REPUBLIC OF KENYA

IN THE SUPREME COURT

(Coram: Mutunga CJ & P, Ibrahim, Ojwang, Wanjala and Njoki SCJJ.)

CIVIL APPLICATION NO. 11 OF 2016

– BETWEEN –

THE HON. LADY JUSTICE KALPANA H. RAWAL……..APPLICANT

– AND –

1. JUDICIAL SERVICE COMMISSION…….....……RESPONDENT

2. THE SECRETARY, JUDICIAL SERVICE COMMISSION…… RESPONDENT

– AND –

OKIYA OMTATA OKOITI…….. INTERESTED PARTY

– WITH –

1. INTERNATIONAL COMMISSION OF JURISTS…….....….AMICUS CURIAE

2. KITUO CHA SHERIA.....…….….AMICUS CURIAE

3. LAW SOCIETY OF KENYA…….....….AMICUS CURIAE

CIVIL APPLICATION NO. 12 OF 2016

(Coram: Mutunga CJ & P, Ibrahim, Ojwang, Wanjala and Njoki SCJJ.)

– BETWEEN –

HON. JUSTICE PHILIP K. TUNOI…….....…..……..APPLICANT

JUSTICE DAVID A. ONYANCHA…….…..……..APPLICANT

– AND –

JUDICIAL SERVICE COMMISSION……..……..RESPONDENT

THE JUDICIARY .....……..RESPONDENT

– AND –

OKIYA OMTATA OKOITI……..…….. INTERESTED PARTY

– WITH –

1. INTERNATIONAL COMMISSION OF JURISTS…….....….AMICUS CURIAE

2. KITUO CHA SHERIA.....….....…….AMICUS CURIAE

3. LAW SOCIETY OF KENYA….....…….AMICUS CURIAE

THE RULING BY THE HON. JUSTICE (PROF.) J.B. OJWANG

A. INTRODUCTION

[1] The essence of Mr. Okiya Omtata Okoiti's preliminary objection was that, the Judges of this Supreme Court lack jurisdiction to entertain the applicants' cases; and so they should down tools at this stage, leaving the Judgment and Orders of the Court of Appeal to stand as the final determination of the relevant causes. He was, however, taking into account certain unsettled evidentiary positions, on the basis of which he contended that there was "an absolute constitutional bar on a Judge or Magistrate hearing matters when they were partial." He was of the impression that all the Judges on the Supreme Court Bench were not impartial in the matter, and consequently they were devoid of the requisite jurisdiction.

B. PRELIMINARY OBJECTION

[2] Mr. Omtata contended that "*Article 50(1) strips any partial or dependent Judge of jurisdiction to hear a matter that can be resolved by the application of law."*

[3] Mr. Omtata informally canvassed evidentiary matter, asserting that members of the Supreme Court Bench had already taken their choices on the contested question of Judges' age of retirement, which is the matter in issue in the applicants' main cause. He claimed as well, that the two members of the Bench who were also members of the Judicial Service Commission (1st respondent), had already taken a stand on matters in litigation, and so, had lost impartiality, thereby forfeiting their entitlement to perform the adjudicatory role. And he contended that *Lady Justice Kalpana Rawal* and *Mr. Justice Tunoi*, on account of having moved the High Court and the Court of Appeal to resolve their employment-grievance, had by that very fact, foregone their entitlement to be part of an adjudicating Bench. Mr. Omtata contended that three of the Supreme Court Judges, in a different case coming up before them, had already expressed an opinion on the issue of Judges' age of retirement, thereby prejudicing their position of impartiality.

[4] Not only did Mr. Omtata rely *on claims that require evidence*, to attribute incapacity to the Judges of the Supreme Court, he also sought to disqualify them as members of the Bench, on *foundations built on argument*: such Judges would have misconducted themselves, if they joined the Bench entertaining the applicants' appellate causes – misconducted themselves, because a conflicted Judge *ought not to be* part of the Bench, on any relevant issue. He submitted that the cause being pursued by the applicants, was one that *requires disqualification* by each one of the Judges of the Supreme Court; and, for effect, Mr. Omtata posed the question: "If the Chief Justice and *Wanjala, SCJ* [members of the Judicial Service Commission (1st respondent)] can sit in this matter, why cannot *Tunoi, SCJ* and *Rawal, DCJ* also sit?"

[5] Thus, clearly debatable considerations, to Mr. Omtata, constituted fixed foundations of law, which peremptorily dictated that the members of the Supreme Court Bench must not entertain the applicants' causes; and the Court, with them on board, was devoid of jurisdiction, and so must down tools. Yet it was the objector's position, that the standard for the recusal of a Judge was no

more than mere perception – which suggests that the specific course to be taken by the Judge was *not defined by law*, but was dependent on *relevant evidence of perception* being adduced. Notwithstanding the lack of relevant evidence, Mr. Omtata intrepidly urged that the Judges of this Supreme Court Bench had, by virtue of Article 51 of the Constitution, been *stripped of jurisdiction*, and must down tools, as they lacked capacity.

[6] Mr. Omtata, in effect, was urging that his motion was indeed a *preliminary objection* in the conventional sense, insofar as the law of jurisdiction had disqualified the entire Bench, and the Bench was not entitled to conduct any hearing at all. But, perhaps as a fall-back position, for ensuring no hearing at all could take place, Mr. Omtata *pleaded with the Judges to take separate individual action,* by declaring personal recusal, to the intent that "there should result a lack of quorum"; "the effect is that this Court would then be unable to sit." It is a logical inference arising, from such a proposal, that it was simply a matter of personal conviction, or of policy, or ideological choice, on the part of Mr. Omtata, that *the applicants must not have their constitutional contest laid before the apex Court for consideration and determination.*

[7] The foregoing assessment is validated by Mr. Omtata's contest of the "necessity" principle for the sitting of Judges, notwithstanding their earlier association with a matter coming up on appeal – as had been explicated by this Court in ***Jasbir Singh Rai & Three Others v. Tarlochan Singh Rai & Four Others,*** Supreme Court Petition No. 4 of 2012. Though proffering no cogent basis for questioning the necessity principle in Supreme Court Bench-quorum, Mr. Omtata contended that the propriety of this principle "had been overtaken by developments around the world."

[8] Mr. Omtata disclosed his real intent by urging that *"the matter should terminate at the Court of Appeal"*, because "*the jurisdiction vested in the Supreme Court by Article 163(4) of the Constitution is only discretionary."*

[9] Mr. Omtata moved even further from the "pure point of law" of jurisdiction, as the basis of a preliminary objection, when he proposed that there was a "hierarchy of rights", distinguishing the "fair trial" from the "right of appeal" – and that the applicants had no right of appeal, as they had already been accorded fair trial in the first two superior Courts. He urged hat "matters concerning Judges of the Supreme Court should terminate at the Court of Appeal."

[10] On the basis of the foregoing observations, Mr. Omtata asked this Court to allow his *notice of preliminary objection*; he urged that the Appellate Court decision be allowed to stand; and he asked this Court to mulct the *Hon. Lady Justice Rawal* in costs.

C. PRELIMINARY OBJECTION: RESPONSES

[11] Learned counsel, Mr. Kanjama made his submission in a common pattern with the setting in the preliminary objection: departing not from the essence of such an objection as one resting on a *recognized point of law*, but from foundations of *argument* and *proposition.*

[12] Learned counsel began by asking whether there exist situations of conflict, such as would prevent a Judge from sitting. This led him to inferences drawn from Articles 73 and 75 of the Constitution: Article 73, by defining State office as a public trust, required objectivity and impartiality; and therefore, favouritism is proscribed. And, by Article 75, a State officer is to conduct himself or herself in such a manner as will preclude conflicts between the public interest, and the discharge of official duty. Counsel proceeded to draw a distinction between the right to fair trial (Article 25) and the right to fair hearing (Article 50). He urged that the right to fair trial will give the right to appeal, in criminal matters; but that the right to fair hearing, "*gives no right of appeal, where members of the Court are conflicted."*

[13] Mr. Kanjama submitted that the Supreme Court's jurisdiction, in the instant case, was *limited to considering the foregoing abstract issues* bearing on its competence. Thereafter, however, learned counsel urged, the Bench as now constituted should not entertain the applicants' cause. He

submitted that, as the Judges in this case had previously made comment on the subject of retirement-age, they *should not* continue to entertain the applicants' cause.

[14] *How does such argumentation relate to the law of jurisdiction*? And what is its relevance to the concept of a "preliminary objection", which is now well recognized to be *an issue turning on identifiable pillars of law and legality?*

[15] That Mr. Kanjama has not accommodated the true meaning of the *preliminary objection,* is clear from the hortatory ring of his submission:

"True, of course, that the Judges can change their minds. But I would persuade them otherwise."

[16] Learned counsel continues to urge the perceived merits of *his own preference* on this issue that carries a jurisdictional import:

> *"Members of the public would not have the confidence, in view of the statements long ago made by the members of the Supreme Court."*

[17] Learned counsel departs from the fundamentals of the preliminary objection, by attempting to elevate the merits of his claim through a case of tenuous relevance: ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission and Seven Others,*** Supreme Court Petition No. 23 of 2014. He implies that the Supreme Court, in that case, improperly referred to the ***Tunoi*** case, at the High Court stage; but he is not cognizant of the fact that *the respondent's precipitate directives had disrupted Mr. Justice Tunoi's essential part which alone, would empower the Supreme Court to issue Judgments already constitutionally adjudicated, and were standing out for prompt delivery on the basis of judicial independence.* So in effect, *the apex Court's constitutional duty certainly trumped any claims that the Judicial Service Commission was associating with the retirement question at the trial-Court level*. Such an eminently debatable question, certainly, cannot be a proper foundation for jurisdictional issues, within the concept of the *preliminary objection*.

[18] Learned counsel clearly departs from the essence of the preliminary objection, and from the relevant issue of *jurisdiction,* when he pleads certain *pragmatic arrangements and assumptions* which, no doubt, had created among certain members of the Bar the perception that the ultimate appellate recourse of the parties in the Supreme Court, provided for under the Constitution itself, could be overlooked. So learned counsel remarks:

> *(i) "If the High Court and the Court of Appeal agree on something, how does it take away the constitutional jurisdiction of the Supreme Court?"*
>
> *(ii) "We have deponed in our affidavits as to what happened – in the meeting recommending the enlarged Benches of the High Court and the Court of Appeal."*

[19] That learned counsel has departed from the essentials of the preliminary objection, is clearer still from the argument that the ***Jasbir Singh*** *Case*, which provides for situations of necessity in the make-up of Supreme Court Benches, ought to be distinguished from the instant case. Without that principle applied, as counsel prefers, the Supreme Court is portrayed as being conflicted, and so, ought not to proceed to entertain the appeals by two private individuals, who happen to be Judges, against the State entity which is the Judicial Service Commission. So, *upon such an inarticulate premise, the ordinary citizen, in his or her wonted frailty, is to be debarred from the ultimate seat of justice, all for the benefit of Leviathan!*

[20] Yet, learned counsel seeks precisely that, and urges that "in cases involving a second appeal, there is no absolute right for an appellant". Counsel submits thus:

"*If this Court goes to the substantive appeal – and to consider interlocutory orders – it may find*

itself not being able to give a fair hearing. The right to fair hearing is superior to any right to a second appeal."

[21] Without adhering to the essential terms of a *preliminary objection*, learned counsel has evolved only *general arguments* as a basis for calling into question the Supreme Court's jurisdiction; and upon such a flimsy foundation of law, he calls for *a nominal, initial jurisdiction, merely to empower this Court to lift lawful Orders already established, in a context of judicial independence, as the Constitution requires*.

[22] Notwithstanding the juristic shortcomings of Mr. Omtata's preliminary objection, and in spite of the fragility of the supporting propositions made by learned counsel, Mr. Kanjama, learned Senior Counsel, Mr. Muite did wholly adopt the same. He then asked this Court to "lay down the law, by adopting the jurisprudence of the Supreme Court of South Africa." And what is that South African jurisprudence? That –

"*where the apex Court finds itself conflicted, for whatever reasons, the correct position is to decline to hear the appeal – so that the Judgment of the lower Court becomes final*."

[23] Mr. Muite sought to draw a distinction between "having jurisdiction," and "declining to assume jurisdiction." Just as with learned counsel, Mr. Kanjama, Mr. Muite attributes to this Supreme Court *a temporary, initial jurisdiction, to validate the sitting at which, thereafter, further hearing within jurisdiction is declined*.

[24] How does counsel justify this novel mode of exercising the judicial competence? He invokes broad statements of principle found in the Constitution: sovereign authority of the people; delegation of the people's sovereign authority; importance of the public interest; public interest in the administration of justice; "the Republic of Kenya should have a fully-constituted Bench – without a cloud"; there should be no Judge with a question-mark; "as long as each of the seven is a man and woman of integrity, the public will be satisfied."

[25] Mr. Muite submitted that, "where there is a conflict, then the Judgment of the Court of Appeal stands." He stood for the two applicant-Judges being accorded *no further appellate forum*, as, in his words: *"the two Judges have tried to cling to office."*

[26] Taking the same line of argument was learned counsel, Mr. Nyaundi who however, once again, paid no heed to the recognized attributes of the *preliminary objection* – especially the requirement that it should turn upon *definite points of law*. Learned counsel was only concerned to *make a plea, for its perceived moral gravity* – "this Court should decline jurisdiction to receive and determine this matter". That should be so because, in counsel's perception, "this Court would not be quorate for determining the question." He also attributed bias to the members of the Supreme Court, and urged that: "a party *should not* determine a matter in which they have an interest."

[27] Mr. Nyaundi does not consider that the quorum issue can be resolved on the basis of this Court's precedent in the ***Jasbir Singh Rai*** *Case*: "that case is different from the scenario we are dealing with today"; "fair trial should supersede the rights of the parties"; "we are dealing with exceptional circumstances."

[28] Learned counsel, Mr. Anzala took precisely the same position. Without addressing the *essentials of a preliminary objection*, he contended, in evidentiary style, that "a likelihood of bias exists." He contended that the *test of impartiality* had not been met, and called for the direct application of a South African case which Mr. Muite had already cited.

[29] Learned counsel, Mr. Kilukumi contested Mr. Omtata's preliminary objection: in the first place, Mr. Omtata's contention that this Court indeed has jurisdiction in this matter, but should decline to exercise it. Counsel urged that in the proper setting of Court operations, and also in the public interest, *this apex Court is to speak with finality, and has the mandate to dispose of any*

putative preliminary objection such as the instant one. The alternative course, of the kind proposed by Mr. Omtata, would serve only certain *vested interests,* but not the public interest.

[30] Learned counsel submitted that the notion of a final appeal in the penultimate Court had no basis in law, especially in this instance, with the *parties not having agreed themselves to forgo rights of appeal*; and in the circumstances, a premature termination of the appeal process would be a travesty of justice. The prospect of failure of justice beckoned, counsel urged, in view of the evidence in the affidavit of 20th June, 2016, that a prejudiced commitment had already been made extra-judicially, in relation to the conduct of the applicants' causes. He urged that the applicants were entitled to a *fair hearing*; and that the right to appeal should be perceived as an integral part of the right to fair trial. Counsel submitted that, by virtue of Article 163(3)(a) of the Constitution, the appellate jurisdiction of this Supreme Court must be exercised, to uphold the rights of fair trial, and of fair hearing. He urged, on these principles, that this Court *ought to sustain the earlier Orders of 27th May, 2016, as the threshold from which now departs the motions of fair hearing and fair trial.*

[31] Learned counsel called to attention the evidence of internal communication regarding the instant case, which has recently taken place among Bench-members: he submitted that these are tell-tale signals of vested interests in the instant case. He urged that the *doctrine of necessity* ought to come into play, to ensure that the pertinent issues are fully resolved, in the cause of justice, for the affected parties. There is, in the circumstances, Mr. Kilukumi submitted, a constitutional imperative to hear and determine the dispute with finality – at this particular Court, which is "the only organ with a final say on the interpretation and application of the Constitution," in the terms of the Supreme Court Act, Section 3. He cited as highly relevant in this regard, Article 48 of the Constitution which provides that:

> *"The State shall ensure access to justice for all persons…"*

[32] Learned counsel contested the submissions by the objector, that the members of the Supreme Court Bench have previously expressed themselves on matters bearing on the dispute herein, and so they are now in conflicted positions, and should no longer adjudicate upon the outstanding grievance. Such earlier comments, by themselves, counsel urged, do not extirpate the Judge's constitutional oath of office, and are by no means signals of partiality on the part of a Judge: and *Judges remain open to persuasion during the ordinary motions of Court process.* Counsel submitted that where any particular member of the Supreme Court thought he or she was conflicted in suasion, such a Judge ought, from the very beginning, to have expressed that apprehension – and in the circumstances, it is to be taken that the whole Bench is in a normal psychological setting to dispose of the case, on the basis of the constitutional oath of office. In all the circumstances, counsel urged, the doctrine of necessity should play its role, as *this Supreme Court is the only competent Court to render final interpretation of the Constitution.*

[33] Mr. Kilukumi submitted that *there is a great public interest in knowing the true retirement age for about 40 Judges now serving in the superior Courts* of Kenya; and this public interest will be realized only by way of this Supreme Court taking this opportunity to interpret the Constitution, and to settle the issue.

[34] Learned counsel, Dr. Khaminwa urged that the doctrine of necessity should apply, to ensure that the highest Court is able to sit and to discharge its reserved constitutional obligations. At stake in the instant case, Dr. Khaminwa submitted, are the rights of the individual secured under the Bill of Rights, as well as employment rights under Article 40 of the Constitution.

[35] Urging that the Supreme Court's jurisdiction cannot be excluded in the instant matter, Dr. Khaminwa invoked Article 168 of the Constitution, stating that this Court has the last word, before a Judge is removed from service; it would be wrong in the circumstances, to terminate the service of a Judge exclusively on the orders of the Court of Appeal. *It was entirely legitimate, learned counsel urged, that a Judge who had served at both the High Court and Court of Appeal, and having a grievance over the termination of his or her service, be heard at the level of the Supreme*

Court.

[36] Learned counsel, Ms. Shamalla raised a point of principle, regarding *Lady Justice Kalpana Rawal's* plea that her cause be heard and determined by the Supreme Court. In Ms. Shamalla's words: "If it will be so difficult for a Judge to gain access to this Supreme Court, what is *Wanjiku's* fate?" She urged that even though there may be shortfalls in levels of impartiality within the Supreme Court Bench, the real concern in a case such as the instant one, should only be as to the *degree of such possible shortage of impartiality*.

D. QUESTIONING THE INTEGRITY OF THE PRELIMIANRY OBJECTION

[37] It was learned Senior Counsel, Mr. Nowrojee's position that no true preliminary objection had been brought before the Court; and consequently it was for dismissing.

[38] The basic law currently guiding the Courts, as regards preliminary objections, had been set out in the ***Mukisa Biscuits*** *Case* [1969] EA 696. Such an objection is to be on a "pure point of law", which is *argued on the assumption that the facts pleaded are not the subject of controversy.* And so, a valid preliminary objection by Mr. Omtata would have to be argued on the basis that the facts pleaded by learned counsel, Mr. Kilukumi are true; and there would be no preliminary objection to consider, if any fact still remained unascertained. Mr. Omtata came to ask the Court to exercise *a discretion*; and he was *contesting the facts* of Mr. Kilukumi's application. Mr. Nowrojee submitted that Mr. Omtata ought to have come by a normal application, rather than a preliminary objection.

[39] Learned counsel submitted that Mr. Omtata has come up with two contradictory propositions: that the Supreme Court *lacks jurisdiction*; and that the Supreme Court *has jurisdiction*, in the exercise of which it should exercise a certain *discretion*. He submitted that jurisdiction can only be exercised when a Court is in motion – not where it has downed tools. But Mr. Omtata confounds the position by maintaining that a Court *may not exercise jurisdiction when doing so will lead to unfair trial;* that *a Court which is not impartial has no jurisdiction*; that *jurisdiction must be declined when a Court is so conflicted that it will not be impartial*. At the same time, *that same Court is being called upon to exercise a discretion.* Mr. Nowrojee submitted that, no proper preliminary objection had been laid before this Court.

[40] Learned Senior Counsel submitted that Mr. Omtata had brought up *a point of argument, rather than one of law,* upon which a preliminary objection would rest. Moreover, Mr. Omtata came up with a long list of cases to support his point; this gives rise to the question: who is to analyze these cases, and to determine the applicable rule, where the Court is devoid of jurisdiction?

[41] Mr. Omtata rests his objection on *contentious assertions*: such as that, the hierarchy of rights provided for in the Constitution ordain that the right of appeal ranks below the human rights. *Who, but the Court armed with jurisdiction, would resolve such an issue?*

[42] Counsel submitted that when Mr. Omtata states that the Judges of the Supreme Court are disqualified, *he presents a disputable point*: and that does not qualify as a preliminary objection.

[43] Mr. Nowrojee gave a litany of examples of *disputable matters* which Mr. Omtata relies on, in making his preliminary objection: the Judges are disqualified; the Appellate Court's decision ought to stand; the Supreme Court must depart from the terms of Article 163(4)(a) of the Constitution; and it should depart from the requirements of Articles 48 and 50 of the Constitution; there is an overwhelming public interest in sustaining the Appellate Court decision; etc.

[44] Learned Senior Counsel submitted that the impropriety of Mr. Omtata's preliminary objection was manifested in the lines of support for the same, emanating from some of the counsel appearing before this Court. Examples are: claims that the Judges of the Supreme Court seeking a determination of their cases, have a cloud hanging over their heads; contention that such Judges are

not entitled to rights of appeal; claim that Judges in such a position are not entitled to a second appeal; contention that access by the aggrieved Judges to the Supreme Court, falls short of a constitutional right.

[45] Mr. Nowrojee, after illustrating the argument that there is no valid preliminary objection before this Court, took on some of the vital issues of law ventilated in the proceedings. He submitted that, with the unprecedented issues being canvassed before the Court, the judicial mandate is at a crossroads, of sustenance of the *rights set out in the Constitution*, on one stretch, and *short-term goals of some parties*, on another stretch. The proper submissions, in the circumstances, "are those meant to sustain all, into the future." He urged that *fair trial* be sustained, for now and for the future; and that the two Judges of the Supreme Court in this matter, be accorded fair trial, in its full signification. The matter should be properly entertained, by virtue of the Constitution; and the Supreme Court's finality of decision-making be not relegated to the penultimate Court.

[46] Mr. Nowrojee's concerns were further articulated by learned counsel, Mr. Kiragu, who observed that this is the first time so much energy and determination has been demonstrated in "blocking parties' access to justice." In his submissions, this Court ought to decline the invitation by Mr. Omtata, to down tools, in respect of the appeal cause moved by the two Judges of the Supreme Court. Counsel invoked the Judges' constitutional oath of office, which calls for impartial dispensation of justice as prescribed by law, without favour, bias or ill-will. Learned counsel remarked the clearly unusual scenario, in which ever-so-much investment of energy and enterprise has gone into pre-empting a hearing on the merits, which would lead to the most appropriate determination of claims in the apex Court, in the precise terms of the Constitution. He submitted that, both the Constitution and the Supreme Court Act, have conferred the requisite jurisdiction in this matter upon the Supreme Court; and no authority can be shown, indicating the existence of any exception at all.

[47] Mr. Kiragu submitted that the claim by Mr. Omtata, which is roundly embraced by the Judicial Service Commission, would leave the aggrieved Judges without redress, even though they are holders of rights like anybody else.

[48] Learned counsel submitted that the pending, substantial issue is: *the determination of the two Judges' applications for conservatory Orders*. So crucial is this question, that the Court's, and counsel's valuable time should have been spent in laying down the law that facilitates such a cardinal question. Counsel expressed regret, that the Court was now being asked to brusquely turn down such vital applications, without a hearing.

[49] Counsel asked this Court to be guided by plain objects of justice. He asked: "What makes these Judges unsuitable, so they may not hear the matter?" He urged: "It is not proper to throw mud at the five Judges of the Supreme Court."

[50] Learned counsel observed:

> *"Mr. Omtata says he wants to protect the Constitution. He wants to discharge the Orders of 27th May, 2016. He wants the applications by the two Judges cast away, without a hearing. Is this justified?"*

[51] Learned counsel doubted the *bona fides* of Mr. Omtata's position; for that position was entirely woven around *argument*, rather than *fact.* Learned counsel surmised: "Did the Constitution come to abolish the rule of law?"

[52] Mr. Kiragu asked: "What is the foundation of [Mr. Omtata's case]? Are we going to stop our constitutional mandates?"

[53] Learned counsel submitted that a clear distinction should be drawn between the prospect of

members of the Supreme Court signalling themselves as conflicted, on the one hand; and the status of the decisions of Courts below, on any given matter. He urged that "even if the Supreme Court Judges were conflicted, it would not follow that the earlier decisions of lower Courts are now to stand as final." In such a situation, counsel submitted, "all the cases not concluded are to be regarded as pending, and not concluded."

[54] Mr. Omtata in his response, did not squarely address the concept of "preliminary objection," as set out in detail by learned Senior Counsel, Mr. Nowrojee. Instead, he pressed on with his earlier, broad contentions:

i. "I hold that the Court lacks jurisdiction".

ii. "I am not asking for recusal *per se*; I am asking for disqualification of the Supreme Court Judges"

iii. "If a Court is conflicted, it is a denial of justice."

iv. "If a Court is conflicted, none has a right to appear before such a Court."

v. "If *Wanjiku* had special protection, there would be anarchy. There is no *Wanjiku;* all parties are equal…The law applies in the same way."

vi. "This Court, where not impartial, is stripped of jurisdiction."

vii. "*Rawal, DCJ* has had the benefit of one appeal. This Court does not have jurisdiction to entertain a retirement-age question."

viii. "The decision of the lower Court should be allowed to stand."

E. **DETERMINATION**

[55] Just as learned counsel, Mr. Kiragu depicted, Mr. Omtata's "notice of preliminary objection" is so wide in design, it transcends that concept as recognized in judicial practice. Moreover, the said "preliminary objection" has become *the symbol of a major strife now playing out, which draws the arsenals of legal practitioners, public bodies charged with matters of law and legal functions, and private agencies concerned with matters of law, before the recognized dispute-resolution agency, namely, the Court of law*. It is most relevant in this regard, that the theatre of the conflicting assertions is *the Supreme Court – the apex judicial forum under the Constitution.*

[56] As it devolves to the Court, by the terms of the Constitution, to pronounce the last word in such a situation of conflict, it follows that this Supreme Court, at this moment, has its greatest challenge ever: of *taking stalk of the contending claims, sorting these and ascertaining the path of validity; upholding the terms of the Constitution, on the basis of its apprehension; sustaining the rights declared in the Constitution; applying the law governing such situations; and rendering a judicial edict objectively, in good faith, and without regard to any restive sectoral interests, lobbies or preferences.*

[57] Notices of preliminary objection have a recognized design and purpose, and are by no means a burden upon the progressive and rational operation of the legal process. Consequently, this Court has to assess Mr. Omtata's matter for *its juristic propriety, by the operative understanding of "preliminary objections."*

[58] The most detailed analysis of the said objection's compliance with the law on such matters, has been undertaken in meticulous detail by learned counsel, Mr. Nowrojee, whose position is to be upheld. *Mr. Omtata's matter does not qualify as a preliminary objection, and is to be disallowed on that basis.*

[59] The sole merit in Mr. Omtata's initiative, is that it provided space, which all counsel herein partook of, to propose possible lines of law-making, or process-reform.

[60] As regards such suggestions, it is my considered opinion that *the Supreme Court's jurisdiction is a vital constitutional asset, which is not to be constricted upon an ordinary claim*. In this instance, I would hold that *this Supreme Court, indeed, has jurisdiction to proceed with the cause now before it, and to hear all matters, whether preliminary or not, including the application for conservatory Orders. This Court has the ultimate word in the interpretation of the Constitution; and, a fundamental guideline in the discharge of that obligation, is the vindication of all elements set out under the Bill of Rights. The applicant has well-safeguarded rights of recourse to the Courts, and of appeal up to the Supreme Court, for the protection of her fundamental rights – which include rights of fair trial, and rights of recourse to the full-scale appellate system.*

[61] The rights of the Constitution being dependent ultimately upon the due functioning of the Supreme Court, a Court of limited-size membership, this Court is, in my perception, to be guided by the principle *that necessity is a vital criterion, in the make-up of Benches to entertain a matter*. This principle, which we had laid down in the ***Jasbir Singh Rai*** *Case,* is of the greatest relevance at this moment. *The Judges of this Supreme Court should not be limited by generalized claims of potential want of impartiality, and should stand together in the make-up of Benches to entertain such causes as the instant one that is unfolding, on the question of retirement ages for Judges serving in the superior Courts.*

F. **ORDERS**

[62] Accordingly, my specific Orders would break down as follows:

a. ***The notice of preliminary objection by Mr. Okiya Omtata Okoiti is disallowed.***

b. ***The hearing of the matters to which this Order relates, shall proceed to the next stage.***

c. ***Costs shall abide the final determination of applications and/or causes of action herein.***

DATED and DELIVERED at NAIROBI this 14th day of June, 2016.

THE HON. JUSTICE (PROF.) J.B. OJWANG

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT