ousted by Section 23 of the Sixth Schedule.

62. Article 10 and Article 159 of the Constitution whose guiding principles are to be complied with in proceedings under Section 23 of the transitional and consequential provisions set out in the Sixth Schedule of the Constitution provide in part:

> 10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law;
>
> or
>
> (c) makes or implements public policy decisions.
>
> (2) The national values and principles of governance include-
>
> SUBPARA (a)
>
> patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
>
> SUBPARA (b)
>
> human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
>
> SUBPARA (c)
>
> good governance, integrity, transparency and accountability; and
>
> SUBPARA (d)
>
> sustainable development."

63. Judicial authority flows from Article 159 of the Constitution in the following terms:

> (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
>
> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> (d) justice shall be administered without undue regard to procedural technicalities; and
>
> (e) the purpose and principles of this Constitution shall be protected and promoted.
>
> (3) Traditional dispute resolution mechanisms shall not be used in a way that-

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law."

64. Clearly, the mandate of the Vetting Board is to vet the suitability of judges and magistrates to continue to serve in the Judiciary. The Vetting Board has the exclusive mandate to carry out the vetting process in accordance with the constitution and the Vetting Act.

3) Whether the provisions of Section 23 of the Sixth Schedule to the Constitution ousts the jurisdiction of the High Court.

65. To determine this crucial issue, I will consider Constitutional provisions and jurisprudential developments from other jurisdictions where the issue of ouster clauses has been determined.

66. Section 23(2) of the Sixth Schedule provides:

> "S 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."

Despite the provision in Section 23(2), Article 165 (3) (c) provides that:

"[165 (3) (b) Subject to clause (5), the High Court shall have –

(b) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144."

Oxford's Dictionary of Law, 5th Edition, defines an ouster jurisdiction as follows:

"The exclusion of judicial proceedings in respect of any dispute. There is a presumption that statutes and other documents e.g contracts do not oust the jurisdiction of the Court."

Maxwell on Interpretation of Statutes, 11th Edition at page 122 states as follows:

"It is perhaps, on the general presumption against an intention to disturb the established state of law or to interfere with the vested rights of the subject, that so strong a leaning now exists against construing statutes so as oust or restrict the jurisdiction of the superior courts..."

An ouster clause operates by removing some actions from the jurisdiction of the High Court. Clauses that purport to remove the jurisdiction of the High

Court have been found to be ineffectual. For example, in R. V. MEDICAL

APPEAL TRIBUNAL, EX PARTE GILMORE, EWCA Civil 1[1957]1 Q.B 574 the

legality of the total ouster clause in the National Insurance (Industrial Injuries) Act 1946 was considered by the Court. The Court was of the opinion that the words contained in the Act, "any decision of a claim or question ... shall be final" resulted in excluding only an appeal, but not in excluding the jurisdiction of the judicial review jurisdiction of the court. The court stated that:

"...I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal." It does not mean "without recourse to certiorari." It makes the decision final on the facts, but not final on the law.

Notwithstanding that the decision is by a statute made "final," certiorari can still issue for excess of jurisdiction or for error of law on the face of the record..."

The rationale behind this was explained by Lord Denning when he said that:

"...The court never allowed a statute to be used as a cover for wrongdoing by tribunals. If tribunals were to be at liberty to exceed their jurisdiction without any check by courts, the rule of law would be at an end..."

Similarly in R V. SECRETARY OF STATE FOR HOME DEPARTMENT, EX

PARTE FAYED [1997] 1 ALL ER 228, during an appeal against the decision of

the Home Secretary, in the face of section 44(2) of the British Nationality

Act 1981, which states that:

"... the secretary of state...shall not be required to assign any reason for the grant or refusal of any application under this Act....and the decision of the secretary of state....shall not be subject to appeal to, or review in, any court..."

It was held that this clause did not oust the jurisdiction and prevent the court from reviewing the decision on procedural grounds. In this case, the court formed the opinion that it was not intended that a decision that had failed to comply with the rules of fairness could be excluded from review. The general rule is that the remedy of certiorari is never to be taken away by any statute especially where it is the process, and not the merits of the decision that is questioned.

The celebrated case of ANISMINIC LIMITED VS FOREIGN

COMPENSATION COMMISSION & ANOTHER, (supra) [1969]2 AC 147,

[1968] UKHL 6 appears to be the high water mark of judicial review. The crucial words were the provision of the Foreign Compensation Act, 1950 that a determination by the Commission "shall not be called in question in any court of law". The said holding takes the position that any construction of an ouster jurisdiction ought to be construed strictly with the end result being the preservation of the Court's jurisdiction. The relevant provisions provide as follows:

"It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly, meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court." As per Lord Reid.

The Supreme Court of Hong Kong in the case of CHAN YIK TING VS. THE

HONG KONG HOUSING AUTHORITY, (H.C.M.P. NO.2111 OF 1989) held as

follows:

"All ouster clauses must be construed strictly. See Anisminic v. Foreign Compensation Commission, supra p. 170 Letters C/D per Lord Reid. There are sound reasons for the courts# ordinary jurisdiction to supervise by judicial review to be jealously guarded. This has been described as the "constitutional fundamentals" by Professor Wade in his article "Constitutional and Administrative Aspects of the Anisminic case" (1969) 85 LQR 198 at p.200. Without which, the tribunal could be made a law unto itself. It would virtually become a potential dictator with uncontrollable given jurisdiction, and the personalities presiding it would become sole judges of the validity of their own decisions. That, needless to say, is repugnant to a coherent legal system. It is therefore a cardinal principle that the court#s ordinary jurisdiction to review should not be whittled down. ..."

In the case of AUSTIN V ATTORNEY GENERAL, CASE NO. 1982 of

2003, Judge William Chandler of the High Court of Barbados typically addressed constitutional ouster clauses as follows:

"In my judgment these strict approaches to constitutional ouster clauses cannot be applied to every case. In fact, Hyatali, CJ, in his reasoning recognized that an ouster clause may be usurped if there are „strong and compelling reasons#. In light of this, I am of the opinion that the breach of fundamental human rights and breaches of

natural justice ar e enough to satisf y „strong and

compelling reasons# and that where such breaches are alleged on ouster may be ignored. There is sufficient authority to support this."

[Emphasis added].

The "strong and compelling reasons" test as a basis for ousting an ouster clause

finds reflection in the jurisprudence of other Caribbean States. Thus, in

HARRIKISSON Vs. ATTORNEY GENERAL OF TRINIDAD AND TOBAGO, Civil

Appeal No. 59 of 175, Hyatali CJ, stated:

"I am firmly of the opinion that a Court would be acting improperly if a perfectly clear ouster provision in the constitution of a country is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons." (Emphasis added)

Wade on Administrative Law at page 713-717 states that:

"Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is sound policy, since otherwise Administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. Finality is a good thing but justice is better... parliament only gives the impress finality to the decisions of the tribunal on condition that they are reached in accordance with the law...the law as now settled by the House of Lords is, that these ouster clauses are subject to exactly the same doctrine as the older no certiorari clauses namely, that they do not prevent the Court from intervening in case of excess jurisdiction. Violation of principles of natural justice, for example, amounts to excess of jurisdiction." [Emphasis added]

In England, the landmark case of Anisminic v. Foreign Compensation

Commission, [supra], the House of Lords categorically held that where a

tribunal exceeds its jurisdiction or where it contravenes the principles of

natural justice, despite the finality, ouster or privative clauses, a court can and

will intervene or examine the tribunal's decisions.

In the Indian case of KESAVANANDA BHARATI V STATE OF KENALA

& ANOR, AIR [1973] SC 1461, the Indian Supreme Court held that the court

has the jurisdiction to hear and question the constitutionality of a statute regardless of ouster clauses.

The Barbados Supreme Court of Judicature in ANTHONY LEROY

AUSTIN V THE ATTORNEY GENERAL OF BARBADOS, NC 2161 OF 2003,

while citing with approval the case of ENDELL THOMAS V ATTORNEY

GENERAL OF TRINIDAD & TOBAGO, [1982] AC 113, at paragraphs 82, 84

and 85 held that:

"[82] In my judgment these strict approaches to constitutional ouster clauses cannot be applied to every case. In fact, Hyatali CJ in his reasoning recognized that an ouster clause may be usurped if there are "strong and compelling reasons". In light of this, I am of the opinion that the breach of fundamental human rights and breaches of natural justice are enough to satisfy the test of

"s trong and co mpell ing re asons" and th at wh ere such breaches are alleged an ouster clause may be ignored."

[84] That authority is consistent with the decision of the Judicial Committee of the Privy Council in Endell Thomas v Attorney General of Trinidad and Tobago [1982] AC 113, where it was held that an ouster clause is not efficacious in the light of an infringement of the Bill of Rights.

[85] Apart from being a fundamental right enshrined by the Constitution, the right to a fair hearing is one of the more far reaching of the principles of natural justice. A breach of the principles of

natural justice opens up the decision of the tribunal to review even if there is an ouster clause."

In my view the learned Judges correctly interpreted the law and laid down the core general principles that should govern interpretation of ouster clauses in Kenya as follows:

"1) Statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It would be a travesty of justice if ouster clauses are applied at face value as tribunals, bodies, authorities or persons in position conferred with power may run amok, act with impunity or abuse that power to the detriment of our people.

2) The Court will not normally intervene where the authority under challenge acts within its permitted field, even when the emerging decisions are wrong.

3) In spite of a finality clause, it is open to the court to examine whether the action of the authority under challenge is in excess of its jurisdiction or contravenes a mandatory provision of the law conferring on the authority the power to take such action.

4) Breach of the principles of natural justice, including the right to a fair hearing, opens up the decision of the tribunal to review even if there is an ouster clause.

5) Breach of fundamental rights and freedoms enshrined in the Constitution including the right to protection of the law and respect for fundamental human rights will entitle a court to intervene, notwithstanding the existence of a finality or ouster clause.

6) An ouster clause may, ultimately, be usurped if there are strong and compelling reasons."

Other issues that fell for determination included the appellant's contention that the political question doctrine dictates that the Vetting Board is not subject to the supervisory jurisdiction of the High Court but is reserved for the Legislature. They argued that the vetting process emanated from a political process and the jurisdiction of the High Court was therefore limited in keeping with the constitutional doctrine of separation of powers. They further argued that the area of determination of policy directions lay squarely with the Executive arm of government. In the appellant's view therefore, the vetting of judges and magistrates was removed from the ambit of the Courts and the mandate exclusively granted to the Vetting Board.

Counsel relied on the authority of NIXON V UNITED STATES, 506 US

224 (1993), US Supreme Court.

Having considered the argument on the political question and the authorities cited, the learned judges held, correctly in my view, that the issues of justiciability and the political doctrine question are substantive not jurisdictional questions. Accordingly, these are issues that should be heard and determined on their merits once a Court is seized of a matter.

Another issue raised for determination by the respondents is that their appeal is hinged on breach of fundamental rights and freedoms. Article

165(3)(b) grants the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

The respondents further buttressed their argument that Article 25(c) of the Constitution stipulates that the right to a fair hearing is a non-derogable right that may not be limited or taken away. This right is anchored on Article

50 of the Constitution which spells out in great detail the right of a fair hearing. In my view, this non-derogable right cannot be taken away from any person, including judges and magistrates arising from the vetting process.

"In my view, an allegation of breach of fundamental rights and freedoms and failure to observe the cardinal rules of Natural justice constitute strong and compelling reasons for the High court to enquire and intervene. A breach of the principles of natural justice opens up the decisions and determinations of the Vetting Board to supervision by the High Court even if there is an ouster."

Conclusion

In my view, Article 22 of the Constitution gives every person the right to

institute court proceedings claiming that a right or fundamental freedom in the

Bill of Rights has been denied, violated or infringed or is threatened. To my mind, such wide protection of fundamental rights and freedoms could not have

been granted to all by the Constitution only to be clawed back from judges and

magistrates. This, in my view could not have been the intention of the people of Kenya when they overwhelmingly promulgated the Constitution. Clearly, the High Court has jurisdiction to hear and determine alleged breaches of fundamental rights and freedoms for all including judges and magistrates.

An important issue that arises is whether judges and magistrates who refer their matters to the High Court will be judges in their own cause.

I reiterate that the Vetting Board remains the only statutory body clothed

with the mandate to determine the suitability of a judge or magistrate to

continue to serve in the Judiciary. The vetting has to be carried out in accordance with the Constitution and the Vetting Act. There is a legitimate expectation that the Vetting Board will carry out its mandate in accordance with the Constitution and the Vetting Board. The supervisory jurisdiction of the High Court only comes in when there are allegations that the Vetting Board is not carrying out its mandate in accordance with the Constitution and the Vetting Act. Once the High Court makes its determination whether the Vetting Board has exercised its mandate in accordance with the Constitution and the Vetting Act, it refers the matter back to the Vetting Board to determine the

suitability of a judge or magistrate, in accordance with the Constitution and

the Vetting Act. The High Court does not have the jurisdiction to determine

the suitability of judges and magistrates to continue serving in the Judiciary.

The learned Judges were therefore right when they clearly demarcated the mandate of the Vetting Board to determine the suitability of judges and

magistrates in accordance with the Constitution and the Vetting Act. The learned Judges clearly outlined the jurisdiction of the High Court to intervene and review the decisions of the Vetting Board where there were

allegations that the Vetting Board had not carried out its mandate in accordance with the Constitution and the Vetting Act. The Vetting Board was given finality in that

regard in that it is the only body that can determine the suitability of judges and magistrates to continue serving in the Judiciary. The Judiciary or any other body does not have this jurisdiction.

In my view, we should not sacrifice justice for judges and magistrates

at the altar of finality and justify this on the alleged past ills of some judges

and magistrates. Judges' and magistrates' rights are enshrined in the

Constitution with those of other Kenyans.

Counsel in support of the Appeal conceded that there are instances when an ouster clause can be ignored, such as when there is some „absurdity#. This begs the question: Who will determine the matter, particularly when there is an allegation of breach of rights and fundamental freedoms? In my view, this matter falls squarely within the jurisdiction of the High Court.

From the foregoing, I find that the learned Judges interpreted the law correctly when they found that:

1) The High Court shall have jurisdiction to intervene and review the process and decisions of the Vetting Board to the extent that the Board#s mandate is shown to have exceeded its constitutional and statutory mandate under the Constitution and the Vetting Act.

2) The High Court shall have jurisdiction to consider and

adjudicate upon alleged breaches of fundamental rights and freedoms arising from the exercise of the Vetting Board#s mandate under the Constitution and under the Act.

3) The High Court shall have jurisdiction to consider

matters relating to extension of time of the Vetting

Board effected pursuant to Article 259(9) of the

Constitution.

4) The High Court shall have jurisdiction to issue, review, uphold or vacate conservatory orders in connection with the vetting process.

5) The High Court shall have jurisdiction to determine any questions ancillary to or consequential upon the vetting process.

I, therefore, find no reason to disturb the ruling of the High Court, the subject of this appeal. In the result, this appeal fails in its entirety and I would disallow it. I would order each party to bear its own costs due to the public nature of this appeal and the proceedings before the High Court.

Dated and delivered at Nairobi this 18th day of October, 2013.

J. MOHAMMED

JUDGE OF APPEAL

JUDGMENT OF OTIENO-ODEK, J.A

1. Ousted or not ousted this is the question. The Constitution of Kenya 2010, under Section 23 (1) of the Sixth Schedule thereto requires all Judges and Magistrates who were in office on 27th August, 2010 to be vetted on their suitability to continue to serve as Judges and Magistrates. Sub-section (2) thereof provides that the removal or process leading to the removal of a Judge from office by virtue of the Vetting of Judges and

Magistrates Act No. 2 of 2011, shall not be subject to question in, or review by, any court. This provision is the gist of the appeal. Ordinarily, the High Court of Kenya exercises supervisory jurisdiction through the process of Judicial Review over all subordinate courts and inferior tribunals and persons exercising quasi-judicial powers. The cardinal issue in this appeal is whether the High Court's supervisory jurisdiction is ousted by Section 23 (2) of the Sixth Schedule to the Constitution.

2. The substance of this appeal is concise if phrased into the following questions:- Did the Constitution create a vetting process immune and not amenable to the supervisory jurisdiction of the High Court through the process of Judicial Review as known and practiced by civilized nations and embodied in the concepts of the rule of law and good governance?; and/or did the people of Kenya in exercise of their sovereign right promulgate a Constitution that led to the establishment of an organ or institution to wit the Vetting Board, whose functions, decisions and procedures are incontestable and not subject to judicial review in any court of law?

3. At the outset, it is imperative to distinguish between two concepts: first is the vetting process which is a mechanism prescribed by the Constitution to determine the suitability of a judge or magistrate to continue to serve in office and second, the vetting function which is the practical vetting of an individual judge or magistrate and which function is discharged by the Judges and Magistrates Vetting Board. The first is constitutional while the second involves the exercise of judicial or quasi-judicial power. A failure to keep the two concepts distinct shall lead to misinterpretation and misapplication of constitutional and legal principles.

4. The background facts to this appeal are captured in the judgment of Honourable Patrick Kiage, J.A and I adopt the facts as stated. On 30th October, 2012, a five Judge bench of the High Court in its ruling issued the following orders:-

(e) All the conservancy orders made herein and extended from time to time are hereby set aside and the Vetting Board is at liberty to continue with the vetting of Judges pending the hearing and determination of the Application and Petitions filed herein.

(f) As regards the Judges whose vetting process has been determined by the Vetting Board as complete, we recognize that they will suffer irreparable loss and damage should their de-gazettement as Judges be effected before the Applications and Petitions filed herein have been heard and determined.

(g) We therefore order that pending the determination of the said Application and Petitions, the affected Judges shall not be de-gazetted.

(h) As regards the Judicial Review Application and the Petitions filed herein, we direct that each shall be heard separately and determined by this Court applying the principles that we have outlined herein.

(i) Costs, where applicable shall be in the cause.

5. Aggrieved by the orders made, the appellant lodged this appeal citing 41 (forty-one) repetitive and winded grounds of appeal in its memorandum of appeal. I hereby caution that it is a misunderstanding of the judicial process and dearth of drafting skills and acumen to be under the illusion that wordiness, verbosity, surplusage and replication of issues would enhance the chances of success of an appeal. The issues arising for determination before this Court from the said 41 grounds can aptly be summarized as follows:-

• Whether the High Court has jurisdiction to hear the Petition/Applications before it in light of the unique history and provisions of Section 23 (2) of the Sixth Schedule to the Constitution and Article 165 of the said Constitution.

• Whether the High Court has supervisory jurisdiction over the Judges and Magistrates Vetting Board.

• Are the concepts of political doctrine and residual jurisdiction part of Kenya's legal system?

• Is the Judges and Magistrates Vetting Tribunal a subordinate court or tribunal contemplated under Article 169 (2) the Constitution.

• Is the Vetting Tribunal sui generis?

• What is the constitutional underpinning of the finality clause under Section 22 of the Vetting of Judges and Magistrates Act?

6. The reliefs sought by the appellant as per its Memorandum of Appeal are that the ruling and orders issued on 30th October, 2012, upholding the jurisdiction of the High Court as therein stated be reversed and set aside; an order be granted in favour of the appellant varying and restating the jurisdiction of the High Court by upholding the ouster provision in the vetting clause in regard to the various Petitions/ Applications filed therein; that the orders given on 30th October, 2012 stopping the de-gazettement of the Judges found unsuitable pending the determination of their Petitions/Applications be set aside; and be substituted with an order dismissing the Petitions/Applications on the ground of lack of jurisdiction and/or demonstrable or prima facie merit.

7. I appreciate the submissions made by learned counsel who with ease cited local and comparative judicial decisions that illuminated issues for consideration and determination in this appeal. I acknowledge learned counsel Charles Kanjama for the appellant; Dr. John Khaminwa, Katwa Kigen and Paul Gicheru for 1st, 2nd and 3rd respondents respectively; Wilfred Nderitu and Ekuru Aukot for 4th respondent; Mwangi Njoroge for 5th respondent; Issa Mansur for 6th respondent; Steve Mwenesi for 9th and 14th respondents; Ochieng Oduol for 10th and 11th respondents; Muriuki Mugambi for 12th respondent and Kennedy Ochieng for 13th respondent who all made priceless submissions.

8. This appeal is premised on two legal issues namely the interpretation of various Articles in the Constitution of Kenya; and the determination of the scope and extent of the jurisdiction of the High Court vis- a- vis the decisions and determinations of the Judges and Magistrates Vetting Board. Underlying all these issues, the Constitution is the highest law (summum jus). This leads to the question whether the High Court as established by the Constitution has supervisory jurisdiction over the Judges and Magistrates Vetting Board which is established by statute though the vetting process is anchored in the Constitution. I am mindful of the case of Lillian "S", [1989] KLR 1 in which this Court succinctly set out the principles and context for determination of jurisdiction. In that case Nyarangi, J.A stated, inter alia:-

"Jurisdiction is everything. Without it, a court has no power to make one more step....A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The above decision was also restated by the Supreme Court In the Matter of the Interim Independent Electoral Commission- Constitutional Application No. 2 of 2011 as follows:-

"The Lillian 'S' case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."

9. The bone of contention in this appeal is whether the provisions of Section 23 (2) of the Sixth Schedule to the Constitution ousts the supervisory jurisdiction of the High Court in relation to the decisions and determinations of the Judges and Magistrates Vetting Board. The Section reads as follows:-

"23 (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."

10. Parliament did enact The Vetting of Judges and Magistrates Act establishing the mechanisms and procedures for vetting of Judges and Magistrates. The provision of the Act relevant to this appeal is Section 22 (3) (as it then was before repeal and re-enactment). The Section provided:-

"22 (1) A judge or magistrate who has undergone the vetting process and is dissatisfied with the determination of the Board may request for a review by the same panel within seven days of being informed of the final determination under Section 21(1).

(2) .....

(3) The decision by the Board under this section shall be final."

Section 23 (2) of the Sixth Schedule to the Constitution raises the issue of constitutional ouster clause while Section 22 (3) of the Vetting of Judges and Magistrates Act raises the question of statutory finality clause. The jurisdiction of the High Court in relation to the vetting process squarely rests with the interpretation of the aforementioned constitutional ouster clause and the statutory finality clause.

11. In the case of Minister for Home Affairs & Another – vs- Fischer [1979] 3 ALL ER 21, Lord Wilberforce, delivering the opinion of the Court stated as follows:-

"A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights, and freedoms with a statement of which the Constitution commences."

12. Article 10 of the Constitution enjoins all State organs, State officers, public officers and all persons to abide by the national values and principles of governance in applying or interpreting the Constitution or any law. Of relevance to this appeal is the requirement that the rule of law, equity, social justice, non-discrimination, good governance, transparency and accountability should be adhered to. These values and principles are core in arriving at a determination in this appeal. Article 259 of the Constitution provides guidelines on how to interpret the Constitution. It is stipulated that the Constitution should inter alia be interpreted in a manner that promotes its purposes, values and principles and advances the rule of law and contributes to good governance.

13. As already stated, the issue in this appeal relates to interpretation of the constitutional ouster clause in Section 23 (2) of the Sixth Schedule to the Constitution. The Supreme Court in the Matter of the Interim Independent Electoral Commission (supra) at pp. 23-24, para. 43 stated:-

"The High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High court an exclusive jurisdiction; for by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court..... Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages."

14. In relation to the present appeal, it is my considered opinion that if the High Court has supervisory jurisdiction over the Vetting Board, then ipso jure the Court of Appeal must of necessity have jurisdiction in respect of an appeal over the exercise of the said supervisory jurisdiction. Conversely, if the High Court has no jurisdiction the conclusion must be that both the Court of Appeal and the Supreme Court shall have no jurisdiction in relation to the vetting process. This conclusion is rationalist in approach and is derived from reason, deduction and certainty in logical flow. This Court's decision in Rashid Odhiambo Aloggoh & 245 Others -vs- Haco Industries Ltd -Civil Appeal No. 110 of 2001, settled the principle that,

"Where allegations touching on violations of the Constitution are made by a party, the Court has a [constitutional] duty to investigate the said allegations and to give a remedy if the allegations are merited."

This Court also in Epco Builders Ltd. -vs- Adam S. Marjan, Arbitrator & Another- Civil Appeal No. 248 of 2005, opined that:-

"Once a cause of action is disclosed by the pleadings especially on matters touching on violations of fundamental human rights and freedoms, the Courts are under the mandatory constitutional obligation to hear the party making such allegations."

15. I now turn to address the question whether or not the jurisdiction of the High Court is ousted by Section 23 (1) & (2) of the Sixth Schedule to the Constitution; and if any jurisdiction is left to the High Court in the Sixth Schedule, what is the nature, scope and extent of the jurisdiction?

16. A literal reading of Section 23 (1) of the Sixth Schedule to the Constitution reveals that the section ousts the following issues from the jurisdiction of the High Court in relation to the vetting process:-

a) It ousts the provisions of Article 160 of the Constitution from the purview of the vetting process. Article 160 (5) stipulates that:

"A member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."

The ouster of this provision means that a member of the judiciary can be held liable for things done in performance of his/her judicial function. In other words the actions of a Judge in performance of his/her judicial functions can be questioned through the vetting process.

b) Article 167 of the Constitution which provides for the tenure of office of the Chief Justice and Judges is ousted in respect of Judges, who were in office as at 27th August, 2010. Therefore, the tenure of serving Judges is made subject to the determination of suitability to continue in office through the vetting process. The implication is that a Judge who was in office on the effective date cannot raise the issue of tenure of office under the old Constitution.

c) Article 168 of the Constitution is also ousted and the process of removal of a Judge or Magistrate who was serving on the effective date of 27th August 2010 is governed by the vetting process.

17. A literal construction of Section 23 (2) of the Sixth Schedule indicates that the following issues are ousted from the jurisdiction of any court in Kenya:-

a) Questions relating to a removal or a process leading to the removal of a judge from office by virtue of the operation of the Vetting of Judges and Magistrates.

b) Questions relating to review of the issue of removal or process leading to the removal of a judge from office by virtue of the operation of the Vetting of Judges and Magistrates Act.

18. For purposes of this appeal, the meaning of the word "review" as used in Section 23 (2) of the Sixth Schedule is critical. Is the review contemplated under the Sixth Schedule a Judicial Review by the High Court in exercise of its supervisory jurisdiction or is the review contemplated a review as envisaged under Section 22 of the implementing legislation i.e. the Vetting of Judges and Magistrates Act? Is the word review to be interpreted in the context as used in Section 80 of the Civil Procedure Act, Chapter 21 Laws of Kenya and Order 45 (1) (b) of the Civil Procedure Rules?

19. Order 45 Rule (1) of the Civil Procedure Rules provides:-

"Any person considering himself aggrieved-

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

20. Section 22 of the Vetting of Judges and Magistrates Act deals with review of decisions of the Vetting Board. It provides that a Judge or Magistrate aggrieved by the decision of the Vetting Board can only apply for review of the decision to the same board whose decision is final. Section 22 (2) provides that,

"22 (2) The Board shall not grant a request for review under the section unless the request is based,

(a) on the discovery of a new and important matter which was not within the knowledge of or could not be produced by the judge or magistrate at the time the determination or finding sought to be reviewed was made, provided that such lack of knowledge on the part of the judge or magistrate was not due to lack of due diligence; or

(b) on some mistake or error apparent on the face of the record."

The wordings and phraseology of Section 22 (2) of the Vetting of Judges and Magistrates Act borrows heavily from Order 45 Rule (1) of the Civil Procedure Rules. The provisions are in pari materia. In Jivraj – vs- Devraj (1968) EA 268 it is was held that:

"There is a principle of law that where a court has interpreted the law in a certain manner, particularly, an interpretation which affects the rights of a citizen and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to an injustice."

In Jaffer Gulamhussein Ismail – vs- R (1963) E.A 55, the former Court of Appeal for Eastern Africa observed that:

"When a statute is not truly a new enactment but is in substance a re-enactment of existing provisions, unless there is a clear intention to the contrary, the use of any words which had previously received judicial interpretation would normally result in a presumed intention that the re-enacted words should receive a similar interpretation."

21. Since time immemorial, courts have interpreted "review" to be distinct from "Judicial Review" and there is no reason to depart from this distinction which has stood the test of time. As per the Oxford Concise English dictionary, review means a retrospect or survey of the past; revision or reconsideration; or a second view. It is also a survey, or to look back on, reconsider or revise or to view again. In order to review a decision, an error, omission or default should be demonstrated to have been incorporated in that decision, or that an extraneous issue was considered which ought not to have been considered. (See Peter Odoyo Odaga & 9 others v Independent Electoral and Boundaries Commission of Kenya & 14 others [2013] eKLR).

22. It is my considered view that the "review" contemplated under Section 22 (2) of the Vetting of Judges and Magistrates Act is not the same kind of "judicial review" that the High Court exercises in a supervisory jurisdiction under Article 165 (6) of the Constitution and Order 53 of the Civil Procedure Rules. If the Constitution makers and legislature intended the word "review" in the Sixth Schedule to mean "Judicial Review", nothing could have been much easier to say than that. The High Court in its supervisory jurisdiction exercises the power of "Judicial Review" and not "review". There are three reasons for this conclusion:- Firstly, Section 22 (2) of the Vetting of Judges and Magistrates Act is in pari materia with Order 45 Rule 1 of the Civil Procedure Rules and the two provisions should be construed in the same way. Just as Order 45 Rule 1 of the Civil Procedure Rules is different from Order 53 of the Civil Procedure Rules, it follows that the meaning, purport and object of Section 22 (2) of the Vetting of Judges and Magistrates Act must be construed differently from Order 53 of the Civil Procedure Rules which governs Judicial Review.

23. Secondly, the remedies and outcomes are different. The outcome or remedy under Section 22 of the Vetting of Judges and Magistrates Act is a confirmation or reversal of an earlier decision of the Board in relation to suitability to continue in office of an individual Judge or Magistrate. Conversely, in Judicial Review, the remedy is either an order of Certiorari, Prohibition or Mandamus. The Vetting Board has no jurisdiction to issue the remedies available under the High Court's supervisory jurisdiction. Thirdly, Section 23 (1) of the Sixth Schedule to the Constitution does not oust Article 165 (6) of the Constitution which vests the High Court with supervisory powers exercisable under Judicial Review.

24. Fourth and most important, the Constitution in one of its Articles uses the word "review" and in another Article the words "Judicial Review" is used. The use of different words in different Articles demonstrates an intention to distinguish these concepts. For example, in Article 50 (2) (q)and Article 89 (10) and Section 23 (2) of the Sixth Schedule, the word "review" is used; in Article 23 (3) (f), the phrase "Judicial Review" is used. These words are not ejusdem generis and cannot be interpreted to have the same meaning. It is a trite principle of law that expression of one thing excludes the other; this is well captured in the maxim expressio unius est exclusion alterius. In stricto sensu, whenever expression of one thing excludes the other the two are said to be mutually exclusive. In this context, any reference to "review" excludes "Judicial Review" and vice versa. In Kenya, the unius est exclusion alterius maxim has been accepted as a principle of constitutional and statutory interpretation as stated by Githinji J. (as he then was) in Ntoitha M'mithiaru -vs- Richard Maoka Maore and 2 Others [2008] 3 KLR (EP) 730, 550 at para 10; and the Privy Council in Attorney General of Australia v The Boiler Makers Society of Australia [1957] AC 288.

25. Both the appellant and the respondents cited numerous local and comparative cases on the distinction between a constitutional ouster clause and statutory finality clause. In this appeal, I find that Section 23 (2) of the Sixth Schedule is a constitutional ouster clause. However, it is my considered opinion that what is ousted by the constitutional ouster clause is the jurisdiction of any court to "question and review" the decisions of the Vetting Board. For avoidance of doubt, I am of the considered opinion that the word "review" in this constitutional ouster clause must be interpreted to have the same meaning as "review" as used in Article 50 (2) (q) of the Constitution, Section 22 (2) of the Vetting of Judges and Magistrates Act and Order 45 Rule 1 (b) of the Civil Procedure Rules.

26. Having expressed myself as above, the next question is whether Section 23 of the Sixth Schedule of the Constitution as read with Section 22 of the Vetting of Judges and Magistrates Act ousts the High Court's supervisory jurisdiction exercisable under the ambit of Judicial Review? In a supervisory jurisdiction, administrative or quasi judicial power is subject to judicial control to ensure that the scope and limits of the power are not exceeded. In the case of Council of Civil Service Union & Others – vs- Minister for the Civil Service (1984) 3 All ER 935, 936 it was stated that an administrative action is subject to control by Judicial Review under three headings:-

"a) Illegality - where the decision making authority has been guilty of an error of law e.g. by purporting to exercise a power it does not possess.

b) Irrationality - where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision and

c)Procedural impropriety - where the decision making authority has failed in its duty to act fairly."

See Associated Provincial Picture Houses Ltd. – vs- Wednesbury Corp. (1947) 2 All ER 680.

In the Kenyan context, the High Court's supervisory jurisdiction is derived from Article 165 (6) & (7) of the Constitution. Article 165(6) & (7) of the Constitution provides that:-

"165 (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over a superior court.

(7) For the purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

27. Interpretation of Section 23 (1) of the Sixth Schedule explicitly shows that Judicial Review under the High Court's supervisory jurisdiction as conferred by Article 165 of the Constitution is not ousted in the vetting process. I am of the considered view that Section 23 (1) of the Sixth Schedule ousts review within the meaning of Section 22 of the Vetting of Judges and Magistrates Act which is pari materia to Order 45 (1) (b) of the Civil Procedure Rules. It is instructive to note that Article 165 (6) of the Constitution ousts the supervisory jurisdiction of the High Court only over a Superior Court. Article 162 (1) of the Constitution defines Superior Courts as the Supreme Court, the Court of Appeal, the High Court, the Land and Environment Court and the Employment and Labour Relations Court. The Judges and Magistrates Vetting Board is not a Superior Court as per the above mentioned definition. The interpretation of Article 165 (6) of the Constitution invites a conclusion that any court, tribunal, person, body, organ or institution which does not come within the definition of a Superior Court is subject to the supervisory jurisdiction of the High Court.

28. The next issue for consideration is what is the status of the Vetting Board; is the Board subordinate to the High Court or an inferior local tribunal and hence subject to the High Court's supervisory jurisdiction? As already alluded, Article 162 of the Constitution establishes the system of courts in Kenya. The superior courts are the Supreme Court, the Court of appeal and the High Court. The subordinate courts are the courts established under Article 169 (1) of the Constitution or by Parliament in accordance with the Article 169 (1) (d) of the Constitution. The said Article identifies the subordinate courts to be the Magistrate's courts; Kadhi's courts; Court martial's and any other court or local tribunal as may be established by Parliament. Is the Vetting Board established under Article 169 (1) (d) of the Constitution to make it a local tribunal or a subordinate Court? The answer is in the negative. The implementing legislation establishing the Vetting Board is the Vetting of Judges and Magistrates Act. Parliament derived the legislative power to establish the Vetting Board under Section 23 (1) of the Sixth Schedule to the Constitution. It is my considered view that the Vetting Board is neither mentioned in Article 169 (1) of the Constitution nor is it established pursuant to Article

169 (1) (d) of the Constitution and as such it is not a local tribunal or subordinate court envisaged under the forestated Article.

29. What then is the nature of the Vetting Board? I find that the Vetting Board is neither part of the court system in Kenya nor is it a local tribunal; it is a sui generis quasi judicial organ with precise mandate, time frame and distinct legislative framework. Its mandate is exclusive and sui generis. The Board is an exceptional institution in the epoch of Kenya's juridical system. The Board is neither a Superior Court as defined in Article 162 (1) of the Constitution nor a subordinate court as stipulated under Article 169 (1) of the Constitution. It is not a local tribunal established by Parliament under Article 169 (1) (d). The Vetting Board as established is unique; transitional in nature with a life span determinable by Parliament; and above all and of significance, it fulfills the exceptional transitional constitution making role of restructuring the judiciary. This exceptional transitional role is not vested upon the court system in Kenya. Without determining the admissibility of the travaux prepatoire of the 2010 Constitution, the vetting process shows that the people of Kenya intended to restructure the judiciary through promulgating the 2010 Constitution. (On the issue of admissibility of travaux prepatoire see Attorney General of Uganda – vs- Kabaka's Government (1969) E.A. 393; see also Katikiro of Buganda – vs- Attorney General of Uganda (1959) E.A. 382; 1960 E.A. 784 (Privy Council)).The Constitution laid the restructuring framework and the vetting process is aimed at finalizing the process of reformation, re-engineering, repair and identification of suitable judicial officers to continue in office. It is my considered view that the sui generis nature of the Vetting Board is fortified by its exclusive role in finalizing the constitutional process of restructuring the judiciary. In this role, it has exclusive jurisdiction to determine suitability to continue in office of any serving Judge or Magistrate as at the effective date of 27th August, 2010. I find that Section 23 of the Sixth Schedule is a provision of law which postulates a factual situation of life to which the Kenyan people expressed the desire to restructure and reform the judiciary to produce a certain outcome which is to determine which of the serving Judges and Magistrates are suitable to continue to serve in office.

30. In this sui generis role, is the Vetting Board amenable to the supervisory jurisdiction of the High Court through the process of Judicial Review? The answer lies in Article 165 (6) of the Constitution. There is a misconception that the supervisory jurisdiction of the High Court is only exercisable over inferior tribunals and this has given rise to the unmerited preoccupation and undue emphasis on the submission as to whether the Vetting Board is subordinate or inferior to the High Court. The correct legal position is captured in Article 165 (6) of the Constitution wherein the High Court's supervisory jurisdiction is exercisable not only in relation to inferior tribunals but also, "over any person or body or authority exercising judicial or quasi-judicial powers." (Emphasis added). The fact that honourable Judges of the High Court and Court of Appeal appear before the Vetting Board does not elevate the Board to rank in pari pasu and be of equivalent status to the High Court or make it equal in stature to a superior court. The appearance of Judges of the High Court and Court of Appeal before the Board relate to functions and functionality of the Board and not to its jurisdiction, supremacy or status. Section 6 (2) of the Vetting of Judges and Magistrates Act establishes the Board as a corporate body with perpetual succession. I find that the Vetting Board fulfills the Constitutional criteria in Article 165 (6) of being a person, body or authority and it is evident from its mandate that the Board exercises quasi-judicial power. The Board has the responsibility of a body charged by statute with a duty of deciding the suitability of Judges and Magistrates to continue holding their offices. I find that the Vetting Board is under a duty to act judicially and is subject to the supervisory jurisdiction of the High Court within the meaning of Article 165 (6) of the Constitution. (See General Medical Council – vs- Spackman (1943) AC 627, 641 & Board of Education – vs- Rice (1911) AC 179,182). In Kadamas -vs- Municipality of Kisumu (1985) KLR 954 it was stated that,

"Acts of a body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, are subject to Judicial Review whenever they act in excess of their legal authority."

31. The next question is whether Section 23 (2) of the Sixth Schedule to the Constitution ousts Article 165 (6) of the Constitution in relation to the vetting process. The answer to this query is dependent on the relationship between the Constitution and its Schedules; the issue whether a schedule to the Constitution can oust a specific provision in the Constitution and whether a statutory provision as in Section 22 (2) of the Vetting of Judges and Magistrates Act can expressly or otherwise oust an explicit constitutional provision to wit Article 165 (6). Section 23 (2) of the Sixth Schedule contains no ambiguities and obscurities. The language in the Section is succinct and no extraneous interpretation should be added thereto.

32. The supremacy of the Constitution is cardinal and Article 2 (1) thereof stipulates that the Constitution is supreme and binds all persons and all State organs. Any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid (See Article 2 (4) of the Constitution). It is elementary law that a statutory provision cannot oust an express constitutional provision. A statute can neither be used to interpret a constitutional provision nor can statute override a constitutional provision. Section 22 (2) of the Vetting of Judges and Magistrates Act cannot be used to interpret a constitutional provision to wit Section 23 (2) of the Sixth Schedule of the Constitution. In the same vein Section 22 (2) of the Vetting of Judges and Magistrates Act being a statutory provision cannot supersede the provisions of Article 165 (6) of the Constitution and neither can it override Section 23 of the Sixth Schedule to the Constitution.

33. Section 23 (1) of the Sixth Schedule expressly ousts Articles 160, 167 and 168 of the Constitution in so far as the vetting process is concerned. Article 165 is not ousted and consequently I do find that the Sixth Schedule to the Constitution does not oust the supervisory jurisdiction of the High Court as constitutionally mandated. I also find that a Schedule to the Constitution can neither be utilized in interpreting the main provisions in the body of Constitution nor can a schedule be used to oust main provisions in the body of the Constitution. On this issue I take cognizance of the guiding principles laid in Article 259 of the Constitution and the dicta by this Court stated in the case of Centre for Right Education and Awareness & another -vs- John Harun Mwau & 6 others (2012) eKLR where Justices of Appeal E. M. Githinji, M. K. Koome, H. M. Okwengu, K. H. Rawal & D. K. Maraga, JJ.A, stated that the Sixth schedule to the Constitution of Kenya 2010 is an integral part of the Constitution and has the same status as the provisions of the other Articles although it is of a limited duration.

34. The 1st to 12th respondents contend that they had a legitimate expectation to serve in office till retirement under the old Constitution or until a tribunal properly established thereunder makes a determination to remove them from office; and that the Vetting Board is not such tribunal. In administrative law, the doctrine of legitimate expectation has three facets premised on natural law principles as follows:-

a) Before a decision is made, there is expectation to be given an opportunity to make representation;

b) There is an expectation that the decision making authority shall act fairly; and

(f) There is an expectation that the criteria for making decisions would be followed.

See the case of R – vs- Secretary of State for the Home Department ex-parte Ruddock & Others (1987) 2 ALL ER 518.

35. Is the doctrine of legitimate expectation applicable in the present case? Legitimate expectation is founded on a basic principle of fairness that legitimate expectations ought not to be thwarted – that in judging a case, a Judge should achieve justice and weigh the relative strengths of expectations of the parties. (See the case of Council of Civil Service Unions – vs- Minister for Civil Service (1995) AC 374). In Kenya, the doctrine of legitimate expectation has been applied in cases such as Republic –vs – Kenya Revenue Authority ex parte Aberdare Freight Services Limited (2004) eKLR and in the Supreme Court case of Diana Kethi Kilonzo & another – vs- IEBC & 10 Others (2013) eKLR. The doctrine is thus embedded in Kenya's legal system.

36. It is my considered view that the doctrine is applicable to the vetting process and judges and magistrates have a legitimate expectation that the criteria laid down for vetting shall be followed. Whereas Section 19 of the Vetting of Judges and Magistrates Act outlines the vetting procedure; Section 18 (1) thereof lays out the relevant criteria to be considered by the Board in making its decisions. The section provides that 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 Anti- Corruption Commission; and

e) Pending complaints or other relevant information received from any person or body.

Section 18 (2) requires the Board to also take into account the professional competence, written and oral communication skills, integrity, fairness, temperament, good judgment, legal and life experiences and demonstrable commitment to public and community service of a Judge or Magistrate in determining their suitability to hold office.

37. Did the 2010 Constitution confer power on the Vetting Board to do as they wish despite the doctrine of legitimate expectation? No, the issue is not whether or not the Vetting Board's decision is proper or fair or justifiable on its merits. As provided in Section 23 (2) of the Vetting of the Judges and Magistrates Act, these are not matters for the courts to determine. The sole issue is whether the Board's decision is reached following the criteria laid down by statute. The supervisory jurisdiction of the High Court permits it to inquire into the criteria used and if it is established that the statutory criteria was followed in letter and spirit to the satisfaction of the court, then High Court cannot inquire into the propriety of the findings and decision made. I see no reason either in principle or in authority why the Vetting Board, set up as this Board was set up, should not be a person amenable to the supervisory jurisdiction of the High Court. The establishment of the Vetting Board is anchored in the Constitution and set up by an enabling statute. If a body established by law acts unfairly, then the courts must have supervisory jurisdiction to ensure, as far as may be, that justice is done. Lord Atkin in Rex –vs– Electricity Commissioners (1924) 1 KB 171,at page 205 stated:-

"Wherever anybody of persons having legal authority to determine questions affecting the rights of subjects and having to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writs of Judicial Review."

38. At this point I re-define and restate the role, function and province of judicial review and the supervisory jurisdiction of the High Court as hereafter. It is not a justification for any decision made by a tribunal, person, authority (or the Vetting Board for that matter) exercising judicial or quasi-judicial power to state that it is established by statute and its decision is final. A finality clause does not legalize or justify a decision or determination; a decision or determination is legal and justifiable if natural justice and the due process of law have been followed. A finality clause is neither a carte-blanche to run wild nor can it justify a fishing expedition. An inferior tribunal, person or authority charged with the responsibility of making a decision in a judicial or quasi-judicial function has the parameters and limits of its jurisdiction set out by its enabling statute. The legal mandate, pathway, coordinates, beacons and juridical criteria that a tribunal, person or authority has to follow in making its decisions is delineated and demarcated by the enabling statute.

39. If it is proved that the tribunal, person or authority has deviated from the established and set beacons or pathway or legal criteria as delineated and demarcated for it and has run wild and amok, and at worst has gone

on a frolic of its own, become an unruly horse and engaged in caprice, malice, witch-hunting and a wild goose chase running helter- skelter, it is the duty of the High Court through its supervisory jurisdiction to pull the leash and firmly point the delineated legal path that the tribunal, person or authority is enjoined by law to tread and to follow. The supervisory jurisdiction of the High Court is the leash and bridle that affirm and ensures that all tribunals, persons or authority are subject to the Constitution, rule of law, natural justice and good governance. It ensures that there is no trampling and aberration of the fundamental rights of the citizen. The supervisory jurisdiction is an in-built internal check and balance within the judicial system. It is the king pin upon which the cog and wheels of justice revolve and without it, untrammeled exercise of discretion reigns supreme – this is not what the people of Kenya intended when they promulgated the 2010 Constitution. The people of Kenya intended to have a country governed by the Constitution and the rule of law, not an unchecked exercise of judicial and quasi-judicial power by any person or authority.

40. If it is proved that in the vetting of any individual Judge or magistrate the Vetting Board has exceeded the legal parameters and criteria set out for the exercise of its jurisdiction, the leash of the supervisory jurisdiction of the High Court must be activated and invoked. Am not persuaded by the argument that the Vetting Board because it is a transitional Board, can exceed its legal mandate and find cushion under the ouster or finality clause. A transitional Authority is still subject to the Constitution and the Rule of Law. A Transitional Board or Authority cannot exceed its legal mandate, if it does so, the supervisory jurisdiction of the High Court is available.

41. In the context of the legitimate expectation in the present appeal, I am reminded of the words of Lord Parker in R – vs - Thames Magistrates' Court, exp. Greebaum (1957) 55 L.G.R. 129, C.A. (quoted in Constitutional and Administrative Law by R. H. Jones at P. 178) wherein he stated:-

"The remedy of Judicial Review by way of certiorari is discretionary. Anybody can apply for it – a member of the public who has been inconvenienced or a particular party or person who has a particular grievance of his own. If the application is made by what, for convenience, one may call a stranger the remedy is purely discretionary. When, however, it is made by a person who has a particular grievance of his own, whether as a party or otherwise, then the remedy lies ex debito justitiae."

42. I find that any individual Judge and Magistrate who is subject to the vetting process has a legitimate expectation that the published criteria set out in Sections 18 &19 of the Vetting of Judges and Magistrate Act shall be followed. The individual Judge and Magistrate also have a legitimate expectation that procedural propriety shall be observed. If a question arises as a matter of fact whether the criteria was followed and procedural propriety observed, then the High Court in its supervisory jurisdiction must call the record of the Vetting Board and consider the evidence available to determine whether it should intervene to correct the excesses. To oust the court's jurisdiction totally in a field where the citizen can have no right is draconian and a dangerous step. I refuse to believe that the Kenyan people intended to create a draconian vetting regime where any excesses cannot be subject to the supervisory jurisdiction of the High Court. One of the national values identified in Article 10 of the Constitution is respect for the rule of law. The three limbs of the doctrine of legitimate expectation enunciated heretofore are fundamental precepts of the rule of law and good governance. I find that Article 165 (6) of the Constitution reflects the dream and aspirations of the Kenyan people who never intended to create any organ, institution, person or body that is above the law and not subject to the supervisory jurisdiction of the High Court with the exception of the Superior Courts; even so, the Superior Courts are subject to the Constitution and its values; and the individual persons holding and discharging the office of Superior Courts are bound by Articles 2(1), (2) & Article 159 thereof.

43. The appellant contends that the political question doctrine dictates that the Vetting Board is not subject to the supervisory jurisdiction of the High Court. The argument is that the vetting process was created through a political process and it is covered under the political question doctrine. In the appellant's submission, there are political matters which are shielded from the jurisdiction of the courts such as impeachment of the

president and the vetting process. It was submitted that courts should not make decisions on political issues and the vetting process is a political issue. It was submitted that political doctrine confers immunity from court intervention in political issues.

44. The doctrine of "political question" emanated from the concept of separation of powers. This doctrine was a creation of the court in the case of Marbury -vs- Madison- 5 US. 137, as part of the broader concept of justification of whether or not it is appropriate for a court to review the business of other branches of government. Black's law Dictionary by Henry Campbell Black & others, 6th edition West Publishing Company 1990, page 1158 defines political question as:-

"Questions of which Courts will refuse to take cognizance, or to decide on account of their purely political character, or because their determination would involve an encroachment upon the Executive or Legislative powers".

45. Political question doctrine holds that certain issues should not be decided by courts because their resolution is committed to another branch of government and/or because those issues are not capable, for one reason or another, of judicial resolution. Its purpose is to distinguish the role of the judiciary from those of the Legislature and the Executive, preventing the former from encroaching on either of the latter. Under this rule, courts may choose to dismiss the cases even if they have jurisdiction over them. The doctrine has been applied in the cases of Baker Et Al -vs- Carr Et Al 369 US 186 (1962), R -vs- Cambridge Health Authority ex PB [1995] 2 ALL ER 129. The doctrine is defined as the determination by court that an issue raised about the conduct of public business is a "political" issue to be determined by the legislature or the executive branch of Government and not by the court. The Supreme court of Uganda in Attorney General -vs- Major General David Tinyenfunza -Supreme Court Constitutional Appeal No. 1 of 1997 adopted this doctrine. Kanyeihamba, JSC (as he then was), in the said case went to great length to explain the extent to which courts should go in interpreting and concerning themselves with matters which are, by the Constitution and law assigned to the jurisdiction and powers of Parliament and the Executive. He adopted the decisions in Luther -vs- Border 7 HOW 1 (1849) and Hirabayashi -vs- United States 320 US 81 (91-92) (1943), and noted the following:-

"The rule appears to be that courts have no jurisdiction over matters which arise within the constitution and legal powers of the Legislature or the Executive."

46. The appellant in relying on the doctrine of political question cited dicta from the case of Nixon – vs – United States et al 506 U.S. 224 (1993, US Supreme Court) which considered the power of the United States courts to inquire on the US Senate exercise of its power of impeachment. The provision in issue was worded that "Senate shall have the sole power to try all impeachment". It was argued that the provision ousted the jurisdiction of courts from conducting any review of the role and decisions of Senate in relation to impeachment. It was also argued that the controversy was non-justiciable as it involved a political question. In the judgment read by Chief Justice Rehnquist it was held that:-

"A controversy is non-justiciable where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it."

The learned Judges of the US Supreme Court also held that interpretation of the provision, "Senate shall have the sole power to try all impeachment", demonstrated constitutional commitment that the US Senate was the sole political organ to handle impeachment and not the courts.

47. In the instant case, the appellant submitted that the framers of the Kenyan Constitution sought to insulate the vetting process from the courts and deliberately decided to set up a separate and distinct procedure outside the judiciary to handle the vetting of the Judges and Magistrates; that this separate procedure through the Vetting Board was designed as a check on the judiciary; and that this Court should not permit the High Court

to have supervisory jurisdiction over the Vetting Board as this would eviscerate the important constitutional check placed on the judiciary.

48. The respondents in the instant case cited the dicta by Justice Souter in Nixon – vs- United States (supra) where the Honourable Judge stated:-

"If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say upon a coin toss, or upon a summary determination that an officer of the United States was simply "a bad guy", judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority and the consequent impact on the Republic so great, as to merit a judicial response. The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote disorder".

49. The question for consideration is whether there is any provision in the Constitution or statute law in Kenya that states political issues are non-justiciable? If I were to borrow the phraseology in the US case of Nixon - vs- United States (supra), is there a demonstrable constitutional commitment in Kenya that the Vetting Board is the only organ to handle the vetting of Judges and Magistrates with no supervisory jurisdiction from the High Court? Should a court of law accept that when the subject matter of dispute is political, it must down its tools? The Constitution itself is a political document and yet it is justiciable and enforceable. This provides a straight forward answer that not all political issues are immune from justiciability and the political question doctrine does not confer blanket immunity from court inquiry in all political issues. There are many other examples where political issues are justiciable, for example disputes involving political parties, election petitions and even presidential election petitions.

50. The political question doctrine applies in the context of separation of powers and is aimed at ensuring that each of the three arms of government act independently without interference from the other. In the context of the present appeal, the political question doctrine is inapplicable as the Vetting Board is not one of the arms of government. I concur that the vetting process was established by the people of Kenya in exercise of their sovereignty; to this extent, it is the vetting process itself that is covered by the political question doctrine and the legality of the process cannot be questioned. By establishing the vetting process in exercise of their inalienable and indivisible sovereignty, the people of Kenya can neither be constrained nor hedged with obligations and conditions that seek to challenge their sovereignty. There is no constitutional or statutory provision in Kenya shielding political issues or any institution or body of persons from the probing eyes of the courts whenever there is a compelling reason and particularly allegations of violation of fundamental rights and freedoms. I adopt the wordings of Justice Souter in Nixon – vs- United States (supra) that the political question doctrine should not be so applied as to promote disorder. I hasten to add that the political question doctrine is not a tool to subvert the rule of law; it is not geared to prevent the application of due process, thwart legitimate expectation and abridge or trammel constitutional provisions; and it cannot be used as an exclusive tool to interpret constitutional or statutory provisions. Political issues are subject to the rule of law, good governance and the supervisory jurisdiction of the High Court. It is the courts upon inquiry that can make the decision whether an issue at hand comes under the ambit of political question doctrine. The doctrine should not be used to lock out the courts eye without inquiry.

51. The appellant raised several other grounds of appeal that deserve consideration in this judgment. It was submitted that the learned Judges of the High Court erred in law in failing to consider and determine each and every specific issue or question raised in the petitions/application before the court and also erred in failing to consider each individual petition/application separately. With due respect, I do not agree that the learned Judges erred in law. I have considered this ground of appeal and note that the when the question of jurisdiction of the High Court was raised, it was incumbent upon the Honourable Judges to consider and make a determination on jurisdiction before delving into the merits of the petitions/applications before the

court. A reading of the orders issued by the Court on 30th October, 2012 shows that the learned Judges were alive to this issue and made an order directing that each petition/application shall be heard separately.

52. The appellant further contended that the learned Judges of the High Court erred in declining to rely on its oral and written submissions. In support of this contention, the appellant stated that nowhere in the written judgment are its submissions considered. Natural justice requires that all parties to a suit must be heard and hearing of a party is not restricted to giving evidence, it extends to oral and or written submissions on issues that a party would like to emphasize before the trial court. However, the trial court is neither expected to reproduce verbatim the submissions of parties in its judgment nor to quote in extenso the submissions made in order to demonstrate that it has considered them. It suffices for the court to take into account arguments by parties in considering the contentious points of law and fact raised and the issues framed for determination. For instance, the issue at the core of the judgment which relate to the jurisdiction of the High Court, the constitutional ouster clause and statutory finality clause were raised by the appellant and these were evaluated and considered by the Honourable Judges of the High Court.

53. The appellant further raised the issue that the learned Judges in ruling that the High Court had supervisory jurisdiction fashioned a residual jurisdiction to the court. Jurisdiction either exists ab initio or it does not exist. Jurisdiction is either substantively granted by the Constitution or statute or is inherent as by law prescribed. There is no residual, fall back or remnant jurisdiction. On this submission, I cite the statement in Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011, where the Supreme Court delivered itself as follows on the issue of jurisdiction:-

"A court's jurisdiction flows from either the Constitution or legislation or both."

51. Another issue raised by the respondents is that their grievance revolves on breach of their fundamental rights as enshrined in the Bill of Rights. It was submitted that the jurisdiction of the High Court to hear the respondents' petitions/application is anchored on Article 165 (3)(b) of the Constitution which grants the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Article 25 (c) of the Constitution explicitly states that the fundamental right to a fair trial shall not be limited. Any person resident within the territory of the Republic of Kenya is entitled to enjoyment of the fundamental freedoms enshrined in the Bill of Rights. In the instant case, the respondents' petition is premised not only on the Bill of Rights but more specifically on the provisions relating to the Vetting of Judges and Magistrates Act. It is my considered view that in the implementation of any statute including the Vetting of Judges and Magistrates Act, the provisions of the Bill of Rights is applicable, paramount and sacrosanct. Notwithstanding that the Vetting of Judges and Magistrates Act establishes a special procedure and forum for vetting; the Bill of Rights as well as the constitutional values must be seen and read to be part and parcel of the vetting procedures. Comfort for this holding is found in Article 25 (c) foretasted and Article 20 (1) of the Constitution which expressly stipulates that:-

"The Bill of Rights applies to all law and binds all State organs and all persons."

54. The appellant in its grounds of appeal contend that Hon. Justice Warsame (as he then was) ought to have disqualified himself from being a member of the 3 Judge bench that issued interim orders. It was argued that Hon. Warsame, J. was an interested party to the extent that he had not appeared for vetting before the Vetting Board and there was a likelihood and perception of bias. On this issue, I adopt the dicta by Lord Denning in Metropolitan Properties -vs- Lannon where he stated:

"In considering whether there was a real likelihood of bias...the court looks at the impression which would be given to other people...what right-minded persons would think".

The old adage that justice must not only be done but must be seen to be done is relevant to the issue raised in the submission. Appearance and perception is critical in the administration and adjudication of justice. It is

good practice for a Judge to recuse him/herself whenever a scintilla of perception emerges that he/she could be biased. There is need to avoid what Lord Goff in R- vs – Gough (1993) 2 All ER 724 stated that:

"Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking, "the judge was biased".

In the instant case, dwelling on the issue whether or not the Hon. Warsame, J. (as he then was) was competent to sit on the bench would be an academic exercise in futility as the interim orders issued have lapsed by effluxion of time and this Court cannot act in vain. However, it is good practice and ethics for a Judge or magistrate to recuse oneself in cases where there could be a scintilla, latent or manifest conflict of interest bearing in mind that in administration of justice negative perception destroy confidence and respect for judicial pronouncements and institutional integrity.

55. Both the appellant and the respondents submitted and urged this Court to pronounce itself on the need to obey court orders. The submission was premised on the fact that the High Court had issued orders to the effect that individual Judges who had undergone the vetting exercise should not be de-gazetted and that their personal emoluments are not to be withdrawn. The record of appeal in this matter contains the order against de-gazettement; on the record there is no order against withdrawal of personal emoluments. Notwithstanding this, counsel addressed this Court from the bar and intimated that the personal emoluments of the Judges had been withdrawn. Noting that learned counsel are officers of the Court I am minded to take cognizance of the submission and I pronounce myself as hereafter. A court order is a solemn instrument in the administration of justice and furtherance of the rule of law. Court orders must be obeyed by the high and mighty and all persons, institutions and organs within the jurisdiction of the court in the Republic of Kenya. The judiciary is but one of the institutions in Kenya and it must respect and obey court orders. If the judiciary does not obey court orders why should it expect anyone else to obey such orders? It is beholden upon the judiciary to lead by example and walk the talk. Willful disregard and deliberate flouting of court orders by a juristic person is punishable as contempt of court. In order for any court to determine if there has been willful disregard of its orders, the person upon whom the order was served must be disclosed. The status of that person within the organization or institution has to be disclosed so that it can be ascertained whether he/she is a person capable of binding the institution or organization. In the instant case, the person upon whom the High Court order was served has not been disclosed and a certified copy of the order has not been placed on record. The remedies for disobedience of court orders are well known and the parties in this case should not shy away from initiating contempt proceedings against persons, individuals or institutions, corporate or otherwise that frowns upon and nonchalantly disobeys court orders.

56. In conclusion, I am not convinced and I decline to order that the Vetting Board as established under the Vetting of Judges and Magistrates Act is immune and not amenable to the supervisory jurisdiction of the High Court as embodied in Article 165 (6) & (7) of the Constitution. I hold that Section 23 (2) of the Sixth Schedule to the Constitution and Section 22 (2) of the Vetting of Judges and Magistrates Act do not oust the supervisory jurisdiction of the High Court. I further hold that the word "review" envisaged in Section 23 (2) of the Sixth Schedule to the Constitution should be interpreted to have the same meaning as "review" used in Order 45 Rule 1(1) of the Civil Procedure Rules and not "Judicial Review" as understood in the context of the supervisory jurisdiction of the High Court as implemented under Order 53 of the Civil Procedure Rules.

57. Notwithstanding the foregoing, Section 23 of the Sixth Schedule to the Constitution vests exclusive jurisdiction on the Vetting Board to determine the suitability or otherwise of a Judge or Magistrate to continue in office. I find and hold that no court in Kenya has the jurisdiction to make the decision or determination on whether a Judge or Magistrate shall continue in office. In deference and obedience to this Constitutional Schedule and provision, I make a further order and direct that whenever the High Court exercises its supervisory jurisdiction and make a finding that the Vetting Board exceeded its power or jurisdiction, the High Court must remit the matter back to the Vetting Board for a determination and decision on suitability of the

individual Judge or Magistrate to continue to serve in office. This order casts away any perception that one is a Judge in his/her own cause and casts away any perception that the High Court by exercising its supervisory jurisdiction has hijacked the vetting process. The High Court through its supervisory jurisdiction must not and has no jurisdiction to make a determination that any Judge or Magistrate is suitable to serve and shall continue in office.

58. Ensuing from the foregoing, the next issue for consideration is what happens once a decision of the Vetting Board is quashed and the same cannot be remitted to the Board because either the Board has ceased to exist or the time for the vetting process has lapsed. I take cognizance of the argument that the Constitution cannot be deemed to have intended to create a lacuna and therefore in the above mentioned circumstance there must be someone who can make a decision on the suitability of a Judge or Magistrate to continue in office. It is argued that the fall back scenario should be Article 168 of the Constitution; that a tribunal should be established by the President on the recommendation of the Judicial Service Commission to determine the suitability of a judicial officer to continue in office. Relating to the above mentioned argument it is my considered view that the provisions of Article 168 and the procedure outlined therein was only intended to apply to those Judges and Magistrates who have been found suitable after the vetting process and those Judges and Magistrates who were appointed after the effective date. Further I am of the view that the Tribunal established under Article 168 and the Judicial Service Commission are not the organs contemplated to determine the suitability of a Judge or Magistrate to continue in office. The Tribunal's mandate under Article 168 is to determine the question of removal of a judge from office while the mandate of the Vetting Board under Section 23 of the Sixth Schedule to the Constitution is to determine the suitability of a judge who was serving on the effective date to continue in office.

59. I find that there shall be no lacuna in the event the Vetting Board ceases to exist or in the event the time frame provided for the vetting process lapses. Any individual Judge or Magistrate whose finding and determination by the Vetting Board may be quashed through the supervisory jurisdiction of the High Court shall be deemed not to have been vetted ab initio and the relevant Constitutional provisions for a Judge or Magistrate who has not been vetted shall accordingly apply. It may be contended that any judge or magistrate who finds him/herself not vetted ab initio may be required to involuntarily vacate office. This may be so but there is precedence in the 2010 Constitution. The then Chief Justice was required to vacate office under Section 24 of the Sixth Schedule to the Constitution, likewise the then Attorney General. It is also a trite principle of law that subject to compensation, public interest supersedes private individual interest. The 2010 Constitution must also be interpreted in a purposive approach to give effect to its values, principles and objectives which in the instant case is that no judge shall continue to serve unless he/she has been vetted and found suitable to continue to serve.

60. Subject to the foregoing, the upshot is that I dismiss this appeal. The novel points of law raised in the appeal leads me to propose that each party is to bear his/her/its own costs. In conclusion I agree that the appeal be dismissed in accordance with the order by Hon. Justice Patrick Kiage, J.A.

Dated at Nairobi this 18th day of October, 2013.

J. OTIENO - ODEK

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JUDGE OF APPEAL

RULING OF THE COURT, A.K. MURGOR, JA

(DISSENTING)

The facts and proceedings relating to the application are as set out in the lead judgment of Kiage JA, and as such I do not deem it necessary to enumerate the entire narrative.

Introduction

At the core of this application is the issue whether the High Court has jurisdiction to review the decisions of the Vetting of Judges and Magistrates Board ("the Vetting Board"), despite the existence of the ouster clause in Section 23 (2)of the Sixth Schedule of the Constitution.

In order for this issue to be determined, it is important that the surrounding circumstances be considered in context.

Background and Historical context

Following almost two decades of political agitation for a new constitution, the people of Kenya finally voted for a new constitution through a national referendum held on 4th August 2010.In accordance with Article 263, the Constitution of Kenya 2010 was promulgated, and came into force on 27th August 2010, and was to usher in a new socio –economic political and cultural order, firmly derived from, and rooted in the people of Kenya. A Constitution that was not only confined to limited government, or the embodiment of national values, ethos and identity, but also socio-political, economic and cultural engineering. (SeeYashGhai- Constitutional asymmetries; Communal representation, federalism and Cultural Autonomy).

During the several attempts at creating a new constitutional order, one constant wasthe Judiciary coming under repeated and severe criticism for actual or perceived failure to uphold the rule of law, arising from delay in the dispensation of justice, rampant corruption, incompetence, and lack of independence, which greatly undermined the confidence of the Kenyan people in the judiciary, and the judicial process. The Final Report of the Task Force on Judicial Reforms as presented to the Government of Kenya on 1st July 2010 observed that the process of appointing judicial officers had hitherto been devoid of transparency, giving rise to questions of suitability of some judicial officers, ab initio, and hence severely compromising the image of the judiciary and its processes.

Article 262 provides for "The Transitional and Consequential provisions", comprising Section 23(2) of the Sixth Schedule in respect of the vetting of serving judicial officers. The vetting of judicial officers was one of the transitional requirements included as an integral and fundamental part of the Constitution, to transit the then existing judiciary, to a restored and reformed judiciary that would operate in consonance with, and within the framework and spirit of the new constitution, dispensing justice without fear or favour.

In order to give effect to Section 23, and in accordance with the requirements of Article 262 of the Constitution, Parliament enacted the Vetting of Judges and Magistrates Act, 2011 (Act No. 2 of 2011)("the Vetting Act") which came into force on 22nd March 2011, and established a framework for the vetting of judges and magistrates. Section 6 of the Act established an independent Board to be known as the Vetting of Judges and Magistrates Board. Section 13 provided for the functions of the Board which were, inter alia, "To vet judges and magistrates in accordance with the provisions of the Constitution and this Act".

Section 23 of the Sixth Schedule, of the Constitution provided that,

"23(1) Within one year after the effective date Parliament shall enact legislation which shall operate despite Articles 160, 167, 168, establishing a mechanism and procedure for vetting within a timeline to be determined by the legislature, the suitability of 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 Article 10 and 159.

23(2). A removal or 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."(emphasis mine)

In determining the issues that were before it, the High Court found that, it had jurisdiction to exercise the constitutional mandate conferred upon it by the people of Kenya under Article 165, and further that the Section 23 (2) was incapable of eliminating the Court's jurisdiction in respect of breaches of fundamental rights. The High Court considered the Anisminic case to be, "...the definitive authority in relation to the former writ of certiorari and the Administrative jurisdiction this court by way of review".

Issues for determination

I have considered the appellant's, as well as the respondent's and the interested parties' arguments as set out in the pleadings, and the submissions from learned counsel for all the parties. I have discerned the following to be the issues for determination:

61. What is the interpretation and effect of Section 23 of the Sixth Schedule?

62. Is the ratio decidendi in Anisminic vs Foreign Compensation Commission applicable to the vetting process?

63. Does the High Court have supervisory jurisdiction over the Vetting Board?

64. What is the effect of the Transitional and Consequential provisions in relation to the Constitution?

65. Does the High Court have the jurisdiction to review decisions of the Vetting Board as established under the Vetting of Judges and Magistrates Act (Act No. 2 of 2011)?

I begin with the question of interpretation of the Constitution, as this must be examined and understood before the issues herein can be analysed;

(v) Interpretation and effect of Section 23 of the Sixth Schedule.

In interpreting the Constitution 2010, Section 259 provides that,

259. (1) This Constitution shall be interpreted in a manner that-

(j) promotes its purpose, values and principles;

(k) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(l) Permits the development of the law and

(m) Contributes to good governance.

The Constitution is the supreme law of the land, and sets the standards against which the legality of all national laws are tested. In construing or interpreting the provisions of the Constitution, the courts are obligated to promote its purpose, values and principles, rule of law, Bill of Rights, development of the law and good governance.

In interpreting a Constitution, the principles to be applied were stated by in Republic vs Mann (1969) EA 357,as follows:

"We do not deny that in certain contexts a liberal interpretation of the constitution may be called for, but in one cardinal respect we are satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is where the words used are precise and un-ambiguous they are construed in their ordinary and natural sense. It is only where there is some in-precision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words."

In construing the Constitution, it is also essential that the intention, or the meaning behind the words is brought into focus. In the case of Direct United States Cable Co. vs The Anglo-American Telegraph Co. (1877) 2 A.C. 394 Lord Blackburn stated that;

"The tribunal that has to construe an Act or legislation or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in review."

The Constitution comprises provisions that are of a general nature, and there are those that are concerned with specific aspects and for distinct purposes. In the latter case, due regard must be taken of the intention behind the

specific provisions, and the purposes for their inclusion. The interpretation of the provisions that are specific, also requires that the meaning should be construed strictly from the words as set out in the Constitution.

Section 23(2) provides that,

23(2). A removal or process leading to the removal of a judge from office by virtue of the operation of legislation ...shall not be subject to question, in, or review by any court. (emphasis mine)

When the plain and ordinary meaning test is applied to Section 23(2), the meaning and effect of the words is unequivocal that; the Court's jurisdiction to review decisions or process of the Vetting Board is emphatically ousted. From the clear intention and purport, Section 23(1),provided that the vetting of judges and magistrates, as recommended by the Committee of Experts ("the COE")was to be carried out by a body distinct from the courts. It was the intention that the process would be conducted within a limited time frame, and that the vetting of each judge would be determined with finality, hence the need to exclude the courts from reviewing the Vetting Board's decisions. It was not the intention of the framers and the people of Kenya that, the express provisions of Section 23(2) would be blatantly disregarded, so as to allow the court jurisdiction over the decisions of the Vetting Board, or its process.

Were the legal principles in Anisminic vs Foreign Compensation Commission (1969) 2AC 157applicable to the vetting process?

Mr. Kanjama, learned counsel for the appellant, argued that the High Court erred in applying the legal principles advanced in the Anisminic case, which in his view were was specifically relevant to, a statutory ouster clause in a UK statute. Learned Counsel was of the view that the decisions from the UK, West Indies, Indian and Pakistan were not applicable to the Kenyan context, and should be disregarded. Mr. Kanjama entreated us to distinguish this case from the decisions in other jurisdictions. Mr. Gicheru, learned counsel for the 3rd respondent, submitted that, in most jurisdictions the courts have disregarded ouster clauses, particularly where they affect the fundamental rights and the rules of natural justice. Dr. Khaminwa, learned counsel for the 1st respondent, considered, the decisions from the common wealth and other jurisdictions to be good law and applicable to this case.

In their judgment, the learned judges, critically analysed the legal principles on the ouster clauses derived from the various jurisdictions, and enumerated general principles that a Kenyan Court should consider in interpreting an ouster clause in order to determine the extent of the court's interference as follows:

• "Statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It would be a travesty of justice if ouster clauses are applied at face value as tribunals, bodies or persons in position conferred with power may run amok, act with impunity or abuse that power to the detriment of our people;

• The court will not normally intervene where authority under challenge acts within its permitted field, even when the emerging decisions are wrong;

• The court will not normally intervene where authority under challenge acts within its permitted field, even when the emerging decisions are wrong;

• In spite of a finality clause, it is open to the court to examine whether the action of the authority under challenge is in exercise of its jurisdiction or contravenes a mandatory provision of the law conferring on the authority the power to take such action;

• Breach of the principles of natural justice, including the right to a fair hearing, opens up the decision of the tribunal to review even if these is an ouster clause;

• Breach of fundamental rights and freedoms enshrined in the Constitution including the right to protection of the law and respect for human rights will entitle a court to intervene, notwithstanding the existence of finality or ouster;

• An ouster clause may ultimately be usurped if there is strong and compelling reason."

Ouster clauses have been the subject of intense legal discourse, over the years. The debate evolved around the statutory ouster clause and if so, the circumstances and the extent to which the court can intervene to review the decisions of tribunals and bodies. Then there is the paradox that exists, where the ouster clause is a part of the constitution itself. Would the constitutional ouster be subjected to the same justifications as those specified for a statutory ouster clause? This is clear from the case of Anthony Leroy Austin vs. the Attorney General of Barbados (No. 2161 of 2003)where Chandler J stated,

"There is much debate about the way in which Constitutional ouster clauses should be interpreted. It has long been thought that constitutional ouster clauses should be taken as they are and given a 'face value' approach since they are deemed to represent the clear intentions that certain questions should not be the subject of review by the courts.

Thus the approach is taken that 'where the Constitution itself excludes such questions, the courts lose their jurisdiction to entertain these questions because they have no power to override the Constitution'. This is the view of Dr. Basu in his Commentary of the Constitution of India.

This approach is taken by several authorities. In Jones V. Solomon Civil Appeal No. 85 of 1986, a case from the Court of Appeal of Trinidad and Tobago, Sharma J.A. stated:

'When the court is called upon to deal with the effect of an ouster clause contained in a Constitution,...it must so interpret the ouster clause that the supremacy of the constitution is preserved'.

The English decision from the House of Lords in the Anisminic case (supra)is the locus classicus on statutory ouster clauses. The Court there held that, despite the existence of an ouster clause in Section 4(4) of the Foreign Compensation Commissions Act 1950, the court's jurisdiction would not be excluded, where the determination of the Tribunal was considered a nullity. In reaching this decision, three of the law Lords allowed the appeal, while two dissented.

Lord Reid in the Anisminic case stated thus,

"It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court".

Lord Pearce in the same case stated thus,

"My lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts considered that such a decision went too far in by providing an almost open door for interventions by the courts in many situations where the judges had previously been reluctant to tread".

This decision was followed in R vs Secretary of State for the Home Department ex p Fayed (1997) 1 All ER 228, but in limiting the decision of the House of Lords in the Anisminic case, the Court held that the clause did not oust the jurisdiction of the courts from reviewing the decision on procedural grounds.

West Indies case law has generally followed the decision in, the Anisminic case, which was based on a statutory ouster clause. There are authorities that seek to enforce the constitutional ouster provisions. In the case ofJones vs Solomon Civil Appeal No 85 of 1986, it was stated by the Court of Appeal of (Trinidad & Tobago) that,

When the Court is called upon to deal with the effect of an ouster clause contained in a Constitution....it must interpret the ouster clause so that the Supremacy of the Constitution is upheld.

In the case of Harrikison vsAtorney General of Trinidad& Tobago Civil Appeal No 59 of 175 Hyatali CJ stated:

"A court would be acting improperly if a perfectly clear ouster provision in the constitution of a country which is its supreme law is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons".

The Court, based its decision on the Anisminic case, and nevertheless went on to state that,

"Whether an ouster of jurisdiction clause of the Constitution, despite its unqualified language, is nevertheless subject to the same limited kind of implicit exceptions was held by the House of Lords on The Anisminic Limited vs Foreign Compensation Commission 1969 to apply to an ouster of jurisdiction clause in very similar terms contained in an Act of Parliament".

It is interesting to observe that in the same case, Lord Diplock in the Judicial Committee of the Privy Council, left open for consideration the distinction between constitutional ouster clauses and statutory ouster clauses in stating thus,

"...there is considerable discussion of recent English cases dealing with "ouster of jurisdiction clauses" contained in Acts of Parliament. Section 102(4) does not form part of an Act of Parliament; it is part of the Constitution itself. Their Lordships do not think that the instant appeal provides an appropriate occasion for considering whether section 102(4) of the Constitution, despite its unqualified language, is nevertheless subject to the same limited kind of implicit exception as was held by the House of Lords in Anisminic Ltd. vs. Foreign Compensation Commission [1969] 2 A.C. 147 to apply to an ouster of jurisdiction clause in very similar terms contained in an Act of Parliament. This question is best left to be decided in some future case if one should arise, in which the facts provide a concrete example of the kind of circumstances that were discussed in the judgments in the Anisminic case. The facts in the instant appeal do not. The appeal is dismissed with costs."

Likewise, in the Barbados cases of the Committee of the Privy Council in Endell Thomas vs Attorney General of Trinidad and Tobago [1982] AC 113 stated,

"Apart from being a fundamental right enshrined by the Constitution, the right to a fair hearing is one of the more far-reaching of the principles of natural justice. A breach of the principles of natural justice opens up the decision of the tribunal to review even if there is an ouster clause. The violation of a principle of natural justice amounts to an excess of jurisdiction.

The law is now settled that an ouster clause will not prevent the court from intervening in the case of an excess of jurisdiction. The case of [ANISMINIC] is authority on this point."

In the same jurisdiction, an appeal to the Caribbean Court of Justice in the case of Attorney General and Others vs Joseph and another(2007) 4 LCR 199 the learned judges' in declining to uphold the ouster clause stated thus,

That clause, in our view, provides no comfort to the Attorney General. Ever since the House of Lords decision in Anisminic Limited vs Foreign Compensation Commission 1969courts will make it clear that they will not be deterred by the presence of such ouster clauses from inquiring into whether a body has performed its functions in contravention of fundamental rights guaranteed by the Constitution, and in particular, the right to procedural fairness".

In the Indian case of Kihoto Hollohan vsZachillhu and others 1992 SCR (1) 686 the Supreme Court of India heard a large number of petitions challenging the constitutionality of the Constitution (Fifty-Second Amendment) 1985, where the Tenth Schedule that was inserted into the Constitution of India contained

amongst other things, an ouster clause seeking to impose a statutory finality clause on the decisions of Speaker or Chairman. In determining the question on whether the Courts' jurisdiction could be ousted, the Court, stated thus,

"Paragraph 69(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the speakers/chairmen, is valid. But the concept of statutory finality embodied in paragraph 6(1) does not detract from or abrogate judicial review under Articles 136, 226 and 227 in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and precocity, are concerned."

In this case, the contention was an amendment to the Constitution, which the general populace in India found to be objectionable. This is easily distinguishable from the appeal before this court wherein, the ouster clause under consideration is an express provision within the Kenya Constitution, as enacted by the Kenyan people.

What emerges from the aforementioned UK and West Indies decisions, is that the principles in the Anisminic case, were applicable irrespective of whether the ouster clause in question was concerned with a statute, or in a Constitution, on the basis that where prejudice is suffered for failure to adhere to fundamental rights and freedoms, the courts would not hesitate to intervene. It will be borne in mind that, unlike other nations, the UK does not have a formal written constitution. English Constitutional Law defines this phenomenon as follows:

"[T]he British Constitution is largely unwritten and is derived from a number of formal and informal sources including statutory law, judge made law, constitutional conventions and the royal prerogative. A W Bradley and K D Ewing, Constitutional and Administrative Law (15th edition)"

In the Anisminic case, the House of Lords allowed the court jurisdiction, based on the interpretation of a provision to be found in an Act of Parliament, namely the Foreign Compensation Commission Act 1950 on grounds that the commission was acting ultra vires, and therefore its decision was void ab initio, and as such intervention by the courts could not be excluded by this provision. The Anisminic case was followed by a string of West Indies decisions which also applied the principles in the Anisminic case. However, these decisions must be considered in the light of their proper context. From a historical perspective, the West Indies, continue to prefer their appeals to the Judicial Committee of Privy Council hence, it is expected that based on the doctrine of precedence they were bound by the decision in the Anisminic case. In the Indian decisions, the proposed amendment to the Constitutional creating an ouster clause was never passed or enacted. I am convinced that, given the diverse historic and other unique circumstances in these jurisdictions, I find it difficult to accept that the ratio decidendi in the Anisminic case applies on all fours in the interpretation of Section 23(2) of the Kenya Constitution, and hold that the Anisminic case must be distinguished as such.

Does the High Court have supervisory jurisdiction over the Vetting Board?

Mr.Kanjama, submitted that, the Vetting Board established by an Act of Parliament was a constitutional and judicial body, that was independent and free from interference of any other body or entity; that having regard to the position of the Vetting Board relative to the High Court, the High Court could not arrogate itself jurisdiction, where it had been specifically excluded by the Constitution; that once the Vetting Board was established the jurisdiction of the High Court was ousted. Learned Counsel cited the cases of Mecol Limited vs Attorney General & 7 others (2006) eKLR, Kenya Airways Limited vs Kenya Pilots Association and Safaricom Limited vs Ocean View Beach Hotel & 2 others (2010) eKLR in urging that the status of Vetting Board was akin to the Industrial, Land and Environmental Courts, and could not be considered inferior to the High Court. Mr. Nderitu, learned counsel for the 4th respondent contended that the Constitution is not a statute but is the supreme law and required to be interpreted as such. It was the submission of Mr. Gichuru submitted that, the Vetting Board was a creature of statute, and not a creature of the Constitution, and therefore it was subject to the jurisdiction of the High Court, and that only the Court of Appeal and the Supreme Court are superior to the High Court. Mr. Katwa, learned counsel also for the 2nd respondent was categorical that Section23 (2) did not oust the powers of the High Court to supervise the Vetting Board.

At Article 1(3), Judicial authority is delegated to the Judiciary and independent tribunals, including the Vetting Board, to perform their functions in accordance with the Constitution, while Chapter 10 of the Constitution establishes the Judiciary and the legal system, with Articles 163, 164 and 165, establishing the judicial hierarchy comprising of the Supreme Court, the Court of Appeal and the High Court, each vested with its own jurisdiction, and scope of authority, designed to ensure that courts do not compete for supremacy.

Article 165(6) provides for the supervisory jurisdiction of the High Court, and powers of judicial review as follows,

"(6) The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi judicial function but not over a superior court."

The Vetting Board is a body established by an act of Parliament, with constitutional authority prescribed by Section 23 of the Constitution. It is an independent judicial body, sui generis, and of unusual hierarchical status, arising from its origins in Section 23 of the Sixth Schedule of the Constitution. It is endowed with judicial or quasi- judicial functions, and constitutionally derived powers. The Vetting Board has a special and exclusive jurisdiction, to vet judges and magistrates in accordance with the provisions of the Constitution and this Act, which is akin to the Industrial, Land and Environmental Courts as established under the Constitution.

In arriving at how the courts' jurisdiction should be interpreted, the Supreme Court adopted a restrictive approach, in the case of Samuel Kamau Macharia and another vs Kenya Commercial Bank and 2 others, [2012] eKLR the Supreme Court took the view that a court may not arrogate to itself jurisdiction through craft of interpretation stated thus,

"...A court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ... It goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...where the Constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation..."

Indeed, there is no question that the High Court has supervisory jurisdiction over subordinate courts, tribunals and bodies, however, the scope of such jurisdiction cannot be held to be unlimited. This is because the parameters of the court's jurisdiction is defined in the Constitution, legislation and in judge made law. Where a provision of the Constitution, or an Act of Parliament exists to limit or exclude the court's jurisdiction, the court should very carefully examine the Constitution, or such written law to establish whether or not to confer upon itself jurisdiction. Where there is doubt, then, the court should be decline to confer upon itself jurisdiction. "[30] The Lillian 'S' case [Owners of Motor Vessels 'Lillian S' Vs. Caltex Oil (Kenya) Ltd [1989] KLR1].

In Republic vs Public Procurement Administrative Review Board and Another Ex Parte Selex Sistemi Integrati (2008) eKLR the Court stated thus,

"The reason for the above analyses is to emphasise that in constitutional matters even this court has limitations, and must confine itself to constitutional limits and delineation. The court does not have a blank cheque to fill, in the name of the exercise of raw power, or under the guise of principle of finality or hierarchy. The other limitation of the court's jurisdiction, as regards fundamental rights is that all persons, authorities or organs of government are subject to the enforcement jurisdiction, and nothing can supersede these rights."

I am of the considered view, that when the Vetting board is considered in comparison to the subordinate courts and tribunals and other bodies, its status, because of it constitutional genesis, is such as to exclude it from the supervisory authority of the High Court.

Effect of the Transitional and Consequential provisions in relation to the Constitution?

Mr. Kanjama submitted that with the existence of the transitional and consequential provisions, the substantive provisions of the Constitution were suspended to the extent that they were in competition with them; that Section 23(2), would take precedence notwithstanding Articles 160,167 and 168, as well as the fundamental rights and freedoms. Mr. Kanjama further submitted that the Vetting Act made adequate provision for the right to be heard, and the rules of natural justice. Mr. Njoroge learned counsel for the 4th and 5th respondents, submitted that these provisions were designated as part of the ongoing transition process, but this notwithstanding, the appointment process would not be impeded. In effect, the transitional clauses were to take effect before the substantive clauses of the Constitution, and as a consequence Article 165(6), and the fundamental principles were excluded from the ambits of the ouster clause. Dr. Khaminwa on the other hand submitted that, the fundamental rights and freedoms were central to the Constitution, and could not be disregarded, and further that an ouster clause in the Constitution, or a statue is not effective against the Bill of Rights and the rules of natural justice. Mr. Oduol learned counsel for the 10th and 11th Respondents and Mr. Mwenesi learned counsel for the 9th Respondent argued that there had been violations of the petitioners' rights during the process, which should be open to the courts to review.

The "The Transitional and Consequential provisions", are to be found in the Schedules of the Constitution, and are applicable by virtue of Article 262 of the Constitution which provides that they are deemed to be an integral part of the Constitution. The transitional clauses were enacted in the Schedules, for reasons that their usage was required for a particular period in time, as well as to avoid encumbering the Constitution with provisions that would cease to be of any consequence, once the Constitution was fully implemented. This was not so as to relegate the transitional provisions to a status inferior to the substantive provisions of the Constitution.

In Centre for Rights Education & Awareness (CREAW) & two others vs John Harun Mwau& 2 Others), this Court stated thus,

"...The functional construction rule referred to requires that the enactments must be construed in a manner which gives each component part of the Act containing it according to its legislative function as such a component. In my view, the same construction applies to a schedule to the constitution. Furthermore, the schedules including the Sixth Schedule to the current Constitution were contained in the Proposed Constitution of Kenya which was approved in a national referendum..."

Section 262, does not specify in a situation of conflict, which of the provisions would prevail. However in the case of South Dakota vs North Carolina (192 US 268 (1940) L ED, the court stated,

"It is an elementary rule of constitutional construction is that no one provision of the Constitution is to be segregated from all the others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be interpreted as to effectuate the general purpose of the instrument".

In seeking to examine and construe the effect of Section 23(1), it is observed that, Article 160 deals with the independence of the judiciary, Article 167, with the tenure of the office of the Chief Justice, while Article 168 is with respect to the removal of judges. The reference made to these provisions within Section 23 (2) was to remove them from the effect, or possible conflict with the vetting process during the transition period. As such, they are not in anyway affected by the vetting process. However, Article 165(6), and the fundamental rights and freedoms, have a direct bearing on the vetting process, in that they would become an impediment to the process. Nevertheless, it is obvious to me that during the transitional period, the procedures to be undertaken required to be carried out within a limited period, with due regard to the specified subject matter and timelines. Any substantive provision that created a challenge to this constitutional objective would naturally require to be suspended in order to enable the transitional processes to be disposed of expeditiously. The position was

no different in the case of the vetting process, and the specific timeline that the Vetting Board was required to adhere to.

As to whether the ousting of the fundamental rights and freedoms, is justified, this must be considered in the context of the actual right infringed. In this case, the complaint was more specifically with regard to the right to a fair hearing, as that was within the scope of the vetting process. Were adequate legislative measures taken to ensure that the judges and magistrates were accorded a fair hearing during the vetting process?

An examination of the Vetting Act will show that proper and adequate, provision was made for the observance of the rules of natural justice. Specifically, Sections 19 the Vetting Act makes provision for the process to be followed by the Vetting Board in the vetting of each judge and magistrate, including, the compiling of the complaints, the provision of notices for vetting, which would comprise the summary of complaints, the hearing, and most important that the rules of natural justice would be adhered to by the Vetting Board. Section 21 provides for the determination of suitability or not of all judges and magistrates by the Vetting Board, in accordance with the values and principles set out in Article 10 and 159 of the Constitution, and the removal of judges who were not found to be suitable. Section 22 provides for a review of the first decision by the Vetting Board, after which review the decision will be final.

I am convinced that, the drafters of the Vetting Act, and the legislature being cognizant of Section 23(2) and its effect, made adequate provision on the right to be heard and the need for observance of the rules of natural justice within the Act, to govern the proceedings of the Vetting Board Therefore with the conduct of hearings, and the right to apply for review of the determinations, it cannot be argued that a judge or magistrate had been denied their fundamental rights.

For these reasons, I find that the transitional provisions took precedence over Article 165 (6) and the provisions in respect of the fundamental rights and freedoms, as the vetting process adequately ensured the right to a fair trial and observance of the rules of natural justice, and as such stands conclusively overridden by Section 23, as read together with the Vetting Act.

Does the High Court have the jurisdiction to review decisions of the Vetting Board as established under the Vetting of Judges and Magistrates Act (Act No. 2 of 2011)?

It is my considered view that, the High Court does not have jurisdiction to review the decisions or supervise the vetting process or the Vetting Board. This is for reasons that, in interpreting the Constitution, the historical perspective, purpose and intention of the constitutional provision must be ascertained to appreciate the rationale behind its inclusion in the Constitution, ab initio. It was understood that, the reason behind the vetting process is to be discerned from the report of the Committee of Experts on Constitutional Review dated 11th October 2010. From the report it is clear that, the Committee was unanimous that the Judiciary required to be reformed to restore public confidence, integrity and accountability. Two remedial options were proposed, either that all the judges were to resign and reapply for their positions, or that judicial officers to remain in office, but were required to take a new oath of office and undergo a "vetting process" to ensure that the judges appointed were suitable to serve within the strict ethical principles as set out in the Constitution. The latter option was selected, presumably after adequate consultation with all stake holders including the judiciary, and by extension the judicial officers who were to be affected by the proposed vetting process.

Having regard to the circumstances that give rise to this appeal, when Section 23 is read together with the Vetting Act, it is clear to me that the Vetting Board, is an independent judicial body, sui generis, endowed with judicial or quasi- judicial functions, and constitutionally derived powers, necessary to carry out a specific mandate, akin to the Industrial, Land and Environmental Courts as established under the Constitution, in accordance with Article 162(2). Because of the existence of the constitutional ouster clause which excluded the jurisdiction of the court, the correct position was that the Vetting Board was not subordinate to the High Court, but was of equal standing. It is unequivocal that the vetting function in its entirety, was constitutionally vested in the Vetting Board, and not in the High Court. How then does the High Court become involved in

supervising or reviewing the vetting process? The simple answer is, that it cannot, as this would result in an absurdity with the court vetting the suitability of its own members to remain in the judiciary. In the case of JVJumavs Chief Justice of Kenya& 6 Others (2010), the Court stated thus,

"In order to again deal with these claims would have to put on the cloth of an appellate court whilst it is constituted to determine a constitutional issue...it would imply that that there was always room for a party to have a second bite at the cherry..."

It is my view that Section 23(2) specifically excludes the supervisory jurisdiction of the High Court from any determinations of the Vetting Board with respect to the suitability of any judge or magistrate, and it therefore cannot be conceived how the High Court can have jurisdiction to entertain an application for review, or an appeal over the process or decisions of the Vetting Board.

Secondly, the Constitution being the embodiment of the norms, values and ethos of the people, any interpretation of Section 23 (2) would require to respect the desires of the people to exclude the jurisdiction of the courts in the vetting process of judges and magistrates. When interpreting Section 23(2), from the plain and ordinary meaning of the words, "...shall not be subject to question, in, or review by any court", there can be no doubt that the framers of the Constitution intended to exclude the Court's jurisdiction with respect to thevetting process and the decisions of the Vetting Board. To conclude otherwise, would render Section 23 supererogatory and redundant, and defeat the clear and stated purpose of vetting in the first place.

To emphasis this position, the Supreme Court in Re IIEC (Advisory Opinion) Constitutional Opinion No . 2 of 2011 stated thus,

The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural, and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence in Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

Thirdly, the Anisminic case, was founded on the jurisprudence arising from the UK where, no written constitution exists. Unlike the UK, the Kenya Constitution 2010 is a written expansive, descriptive and all inclusive instrument, expressing the desires and aspirations of the Kenyan people. Article 1(1) of the Constitution, declares the paramount supremacy of the Constitution as derived from the people. It provide that,

"1(1) All sovereign power belongs to the people of Kenya, and shall be exercised only in accordance with this Constitution."

The principles set out by the High Court in its judgment makes reference to ouster clauses in statutes, as opposed to constitutions. I have no hesitation in accepting the decision of the High Court where, the Anisminic principles are applied and specifically limited to Acts of Parliament. However, when compared and contrasted with the subject ouster clause in the Kenya Constitution, I find that an ouster clause in the Constitution cannot be downgraded or disregarded with the same arguments applicable to statutes. Doing so would amount to an aberration and a travesty. In the case of Section 23(2),its inclusion in the Constitution was to ensure that the vetting process would proceed without any oversight or interference from the courts. To fail to uphold the ouster clause contained in Section23 (2) in its clear and unequivocal form, would be to flagrantly disregard and trash the hopes and aspirations of the Kenyan people to a radically reformed judiciary, and certified to be so, by an independent constitutional body. I am therefore of the considered view, and hold that the decisions in respect of statutory ouster clauses in the UK and other jurisdictions, must be

distinguished from the constitutional ouster clause contained in Section 23 (2) of the Constitution that is under consideration. In particular, the Anisminiccase, is limited in its application by virtue of its clear reference to statutory finality clauses, as distinct from constitutional ouster clauses. I therefore find and hold that, the High Court erred on wholly relying on the Anisminiccase as the basis upon which to derive its jurisdiction to supervise and review in the vetting process.

Fourthly, as a result of the transitional provisions, the supervisory jurisdiction of High Court was specifically excluded, to pave way for the vetting of judges and magistrates by an independent body, unconnected with the judges and magistrates who were to be vetted. Once the vetting process was incorporated in the Constitution, and the Vetting Act came into force, the substantive provisions of the Constitution contained in Chapter 4on the fundamental rights and privileges, more particularly the right to be heard, were suspended, and replaced by the rights conferred by the Vetting Act, which govern the proceedings of the Vetting Board. Under Sections 19, 21, and 22 of the Vetting Act, adequate provision was made for the conduct of comprehensive hearings, either public or private as the case may be, in order to ensure that the rights of judges and magistrates were duly protected. Upon completion of the vetting process, and after determination, there was to be no recourse to the Courts, but possibly a right to compensation could accrue.

Sixthly, the purpose of including this ouster clause to exclude the jurisdiction of the High Court was to prevent and avoid the mischief whereby the judges through the courts, would become the judge and jury in their own cause.It is not impossible to imagine the effect of the courts being seen to take over the process of vetting through oversight of the process and reviewing the decisions of the Vetting Board. The Kenyan nation will rise up and say, ".....it is back to business as usual in the judiciary, as the judges have succeeded in hijacking the process of the vetting of judges and magistrates". It bears repetition that the post election violence of 2007 and 2008 was contributed to a large measure by the public's loss of confidence in the judiciary to resolve serious political disputes.

I find a parallel between the ouster clause in Section 23(2) and the one that formed the subject of the appeal in the Nixon vs. United Stateset al 506 U.S. 224 (1993)which governed impeachment proceedings against, Chief Judge Nixon, and provided that the "Senate shall have the sole Power to try all impeachments."Similar arguments were raised by Nixon but overruled by the District Court, and the Court of Appeal on grounds that his claim was non justiciable. At page 235 Rehnquist CJ stated:

"Judicial involvement in impeachment proceedings, even if for the purpose of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the judiciary by the Framers. Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate."

Likewise, the decision of the High Court effectively places final reviewing authority in the hands of the same judiciary, whose members the vetting process was meant to determine suitability or otherwise to remain in the judiciary, with due respect, it cannot stand.

I would allow the appeal, but having regard to the majority who are of a contrary order, I order that each party bear its own costs due to the public interest nature of these proceedings.

Dated and delivered at Nairobi this 18th day of October, 2013.

A.K. MURGOR

.....

JUDGE OF APPEAL

JUDGMENT OF FATUMA SICHALE, JA.

(DISSENTING)

This is an appeal arising out of the judgment of five High Court Judges namely, Justices J. Havelock, J. Mutava, P. Nyamweya, E. Ogola & A. Mabeya delivered on 30th October, 2012. The proceedings, the subject matter of this appeal are:-

1. H. C. JR. No. 295 of 2012 filed by Hon. Lady Justice Jeanne W.

Gacheche against the Board and the Judicial Service Commission

(JSC). That suit had four parties named as interested parties namely:

(a) The Attorney General

(b) The Law Society of Kenya

(c) The Kenya Magistrates and Judges Association (KMJA) (d) Hon. Justice E. O. O'Kubasu

2. Eldoret H.C. Constitutional Petition No. 11 of 2012 by the Centre for Human Rights and Democracy & 2 Others against the Board and the JSC. It had two interested parties namely;

(a) Hon. Justice Mohammed Ibrahim and

(b) Hon. Justice Roselyne Nambuye

3. Nairobi H.C. Constitution Petition No. 433 of 2012 by Hon. Justice

Riaga Omolo against the Board, the Attorney General and the JSC.

4. Nairobi H.C. Constitutional Petition No. 434 of 2012 by Hon. Justice

S.E.O. Bosire against the Board, the Attorney General and the JSC.

5. Nairobi H.C. Constitutional Petition No. 438 of 2012 by

Hon. Justice Joseph G. Nyamu against the Board and the Attorney

General with the JSC named or enjoined as an Interested Party.

All the above petitions were filed by or on behalf of Judges who were serving as at 27th August,

2010. The substantive petitions seeking various orders and declarations are still pending at the

High Court.

However, when the matter came before the five Judges as indicated above, it was directed that the matters be heard separately except with regard to preliminary jurisdictional issue touching on all the matters and which was raised by the Law Society of Kenya (LSK), the appellant herein which had been the 3rd Interested Party in Petition No. 11 of 2012. The LSK challenged the jurisdiction of the High Court to hear and determine the matter pleaded before it vide a Notice of Motion dated 5th October, 2012.

The Notice of Motion had been provoked by the issuance of conservatory orders within that Petition on 25th September, 2012. The majority of the three-Judge bench that heard the Interlocutory Application (Mohammed Warsame, J.) (as he then was) and G. V. Odunga, J. with G. Kimondo, J. (dissenting) had ordered as follows:

"1. We direct that this matter be placed before the Hon. Chief Justice as soon as possible for purposes of enlarging the panel to five.

2. In exercise of our powers under Article 23(3)(c) of the Constitution and having addressed our minds to all the issues raised we grant an order directing or ordering that all matters or proceedings before the Board be and is (sic) hereby stayed for a period of 14 days or until further orders ..."

In the Notice of Motion filed by the appellant dated 5th October, 2012, they sought, inter alia the following prayers:

"7. THAT the Honourable Court do subsequently direct that substantive hearing of the Applicant's challenge to the jurisdiction of the Court on matters touching on the judicial vetting process be heard and determined on the merits prior to the grant of any further orders against the respondents, whether interim, conservatory or of any other nature in the Petition herein or otherwise howsoever, designed to delay, hinder, supervise or affect the process of vetting of Judges and Magistrates as by law established pursuant to section 23 of the Sixth Schedule to the Constitution of Kenya 2010 and the vetting of Judges and Magistrates Act, No. 2 of 2011.

8. THAT the Honourable Court do determine whether and if so, to what extent, it has jurisdiction to deal with matters touching on the judicial vetting process established under Section 23 of the Sixth Schedule of the Constitution of Kenya and the Vetting of Judges and Magistrates Act, No. 2 of the 2011.

9. THAT this Honourable Court do dismiss the Petition filed herein in limine on account of lack of jurisdiction and/or lack of demonstrable or prima facie merit."

The various parties filed their necessary responses to the appellant's Notice of Motion.

Thereafter the learned Judges drew the following issues for determination:

"(a) Whether the learned Judges of the High Court applied the wrong principles in interpreting the constitutional ouster clause.

(b) Whether the learned Judges erred in holding that Article 165 of the Constitution conferred on them supervisory constitutional jurisdiction over the Vetting Board.

(c) Whether the learned Judges fell into error in not treating the vetting process as a political question reserved to the Legislative and to judicial enquiry.

(d) Whether the learned Judges erred in applying inappropriate common law judicial decisions on ouster or finality clauses.

(e) Whether the learned Judges fell into error in holding the High Court's jurisdiction to interpret the Constitution under Article258 or to enforce fundamental rights under Article 22 to be unlimited."

Upon careful examination and consideration of the parties' submissions as well as the authorities cited, the learned Judges of the superior court held as follows:

"1. The High Court shall not stop the process of vetting of Judges and Magistrates pursuant to the Vetting Act, 2012 saw to the extent determined as merited in individual cases.

2. The High Court shall have jurisdiction to intervene and review the process and decisions of the vetting Board to the extent that the exercise of the Board's mandate under the Constitution and the Vetting Act.

3. The High Court shall have jurisdiction to consider and adjudicate upon alleged breaches of fundamental rights and freedoms arising from the exercise of the Vetting Board's mandate under the Constitution and under the Act.

4. The High Court shall have jurisdiction to consider matters relating to extension of time of the Vetting Board affected pursuant to Article

259(9) of the Constitution.

5. The High Court shall have jurisdiction to issue, review, uphold or vacate conservatory orders in connection with the vetting process.

6. The High Court shall have jurisdiction to determine any questions ancillary to or consequential upon the vetting process."

In arriving at the conclusion that the High Court had jurisdiction, the learned Judges underscored the critical issue of whether the High Court has a supervisory control over the Vetting Board and rendered itself thus:-

"The question of whether or not this Court has jurisdiction over the Vetting Board's processes and decisions is arguably the single most important determination that we are required to make at this phase of establishing jurisdiction. Essentially, we are required to answer the probing question of whether or not section 23(1) of the 6th Schedule of the Constitution hereinafter called 'the ouster clause' in effect operates to absolutely unseat the jurisdiction of this Court as conferred by the

Constitution of Kenya, 2010."

The High Court next proceeded to find that the Vetting Board was "akin to any Tribunal which

is susceptible to the jurisdiction of this Court under Article 165(b) of the Constitution"

The LSK was dissatisfied with the ruling of the Judges and immediately filed a Notice of Appeal on 1st November, 2012 and hence this appeal. The LSK's memorandum of appeal had 41 grounds of appeal which can be summarized as follows:

"(a) Whether the learned Judges of the High Court applied the wrong principles in interpreting the constitutional ouster clause.

(b) Whether the learned Judges erred in holding that Article 165 of the Constitution conferred on them supervisory constitutional jurisdiction over the Vetting Board.

(c) Whether the learned Judges fell into error in not treating the vetting process as a political question reserved to the Legislative and to judicial enquiry.

(d) Whether the learned Judges erred in applying inappropriate common law judicial decisions on ouster or finality clauses.

(e) Whether the learned Judges fell into error in holding the High Court's jurisdiction to interpret the Constitution under Article 258 or to enforce fundamental rights under Article 22 to be unlimited."

The LSK sought the following prayers from this Court, namely that:-

"1. The appeal be allowed with costs.

2. The ruling and order upholding the jurisdiction of the High Court as therein stated be reversed and set aside and an order be granted in favour of the appellant varying and restating the jurisdiction of the High Court and upholding the ouster previsions in the vetting clause in regard of the various petitions/applicants filed herein.

3. The orders given on 30th October, 2010 stopping the de-gazettement of Judges found unsuitable and ordering the determination of their petitions/applications individually be set aside and replaced with an order dismissing the petitions/application on the ground of lack of jurisdiction and/or demonstrable or prima facie merit."

Submissions in Support of the Appeal

The appeal before us proceeded to hearing on 8th July, 2013. Mr. Kanjama, the learned counsel for the appellant, in arguing this appeal, submitted that the core issue, the subject matter of this appeal is whether the High Court has jurisdiction to deal with review decisions of the Vetting Board inspite of the ouster clause contained in Section 23 of the Sixth Schedule of the Constitution. The learned counsel faulted the decision of the High Court when it held that judicial power was exclusive to the courts as in Article I paragraph 3 of the Constitution.

"(3) Sovereign Power under the Constitution is delegated to the following state organs, which shall perform their functions

in accordance with the Constitution ...

(c) The judiciary and independent tribunals."

In his view, the Courts do not possess a monopoly of judicial authority as by dint of Article (1)(3)(c) it is delegated to the tribunals as well. However, he argued, that whereas decisions and actions of independent tribunals that are of statutory creation or origin were amenable to judicial review and supervisions by the High Court by dint of Article 165(6) of the Constitution which provides:

"(6) The High Court has supervisory jurisdiction over the subordinate courts and every person, body or authority exercising a judicial or quasi- judicial function, but not over a superior court",

the Board was not subject to the said supervision. The learned counsel's argument was that the Vetting Board was a body sui generis and not an inferior tribunal to be supervised by the High Court. He was of the view that if the Court was to hold that the Vetting Board was a subordinate court that interpretation would "make empty Section 23 of the 6th Schedule and would succeed in voiding substantive provisions of the Constitution." According to the appellant's learned counsel the Vetting Board is not a subordinate tribunal and its special character was not lessened by its not being listed in Article 162 that enumerates the superior courts.

The learned counsel pointed out that the essence of the transitional clauses was to serve purposes that were time bound and were not included in the substantive part of the Constitution as this would 'clatter' the Constitution. This did not however place the 6th Schedule in an inferior position vis-avis the substantive provisions of the Constitution.

Mr. Kanjama pointed out that the background that led to the setting up of the Board was informed by a middle ground position that was taken in dealing with the Judiciary. The framers of the Constitution had grappled with a provision requiring all judicial officers to be sent home and thereafter re-applying for their jobs. The other alternative was to allow for a smooth transition without the necessity of vetting. He submitted that the Kenyan people opted for a middle-ground position of the vetting process; and that to insulate the process from judicial interference, it was imperative that the court is locked out of an opportunity to review the decisions of the Board, as otherwise to allow for a supervisory control would cause delays and further, would be tantamount to one being a Judge in one's cause. It was necessary therefore,

that the determination of the Board on the suitability of a judicial officer be vested in a Board with finality and further that the jurisdiction of the Courts be ousted. He likened this process to the powers given to the Supreme Court in matters reserved to its exclusive jurisdiction and are not subject of the High Court's supervisory control. The learned counsel submitted that by its very special nature the Vetting Board was immunized from the High Court's intrusion. It was therefore not available to the High Court to discover, rediscover or invent a jurisdiction over the Board that was never intended by the Kenyan people.

In his further submissions, the learned counsel for the appellant faulted the High Court for going against the decision of the Supreme Court in the Advisory opinion rendered in Re:

The Matter Of The Interim Independent Elctoral Commission [2011] eKLR on the limits of a

court's jurisdiction, thus:

"[30] The Lilliam 'S' case [Owners of Motor Vessels 'Lillian S' vs. Caltex Oil (Kenya) Ltd [1989} KLR1] case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret intentions of Parliament, where the wording of legislation is clear

and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."

It was the learned counsel's submissions that Section 23 was so clear and in assuming jurisdiction that does not exist, the High Court arrogated to itself a jurisdiction through judicial craft.

Mr. Kanjama also took exception to the High Court's failure to distinguish between ouster clauses provided for statutorily and ouster clauses provided for by the Constitution as it did not distinguish between a Constitutional ouster clause and a statutory ouster clause. According to counsel, the High Court's failure to distinguish between the two was demonstrated

by their reliance on The Anisminic Ltd vs The Foreign Compensation Commission & Another

[1969] 2 A.C. 147; [1969] 2 WLR 163; 113 S.J. 55; [1969] 1 ALL CR 208 and in Attorney

General vs Ryan [1980] AC 718 wherein the ouster clause referred to therein was a statutory

one as opposed to a Constitutional ouster clause

And as regards authorities from Trinidad and Tobago on Constitutional ouster clauses, the learned counsel submitted that these are neither binding nor persuasive due to "the different constitutional and legal environment in West Indies" which is dissimilar to the Kenyan situation. The dissimilarity is captured in ground 28 of his memorandum of appeal to wit:

(a) Their constitutional history of adoption of an allochtonous constitution from their colonial maters (United Kingdom),

much like our previous but not current autochthonous Constitution.

(b) Their full dependence on English common law, as well as English Courts supremacy though the UK Privy Council (as a Superior Court) leading to their application of English common law without any distinction or reservation.

(c) Their constitutional structure, as small Islands with monarchic dependency, or republican subservience to the Queen or her representative the Governor General as Head of State.

(d) The fact that the ouster clauses referred to in the West Indies Cases had been introduced by amendments to the Constitution, but were not of original provenance.

(e) The fact that the Kenyan Constitution was introduced by full exercise of constituent power by Kenyans in a national referendum after extensive and intensive voter and civil education, preceded by generalized public participation, thus affecting the approach to be taken by the Courts in interpreting the Constitution.

(f) The conflict of interest the ouster provision in Kenya sought to avoid, in relation to processes involving judicial removal or vetting, totally contrary to the West Indies cases.

(g) The fact that the ouster provision in the Kenyan Constitution, as read together with the Vetting Act, reposed the mechanism for vetting in a judicial or quasi judicial body that would thus be competent to deal with

jurisdictional issues, as opposed to the West Indies cases that dealt with ouster clauses in regard to administrative bodies.

In respect of judicial authorities on constitutional ouster clauses from Pakistan, Mr. Kanjama sought to distinguish them in Ground 32 of the Memorandum of Appeal;

"... the learned Judges erred in law and in fact by quoting with approval the Pakistan decision in Khan vs Musharaf, without distinguishing the case on the grounds of the dictatorial nature in which the Pakistan Constitution had been imposed (by military coup), the political situation applying in Pakistan at the time

including widespread violation of individual rights by the military Government, and the need of the Courts to act as the last bastion in regard to administrative decisions of the Pakistan Government"

And as to the allegation of violation of fundamental rights as contained in the Bill of Rights, the learned counsel's contention was that that was still within the purview of the Vetting Board. At this juncture, he posed a rhetorical question,

"Had the new Constitution provided that all Judges go home could they have gone to the High Court to urge a contravention of their fundamental rights?"

The learned counsel referred us to the Supreme Court case of Samuel Kamau Macharia & Anor

vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR and the High Court case of Peter

Oduor Ngoge vs Francis Ole Kaparo & 5 Others [2012] eKLR which adopted the position in

the Lilian"S" case in enunciating a strict and and narrow approach to their jurisdiction.

On his part, Mr. Wilfred Nderitu on behalf of the 4th and 6th respondents supported the LSK's appeal and urged us to find that the Vetting Board being a sui generis tribunal, is insulated by Section 23 of the 6th Schedule from the supervisory jurisdiction of the High Court and that commissions that do not have insulating provisions akin to Section 23 are subject to supervisory control of the High Court. The learned counsel's view was that it is only in clear cases where there has been a fundamental departure from the statutory remit of a Board that the High Court

may be vested with residual jurisdiction, for example, if the Board proceeded to vet a medical doctor as opposed to a judge or magistrate.

The learned counsel took us down a historical journey to the 2003 "radical surgery" of the judiciary wherein the cases were reopened through a judicial process when in fact they ought to have been shelved. He contended that the reason for the establishment of the Vetting Board was to set up an organ that would be insulated from the Court's review as to do otherwise would be allowing Judges to sit on matters affecting their colleagues, hence a clear case of conflict of interest or an appearance of bias. Mr. Nderitu pointed out that Section 23 was part of the Constitution and failure to give full effect to Section 23 is tantamount to abrogating the Constitution.

Mr. Njoroge, learned counsel for the Attorney General, the 5th respondent herein, also

supported the appeal. He submitted that Section 23 of the 6th Schedule was an expression of the will of the sovereign people of Kenya and further that judicial authority under Article 159 of the Constitution it vested on the Kenyan people. He likened the vetting process to the "vetting" by the Judicial Service Commission of all those desirous of joining the Judiciary as Judges. He lauded the provisions of Section 23 of the 6th Schedule which ousted the supervisory role of the High Court.

Submissions Opposing the Appeal

On behalf of the 1st respondent, Dr. Khaminwa supported the position arrived at by the Judges of the superior court. He drew our attention of case law emanating from India, Trinidad, Tobago, the UK and Barbados which all affirm the position that even when the Constitution provides for an ouster clause, the courts are not excluded from exercising its supervisory role.

He was of the view that the Vetting Board is an inferior tribunal under the Constitution and the High Court was possessed of the jurisdiction to review its proceedings. He submitted that although under Article 1(3) of the Constitution power is delegated to the Judiciary and independent tribunals by the Kenyan people, the latter are not experts in law so as to interpret the Constitution.

Mr. Katwa Kigen for the 2nd respondent, refuted the proposition by the appellant to the

effect that the Constitution did oust the power of the High Court to supervise the Vetting Board. He cited the 4 instances wherein the jurisdiction of the High Court under the 2010 Constitution is ousted. These are:-

i) Removal of a President – Article 165(3)(c).

ii) Courts established with similar status of the High Court to hear and determine employment and labour disputes

iii) Courts established with similar status as the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

iv) Supervision of the Superior courts.

To him it would be judicial craft if this Court was to find that the Vetting Board is excluded from the supervisory jurisdiction of the High Court as set out in Article 165. He further contended that under Article 165(3) the High Court it mandated to hear and determine complaints of violation of rights from all citizenry, the Judges included. The learned counsel cited two instances when the Vetting Board declared two Judges unsuitable only for the JSC to find them suitable to serve in even higher positions. Mr. Katwa further contended that Section

23(2) of the 6th Schedule is in conflict with Articles 165 and 258 as relates to the High Court's

jurisdiction, as well as Article 27 of the Constitution on equity and freedom from discrimination.

The position taken by Mr. Gicheru, the learned counsel for the 3rd respondent was that the appeal was devoid of merit. He postulated that the Vetting Board is created by Section 6 of Act No. 2 of 2011 and that under Article 165(6) of the Constitution, the Vetting Board is amenable to the supervisory jurisdiction of the High Court. He maintained that the learned Judges of the superior court carefully examined the ouster clauses in 7 different jurisdictions and in all these jurisdictions, the courts have frowned upon ouster clauses, particularly when they affect the Bill of Rights and the rules of natural justice.

Mr. Ochieng Oduol for the 10th and 11th respondents urged the Court to adopt a

purposive approach in interpreting the Constitution. He submitted that Article 23(1) expressly vests in the High Court the jurisdiction and power to hear and determine questions of whether fundamental rights have been breached. Mr. Oduol further submitted that the declarations sought by his clients in the petition fall squarely within the enforcement and interpretative jurisdictions of the High Court under Article 23(1) and 165(3)(b) and (d). He relied on the In Re

the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the

Constitution, Constitutional Application No. 2 of 2011 where it was held that:

"[43] Quite clearly, the High Court has been entrusted the mandate to interpret the Constitution ... only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that "interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages."

As regards the ouster clause in Section 23(2) of the 6th Schedule the learned counsel submitted that the said provision was enacted with the legitimate expectation that the vetting process would be carried out in strict compliance with the Constitution as well as the Vetting Act. He submitted that Section 23(3) was inapplicable in instances where the Board had contravened Constitutional provisions as the case herein. Mr. Oduol submitted that "strange things" occurred at the Board

including an allegation that one of his clients had presided over torture of accused persons during the 1982 coup hearings and yet this Judge did not preside over the military tribunals. The second Judge whom he represents

was found to have disobeyed a court order which allegation was later found to be baseless and the Board even apologized to the Judge.

To buttress his argument on ouster clauses, the learned counsel referred us to the famous

case of Anisminic vs Foreign Compensation [1969] 2 AC 147 (HL) where the House of Lords

in determining a finality clause in an Act of Parliament establishing the Foreign Compensation

Commission upheld the jurisdiction of the Court to intervene and quash the decision of the

Commission. He also referred us to the Indian case of Kesavanada Bharati vs State of Kerala &

Another [1913] S.C. 1461 where the Court intervened in spite of an ouster clause barring any

court from questioning any statute giving effect to state policy. He thus contended that the interpretation of the Constitution including the constitutionality of a statute remains the province of the High Court, with appeals to the Court of Appeal.

In concluding his submissions, Mr. Oduol opined that this Honourable Court is enjoined under Articles 20, 21 and 259(1)(b) to interpret the Constitution in a manner that advances the rule of law, human rights and fundamental freedoms in the Bill of Rights which can only be limited as provided for by Articles 24 and 25 of the Constitution. He stated that they had placed reliance on many examples from the United Kingdom, India and Barbados as they all provide that an ouster clause is not effective as against an infringement of the Bill of Rights and the principles of natural justice. He submitted that Article 25 is very clear on the rights that may not be limited and the right to a fair trial is one such right that was not taken away by Section 23(2).

Mr. Mugambi for the 13th respondent decried the notion propounded by the appellant and

all those in support of the appeal that the Board could be left to act with impunity and go

unchecked. He submitted that the respondents who were Judges need to be protected from gross violations of their fundamental rights by the Board.

Mr. Mwenesi on behalf of the 9th respondent and on behalf of Justice O'Kubasu, an

Interested Party, vehemently opposed the appeal. He submitted that the Board had operated outside its time, which fact was admitted by the Board itself and that the rulings made during this time should be reversed. He faulted the appellant who had in fact acknowledged that ouster clauses can be ignored although in Ground 27 of its appeal it relied on authorities from West Indies which had held that constitutional ouster clauses could be ignored for "strong and compelling" reasons.

In a brief rejoinder, Mr. Kanjama for the appellants urged us to find that in allowing the High Court to scrutinize the record or the process leading to removal of a party in the absence of jurisdiction, would have the effect of voiding the Constitution.

Analysis and Conclusion

In brief the above sums up the arguments of all those supporting the appeal and all those opposed to the appeal. In my view the single most important issue for determination is whether the High Court was vested with supervisory jurisdiction over the Judges and Magistrates Vetting Board in the light of the provisions of Section 23(2) of the 6th Schedule of the 2010 Constitution. The issue of jurisdiction is key as without it the entire process becomes a nullity. Case law is now replete with authorities in support of this proposition.

In Attorney General of Lagos v Dosunmu [1989] 6 SCNJ, while expousing the

significance of jurisdiction in proceedings generally, Justice Kayode Eso stated thus:

"... The sub-stratum of a court is no doubt jurisdiction. Without it, the "labourer" therein, that is both litigants and counsel on the one hand, and the Judge on the other hand, labour in vain ..."

No less illuminating in this regard is the contribution of Justice Akpata in State v Ollagoruwa

[1992] C.S.C.D. 17 at 19 who in his words said:

"... A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based, but when a court lacks jurisdiction and continues to hear and determine judicial proceedings; it builds on quick sand and all proceedings and steps taken on it will not stand ..."

In a nutshell, jurisdiction may be defined as the authority of a court of law to exercise judicial power in a matter brought to it by litigants and of which it is expected to pronounce judgment on the matter or issues raised.

In Peacock v Bell and Kendal [1667] 85 E.R. 81, pp. 87:88 it was held that:

"... nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly stated ..."

In the often cited case of The Own ers of Mot or Vessel "Lill ian S ." v C altex Oil Kenya

Ltd [1989] KLR 1 at page 14 it was stated:

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

This was further expounded by Ojwang J. (as he then was) in Boniface Waweru v Mary Njeri &

Another H.C. Misc. Application No. 639 of 2005 (unreported)

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

Further in the matter of the Interim Independent Electoral Commission [2011] eKLR,

the Supreme Court held at paragraph 29 as follows:

"[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by Statute Law, and by Principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd [1989]

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient court is to apply the same with any limitations embodied therein ... in the case of the Supreme Court, the Court of Appeal and High Court, these respective jurisdictions are donated by the Constitution."

What then is the jurisdiction of the High Court as regulated by the Constitution, by Statute Law, and by Principles laid out in judicial precedent?

Article 165(3) of the Constitution sets out the Jurisdiction of the High Court. It provides as follows:

"165(3) Subject to clause (5), the High Court shall have -

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article

144;

(d) jurisdiction to hear any question respecting the

interpretation of this Constitution including the

determination of -

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191;

and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

4. Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice."

Article 165(5) of the Constitution limits the jurisdiction of this Court in two respects -

(i) matters "reserved for the exclusive jurisdiction of the Supreme Court;

(ii) matters falling within the jurisdiction of certain special Courts established by the legislature dealing with employment and labour relations, and with environment and land.

Whilst Article 165(6) provides that

"the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi- judicial function, but over a superior court."

On the need to act within the limits of jurisdiction, the Supreme Court in the case of

Samuel K. Macharia vs Kenya Commercial Bank [2012] eKLR, rendered itself thus:

"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 a 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."

On the same point, the Supreme Court had this to say In the Matter of Advisory Opinion

of the Court under Article 163 of the Constitution (Constitutional Application No. 2 of 2011 as

paragraph 30

"... a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity."

Having set out the jurisdiction of the High Court as regulated by the Constitution, the next issue for determination is whether the High Court had supervisory jurisdiction over the Vetting Board. To answer this question, it is imperative to examine the background to the enactment of the transitional provisions and in particular, to the ouster clause in Section 23(2) of the 6th Schedule. The promulgation of the new Constitution in 2010 heralded a new dawn for Kenya. Kenyans made a resounding decision to deal with a past that had

haunted them for a period that seemed to last forever. In the period leading to the promulgation of the 2010 Constitution, the Kenya Judiciary had come under sustained criticism for its failure to uphold the rule of law. It was accused of many ills including the vice of corruption and the adage "why Hire a Lawyer when

you can pay a Judge" described how low the Judiciary had sunk. In order to deal with the vice, the initial proposal was to dismiss all the Judges and Magistrates and then ask those who wished to continue to make fresh applications. This proposal was soon discarded and the framers of the Constitution settled for a less drastic process of vetting the Judges and Magistrates. The decision to vet was informed by the fact that not all the judicial officers were corrupt and there was need to vet them so as to weed out those who had brought disrepute to the institution and retain those who were deserving of such retention.

The process of vetting the judicial officers was urgent. The Kenyan people were facing a General Election in 2012 and going by the experience of the election period of 2007/2008, where some candidates refused to take their grievances to Court for what they termed as lack of confidence in the Judiciary, the consequence of which the country was plunged into a state of near civil war, there was an urgent need to do a 'quick-fix'. As a result of this urgency, the vetting process was to be a transitional one. The Committee of Experts had expressed their

intention of drawing up a transitional schedule in their final report dated 11th October, 2010 by

stating as follows:

"When a new constitution is introduced, a range of provisions are needed to ensure that the move from the old order to the new order is smooth, and, in particular, that the changes expected by the new constitution are implemented effectively and those institutions that are retained under the new constitution continue to function properly. The "transitional" provisions that do this are usually not included in the body of the constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the constitution but, because it is appended at the end of the constitution, its provisions will not interfere with the 'permanent' provision of the constitution in the future."

Accordingly, Section 23 of the 6th Schedule providing for "Transitional &

Consequential Provisions" was formulated. The said section provides as follows:

"23(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 these provisions, Parliament enacted the Vetting of Judges and Magistrates Act

(VJMA) 2011 (Act No. 2 of 2011). The VJM Act came into force on 22nd March, 2011. Section

6 of the Act establishes an independent Board to be known as the Judges and Magistrates Vetting

Board (The Board). The functions of the Board are provided in Section 13,

"13. The function of the Board shall be to vet judges and magistrates in accordance with the provisions of the Constitution and this Act."

Whilst Section 2 of the Act defines "vetting" as

"... the process by which the suitability of a serving judge and magistrate to continue serving in the Judiciary is determined in accordance with this Act."

And to underscore the urgency, the Act established time-frames. The Board was mandated to operate for one year with the possibility of extension for a further year. First on line to be vetted were the Court of Appeal Judges whose vetting was to be completed within the first 3 months of the process. And to ensure expeditious disposal of matters, the Act authorized the Chairman to constitute three panels to sit concurrently.

Accordingly, Section 23(2) providing for an ouster clause was meant to serve during the transitional period. I am fortified in this proposition by the realization that the Board was time- bound as indeed, if Section 23(2) had not ousted the jurisdiction of the High Court, what would have happened of a party who moves to court to challenge the processes of the Board and whilst still litigating in court, the Board winds up its operations? Such a litigant, if successful in court, would not have been vetted and there would be no mechanism for vetting him or her. What would be the fate of such a judicial officer? It is therefore not difficult to fathom the reasons of

providing for an ouster clause in Section 23(2) of the 6th Schedule; which as I have stated above

was to serve during the transitional period.

Furthermore, Section 23(1) of the 6th Schedule provided that the legislation to be enacted would operate inspite of Articles 160, 167 and 168 of the Constitution.

Article 168 of the Constitution provides for the processes of removal of a judge. It states:-

"168(1) A judge of a superior court may be removed from office only on the grounds of ...

(2) The removal of a Judge may be initiated only by the Judicial Service Commission acting on its own motion or on the petition of any person to the Judicial Service Commission."

Suffice to state that Article 168 of the Constitution would apply in respect of those not serving before the effective date and Section 23(2) would apply in respect of those who were serving before the effective date.

In my view, it is erroneous to argue that Section 23 of the 6th Schedule was

unconstitutional as it was not in keeping with Article 168 of the Constitution as both Section 23 and Article 168 serve two distinct purposes, the former to vet judicial officers who were in office on the effective date and the latter to provide for mechanism of removal of those who would join the Judiciary after the effective date either by way of fresh appointment or after the process of vetting by the Board.

The other argument raised by the respondents counsels was that the ouster clause in Section 23(2) did not oust the jurisdiction of the High Court as Article 165(5) of the Constitution limits the jurisdiction of the High Court in only two instances, namely in respect of matters

"5(a) Reserved for the exclusive jurisdiction of the Supreme Court ... or

(b) falling within the jurisdiction of the Court's contemplated in Article

162(2)

and further that Article 165(6) which provides:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi- judicial function, but not over

a superior court."

did not exempt the Board from the supervisory jurisdiction of the High Court. With tremendous respect to the respondents' counsels', the transitional provisions found in the 6th Schedule were meant to serve for a season. Once the transitional period was over, there would be no need for these transitional provisions. This explains the reason of non-inclusion of the Board in the exceptions provided in Article 165(5) of the Constitution.

Similarly, there was no need to exempt the Board from the supervisory jurisdiction of the High Court as provided in Article

165(6) of the Constitution as to do so would have clattered the Constitution with transitional provisions which were to fade away in the fullness of time. I am fully in support of the contention by the appellants counsel that the design of Section 23 of the 6th Schedule was to serve the transitional period and there was absolutely no reason to include the Board in Article

165(5) and to exclude it from the provision of Article Article 165(6) of the Constitution; as doing so would have required amending the Constitution after the vetting was completed.

The other argument propounded by the respondents was that the Board was an inferior tribunal as it does not find its place amongst superior courts as provided in Article 162 of the Constitution. It was because of this "inferior status", it was argued, that the Board had to be subjected to the supervisory jurisdiction of the High Court. Again, Section 23(2) of the 6th Schedule having been designed for the transitional period, it is my considered view that this explains its absence in Article 162 of the Constitution. I therefore reject the proposal that the Board was subject to supervisory jurisdiction of the High Court for the reason that it was not ranked together with other superior courts. Again, and as stated above, there was no reason to

list the Board as one of the superior courts, as it had a time-bound lifespan and which was of a temporary nature.

The common position of all counsels in this matter was that Articles 10 and 259 of the Constitution require a purposive interpretation of the Constitution and one that promotes the values and principles of the Constitution and contributes to good governance. However, there was variance as to what constituted a purposive approach. Article 10 of the Constitution provides that the national values and principles of governance enunciated in that Article bind all State Organs, State officers, Public Officers and all persons. On the other hand Article 259 calls for the interpretation of the Constitution in a manner that, inter alia, "promotes its values and principles." Chapter 6 of the Constitution lays down the principles upon which State officers should conduct themselves. This Chapter makes it clear that the power exercised by State officers is a public trust that is to be exercised to serve the people. In exercising this power, State officers are required to demonstrate respect for the people of Kenya, make decisions objectively and impartially, refuse to be influenced by favouritism or corruption, serve selflessly and be accountable for their actions.

The process of vetting was aimed at restoring trust and confidence in the Judiciary. The purposive interpretation of the Constitution call for consonance with the ideals of good governance. To this extent, I find that Section 23(2) is in harmony with the ideals enunciated in

the 2010 Constitution. The need for such harmony was underscored in the case of Tinyefuza vs

AG Constitutional Appeal No. 1 of 1997 when the Court held -

"The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paromountancy (sic) of the written Constitution."

In my view, when the 2010 Constitution heralded a new dawn, one of the aspirations of the Kenyan people was to be led by men and women of honour and who satisfy the criteria set out in Chapter Six of the Constitution. Hence, the substantive provisions and the transitional provisions of the Constitution cannot be read in isolation To this extent I find that the provisions of Section 23 of the 6th Schedule sustains the substantive provisions in the Constitution. The Board was to vet in order to determine the suitability of all Judges and Magistrates who were in office on the effective date who would then continue to serve in accordance with the values and principles set out in Articles 10 and 159 of the Constitution.

The learned counsels for the respondent further argued that the Board acted in contravention of the Bill of Rights as contained in Chapter Four of the 2010 Constitution. Mr. Oduol cited an instance where a judge was

accused of having presided over torture of accused persons during the 1982 coup military tribunals and yet this Judge was not a member of a court martial.

The Board was also faulted for having actually found some two judges to be unsuitable yet the same two judges were given accolades by the Judicial Service Commission (JSC) when they appeared for 'vetting' during interviews for higher positions. With tremendous respect to counsel, this does not necessarily mean that the JSC was right and the Board was wrong. But supposing, as asked by Mr. Kanjama in the course of his submissions, all Judges and Magistrates had been sent home packing as initially proposed, would anyone have argued that their fundamental rights were violated? My position in this is that Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised in accordance with the Constitution. Article 2(3) states that the validity or legality of the Constitution is not subject to challenge by or before any court or other state organs, whilst

Article 3 obligates every person to respect, uphold and defend the Constitution. The inclusion of Section 23(2) in the Constitution is an exercise of the people's constituent power and by dint of Article 2(3) of the Constitution, its validity or legality is not to be challenged.

It is also instructive to note that H.C. Eldoret Constitutional Petition No. 11 of 2012 together with J.R. Application No. 295 of 2012, Constitutional Petitions Nos. 433, 434 & 438 of 2013 were filed after the Board had made determinations in respect of the respective Judges and had found them unsuitable to serve. No complaint had hitherto been made against the Board for violation of fundamental rights. It would appear that the various respondents were in effect challenging the determinations of the Board, under the guise of infringement of their fundamental rights. The challenging of the determinations made by the Board flies in the face of the clear and unambiguous provisions of Section 23(2) that insulated the determinations of the Board. The ouster clause in Section 23(2) that is

“23(2) A removal, or process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under sub- section (1) shall not be subject to question in, or review by, any court.”

bears a plain and ordinary meaning.

Besides it is a cardinal principal of law that one cannot be a judge in his own cause. If the vetting process had not been insulated from the supervision of the High Court, then there would have been clear issues of conflict of interest. In my view this would not have helped in restoring the confidence that the Judiciary so badly needed. In the case of R vs Gough, [1993] 2

All CR 724, Lord Goff had this to say:

“Justice must be rooted in confidence, and confidence is destroyed when

right-minded people go away thinking 'the judge was biased'.

In the case of Metropolitan Properties vs Lannor, Lord Denning had this to say:

“In considering whether there was a real likelihood of bias ... the Court looks at the impression which would be given to other people ... What right minded persons would think.”

In the absence of insulation of the Board, judges would have had to decide on matters affecting their own.

There was one more issue. The Respondents counsels submitted that case law from other commonwealth jurisdictions had held that even in situations where ouster clauses were provided

for, the jurisdiction of the High Court was not ousted. They cited the case of Anisminic vs

Foreign Compensation [1969] 2 AC 147 (HL) as a leading authority. However, what counsels

for the respondents did not tell the court was that Anisminic dealt with a statutory ouster clause. The ouster clause in Section 23(3) of the 6th Schedule is a Constitutional Clause ousting the jurisdiction of the High Court, as opposed to a statutory clause.

Besides, as argued by Mr. Kanjama, Mr. Njoroge and Mr. Nderitu, the Vetting Board was a sui generis tribunal. It is a special tribunal provided for in a Constitution ushered in after a referendum. The Vetting Board was a special tribunal set up to specifically deal with a unique situation and during a specific period of time in our history. It cannot be equated to an administrative body whose operations are questioned inspite of ouster clauses. To this extent, I am in agreement with the appellant's counsel that the decisions from other commonwealth jurisdictions on the ouster clauses are distinguishable form the ouster clause in Section 23(2) of

the 6th Schedule, due to the sui generis nature and character of the Board as underpinned by its

unique purpose and import.

It would also appear that case law from these other commonwealth jurisdictions does not deal a fatal blow on constitutional ouster clauses.

In the case of Jones vs Solomon, Civil Appeal No. 85 of 1986, the Court of Appeal of

Trinidad & Tobago held thus -

"Where a court is called upon to deal with the effect of an ouster clause contained in a Constitution, ... it must so interpret the ouster clause that the supremacy of the Constitution is preserved."

In Harrikison vs Attorney General of Trinidad & Tobago Civil Appeal No. 59 of 175,

Hyatali CJ stated

"I am firmly of the opinion that a court would be acting improperly if a perfectly clear ouster provision in the Constitution of a country which is its supreme law is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons."

The strong and compelling reasons would be in situations where a tribunal does something that it outlandish, such as the examples given by Mr. Nderitu of a Board vetting a Doctor as opposed to a Judge or the other example given by Mr. Oduol of a Board sentencing a judge to hang after a vetting process!

For all the foregoing reasons, I find that the High Court is not seized of a supervisory jurisdiction over the Judges and Magistrates Vetting Board and I would allow the appeal, but as the majority are of a contrary opinion, the appeal is dismissed in accordance with the order of Kiage, JA. As for the costs, I propose that each of the parties herein bears its own costs.

Dated and delivered at Nairobi this 18th day of October, 2013.

KIAGE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR