REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. 11 of 2016

−BETWEEN−

HON. (LADY) JUSTICE KALPANA H. RAWAL…… APPLICANT

−VERSUS−

1. JUDICIAL SERVICE COMMISSION

2. THE SECRETARY, JUDICIAL SERVICE COMMISSION……RESPONDENTS

−AND−

OKIYA OMTATAH OKOITI……INTERESTED PARTY

−AND−

1. INTERNATIONAL COMMISSION OF JURISTS

2. KITUO CHA SHERIA

3. LAW SOCIETY OF KENYA……AMICUS CURIAE

−AND−

CIVIL APPLICATION NO. 12 OF 2016

−BETWEEN−

1. JUSTICE PHILIP TUNOI

2. JUSTICE DAVID A. ONYANCHA……APPLICANTS

−VERSUS−

1. THE JUDICIAL SERVICE COMMISSION

2. THE JUDICIARY…… …….RESPONDENTS

−AND−

LAW SOCIETY OF KENYA……AMICUS CURIAE

ORDER OF THE COURT

These are the Orders of the Court:

1. The Preliminary Objection by the interested party (Mr. Omtatah) together with the application No. 13 is hereby allowed.

2. The *ex parte Orders* granted by the Duty Judge, on 27th of May, 2016, are hereby vacated.

3. The Judgment of the Court of Appeal shall stand until it is either affirmed, or reversed by a competent Bench of this Court.

4. In view of the fact that 2 members of this Bench were minded to allow preliminary objections No. 11 and 12, while 2 others were equally minded to disallow the said preliminary objections, and the 5th member has recused himself from making a finding on the objections, there is no determination that has been made regarding preliminary objection No. 11 and 12.

6. Costs shall be in the cause.

D ATED and **DELIVERED** at **NAIROBI** this **14th Day of June, 2016.**

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W. M. MUTUNGA
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....

.....

J. B. OJWANG
JUSTICE OF THE SUPREME COURT

S. C. WANJALA
JUSTICE OF THE SUPREME

.....

S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original
REGISTRAR
SUPREME COURT OF KENYA

RULING OF MUTUNGA CJ & PRESIDENT OF THE SUPREME COURT

A. BACKGROUND

[1] My learned colleagues in their respective rulings have already addressed the background in this matter and I will not repeat it. There were three preliminary objections raised: two were filed by the applicants in Civil Application No. 11 of 2016 and Civil Application No. 12 of 2016 and another was filed by Mr. Okiya Omtatah Okioti (Mr. Omtatah), the interested party. All the applicants in Application Nos. 11 and 12 of 2016 responded to Mr Omtatah's preliminary objection. For purposes of clarity and for neatness, I will first jointly deal with the preliminary objections raised by the applicants in Civil Applications No. 11 of 2016 and Civil Application No. 12 of 2016 and Mr. Okiya Omtatah's preliminary objection separately. My opinion in the preliminary objections and the consequent orders will logically follow from this format.

B. PRELIMINARY OBJECTIONS IN CIVIL APPLICATIONS NO. 11 OF 2016 AND CIVIL AAPLICATIONS NO. 12 OF 2016

I. INTRODUCTION

[2] In my view, the issues raised in the two preliminary objections lodged by the applicants in Civil Application No. 11 of 2016 and Civil Application No. 12 of 2016 against the directions of the Chief Justice dated 30th May 2016, as argued by the parties, are based on two main grounds: first, that the Chief Justice acted without jurisdiction under the Supreme Court Act or Rules; and second, that the directions were in breach of the Constitution, especially the principle of decisional independence of a judge encapsulated in Article 160(1). Counsel Dr. Khaminwa supported the arguments by the applicants while the respondents opposed them.

II. ANALYSIS

[3] Answering these questions invariably calls for a reappraisal of the twin roles a Chief Justice plays as the head of a State organ and as a judicial officer within the terms of the Constitution and relevant laws.

[4] Article 161(2)(a) of the Constitution establishes the Office of the Chief Justice and states that he or she shall be the head of the Judiciary. Underlying this is a recognition in Article 161(1) that the Judiciary is an organ of the state and an institution comprised of courts, judges, magistrates, Kadhis as judicial officers and staff, all under the charge, control, management and leadership of one specific person, the Chief Justice.

[5] Regarding her or his specific and defined roles as the person in whom the Constitution reposes organizational leadership of the Judiciary, the Judicial Service Act No.1 of 2011 (Judicial Service Act) gives effect to Article 161(2)(a) of the Constitution by delineating and defining these roles in Section 5. It reads:

> ***"5. Functions of the Chief Justice and the Deputy Chief Justice***
>
> ***(1) The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government.***
>
> ***(2) Despite the generality of subsection (1), the Chief Justice shall—***
>
> ***(a) assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the***

Principal Judge of the High Court and the Chief Registrar of the Judiciary;

(b) give an annual report to the nation on the state of the Judiciary and the administration of justice; and cause the report to be published in the Gazette, and a copy thereof sent, under the hand of the Chief Justice, to each of the two Clerks of the two Houses of Parliament for it to be placed before the respective Houses for debate and adoption;

(c) exercise general direction and control over the Judiciary."

[6] ***This power highlighted in Section 5(2) (c), namely to exercise general control and direction over the Judiciary,*** *is still broad and wide*. It is broad because it is a generalized power stated without any specific textual limitation on scope or breadth. The expansive terms of this provision must not however be construed to mean that the Chief Justice is an imperial monarch, enjoying unfettered and limitless scope of authority as the head of the Judiciary. It is clear from the architecture and content of the Constitution Kenyans desired the monarchical and feudalist powers of the Chief Justice democratized and decentralized. The creation of heads of superior courts who would seek mandate from their colleagues

and who would become an integral part of the leadership in the judiciary, and act as checks and balance of the Office of the Chief Justice, was based on the history of monarchical Chief Justice of the past. The Constitution also removed administrative and accounting powers from the Chief Justice and judges by creating a constitutional office of the Chief Registrar of the Judiciary. The Chief Justice would exercise oversight roles, but the constitutional design was geared to promote the values of the Constitution.

[7] Therefore, that cannot be the intention of the provision in Section 5(2) (c) of the Judicial Service Act. In this era of transformative constitutionalism demanding various values such as accountability no statutory provision can possess such purport. As the Constitution amplifies in Article 1(1) - *all sovereign power is derived from the people*, and is sanctioned and constrained by the Constitution.

[8] I say so because, as my colleagues and I on this bench have pointed out in previous decisions of this Court, the 2010 Constitution has reconceptualised and reconfigured governance and specified certain constitutional dictates to be observed in the discharge of public authority. In ***Communications Commission of Kenya & Pothers v Royal Media Services***

and Others Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014 ***(CCK)*** at paragraph 368 we said that:

> ***"The Constitution itself has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution. <u>The new Kenyan state is commanded by the Constitution to promote and protect values and principles under Article 10</u> and media independence and freedom."*** ***(***Emphasis added.)

[9] In the earlier Advisory Opinion case ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion No. 2 of 2012 (In Re Gender),*** I pointed out that Article 10 demands that whenever a public or state officer applies or interprets the Constitution; enacts; applies or interprets any law; or makes or implements public policy decision, national values and principles of good governance should be the first point of call. It

was a maiden call that this Court would later unanimously endorse in ***CCK***. Since then, a binding edict of law has been that Article 10 is a peremptory constitutional injunction, applies and binds any interpreter, enforcer, executioner, implementer or legislator of any public authority or discretion at all times when such power is sought to be exercised. At paragraph 364 and 365, the Court stated:

> ***"This appeal has also highlighted, for analysis, some of the cardinal values in our Constitution, particularly those of equity, integrity, non-discrimination, participation of the people, patriotism, inclusiveness, and sustainable development as they relate to media independence and freedom. The deconstruction and demystification of these values and their alignment to the vision of the Constitution is important. Such analysis will clarify the constitutional and legal obligations of the state, government, state organs, commercial and political interests, national and international, implicated in media freedom and independence.***
>
> ***…***
>
> ***Under Article 10 of the Constitution national values and principles of governance bind all***

State organs, State officers, public officers, and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions."

[10] On this account, and in accordance with the edict in Article 10 of the Constitution, the Chief Justice's powers under Article 161(2)(a) as defined further in Section 5 of the Judicial Service Act can be exercised or invoked to instill good governance, promote integrity, equity, inclusiveness, participation of the people, advance transparency and secure accountability of the Judiciary. Without exception or exemption, Article 10 binds all judicial officers to abide by its provisions.

[11] Applying this principle to this case, Section 5 of the Judicial Service Act must therefore be construed to mean that for institutional effectiveness and efficiency, the Chief Justice enjoys wide and expansive leverage in the direction and control of the Judiciary, its functions, management, officers and other agencies, except that in conducting such functions the prescriptions of Article 10 constraints the reach and scope of her or his powers. Additionally, the powers which he or she can exercise direction or control must be in line with the entire

Constitution or can be declared invalid under Article 2(4) of the Constitution.

[12] But the conclusion above cannot be arrived at absent the sad history of intrusive conduct of some of the past Chief Justices who steamrolled or countermanded the work of other judges in a systematic weakening and erosion of judicial independence. Counsel for the applicants gave presentations on the various instances in which some of the previous Chief Justices wrongfully exercised and exceeded their powers, more so in collecting files from other judges and ensuring that the cases were decided in a particular manner. This was indeed a sad reminder of the past Judiciary in which the powers of the Chief Justice were contrary to the rule of law and in effect, hindered access to justice and the right to a fair hearing. It is this past history that the 2010 Constitution has decreed it must be reversed.

[13] The promulgation of the Constitution in 2010 introduces new roles for the Chief Justice while at the same time creates room for other general directions and functions to be performed by the Chief Justice as per statute. The same Constitution also introduces the idea of *non-legal phenomena or considerations* in interpreting the Constitution and these considerations must offer the Chief Justice guidance, when exercising her or his

roles. These considerations was first brought to light in his Court's decision in ***In the Matter of the Interim Independent Electoral Commission*** Constitutional Application No. 2 of 2011; [2011] eKLR at paragraph 86, which states:

> ***"The rules of constitutional interpretation do not favour formalistic or positivistic approach (Article 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 provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court".***

[14] When account is taken of the powers and roles of the Chief Justice conferred by the Judicial Service Act, the broad sense of the powers in Section 5 must be seen to be limited when seen through the lens of some of the non-legal considerations listed in Article 10 of the Constitution such as equity, inclusiveness, transparency and accountability. Unlike the past, the Constitution admits no unregulated or arbitrary power, discretion or authority.

[15] I wish to reiterate that the authoritarian history of our country, in certain cases manifested in the capricious and judicial fiat of some Chief Justices and judges, vividly pointed out by counsel, are not lost on me. It is a regrettable history which the Chief Justice in the current constitutional dispensation cannot desire or seek to re-enact. For to act outside the powers conferred by constitutional imprimatur or by law is to undermine and subvert the very Constitution, its values, ideals and impede the new ethos and culture to which it seeks to reengineer the Kenyan society.

[16] By recalling the words of a South African scholar Etiene Mureinik, writing in the post-apartheid moment, (in a journal article ***'A Bridge to Where? Introducing the Interim Bill of Rights,' 10 SAJHR 31, 32 (1994)***), I state that ours is a new era of constitutional "justification" in which the exercise of all

public power is constrained by the Constitution, its values and principles. In the decision of ***In Re Gender***, our expression of the Constitution's commitment, in relation to values and principles gives more clarity on this issue. There, a majority of the bench stated:

> ***"A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions."***

[17] The national values I am referring to include integrity, accountability, and the rule of law, transparency and good governance. By their aid, one can speak truth to the intransigent authoritarianism by which a complicit judicial

system or its imperial head would unapologetically obtain convictions against dissident voices of indignation against the state or meddle in the judicial province of other judges. The ethos of integrity, accountability, the rule of law, transparency and good governance are the imperatives of now, while impunity and imperium are schemes of yesteryears which cannot be proliferated in this era of constitutional accountability.

[18] My reflections above relate to the powers of the Chief Justice in relation to the Judiciary as a whole. I have paid much emphasis to show that although today the powers of a Chief Justice are still not concisely defined in the Constitution, giving an impression of overbreadth, the constitutional value of accountability provides a counterbalance. I now move to discuss the role and powers of the Chief Justice in relation to the Supreme Court of Kenya. It is this aspect of the Chief Justice's powers that I find most relevant in the context of this case. Before I do let me express my surprise at one aspect that no counsel addressed in arguments on the powers of the Chief Justice. This is the aspect of the monarchical powers of a judge or any other judicial officer. It cannot be argued that while the Constitution clipped and changed the monarchical powers of the Chief Justice those of other judges were left intact. Judicial officers are bound the Constitutional values, too. I say this

because there was a loud silence on the exercise of judicial power by a single judge, called decisional independence, which was monarchical in terms of denying respondents due process, fair hearing, with the urgency that the applicants were accorded justice.

[19] The second role and function of the Chief Justice draws from Article 163(1)(a) of the Constitution. The Chief Justice is the President of the Court. In the Constitution, the Supreme Court Act and the Judicial Service Act there is no definition of what a President of the Supreme Court is, neither has any such role been spelt out. Should that mean, as suggested by Mr. Kilukumi, that the Chief Justice as the President of the Supreme Court has no role at all to play in the case management and organization of the Court aside from being a judge of the Court and the presiding judge? The answer is no. Indeed, with performance management contracting in the judiciary, the daily court returns register, conferencing, and responding to complaints against judges, these administrative powers to reinforce constitutional prescriptions must be exercised. Will the Chief Justice not ask a judge who has delayed a ruling in any court to fast track it and deliver it in the interests of justice? Are the constitutional values not against judicial laziness?

[20] The powers of the Chief Justice in relation to the Supreme Court are to be found in the Rules of the Court. In Part two of the Supreme Court Rules, 2012 as amended by the Supreme Court (Amendment) Rules, 2016 with the title "Administration of the Court" one thing is clear. Falling within the administrative aspect of the Court are four aspects: (i) the role of the Chief Justice in Rule 4; (ii) the role of the Registrar in Rule 4A; (iii) the working hours of the Registry in Rule 5 and; (iv) the language of the Court in Rule 6.

[21] As a function falling within the Chief Justice's administrative province, Rule 4 lists that which she or he can do:

> ***"4. (1) The Chief Justice shall co-ordinate the activities of the Court, including—***
> ***(a) constituting a Bench to hear and determine any matter filed before the Court;***
> ***(b) determining the sittings of the Court and the matters to be disposed of at such sittings; and***
> ***(c) determining the vacations of the Court.***

[22] The Rules make it clear that the Chief Justice, as the President of the Supreme Court, is vested with defined

administrative powers. These powers relate to constituting a bench to hear and dispose of a matter in the Court's roll, determining sittings of the Court and the matters to be disposed of at such sittings and vacations of the Court.

[23] It was contended by Counsels for the applicants that the directions of the Chief Justice of 30th May, 2016 were made without jurisdiction; the directions amounted to a variation of judicial orders of *Njoki SCJ*; and that the Chief Justice has no power or authority to vary the orders of any single judge of the Supreme Court. Mr Nowrojee further argued that the Chief Justice issued directions without specifying the source of his powers, in the Constitution or the law. It was the applicants' case that no administrative power can override a judicial power of a single judge. The sum of all these submissions was that the Chief Justice's directions are inconsistent with the decisional independence of a judge safeguarded by the Constitution.

[24] Let me first dispose of the question whether the Chief Justice acted without jurisdiction in giving the directions now challenged. I quote paragraph 4 and 5 of the directions I gave:

> ***"[4] Granted the urgency under which the hearing of the application was sought, and the public interest in this application, I hereby***

invoke my administrative powers as the Chief Justice and the President of the Supreme Court to fast track the hearing of the application.

[5] My directions are, therefore, as follows: 1) The Registrar of the Supreme Court serves the parties to appear for the hearing of this application inter-partes before a 5-Judge Bench of the Supreme Court on Thursday, June 02, 2016 at 10 am. 2) The Registrar also serves the parties with notices to appear for directions on the said hearing tomorrow, May, 31 2016 at 10 am before Wanjala and Njoki SCJJ."

[25] Paragraph 4 of the directions clearly states the source of the Chief Justice's powers to give directions. The Chief Justice relied on his administrative powers provided in the Rules. Rule 4 specifies those administrative powers exercisable by the Chief Justice. Clearly and contrary to Counsels' contention, the Chief Justice's decision was properly anchored in law and the directions as given, had a lawful basis, in Rule 4 of Supreme Court Rules, 2012.

[26] Featuring on the directions as given were three aspects. First, it fixed the *hearing date in a matter* that was lodged in the Registry under a certificate urgency. Second, the Chief Justice

determined a five-judge bench to consider the application at an inter partes hearing. Third, for purposes of the hearing, *parties were directed to appear before a two-judge bench for necessary directions* on the matter. The Chief Justice did not take the file from Judge Njoki. The Chief Justice did not alter her orders except the one that related to the date of hearing which he had the legal power to do. The Chief Justice in observing the provisions of Article 163(2) of the Constitution directed that a bench of five judges of the Supreme Court hear the matter.

[27] As the President of the Supreme Court, the law confers on the Chief Justice the powers to give those necessary directions. The power to determine or allocate hearing dates, select matters to be heard on priority and to determine the quorum of the Court to hear and dispose of such matters is sourced in Rule 4 of the Supreme Court Rules.

[28] But an important point was raised, in my view by Mr. Nowrojee. His submission was that the power of the Chief Justice to determine sittings of the Court does not include the power to decide a hearing date. This again takes us back to the question of what constitutional approach a court should accord the interpretation of a statutory provision, where the word sought to be interpreted has not been defined in the statute.

[29] In search of that proper approach, we need, by way of inquiry to give context to this case. That entails a duty on us to have regard to the nature of the cause of action at hand and probe what constitutional issues or rights that may be implicated on a conspectus of the facts before the Court.

[30] One cannot entertain any doubt that the power of the Chief Justice to determine sittings of the Court and the manner of exercise of that power, will in all cases implicate or have an effect on a party's right to appeal and the right to have the dispute determined expeditiously. Because the exercise of that power has an implication on the rights of a party, there is a duty on this Court, by dint of Article 20(3)(b), to interpret that provision in a way that most favours the enjoyment of that right. Article 20(3)(b) provides:

> ***"(3) In applying a provision of the Bill of Rights, a court shall-***
> ***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and***
> ***(b)adopt the interpretation that most favours the enforcement of a right or fundamental freedom."***

[31] This rule of interpretation that any law, including statutory law which affects rights must be interpreted to comport with the spirit, purport and objects of rights in the Bill of Rights also appears in Article 20(4)(b) of the Constitution. In my dissent in ***Nicholas Arap Kiptoo Salat v Independent Electoral and Boundaries Commission and Others*** Supreme Court Petition No. 23 of 2014; [2015] eKLR, I stated that:

> ***"As I read these provisions they mean that if any existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop the rule so that it does comply. Additionally, the court has the obligation to interpret statute in a way that also complies with the Bill of Rights."***

[32] In South Africa, a similar provision is to be found in Section 39(2) of the Constitution, and which the Court has interpreted in ***Fraser v ABSA Bank Limited [***2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at paragraph 43 that:

> ***"When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the***

Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation."

[33] In ***Makate v Vodacom (Pty) Ltd*** [2016] ZACC 13, at paragraphs 88 and 90 Jafta J made further illumination to the principle espoused in ***Fraser*** o*n* the duty imposed by Section 39(2):

"It is apparent from Fraser that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

…

It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2), irrespective of whether the parties had asked for it or not. This is so because the operation of section 39(2) does not depend on the wishes of litigants. The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. That duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights."

[34] Therefore, in construing a provision in the Rules which accord the power to determine sittings of the Court, a broad interpretation that most favours the right to appeal and expeditious dispensation of disputes at the Supreme Court must be preferred. The power to determine sitting of the Court must therefore include the power to decide the place, date and time of the sitting and quorum of the Court. On the contrary, adopting an interpretation that does not assign that power to a specific person or authority creates an administrative void

which may affect the hearing and adjudication of appeals before the Supreme Court.

[35] A narrow and restrictive interpretation was suggested by Mr Nowrojee, namely that sittings, as understood in Rule 7C of the Amended Rules means the three terms or sessions in a year when the Court is working. I decline to endorse this approach because it is one that curtails the assigned powers and takes away the important role of institutional leadership which the Constitution vests in the Chief Justice. If adopted, it would mean that the administrative functions in the Court, especially as regards the day and time of hearing matters shall remain in limbo until parties appear before Judges of the Court to seek directions on hearing dates. One cannot think of any potential cause of delay in the administration of justice than this.

[36] Having found that the Chief Justice properly exercised powers conferred on him by the Rules of the Court, I do not find merit in the submissions that the directions amounted to a variation of judicial orders of *Njoki SCJ*, neither is the suggestion that the Chief Justice has no power or authority to vary the orders of any single judge of the Supreme Court on matters of fast tracking dates of hearing in the interests of justice, tenable.

[37] Let me set out the facts giving rise to this case in demonstrating my point. On 27th May 2016, immediately the Court of Appeal handed down its judgment, by way of a certificate of urgency, a notice of motion application was swiftly filed before this Court. The application was brought before a single judge, who heard the matter *ex parte*, in chambers and gave orders staying the decision of the Court of Appeal.

[38] On the same day, the single judge proceeded to certify the matter as urgent, issue conservatory orders and also gave directions that the matter be heard *inter-partes* on 24th of June, 2016.

[39] Section 24 of the Act empowers a single judge to make any interlocutory orders and give any directions other than an order or direction which determines the proceedings or disposes of the questions in issue. This provision of the Act has yet to be interpreted by this Court. In my view, the interpretation and application of Section 24 of the Act read together with Rule 4, as I have signalled above must be brought within the ambit of Articles 10 and 20 of the Constitution and must accord with the canons of interpretation established in other decisions of this Court.

[40] It is common cause that the question of the retirement age of judges is a dispute of greatest public interest- the parties in this case have termed it as an “exceptional” or “unique” case before the Court. The issue transcends the parties involved and the public expects that a speedy resolution of the dispute be attained.

[41] It was therefore imperative that the Court or any single judge seized of the matter allow a ventilation of the issues in an open and transparent environment, with representation of all parties. Article 10 of the Constitution which enjoins all public and judicial officers to adhere to transparency, accountability, equity, inclusiveness, integrity was binding on the single judge when exercising powers conferred by Section 24. If *ex-parte* orders are issued in any matter, it is common practice that the Court sets down the matter for *inter-partes* hearing as soon as possible to allow for the other party to be heard. Equity dictates this. Likewise, Article 159(2) places a duty on courts, while exercising judicial authority, to uphold the principles of justice shall be done to all irrespective of status, justice shall not be delayed and the purpose and principles of the Constitution shall be protected and promoted. In future this court must decide whether a single judge of this court can give orders *ex-parte* without subverting the constitutional values I have repeated in this ruling.

[42] To have heard the matter in chambers, at the exclusion of other parties and to allocate a hearing date several weeks after the Court would have been incapacitated by a quorum deficit runs afoul not only the right to a fair trial but is also an unapologetic abuse of judicial discretion in Section 24 contrary to Article 10 and 20 of the Constitution.

[43] Caution must be sounded to all judges of this Court that discretionary powers under Section 24 are not absolute in a similar way that the powers of the Chief Justice under any law are not without limitations. All judges of this Court must appreciate that Section 24 is neither a blank cheque giving room for a relapse into the old jurisprudence of technicalities n0r is it an invitation to non-adherence of constitutional values and principles of governance.

[44] The justice of this case thus demanded that as the head of the Court I had to intervene in the matter. I was prompted by the glaring injustice and blatant violation of the Constitution with which the ex-parte orders were granted. The Chief Justice invoked his administrative powers as the President of the Supreme Court to secure the right of the respondents to be heard to and the right to have a dispute expeditiously determined before a full bench of this court.

[45] These directions did not alter or vary the orders of *Njoki SCJ*. As I stated in the directions, the extreme urgency with which the matter was brought before the Court necessitated and justified a prompt and urgent hearing in a forum where all parties are present. Furthermore, judicial notice has to be taken of this issue as one involving immense and agitated public interest.

[46] In any case, I find it quite duplicitous for the applicants, who are Judges of an apex Court to challenge an order fast-tracking the hearing of their case when in the first place they moved the Court with a prayer that their application deserves to be treated with priority and sought to have the matter certified as urgent. *Why then would it be against the interests of justice if the matter, which has been certified as urgent is moved to be heard at an earlier date and allows all the parties to argue their case?* I must admit that this aspect of the preliminary objection baffled me. As Counsel Kilukumi eloquently stated the applicants moved to this Court for justice with lightning speed. In urging that the other parties be heard in the same fashion and not be relegated to the speed of an old turtle in their search for justice what prejudice can possibly been caused by bringing the hearing forward?

[47] The Court's attention was drawn to the High Court decision in ***Philip K. Tunoi & 2 Others v Judicial Service Commission & Another*** [2015] eKLR where Mwongo, PJ, Korir, Meoli, Ongudi and Kariuki JJ observed at paragraph 70:

> ***"From the foregoing it is explicit, and we so determine, that substantive directions are to be issued by the court actually seized of the matter, and not any other person or authority. Directions, when issued, form part of the judicial exercise or the road map in the overall conduct of a matter. In our view, the situation is fraught with danger where the Chief Justice issues directions as to the hearing date or the date when the court ought to render judgment, because this ceases to be an administrative function and can be construed as bordering on interfering in the judicial conduct, or road map of a matter. In any case, the court seized of the matter is obliged in law to dispose of all matters in an expeditious manner."***

[48] Two aspects distinguish that case from this present matter. One, the decision is a High Court decision which is persuasive and does not bind this Court. Two, the powers of the

Chief Justice under challenge in that case relate to the scope of Article 165(4) which confers on him authority to empanel a bench of uneven numbers in the High Court when a substantial constitutional question is raised in an action. The directions in that case concerned a case in another court whereas in the present case the directions concern a case in a court headed by the Chief Justice.

[49] In this case, we are dealing with express powers of the Chief Justice donated by the Rules of the Court. Because the sets of facts in this case are at variance with the High Court decision above, its *ratio decidendi* is inapplicable.

[50] It was also contended that the directions of the Chief Justice amount to improper conduct against a judge of the Supreme Court in violation of decisional independence of a Judge. Having found that the directions of the Chief Justice were properly originated and predicated in law and the Constitution, I find no reason to venture into the question whether there was interference with the decisional independence of a judge.

[51] Mr. Muite also raised the point that the avenue adopted to challenge the exercise of administrative powers was not a proper one. I tend to agree with this proposition because it is

clear in our law that where a party is aggrieved by an administrative decision, the proper forum is the High Court where judicial review orders may be sought against that administrative decision. It does not lie to a party to object by raising a preliminary point to the hearing of an appeal or application on grounds that an administrative decision taken in the matter was not proper.

[46] I therefore decline to uphold and consequently disallow the two preliminary objections by the applicants both applications.

B. THE PRELIMINARY OBJECTION RAISED BY THE INERESTED PARTY, MR. OKIYA OMTATA

I. THE PARTIES' CASES

[1] Mr. Okoiti Omtatah raised a Preliminary Objection dated 31st May 2016 together with a Notice of Motion (in Application No. 13 of 2016) of even date against Application No. 11 of 2016. He relied on the arguments in the said Preliminary Objection, Notice of Motion, and the Replying Affidavit dated 6th June 2016 and written submissions of even date to support the said Preliminary Objection. The main argument gleaned from all the pleadings is that this Court lacks the necessary jurisdiction to entertain all the applications filed before this Court. The basis of his argument is that Article 50(1) as read with Article 25(c) of the Constitution places an absolute bar to the exercise of jurisdiction by a judge who is neither impartial nor independent. He urged that Articles 50(1), 73(1)(a)(iii) and 73(2)(b) of the Constitution demand a mandatory and outright disqualification of judges in the case of conflict of interest. In such circumstances, he submitted, recusal is an option. He posited that litigants are entitled to the constitutional guarantee of a fair trial by an impartial and independent court. Further, that the courts must guard against even the appearance of bias.

[2] Mr. Omtatah submitted that under the Constitution, a court means judges and that there can be no court without judges. The import of his argument is such that, if judges are removed from the bench on the basis of lack of impartiality and independence, the court is stripped off its jurisdiction and cannot entertain such a matter. Thus, Articles 50(1) and 25(c) place an absolute bar to the court's exercise of jurisdiction where a judge is not impartial and independent.

[3] He provided the following brief facts as the basis of his argument that, the bench as currently constituted, may not be impartial and independent as required by Article 50(1) of the Constitution. He pointed out that *Wanjala SCJ* and I, are members of the Judicial Service Commission (JSC) which has publicly announced that judges appointed under the repealed Constitution should retire at the age of 70 years as stipulated in the 2010 Constitution. In that regard, he argued that by virtue of our membership on the JSC, we have participated in its decision since there is no evidence whatsoever to show that we recused ourselves from arriving at that decision. On that basis, he said that we are automatically disqualified from adjudicating this matter.

[4] He further stated that the remarks made by *Ojwang SCJ and Njoki SCJ,* in ***Nicholas Arap Kiptoo Salat v IEBC and***

Others [2015] eKLR (***Salat***), regarding the pertinent issues "display a deep-seated antagonism to the view that judges appointed under the old Constitution should retire at [the age of] 70 years". This, he argued, will cause a reasonable person to harbor doubts about the impartiality of the constituted bench. On that basis, he advanced the argument that the two should be automatically disqualified from adjudicating this matter. He went to great lengths to cite several foreign case law in support of his submissions. He also reiterated that the applicants had direct interest in the matters and could not sit to hear them.

[5] Lastly, he stated that the interaction between the judges on the bench and the applicants raises a perception of bias. He pointed out that, on the facts of this case, there is incontrovertible evidence that raises the risk of actual bias.

[6] It is his argument that there is no duty to sit on the part of judges and that, only the responsibility to sit where the court is independent and impartial exists. On the strength of this argument he urged this Court to depart from its earlier decision in ***Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others*** [2013] eKLR (***Jasbir***) because it creates a duty to sit even where the independence and impartiality of the judges of the Court is in question by invoking the doctrine of necessity.

Mr. Omtatah submitted that the doctrine of necessity is not applicable in this case since it can only be invoked to avoid injustice, for a good cause and with due regard to the principles in Article 10 of the Constitution. He further urged this Court to adopt the approach followed by the South African Constitutional Court in ***Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other*** [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC) (***Hlope***) where the Court declined to grant leave to appeal to adjudicate the merits of the application on the basis that the bench was conflicted and recusal would result in a quorum deficit.

[7] He also stated that this case raises "moral" issues and that ancient doctrine that justice should not only be done, but be seen to be done should prevail. He pointed out that the litigants are members of this Court, who had a close interaction with members of this bench and that this raises a perception of bias. He urged this Court to adopt the approach in ***Hlophe*** and decline to adjudicate this case because of conflict leaving the decision of the Court of Appeal as the final judgment.

[8] As regards the conservatory orders, he urged this Court to vacate and declare them null and void as they were improperly and unconstitutionally granted in contravention of Article 163(2) of the Constitution, Rules 31(1) and 31(2) of the

Supreme Court Rules, 2012. He further attacked the validity of the conservatory orders on the ground that there application was irregular as there was no Notice of Appeal, judgment of the Court of Appeal and the Registrar's signature when the appeal was filed and conservatory orders granted. This therefore meant that it had not been sanctioned by the Registrar in terms of Rule 4(b) and Article 83(b) of the Constitution.

[9] Counsel for the 1st and 2nd respondents in Application No. 11 of 2016, Mr. Charles Kanjama supported Mr. Omtatah's Preliminary Objection and associated himself with the submissions outlined above. He added that the right to appeal is exercisable where the court is impartial as demanded by Article 50(1). Senior Counsel for the 1st and 2nd respondents in Application No. 12 of 2016 also supported Mr Omtatah's Preliminary Objection. He stated that judicial authority as espoused in Article 159 of the Constitution is vested in the people of Kenya and should therefore be seen to be done in their eyes. He, like Mr. Omtatah, urged the Court to adopt the approach in ***Hlophe*** by declining to decide the issues, leaving the decision of the Court of Appeal as the final judgment. Counsel for the 1st *Amicus Curiae*, International Commission of Jurists (ICJ), Mr Nyaundi supported Mr. Omtatah's Preliminary Objection and urged the court to decline deciding the matters for the same reasons stated above.

[10] Counsel for both applicants in Applications Nos. 11 and 12 of 2016, opposed Mr. Omtatah's Preliminary Objection. So did Dr. Khaminwa for the Kituo cha Sheria, amicus curiae before both withdrew from the proceedings. Mr. Kilukumi, counsel for the applicant in Application No. 11 of 2016 argued that this Court cannot be invited to abdicate its mandate. He emphasized that his client is entitled to the right to appeal and that the Court of Appeal decision cannot be allowed to stand unchallenged as it was vitiated with bias. He distinguished the case of ***Hlophe*** from the present in that, there the case was to be referred back to the Judicial Service Commission for consideration, which is not the case here. He stated that the doctrine of necessity dictates that the court should sit and render justice to the parties. He urged the Court to invoke the doctrine of necessity just like in ***Jasbir***.

[11] Mr. Pheroze Norwojee, Senior Counsel in Application No. 12 of 2016 strongly opposed the Mr. Omtatah's Preliminary Objection. He filed Grounds of Opposition dated 8th May 2016 opposing the Notice of Motion in Application No. 13 of 2016. These grounds of opposition apply mutatis mutandis to the Preliminary Objection raised by Mr. Omtatah for the reason that Application No. 13 of 2016 and the Preliminary Objection were

merged because of the similarity of the arguments raised therein.

[12] He argued that Mr. Omtatah is urging the Court to abdicate its constitutional mandate and that the Preliminary Objection is merely an attempt to dispose of the matters before court summarily and through a procedure unknown to law. He further stated that the right to access a court of final instance ought not to be denied to an applicant in any circumstances where the Court is mandated to hear the case. Counsel submitted that, in view of the nature of the constitutional issues raised in this case, it is necessary for this Court to provide an authoritative pronouncement on the constitutional question raised in the intended appeal. He submitted that Mr. Omtatah has not provided any legal basis whatsoever, why the judgment of the Court of Appeal should be a final decision on the constitutional question raised in the intended appeal.

[13] In addition to the above, he relied heavily on ***Mukisa Biscuit Co. v West End Distributors Ltd*** 1969 EA 696 (***Mukisa Biscuit Co.***) to support his submission that Mr. Omtatah's "Preliminary Objection" is not a preliminary objection in the true sense of the word because it fails to satisfy the test set out in that case. In that case, Law JA pointed out

that in order for a point to qualify as a Preliminary Objection it must consists of the following:

> ***(a) It must raise a pleaded point of law or one arising from the pleadings by implication.***
>
> ***(b) It must be such that, if argued successfully, would dispose of the suit (and he gave examples of jurisdiction and limitation of time).***

[14] In a concurring judgment, Sir Charles Newbold P added that:

> ***(a) It must be a pure point of law argued on the assumption that the facts pleaded are correct (undisputed).***
>
> ***(b) That it cannot be raised where facts has to be ascertained; and***
>
> ***(c) It cannot be raised where what is being sought is a subject of a court's discretion.***

[15] Applying the above test, the applicant argued that this Court has jurisdiction and that jurisdiction is the only ground which could have placed this Preliminary Objection under the ***Mukisa Biscuit Co.*** test. Counsel further submitted that declining jurisdiction on the basis of lack of impartiality involves

the ascertainment of facts and an exercise of discretion and that a ground which requires the court to exercise its discretion removes the Preliminary Objection from the test set out in ***Mukisa Biscuit***. He said that no application for disqualification of the judges was made and that, in any event, a statement for recusal or disqualification is not a Preliminary Objection. Further, that the question whether the judges' independence and impartiality is compromised is a point to be ascertained from the facts not of law. Lastly, that there is no right that is more important than the other. In the end, he urged the Court to dismiss the Preliminary Objection.

II. ANALYSIS

[16] The issues involved herein are of cardinal and public importance, touching on the integrity of the apex court and its ability to discharge its constitutional mandate independently and impartially. The fate of the integrity of this Court as an institution and its ability to maintain public confidence in the administration of justice will therefore depend on how we handle these issues. I have looked at the respective parties' submissions (both written and oral) and affidavits and the overriding issue is whether the issues raised in Mr. Omtatah's Preliminary Objection are meritorious. His Preliminary Objection is a broader one in the sense that it questions this

Court's suitability to deal with all the applications filed in this Court. What becomes of it determines the fate of all other applications.

[17] As stated elsewhere above, Mr. Omtatah's argument is that this Court lacks the necessary jurisdiction to entertain any of the applications in this regard. In clear terms, he stated categorically that this Court should not touch any of these applications. His argument is that, before this Court can exercise its jurisdiction, it must be impartial and independent as required by Article 50(1) of the Constitution. In other words, judicial independence and impartiality are preconditions of this Court's exercise of jurisdiction. Without these two, the court is stripped off its jurisdiction by virtue of Article 50(1) of the Constitution. This argument is based on the premise that judges of the Supreme Court are the "court" and once disqualified, there would be no court. He argued that the bench as constituted is not independent and impartial for the reasons set out elsewhere above.

[18] The upshot of Mr. Kilukumi's and Mr. Noworojee's arguments is that lack of impartiality should not paralyze this Court from exercising its mandate. Mr. Nowrojee further argued that lack of impartiality does not take away this Court's

jurisdiction and that since the Preliminary Objection is not based on jurisdiction, it fails the test out in ***Musika Biscuit Co***.

[19] It is therefore necessary to start off with the question of jurisdiction. The Supreme Court is created through Article 163(1) of the Constitution and its jurisdiction is donated by Article 163(3) and (4). Article 163(3) provides that the Supreme Court shall have:

> ***"(a) [E]xclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President arising under Article 140 and;***
> ***(b) Subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from-***
> ***(i) The Court of Appeal and;***
> ***(ii)Any other court or tribunal as prescribed by national legislation."***

[20] Article 163(4) provides as follows:

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court –***

(a) As of right in any case involving the interpretation or application of this Constitution; and

(b) In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”

Additionally, Section 3 of the Supreme Court Act No. 7 of 2011 (Supreme Court Act) provides that:

“3. The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things—

(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;

(b) provide authoritative and impartial interpretation of the Constitution;

(c) develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth;

(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined

having due regard to the circumstances, history and cultures of the people of Kenya;

(e) improve access to justice; and

(f) provide for the administration of the Supreme Court and related matters."

[21] From the above provisions, it is quite clear this Court is an institution created by the Constitution and that its jurisdiction is donated by the Constitution and the Supreme Court Act. In ***Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others Sup. Ct. Civil Appeal (Application)*** No. 2 of 2011 we affirmed this as follows (paragraph 72)-

"A court's jurisdiction flows from either the Constitution or legislation or both. As such a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction that goes beyond that which is conferred upon it by law." (See also ***In Re the Matter of the Interim in the Independent Electoral Commission*** Sup. Ct. Application No. 2 of 2011.)

[22] Indeed, in ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*** **[2014] eKLR** this Court held that at paragraphs 37 and 49 that-

> ***"[O]rdinarily, in our view, a question regarding the interpretation or application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it... As the apex Court, we must always be ready to settle legal uncertainties whenever they are presented before us. But in so doing, we must protect the Constitution as a whole."***

[23] The judges of the Supreme Court are therefore separate from the Court as an institution. Neither is its jurisdiction attached to the judges. It therefore follows that, whether a judge or judges are disqualified from sitting does not take away the constitutionally bestowed jurisdiction of the Court for the simple reason that jurisdiction is attached to the Court as an institution not just the judges.

[24] Mr. Omtatah's argument suggests that the jurisdictional provisions should be read subject to Article 50 (1) (impartiality and independence requirement) and 25(c) (the right to a fair trial shall not be limited). The constitutional provisions reproduced above are silent on that proposition. To uphold Mr. Omtatah's proposition would be to limit the jurisdiction of this Court by the art of interpretation through inference. The question in the preliminary objection is clearly about the interpretation of the Constitution – whether the applicant Supreme Court judges right to an appeal can be limited by the fact that there is no impartial bench under Article 50(1) of the Constitution. Essentially, he is dissuading this Court from exercising its jurisdiction because the bench's impartiality is questioned and this will inevitably limit the party's rights to a fair trial. This question invokes the jurisdiction of this Court.

[25] In view of the above exposition, I agree with Mr. Pheroze that the recusal or disqualification of judges does not divest this Court of its constitutionally donated jurisdiction. This line of reasoning defeats Mr. Omtatah's argument that this Court should not have touched the earlier application and should not even "touch" the present preliminary objections. It would not make sense for Mr. Omtatah to urge us not to "touch" the applications yet he has filed the present Preliminary Objection for this Court to make a determination on whether it should

disqualify itself and not proceed to hear any further application. In the ordinary adversarial adjudication process, the Court needs to first convene before a dispute is heard. If a contrary proposition is adopted, this Court would not be in a position to determine the core question, whether the bench, as constituted, is suited to deal with the issues raised in the applications.

[26] What then becomes of Mr. Omtatah's Preliminary Objection? Although the Preliminary Objection is raised under the label and style of "jurisdiction", it is clear from the arguments raised in his Notice of Motion, written submissions and Replying Affidavit that it is in fact not based on the lack of jurisdiction. It is based on the disqualification of the judges on the bench on the ground that their independence and impartiality is compromised. The preliminary objection raises issues of constitutional interpretation which this Court must address. It is on this basis that he argued that all the members of the bench must disqualify themselves and that if they do, there would be no "court" to decide the applications. Mr. Nowrojee has contended that the procedure employed by Mr. Omtatah is unheard of in law and that the court cannot be divested of its mandate summarily by means of a purported Preliminary Objection. This, he submitted, is because the Preliminary Objection fails to satisfy the test laid in ***Mukisa Biscuit Co***. It is therefore apposite to look into this argument.

[27] I have already set out the test enunciated in ***Mukisa Buscuit Co.*** above and I need not do so here. But before I begin, it is necessary to make some observations. When adopting cases decided in the pre-2010 constitutional dispensation, sight should not be lost of the fact that they should be viewed and understood through the constitutional lens. In other words, they should be infused and baptized with the spirit, letter, and overall vision of the Constitution. An approach that pays homage to the principles of equity, fairness, integrity, inclusiveness, transparency, accountability, as enunciated in Article 10, should be preferred over a pure legalistic one. In ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** [2014] eKLR**,** this court when interpreting the well-known and widely used case on jurisdiction ***Owners of the Motor Vessel "Lillian S' v. Caltex Oil* (Kenya) Ltd** [1989] KLR 1, reiterated in paragraphs 88 and 89 that**-**

> ***" [88] The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the Constitution of Kenya, 2010 (Article 163), a***

Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts, has been established."

[89] Such are new functions that were not in contemplation at the time of the decision of the "Lillian S" case. The Supreme Court is, besides, not in the more constrained position in which the Court of Appeal had been, at the time of "Lillian S".

It is for this reason that in ***In Matter of the Interim Independent Electoral Commission –*** Constitutional Application No2 of 2011; [2011] eKLR, we also stated that "[t]he rules of constitutional interpretation do not favour a formalistic or positivistic approach (Articles 20(4) and 259(1)".

[28] I have already stated that Mr. Omtatah's Preliminary Objection is not anchored on jurisdiction although it is labelled as such. Does that disqualify it as a Preliminary Objection? Mr. Pheroze says yes. It is important to note that although Preliminary Objections are, more often than not, based on lack of jurisdiction, it is not the only ground. It is for that reason that, Law JA in ***Mukisa Biscuit Co.*** gave jurisdiction and

limitation of time only as examples of the grounds of raising a Preliminary Objection. The list should not therefore be regarded as closed. Depending on the facts and circumstances of a particular case, they may be other grounds for raising a Preliminary Objection. The instant case is a good example. It is a case that has arisen in the post 2010 Constitutional era and the unique and exceptional facts, which all parties have attested to, will require this Court to interpret ***Mukisa Biscuit Co.***, in light of the provisions of the Constitution.

[29] On the main issue whether this Court has jurisdiction to determine further applications or the Court should disqualify itself, Mr. Omtatah's argument that the judges' impartiality and independence is compromised such that they should be disqualified from adjudicating on the matter. The question is whether such a ground passes the test laid in ***Mukisa Biscuit Co.*** and when answering that, due regard should be had to the spirit and letter of the Constitution; the principles set out in Article 10; the need to safeguard the integrity of the Court as an institution and the need to engender public confidence in the administration of justice.

[30] Whether a judge should be disqualified from sitting may be a question of law depending on the facts and circumstances of a particular case and is not always an issue that falls within

the discretion of the court as argued by Mr Nowrojee. I am guided by the observations of Lord Browne – Wilkinson in ***Ex parte Pinochet Ugarte (No 2)***, where he stated that the fundamental principle that a man may not be a judge in his own cause has two similar but not identical implications. The first is that if a judge is in fact a party to the proceedings or has a financial or proprietary interest in the outcome, he is a judge in his own cause. In these circumstances, the mere fact that he is a party to the proceedings or has a financial interest in the proceedings automatically disqualifies him from sitting without any factual investigation.

[31] The second is where a judge is not a party to the proceedings and does not have a financial or proprietary interest in the outcome, but his conduct or behavior may give rise to the suspicion that he may not be impartial, such as by an association with the parties in *lis*. This second category is not the principle in the strict sense and does not invite automatic disqualification. The ***Pinochet*** case was cited with approval by this Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*** [2013] eKLR (***Jasbir***). The test set out there is therefore applicable in this case provided it arrives at an outcome that accords with the dictates of the Constitution. *Do Mr. Omtatah's allegations of bias fall under the category which calls for disqualification without the need to investigate*

any facts? Only when the answer is in the affirmative can the ground of bias bring his Preliminary Objection under ***Mukisa Biscuit Co.*** test. I say so because the test requires only questions of law, which do not require an exercise of discretion by the court and the ascertainment of which do not require factual investigation.

[31] It is indisputable that the facts relied on by Mr. Omtatah need not be investigated. They are not disputed. **They are hard, clear and recorded**. *Wanjala SCJ* and I sit in the Judicial Service Commission (JSC), a party in these proceedings, which made a decision that judges should retire at the age of 70 years. This is a fact which, even this Court may take judicial notice. We have participated in that decision of a corporate body, the JSC. Now, can we sit on a bench where the JSC is seeking an order declaring that judges should retire at the age of 70 without raising a perception of bias or partiality? I think not.

[32] The position of my other colleagues is also similar. *Ojwang SCJ* and *Njoki SCJ* (with *Rawal DCJ* and *Tunoi SCJ* included) expressed their views in relation to the question before us now in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** [2015] eKLR at paragraph 76 where they stated thus:

"This Court takes the position that the security of tenure for all Judges under the Constitution of Kenya, 2010 is sacrosanct, and is not amenable to variation by any person or agency, such as the Judicial Service Commission which has no supervisory power over Judges in the conduct of their judicial mandate. We find and hold that the Judicial Service Commission lacks competence to direct or determine how, or when, a Judge in any of the Superior Courts may perform his or her judicial duty, or when he or she may or may not sit in Court. Any direction contrary to these principles, consequently, would be contrary to the terms of the Constitution which unequivocally safeguards the independence of Judges. It follows that the said directive concerning Judges of the Superior Courts, issued by the Judicial Service Commission, is a nullity in law."

[33] Mr. Omtatah relied on the above passage to assert that to allow the said judges to sit on this matter may raise a perception of bias. Counsel for the applicants contended that those are not findings. I am not convinced. The above

paragraph is very clear on which position the judges have taken on the matter. To this end, it is clear that Mr. Omtatah's Preliminary Objection raises issues of law touching on the impartiality and independence of members of this Court based on hard facts which require no investigation.

[34] It is important to state that a check list approach to the test in ***Mukisa Biscuit Co.***, as suggested by Mr. Noworojee is not consonant with the spirit and letter of the Constitution. The issues raised in Mr. Omtatah's Preliminary Objection are not insignificant. Nor are they narrowly limited to the rights of the applicants. They speak to the integrity of this Court as an institution and the urgent need to engender public confidence on this Court's ability to dispense with justice equitably, fairly and with due regard to the spirit and letter of the Constitution. Whatever outcome that will arise from this Court as presently constituted, will raise serious questions about the impartiality and independence of its members. This Court's mandate is not only to adjudicate on matters brought before it, but dispensing with justice impartially and independently, with due regard to the principles enunciated in Article 10 of the Constitution.

[35] The pursuit of justice demands that judges act independently and impartially. Where lack of impartiality may raise perceptions of bias, such that members of the public may

think justice has not been rendered, it is only fair and equitable that the court declines to adjudicate such matters. In the circumstances of this case, where the litigants are members of this Court, appearing before their colleagues, and where other members of the bench are members of the 1st respondent, it is only fair and equitable that the Court declines to adjudicate the issues to safeguard the integrity of the institution and to foster public confidence in the administration of justice.

[36] *Whose perception must the Court look at in order to determine that the judges must disqualify themselves?* Several counsel have come before this Court and stated that the test as derived from several cases in foreign jurisdictions persuade the Court to examine what the "reasonable woman or man" would perceive if the bench proceeded to determine the matter. It is critical to emphasize that comparative foreign cases are of persuasive value and pursuant to Article 2(4) of the Constitution that stipulates that *"any law ...that is inconsistent with the Constitution shall be void to the extent of its inconsistency."* Article 1(1) of the Constitution provides that *"all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."* Article 159(1) of the Constitution states that judicial power is derived from the people. Therefore in this particular matter, when determining whose perception the Supreme Court should bear in mind, what

the people/public perceive of the Court is critical. Who are the "people" as contemplated in the Constitution? Counsel seemed to agree that the people mean ***Wanjiku,*** the ordinary Kenyan. We were told to imagine that Kenyan in some bus or ***matatu.*** The reality is that the ordinary Kenyan normally walks. We must, therefore, imagine the people of Kenya to reflect what the Preamble of the Constitution calls ***our ethnic, cultural and religious diversity.*** We could also add class because of the glaring inequalities in our society. Conceptualizing the people is complex and courts problematize and interrogate the concept. Judges will invariably differ on their conception of the people. The critical question is what Kenyan people of different regions, religions, gender, generation, race, class, clan, and ethnicity would perceive as justice in this matter. In this particular exceptional case, the "people" will look at the general outlook of the Court: the two applicants in the matter where their colleagues have to determine the matter; two other judges who are members of the respondents; and two others who have voiced opinions on the issue in a previous case. It is for the judge to imagine what their perceptions would be and decide.

[37] Will this Court's integrity be upheld if it proceeds to determine the other applications in light of all these factors? I have time and again pronounced myself on the prominence of the national values and principles of governance enshrined in

Article 10 of the Constitution. One key principle is integrity. Integrity is usually connoted to individual integrity but it does not stop there. Article 73(1)(a)(iv) of the Constitution recognizes integrity of office or rather institutional integrity. It reads as follows:

> ***" 73. (1) Authority assigned to a State officer—***
>
> ***(a) is a public trust to be exercised in a manner that—***
>
> ***(iv) promotes public confidence in the integrity of the***
>
> ***Office"***

The members of this bench are therefore called upon to promote the public trust in the integrity of the office (in this instance the Supreme Court) and if the public perception calls for this Court to disqualify itself, each member of the Bench must analyze that perception and determine what to do.

[38] However, the applicants strongly submit that they have a right to access justice under Article 48 of the Constitution and this means they also have a right to appeal to this Court. Additionally, it will only be fair to the parties to exercise this right which should not be limited by Article 50(1). On the other hand, the interested party has submitted that the right to access justice under Article 48 of the Constitution does not mean the

right to access the Courts. Justice must not be connoted to merely mean courts. Also, the 1st and 2nd respondents urged us to rely on the ***Hlope*** decision that held that since the applicants therein had already exercised their right to appeal they would be no injustice if they were not granted leave to appeal.

[39] I wish to restate that the applicants have a right to a second appeal. The ***Hlope*** decision cannot be applicable in relation to the set of facts before this Court. In that matter, the facts are highly distinguishable from this case especially in relation to the applicants having justice through an appeal. Article 163(4)(a) of the Constitution allows for parties to access the Supreme Court in relation to second appeals. Making a finding that the applicants should not access this Court because they have already exercised a right of appeal at the Court of Appeal will be an action that can be invalidated by Article 2(4) of the Constitution. However, although parties have a right of second appeal, the question of whether this Court must ultimately exercise is jurisdiction to determine the appeal, should be answered on a case-by-case basis.

[40] What then does the concept of justice entail? The Constitution recognizes in Article 10(2)(b) and 19(2) that social justice is a national value and principle and must be promoted in order to promote the rights in the Bill of Rights. Article

159(2) also places a duty on courts and tribunals exercising judicial authority to uphold the following principles:

> ***"(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."***

[41] The applicants strongly argued that it would be unfair to lock them out of this Court and in effect that would be unjust. However, it would also curtail justice if this Court proceeds and determines the matter and in the long run the ultimate decision-making process is questioned or perceived to have been pre-determined by an impartial bench and in the long run not only hinder the fairness of both parties before this Court but fail to

preserve the fairness of the Supreme Court's processes and in turn, be contrary to the constitutional precepts of justice which courts are required to bear in when exercising their judicial authority.

[42] Mr. Kilukumi urged this Court to invoke the doctrine of necessity like we did in ***Jasbir*** despite the arguments on perception of bias raised by Mr. Omtatah. In fact, Mr. Omtatah urged us to depart from that case since it creates a duty to sit even where there is a risk of partiality on the part of judges. On the other hand, Mr. Kilukumi fortified his position by arguing that the doctrine of necessity is crucial to avoid paralyzing the court from performing its constitutional mandate. The arguments therefore raise the question: how can a court strike a delicate balance between invocation of the doctrine of necessity on the one hand and the need to dispel perceptions of bias in the administration of justice on the other?

[43] First, it is important to distinguish the case of ***Jasbir*** from the present case. In that case no basis whatsoever was provided for the recusal of the judge except for the mere fact that he once recused himself in the same case before the Court of Appeal. In this case, Mr. Omtatah has provided uncontroverted facts to substantiate his claims for disqualification on the basis of perceived bias. These two cases

are distinguishable. It cannot therefore be argued that, merely because the doctrine of necessity was invoked in ***Jasbir***, the same should be done in this case. Each case must be dealt with on its own facts. It is for that reason that in ***Jasbir***, we stated that "the circumstances calling for recusal, for a judge, are by no means cast in stone". For these reasons, I find no reason to blindly follow the approach adopted in ***Jasbir***.

[44] Does the perception of bias in this case such that it calls for the judges to recuse themselves? In ***Jasbir*** we stated the test as follows:

> ***"Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.***

[45] In the circumstances of this case, does perception of fairness and moral convictions permit us to hear this case given the uncontroverted facts provided by Mr. Omtatah? I think not.

The perception of bias that arises from the facts stated above is very clear and in that regard I associate myself with the words of Lord Hutton as endorsed by Ibrahim SCJ in his concurring opinion in ***Jasbir*** that:

> ***"[P]ublic confidence in the administration of justice required that the judge implicated disqualifies himself, it was irrelevant that that there was in fact no bias on the part of the judge, and there is no question of investigating whether there was any likelihood of bias or any reasonable suspicion of bias on the fact of that particular case."***

[46] The quote above responds aptly to the circumstances of this case. As stated by Ibrahim SCJ in ***Jasbir***, "this Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible". *If the answer is in the affirmative, disqualification will be inevitable*." I cannot imagine the people as I have conceptualized them having a different perception other than we would not be seen to be free from perception of bias.

[47] Can the doctrine of necessity be invoked to save the judges from recusing themselves despite what is said above? Mr. Kilukumi says yes and he referred us to a long list of authorities to back this argument. I turn to consider this argument. In his concurring opinion in ***Jasbir***, *Ibrahim SCJ* stated that the doctrine of necessity can only be invoked thus:

> ***"In the circumstances in which all the members of the only tribunal competent to determine a matter are subject to disqualification, they may be allowed to sit and determine the matter . . . to avoid a miscarriage of justice. This common law principle will however, only apply in very exceptional circumstances which are required to be very clear."***

[48] From the above, it is clear that the main object of invoking the doctrine of necessity is to "avoid a miscarriage of justice" and it applies where members of the *only* forum to determine the matter are disqualified. It is this reasoning that gleans on the reasoning of the South African Constitutional Court in ***Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other [ZACC] 4; 2012; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567*** when it stated that:

"In determining the extent to which we should consider the merits, regard must be had to whether substantial injustice will be done to the applicant should this Court refuse to grant leave to appeal."

[49] The learned authors, De Smith, Woolf and Jowell in Judicial Review of Administrative Action (5th ed. 1995) at page 544 make it clear that the doctrine of necessity applies to prevent a failure of justice. Furthermore, in the Australian High Court in ***Laws v. Australian Broadcasting Tribunal*** at page 454 the Court stated that:

"[The doctrine] will not apply in circumstances where its application would involve positive and substantial injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Secondly, when the rule applies, it applies only to the extent that necessity justifies.

These two limitations make it clear that the doctrine should not be applied mechanically.

To do so would gravelly undermine the guarantee of an impartial and independent tribunal. . .”

[50] It is clear from the foregoing that the invocation of the doctrine of necessity is aimed at avoiding a miscarriage of justice. Furthermore, that its invocation does not turn a blind eye to the guarantee of judicial impartiality and independence. I did not hear the applicants to be arguing that an injustice has been occasioned and am I suggesting that it has not. They seem to be arguing that the doctrine compels this court to sit because the applicants have a right of appeal to this Court. The authorities referred to above make it clear that the doctrine must be invoked only to the extent necessary to avoid a miscarriage of justice. Impartiality and judicial independence are essential elements of trusted administration of justice in a constitutional democracy founded in the rule of law. They should be jealously safeguarded to foster public confidence in the administration of justice. The invocation of this doctrine must be done sparingly, to the extent that necessity invites us to do so and with due regard to the spirit and letter of the Constitution.

[51] For the above reasons, I am of the view that the Preliminary Objection should be upheld and that this Court

should decline to entertain any of the applications on their merits. It was urged that we declare the decision of the Court of Appeal as final. In my view, the majority of the Bench are declining jurisdiction and are recusing themselves to hear the applications and the intended appeal, so the decision of the Court of Appeal stands, but I would not say it is final. The applicants have the right to appeal to a Supreme Court differently constituted. I do not believe we are holding that because of recusal, the Supreme Court has no jurisdiction to hear the appeal in future.

[52] My Orders would be as follows:

- **The Preliminary Objections in Petition 11 and 12 are hereby disallowed;**
- **Mr. Omtata's preliminary objection on this court lacking jurisdiction ab initio to hear the preliminary objections including his, is hereby disallowed;**
- **Because of the perceived conflict on interest in the constitution of the bench hearing the matter this court should decline jurisdiction to hear the applicants application, the application by the respondents, and the intended appeal;**
- **For avoidance of doubt, and on the basis of prior orders herein the orders granted by Njoki SCJ must be vacated and hereby vacated.**
- **Costs shall be in the cause.**

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

.....
W.M. MUTUNGA
CHIEF JUSTICE & PRESIDENT SUPREME COURT

I certify that this is a true
copy of the original

REGISTRAR
SUPREME COURT OF KENYA

RULING OF MOHAMMED IBRAHIM, JUSTICE OF THE SUPREME COURT

I. INTRODUCTION

[1] The genesis of these matters now before the Court is the judgements of the Court of Appeal in *Civil Appeal No. 1 of 2016,* ***Hon. (lady) Justice Kalpana H. Rawal vs Judicial Service Commission & 4 others***; and *Civil Appeal No. 6 of 2016,* ***Justice Philip K. Tunoi & another vs Judicial Service Commission & another***. The Court of Appeal delivered its judgements on 27th May, 2016 in which it dismissed the two appeals with the consequence that it affirmed the High Court decision to the effect that the retirement age for judges appointed under the old Constitution is seventy (70) years of age.

[2] The appellants in the Court of Appeal were aggrieved by the decision of the Court of Appeal and sought to appeal to the Supreme Court. They filed their respective applications before this Court:

(i) *Civil Application No. 11 of 2016, Hon. (Lady) Justice Kalpana H. Rawal vs Judicial Service Commission & 4 others; and*

(ii) *Civil Application No. 12 of 2016, Justice Philip Tunoi & another vs The Judicial Service Commission and another.*

II. BACKGROUND

[3] To clearly discern the issues before this Honourable Court, it is important that I first set out in depth the details of all the matters before this Court and the various procedural events that have taken place in this matter.

[4] Upon delivery of the Court of Appeal judgement on the 27th May, 2016, *Civil Application No. 11 of 2016* was filed by Hon. Lady Justice Kalpana Rawal on the same day under a certificate of urgency. The application sought the following orders:

(i) *This application be certified urgent, and heard ex-parte in the first instance;*

(ii) *Pending the inter-partes hearing and determination of this application, this Honourable Court be pleased to issue a conservatory order directing that the decision of the High Court, to the effect that the retirement age of judges appointed before 27th August, 2010 is seventy (70) years delivered on 11th day of December, 2015 and affirmed by the Court of Appeal on 27th May, 2016, be suspended.*

(iii) *Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to issue a conservatory order directing that the decision of the High Court, to the effect that the retirement age of judges appointed before 27th August, 2010 is seventy (70) years delivered on 11th day of December, 2015 and affirmed by the Court of Appeal on 27th May, 2016, be suspended.*

(iv) *Pending the inter-partes hearing and determination of this application, this Honorable Court be pleased to issue conservatory order*

directing that the applicant will continue to discharge her constitutional, judicial and administrative duties as a Supreme Court justice, the Vice President of the Supreme Court and the Deputy Chief justice of the Republic of Kenya.

(v) *Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to issue a conservatory order directing that the applicant will continue to discharge her constitutional, judicial and administrative duties as a Supreme Court justice: the Vice President of the Supreme Court and the Deputy Chief Justice of the Republic of Kenya.*

(vi) *Pending the inter-partes hearing and determination of this application, this Honourable Court be pleased to issue a conservatory order prohibiting the respondents, the Chief Registrar of the Judiciary and the Judiciary from advertising in any media whatsoever, vacancy in the office of the Deputy Chief Justice and or to commence in any manner whatsoever recruitment process for the replacement of the applicant as a Supreme Court Justice, the Vice-President of the Supreme Dourt of Kenya and the deputy Chief Justice of the Republic of Kenya.*

(vii) *Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to issue a conservatory order prohibiting the respondents, the Chief Registrar of the Judiciary and the Judiciary from advertising in any media whatsoever, vacancy in the office of the Deputy Chief Justice and or to commence in any manner whatsoever recruitment process for the*

replacement of the applicant as a Supreme Court Justice, the Vice-President of the Supreme Court of Kenya and the Deputy Chief Justice of the Republic of Kenya.

(viii) *Pending the inter-partes hearing and determination of this application, this Honourable Court be pleased to issue a conservatory order directing the respondents, the Chief Registrar of the Judiciary and the Judiciary from retiring or issuing any retirement notices to the applicant.*

(ix) *Pending the hearing and determination of the intended appeal, this Honorable Court be pleased to issue a conservatory order directing the respondents, the Chief Registrar of the Judiciary and the Judiciary from retiring or issuing any retirement notices to the applicant.*

(x) *Pending the hearing and determination of the intended appeal, this Honorable Court be pleased to issue a conservatory order directing that in the event of a vacancy arising in the office of the Chief Justice, the applicant to act as the Chief Justice of the Republic of Kenya for the maximum duration stipulated under section 5 (4) of the judicial service Act, 2011.*

(xi) *Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to issue conservatory order directing the respondents, the Chief Registrar of the Judiciary and the Judiciary, that judges appointed prior to the 27th of August 2010, are eligible to apply for appointment to the offices of Supreme Court Justices; Deputy Chief Justice and Chief Justice*

respectively, notwithstanding that they have attained the age of seventy (70) years.

(xii) Any other or further order that this Honourable Court may consider appropriate and just to grant in the circumstances.

(xiii) Costs of this application to abide the outcome of the intended appeal.

[5] The application was placed before a single judge, *Njoki, SCJ,* on the same day who made the following orders:

(1) The application is certified urgent and service of the certificate of urgency is dispensed with at this instance.

(2) Pending inter-parties hearing and determination of this application, a conservatory order is hereby issued directing that the decision of the High Court affirmed by the Court of Appeal today the 27/5/2016 to the effect that the retirement age of judges appointed before 27/10/2010 is 70 years be suspended.

(3) Pending the hearing inter-parties, a conservatory order is issued directing that the applicant will continue to discharge her constitutional judicial and administrative duties.

(4) Pending the hearing inter-parties of the application, a conservatory order is hereby issued prohibiting the respondents, the Chief Registrar of the Judiciary from advertising in any media whatsoever a vacancy in the office of the Deputy Chief Justice and Vice President of the Supreme Court of Kenya or to commence in any manner whatsoever the recruitment process of the applicant as a judge of the Supreme Court.

(5) Conservatory orders issue directing the respondents, the Chief Registrar of the Judiciary from issuing any retirement notices to the applicant.

(6) All respondents be immediately served with the order of the Court as issued.

(7) Inter-parties hearing of this application shall be heard and argued before the Court on Friday, 24th June, 2016 at 10.00a.m.

(8) It is so ordered.

[6] Meanwhile, on the same date, 27th May, 2016, *Civil Application No. 12 of 2016* was also filed contained in a notice of Motion dated 27th May, 2016 under a certificate of urgency. The applicant, Justice Philip Tunoi sought the following prayers:

(1) This application be certified urgent and admitted for hearing on a priority basis.

(2) The Court be pleased to issue an order staying execution of the entire judgement of the Court of Appeal delivered on 27th May, 2016 in Civil Appeal No. 6 of 2016 pending the hearing and determination of this application. For the avoidance of doubt, the 1st respondent be stopped and/or barred from retiring the applicant or taking any steps to retire the 1st applicant or moving to replace him as judge in the Supreme Court of Kenya including placing any advertisements in the Kenya Gazette or daily newspapers to replace him.

(3) The Court be pleased to issue an order staying execution of the entire judgement of the Court of Appeal delivered on 27th May, 2016 in Civil Appeal No. 6 of 2016 pending the hearing and determination of the intended appeal. For avoidance of doubt, the 1st respondent be stopped and/or barred from retiring the applicant or taking any steps to retire the 1st applicant or moving to replace him as judge in the Supreme Court of Kenya including placing any

advertisements in the Kenya Gazette or daily newspapers to replace him.

(4) The Court be pleased to issue an order of injunction halting, stopping and or prohibiting the respondents or any organ of the judiciary from issuing the 1st applicant with a retirement Notice or retiring him pending the hearing and determination of this application.

(5) The Court be pleased to issue an order of injunction halting, stopping and or prohibiting the respondents or any other organ of the judiciary from issuing the 1st applicant with a retirement notice or retiring him pending the lodging, hearing and determination of an intended appeal against the judgement and orders made by the Court of Appeal on 27th May, 2016.

(6) Further and in the alternative, the Court be pleased to issue a conservatory order staying any execution or enforcement action of the judgement of the Court of Appeal delivered on 27th May, 2016 and/or judgement of the High Court delivered on 11th December, 2015.

(7) The orders made herein be served with immediate effect upon the respondents.

(8) The costs of and incidental to this application abide the result of the intended appeal.

[7] This application was also placed before a single judge, *Njoki, SCJ*, who made the following orders:

(1) That this application be marked and certified as urgent.

(2) That a stay of execution is issued upon the entire judgement and orders of the Court of Appeal judgement in Nairobi Court of Appeal No. 6 of 2016 issued today on 27/5/2016.

(3) That the applicant continues to discharge his duties as a Supreme Court Judge pending hearing and determination of this application.

(4) That all parties affected should be served with these orders with immediate effect.

(5) That all parties concerned be served with the necessary documents to facilitate an inter-parties hearing of this application before the Court at 10.00a.m on Friday, June 24th 2016.

(6) For avoidance of doubt, there should be no steps taken by the respondent or its agents to retire Justice Philip K. Tunoi until the hearing inter-partes of this application.

(7) It is so ordered.

[8] Though filed by different parties, considering the prayers sought, it suffices it to say that the two applications are similar. Subsequent to the orders of the single judge in the two applications, the Chief Justice and President of the Supreme Court on 30th May, 2016 gave the following identical directions in the two matters:

(1) I have perused the orders in this application granted ex-parte by NJOKI SCJ on May 27, 2016

(2) The said Orders were granted under an application that sought to be certified urgent and be admitted for hearing on a priority basis.

(3) NJOKI SCJ made the certification of urgency, granted interim orders, and fixed hearing inter-parties on Friday June 24, 2016.

(4) Granted the urgency under which the hearing of the application was sought, and the public interest in this application, I hereby invoke my administrative powers as the Chief Justice and president of the

Supreme Court to fast track the hearing of the application.

(5) My directions are, therefore, as follows: 1) The Registrar of the Supreme Court serves the parties to appear for the hearing of this application inter-parties before a 5-judge bench of the Supreme Court on Thursday, June 02, 2016 at 10.00a.m. 2) The Registrar also serves the parties with notices to appear for directions on the said hearing tomorrow, May 31, 2016 at 10.00a.m before Wanjala and Njoki, SCJJ.

[9] The Chief Justice's directions caused the matter to be mentioned before a 2-judge bench on 31st may, 2016; and brought forward the *inter-partes* hearing of the two applications from 24th June, to 2nd June, 2016. These directions by the Chief Justice aggrieved the applicants in both applications for what they termed as interference by the Chief Justice with the judicial orders of a single judge of the Court. Hence two preliminary objections were filed against the directions by the Chief Justice.

[10] Hon. Lady Justice Rawal, the applicant in *Civil Application No.11 of 2016* filed her Preliminary Objection dated and filed on, 30th May, 2016 thus:

*"**TAKE NOTICE** that the applicant will raise a preliminary Objection for determination in limine, on the following grounds:*

(1) The Hon. Chief Justice has today issued outrightly illegal and unlawful directions. He purports to tap his power to issue those illegal directions from a nebulous source described as "administrative powers as the Chief Justice and President of the Supreme Court", without quoting the chapter and the verse conferring the Chief Justice with any such powers.

Needless to state, no administrative power can be cited to override a judicial decision.

(2) The two judge bench is improperly empaneled in contravention of section 23(2) of the Supreme Court Act, 2011, which sets out the purpose and function of a two-judge bench.

(3) The Hon. Chief Justice has no legal power and authority to single-handedly vary an order issued by any judge of the Supreme Court under section 24(1) of the Supreme Court Act, 2011.

(4) The Hon. Chief Justice has neither legal power nor authority to act suo moto so as to vary an order issued by any judge of the Supreme Court acting pursuant to the powers granted under section 24(1) of the Supreme Court Act, 2011.

(5) The Hon. Chief Justice is not at liberty to interfere with the decisional independence of any judge of the Supreme Court.

(6) The Hon. Chief Justice has acted contrary to the Constitution of Kenya, 2010 ("the Constitution") in interfering with the independence of the judges of the Supreme Court.

(7) The Hon. Chief Justice Interference is calculated and designed to undermine and completely erode the applicant's constitutional right to a fair hearing in violation of Article 50 of the Constitution.

(8) Further and other grounds to be canvassed at the hearing."

[11] On their part, the respondents in *Civil Application No. 11 of 2016,* filed a notice of motion application dated and filed on 30th May, 2016 seeking to set aside the orders of *Njoki, SCJ.* The application prayed thus:

1. *THAT the application herein be certified urgent and heard ex-parte in the first instance.*
2. *That the Honourable Chief Justice and President of the Supreme Court give directions for the hearing of the application herein by a single judge or alternatively two judge bench or alternatively five- judge bench without delay.*
3. *THAT this Honourable Court review and/or set aside and vacate the orders issued ex-parte by Hon. Justice Njoki Ndungu on 27th May, 2016 in the matter herein.*
4. *THAT this Honourable Court do hereby consider and strike out the Notice of Appeal filed in the applicant's Application herein and dated 27th May, 2016.*
5. *THAT this Honourable Court do issue any interim orders allowing the Court, however constituted under the doctrine of necessity, to deal with substantively and consider the applicant's application and determine the same prior to the anticipated retirement of the Chief Justice, while upholding the cardinal rules of natural justice.*
6. *THAt this Honourable Court do issue orders declining to take up the intended appeal by the applicant herein in exercise of its constitutional and inherent powers to prevent abuse of court process and to uphold constitutionalism and the rule of law.*
7. *THAT the respondents/applicants costs be provided for.*

[12] The following day, 31st May, 2016, a citizen of the Republic of Kenya, Mr. Okiya Omtatah, who had participated in this matter since the High Court as an interested party, filed a preliminary objection in this Civil Application No. 11 of 2016 dated 30th May, 2016 thus:

“TAKE NOTICE that the Interested Party will raise a preliminary point of law at the hearing of this application, to be determined in limine on the following grounds:

1. *THAT this Honourable Court has no jurisdiction to entertain the instant application or any other application or appeal filed in respect of the judgement and order of the Court of Appeal in Civil Appeal No. 1 of 2016, delivered on the 27th day of May 2016, because all its judges have either supported or opposed the contention that judges appointed under the repealed Constitution should retire upon attaining the age of 70 years.*
2. *THAT by dint of Article 50(1) of the Constitution, jurisdiction of a court can only be exercised where the court is impartial. Otherwise, a Court which is not impartial is stripped of jurisdiction. Further and in particular:*
    a. *A court cannot exercise jurisdiction where doing so violates the enjoyment of the absolute right to a fair trial;*
    b. *A court which is not impartial has no jurisdiction under the Constitution;*
    c. *Jurisdiction must be declined where a court is so conflicted that it cannot be impartial.*
    d. *All matters must be presided over or decided by judges whose detachment and neutrality is not as clearly compromised as is the case with the current judges of the Supreme Court on the subject matter of the retirement age of judges appointed under the repealed Constitution.*
3. *THAT pursuant to Articles 50(1), 73(1)(a)(iii) and 73(2)(b) of the Constitution, the disqualification of all current Supreme Court judges from entertaining any*

applications or appeals filed against the judgement and order of the Court of Appeal delivered on the 27th day of May 2016, in Civil Application No. 1 of 2016, is mandatory and cannot be waived as the learned judges have an obligation to avoid participating in this case where they have taken sides and the grounds for their disqualification are undeniably clear.

4. *THAT the issue herein is outright disqualification of all Supreme Court judges and not voluntary recusal of the judges.*
5. *THAT disqualification based on the precise criteria in Article 50(1) of the Constitution is non-discretionary and cannot be waived by anybody or authority.*
6. *THAT the rule of necessity (also known as the Concept/Doctrine of the Duty to sit) cannot be applied herein.*
7. *THAT under the hierarchy of rights enshrined in the Constitution of Kenya, civil right to appeal is inferior to and is trumped by the entrenched and absolute human right to a fair hearing and, where they conflict, the right to a fair hearing and, where they conflict, the right to a fair hearing prevails.*
8. *THAT because it is disqualified from entertaining this matter, the decision of the Court of Appeal in Civil Appeal No. 1 of 2016, delivered on May 27th 2016, stands as the final decision in the matter.*
9. *THAT there is an overwhelming public interest to sustain the decision of the Court of Appeal in Civil Application No. 11 of 2016 as the final decision in this matter.*
10. *THAT Civil Application No. 11 of 2016 is an abuse of the Court process.*

[13] Meanwhile, the applicants in *Civil Application No. 12 of 2016*, also being aggrieved by the Chief Justice's directions of 30th May, 2016 filed a notice of preliminary objection dated 31st May, 2016 thus:

" Take notice that applicants herein shall raise a preliminary objection to the orders made on 30th May, 2016 on the ground that there was no jurisdiction to make any other orders following the directions given on 27th May, 2016."

[14] On the other hand, the respondents in *Civil Application No 12 of 2016* filed a notice of motion application dated and filed on 30th May, 2016 seeking to vacate the orders of the single judge, *Njoki, SCJ,* of 27th May, 2016 thus:

1. *THAT this application be certified urgent and heard ex-parte in the first instance.*
2. *THAT, the Court be pleased to vacate, discharge and set aside the ex-parte orders issued by the Honourable Lady Justice N. S. Ndungu on 27th May, 2016.*
3. *THAT, the petition of Appeal and Notice of Motion dated 27th May, 2016 be struck out.*
4. *THAT, the costs of and incidental to this application be provided for.*

[15] Subsequent to the above filing, Citizen Mr. Okiya Omtatah filed a notice of motion application dated 30th May, 2016: *Civil Application No. 13 of 2016,* on 31st May 2016 seeking the following orders:

1. *THAT this application be certified as urgent and be heard on priority basis and in priority to Civil Application No. 11 of 2016, on a date to be allocated by the Court.*
2. *THAT the Court does (sic) declare that conservatory orders awarded in Civil Application No. 11 of 2016 to be irregular, null and void ab initio.*

3. *THAT the Court be pleased to vacate, discharge or set aside the conservatory orders dated 27th May, 2016 and issued in Civil Application No. 11 of 2016.*
4. *THAT the Court be pleased to strike out Civil Application No. 11 of 2016.*
5. *THAT the Court do disqualify itself from entertaining any other appeals or applications arising from the decision of the Court of Appeal in Civil Appeal No. 1 of 2016, delivered in Nairobi on May 27th 2016.*
6. *THAT the Court be pleased to declare that because it is disqualified from entertaining this matter, the decision of the Court of Appeal in Civil Appeal No. 1 of 2016, delivered in Nairobi on May 27th 2016, stands as the final decision in the matter.*
7. *THAT such other or further orders as may be just be made to meet ends of justice and to safeguard and protect the authority and dignity of this Honourable Court.*
8. *THAT the 1st respondent (Hon. Lady Justice Kalpana Rawal) be condemned to costs.*

[16] Meanwhile, pursuant to the Chief Justice's directions of 30th May, 2016, all parties appeared for a mention before a two judge bench, *Wanjala and Njoki, SCJJ,* on 31st May, 2016 where the following directions were issued by the Court as regards each application respectively:

In Civil Application No. 11 of 2016

(1) All intended Amicus to file and serve their applications on all parties in this matter.

(2) All the applications filed by the Intended Amicus will be heard on 2nd June 2016 at 10.00a.m. before the five judge bench.

(3) The Notice of preliminary objection filed by counsel for the applicant dated 30th May, 2016 to be served

upon all parties and will be heard by the five judge bench on 2nd, 2016 at 10.00a.m.

(4) The preliminary objection filed by Okiya Omtatah Okoiti dated 31st May, 2016 will be heard by the five judge bench on 2nd June, 2016 at 10.00a.m.

(5) The Notice of motion application filed by Messrs. Mumma and Kanjama to be served on all the parties and the same will be heard by the five judge bench on 2nd June, 2016 at 10.00a.m.

(6) These are the directions issued by this Court.

In Civil Application No 12 of 2016:

(1) All intended Amicus to file and serve their applications on all parties in this matter

(2) All the applications filed by the Intended Amicus will be heard on 2nd June 2016 at 10.00a.m before the five judge bench.

(3) The Notice of preliminary objection filed by Counsel for the applicant Mr. Kiragu kimani, dated 31st May, 2016 to be served upon all parties and will be heard by the five judge bench on 2nd June 206 at 10.00a.m

(4) The Notice of motion application dated 30th day of May, 2016 filed by Issa & company advocates be served on all parties and the same will be heard by the five Judge bench on 2nd June, 2016 at 10.00a.m.

(5) These are the directions issued by this Court.

In Civil Application No. 13 of 2016

(1) The notice of motion application dated 31st May, 2016 filed by Mr. Okiya Omtatah be served on all the parties.

(2) These are the directions issued by this Court.

[17] The matter first came before the five judge bench (*Mutunga CJ, Ibrahim, Ojwang, Wanjala & Njoki ,SCJJ*) for hearing on 2nd June 2016 where the Law Society of Kenya, upon applying and being admitted as an interested party, made an application seeking leave to pursue mediation among the parties. Leave was granted in accordance with Article 159 of the Constitution. Parties were to report back to the Court on 6th June 2016 on the outcome of mediation. On 6th June, 2016, Counsel Mr. Masika for the Law Society of Kenya reported to the Court that mediation had failed to take off, hence the hearing commenced on 7th June 2016.

[18] At the commencement of the hearing, directions were given on the manner in which the applications will be heard. Upon consideration and consultation with counsel on record for the parties, the Court directed, and with the consent of the parties, that the preliminary objection by citizen Mr. Okiya Omtatah and his notice of motion application, being *Civil Application No. 13 of 2016* will be heard together. That is, *Civil Application No. 13 of 2016* was to be collapsed into the preliminary objection by Mr. Omtatah in *Civil Application No. 11 of 2016*. It was further directed, and by consent of parties, that the preliminary objection in *Civil Application No. 11 of 2016* be heard first, followed by the preliminary objection by Mr. Omtatah in that *Application No. 11 of 2016,* and lastly, the preliminary objection in *Civil Application No. 12 of 2016* in that order.

[19] The crux of the nature and content of the preliminary objection of Mr. Omtatah, read together with his *Civil*

Application No. 13 of 2016, is that this Court had no jurisdiction to hear this matter on the basis that all the judges on this bench of the Supreme Court are disqualified. Mr. Omtatah contends that each and every judge on this bench has a conflict of interest and in law we cannot hear the matter as at one time or the other, we had formed an opinion on the main question in controversy which forms the crux of the intended appeal: *whether judges appointed before the Constitution 2010 ought to retire at the age of 70 or 74 years*.

III. JURISDICTION DEMYSTIFIED

[20] Before delving into the matter at hand, I would like to briefly re-state the law as regards preliminary objections as they relate to jurisdiction of this Court. In so doing, I would contextualize what it is meant by the jurisdiction of a court, with more emphasis on our Supreme Court which is a quorate court.

[21] The law as regards preliminary objections is well settled by case law. The Case of ***Mukisa Biscuits Co. Ltd vs. West End Distributors Ltd*** *[1969] EA 696* is regarded as the *locus classica* on this issue in our legal system. This Court endorsed the dictum in ***Mukisa Biscuits*** in the case ***Hassan Ali Joho & another v Suleiman said Shahbal & 2 others,*** *Petition No. 10 of 2013, eKLR [2014],* (***Joho*** case) thus:

> ***"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to***

refer the dispute to arbitration … a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."

[22] This position was subsequently amplified in ***Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others,*** *Sup. Ct. Application No. 23 of 2014* and ***Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others,*** *Application No. 50 of 2014, eKLR [2015]* where it was stated, [paragraph 15]:

"Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record."

[23] A preliminary objection should be argued and dispensed with first given its peculiar nature as it may do either of the two things: Firstly, a preliminary objection touching on jurisdiction if successfully raised, may dispose off the matter. This point was well stated in **Ocheja Emmanuel Dangana v Hon. Atai aidoko Aliusman & 4 Others, SC. 11/2012 (The Dangana case)** Judge Bode Rhodes-Vivour, JSC said thus:

"A successful preliminary objection terminates the hearing of the appeal…Jurisdiction has always been a threshold issue. It must be decided once it is raised and quickly too. A trial or a hearing conducted without jurisdiction amounts to a wasted effort, a complete nullity no matter how well the matter was decided. <u>That explains</u>

why the issue of jurisdiction can be raised at any time, in the trial court, on appeal, or in the Supreme Court for the first time."

[24] Secondly, a preliminary objection may substantially affect the proceedings even if it does not dispose it off. This is because it may impact the proceedings by leading to striking out or wiping away some aspects of the proceedings. Some causes of action may be struck out while others may have to be amended. It could also reduce the prayers sought, hence impacting the proceedings.

[25] A preliminary objection touching on the jurisdiction of the court is very fundamental as jurisdiction of a court is crucial. In the ***Hon. Lemankan Aramat vs Harun Meitamei & 2 others****, Petition No. 5 of 2014* (***Aramat*** case) the Supreme Court by a majority held that even where this Court found it had no jurisdiction on a matter, it could still proceed to determine the relevant questions before the Court. The majority held as follows:

"[88] The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the *Constitution of Kenya, 2010* (Article 163), a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts, has been established. The exclusive, dedicated role of the Supreme Court under the Constitution takes several forms: for example, it has "original jurisdiction to hear and determine disputes relating to the elections to the office of President" [Article 163(3)(a)]; it is required to hear and determine as of right, on appeal, "any case involving the interpretation

or application of [the] Constitution"; it "may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government" [Article 163(6)].

[89] Such are *new functions*, that were not in contemplation at the time of the decision of the "*Lillian S*" case. The Supreme Court is, besides, not in the more constrained position in which the Court of Appeal had been, at the time of *"Lillian S".* The Supreme Court is expressly empowered [Article 163(8)] to "*make rules for the exercise of its jurisdiction";* and besides [Article 163(9)], a Parliamentary enactment "may make further provision for the operation of the Supreme Court"; and indeed, the *Supreme Court Act, 2011 (Act No. 7 of 2011)* has been enacted which upholds this Court's standing as the formal custodian of the interpretive process for Constitution, the national *grundnorm*. This is the context in which we will express our understanding, that in the case before us, *it is not possible to detract from the Supreme Court's authority to hear and determine all the relevant questions." (Emphasis mine).*

[26] While I dissented in that case, it cannot be gainsaid that jurisdiction is still the foundational cornerstone upon which any litigation is anchored on.

[27] The jurisdiction of a Court to hear and determine a matter has to be understood in two-fold. Firstly, jurisdiction as relates to the subject matter, where specific matters can only be litigated in a particular court. Under Article 140 as read together with Article 163 (3)(a) of the Constitution the Supreme Court is only the court clothed with the jurisdiction to

determine a presidential election petition. Hence the Court is given jurisdiction on the basis of the subject matter.

[28] Secondly, jurisdiction should also be broadly understood with regards to the 'competence and legitimacy' of a court sitting to determine a matter. This second part is well understood in the context of a quorate court. This issue was considered by the Supreme Court of Nigeria in the case of ***Ocheja Emmanuel Dangana v Hon. Atai aidoko Aliusman & 4 Others, SC. 11/2012 (The Dangana case)*** in a decision delivered on 24th February, 2012. Like the case in Kenya, the quorum of the Supreme Court in Nigeria is atleast five Justices of the Supreme Court to determine a matter. In the ***Dangana case***, a five judge bench was unanimous on the centrality of jurisdiction where raised as a preliminary objection. The Court also held that a question of jurisdiction was indeed a substantive one. Walter Samuel Nkanu Onnoghen, JSC wrote with regard to jurisdiction thus:

"It is settled law that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity-dead- and of no legal effect whatsoever. That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost."

[29] Judge Bode Rhodes-Vivour, JSC gave what he considers as a competent court. In so doing, the issue of the constitution of the court comes to the fore as being a very essential consideration. He held thus:

"A court is competent, that is to say, it has jurisdiction when-

1. **<u>It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another</u>, and**

2. **The subject matter of the case is within its jurisdiction, and no feature in the case which prevents the court from exercising its jurisdiction; and**
3. **The case comes before the court initiated by the (sic) due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction".**

[30] Consequently, the element of the composition of the court with regard to the requisite numbers of its members is also pertinent when the question of jurisdiction falls for determination. In the same case, Justice **Olufunlola Oyelola Adekeye, JSC** gave a clear check list of what amounts to a competent court with jurisdiction. He also places the constitution of the court at the core of it.

"Jurisdiction on a broad perception encompasses legal capacity, power or authority of a court. Competence of a court is the handmaid of jurisdiction of a court. A court must have both jurisdiction and competence to be properly seized of a cause or matter. Jurisdiction in that sense means the legal capacity, power or authority vested in it by the constitution or statute creating the court.

A court is competent to entertain a case:

a) **When the subject matter of the case is within the court's jurisdiction.**
b) **Whether there is any feature in the case which prevents the court from exercising its jurisdiction.**
c) **<u>When it is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another</u>.**

When dealing with the issue of jurisdiction or lack of it the courts are guided by some principles which are:

a) **<u>Jurisdiction is a matter of substantive law no litigant can confer jurisdiction on the court where</u>**

the Constitution or statute or any provision of the common law says that the court does not have jurisdiction.

b) **Jurisdiction cannot be assumed in the interest of justice.**
c) **Nothing shall be intended to be outside the jurisdiction of the superior court but that which specifically appears to be so and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged.**
d) **Although courts have great powers yet their powers are not limited. Their jurisdiction is confined, limited and circumscribed by the statute creating it.**
e) **The court is not hungry for jurisdiction.**
f) **Judges have a duty to expound the jurisdiction of the court and not expand it as by so doing the court will be usurping the functions of the legislature.**
g) **A court cannot give itself jurisdiction by misconstruing a statute."**

[31] From the foregoing persuasive caselaw, it emerges that for a quorate court; the question of whether a court has the requisite number of judges who are legally required to constitute a bench becomes a jurisdictional question. It is with this finding that I am satisfied that Mr. Omtatah's preliminary objection goes to the jurisdictional competency of this Court to hear the matter before us. I am of the view that it must be heard first before any other preliminary objection in *Civil Application No. 11 or 12.* Mr. Omtatah raises a fundamental issue and as a matter of good order it must be settled first for the Court to proceed having settled the question that indeed the quorate bench is fully constituted and hence competent.

[32] I reiterate that while indeed the issues raised in the preliminary objections Applications No. 11 and 12 are weighty

and ought to be heard outrightly and determined, it is my conviction that Mr. Omtatah's preliminary objection should take precedence. I believe that if Mr. Omtatah's preliminary objection was to succeed in any form, given its nature of the averred conflict amongst the judges, we ought not to deal with any single issue on this matter. On the contrary, once we find that Mr. Omtatah's preliminary objection has no merit, it is my conviction that the Court should then immediately determine the preliminary objections in Application 11 and 12 with the satisfaction that it has the jurisdictional competency to do so.

[33] I agree that the preliminary objections by the applicants on the administrative directions of the Chief Justice as stated in the applications are equally matters which we have accepted must be heard first because they question the validity and constitutionality of the Court sitting on the basis of the directions of the Chief Justice which directions is submitted, interferes with the interlocutory orders of Justice *Njoki, SCJ* who had ordered the matter to be heard on 24th June, 2016.

[34] However, even this issue can only be delved into by a Court that is satisfied that it is competently constituted and has the jurisdiction to hear and determine that issue. This issue is a preliminary objection that comes in these proceedings as a preliminary issue and where there are issues of conflict of interest which seek to remove or disqualify judges from hearing the matter, then it is my conviction that all reason and logic will require that the Court does not delve into any issue until the question of conflict is resolved. No issue for determination before a court exists in a vacuum. All issues arise in the cause of action before the Court and are heard and determined within the matter before the Court. One cannot isolate the preliminary issue against the administrative powers of the Chief Justice and determine them first then proceed to determine whether the

Court has the jurisdiction or competence to determine the matter before it. A judge cannot be said to recuse himself from hearing some issues and then properly sit to hear others. Recusal and disqualification has always to be seen within the broader spectrum of the subject matter in court and not the narrow spectrum of a particular issue for determination among the various issues that are before the court for determination. Consequently, I have reflected and I must first deal with the preliminary objection raised by Mr. Omtatah as read together with *Civil Application No. 13 of 2016*.

IV. THE PRELIMINARY OBJECTION BY MR. OMTATAH

[35] During the subsequent hearings, counsel Mr. Kiragu Kimani, for the applicants in *Civil Application No. 12 of 2016*, inquired from the Court and submitted pointing out that Mr. Omtatah's preliminary objection in *Civil Application No. 11 of 2016* was not filed in *Civil Application No. 12 2016* yet it had possible ramifications that if dealt with might impact or affect Civil application No. 12 of 2016. He submitted that his clients will not be heard on that matter as they were not parties in *Civil Application No. 11 of 2016*, hence denying them a right to be heard.

[36] The Court agreed with his submissions and ordered that *Application No. 13 of 2016* and the preliminary objection in *Civil Application No. 11 of 2016* be served on the applicant in *Civil Application No. 12 of 2016*. Senior Counsel Mr. Pheroze appearing with Mr. Kiragu sought leave to take instructions from their client on how to respond to this. Having been served with the preliminary objection and taken instructions from their client, the following day, they were able to participate fully in the hearing of Mr. Omtatah's preliminary objection.

[37] From the beginning, it was clear that parties could not agree on consolidation of *Civil Application No. 11 and 12 of 2016*, even after the Court suggested the same. It is also clear that from the beginning in the High Court upto the Court of Appeal, the two matters were heard separately and no order for consolidation was made. Likewise, this Court does not compel consolidation as it is the right of the parties to decline consolidation although the Court would have wished to do so to save precious judicial time.

[38] While there is no consolidation, I am of the view that I ought to give one composite ruling in respect of the Preliminary Objection of Mr. Omtatah as read together with *Civil Application No. 13 of 2016* to avoid repetition and to save time. The preliminary objection touches on matters in the two applications even though the arguments were in *Civil Application No. 11 of 2016*. As a result, i shall deliver one ruling in respect of Mr. Omtatah's Preliminary Objection in Civil Application No. 11 of 2016 and Civil Application No. 12 of 2016. *Civil Application No. 13* of 2016 was by consent subsumed in the preliminary objection. As stated earlier, this was unusual but parties agreed on the way forward.

V. SUBMISSIONS

a) Mr. Omtatah's submissions

[39] In raising his preliminary objection, Mr. Omtatah submitted that this Court sits at the heart of the Kenyan enterprise and it should always be protected at all costs. He contended that a court is properly constituted where it is staffed by the requisite judicial officers be they Judges or Magistrates and that as such there can be no courts where the judicial officers are non –existent. He averred that where the concerned

judicial officers are perceived as being impartial then access to justice is in itself at stake.

8. **[40]** Mr.Omtatah submitted that Article 50 of the Constitution gives the standard for hearing matters. The article as read with Article 25 (c) of the Constitution constituted an absolute bar to the exercise of jurisdiction where a judge is impartial. He cited the case of 11th Circuit of Court of Appeal, ***United States v State of Alabama*** *828 F2d 1532,* in urging that the guarantee to litigants of a totally fair and impartial tribunal and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the centre of any judicial system. He urged that Judges are important public officials whose authority is felt in every corner of the society and in doing so the enforcement of judicial orders ultimately depends on public perception and co-operation. Hence it was his submission that where the citizenry conclude that matters before the courts are decided on the basis of favoritism and prejudice rather than the law and the facts, then the enforcement the rule of law becomes compromised.

9. **[41]** It was his case that the entire bench of the Supreme Court was conflicted by reason of various acts of individual Judges. He gave particulars thus: that the Chief Justice and Hon. Justice Wanjala were members of the Judicial Service Commission which had decreed that all judges retire at the age of 70 years; the Deputy Chief Justice, Lady Justice Kalpana Rawal and Hon. Justice Tunoi had moved to court to challenge that position; Hon. Justices Ibrahim, Ojwang and Lady Justice Njoki had written a letter to the Judicial Service Commission addressing the matter; and finally, that Hon. Lady Justice Njoki had filed a suit against the Judicial Service Commission in the High Court. On this basis, Mr. Omtatah submitted that there was sufficient cause for a reasonable person to doubt the

impartiality of the bench to hear this matter. He cited the case of ***Caperton v A.T Massey coal****.556 U.S 868(2009*) in support of the proposition that where judicial bias is probable then there was a requirement for disqualification from the concerned judge.

10. **[42]** Mr.Omtatah submitted that if the Court cannot disqualify itself, then he urged individual judges to take a personal initiative and disqualify themselves. He contended that in the event that any Judge was persuaded to disqualify himself/herself from determining the matters, there would be a lack of quorum and this lack of quorum should be equated to a tie/split vote with the effect that the decision of the Court of Appeal will stand. He cited the case of ***American Isuzu Motors versus United States*** *United States Court of Appeals 2nd Circuit No. 07-919* in support of this contention.

11. **[43]** It was submitted that pursuant to Articles 50(1) ,73(1)(a) and 73(2)(b) of the Constitution, the disqualification of all current Supreme Court Judges from presiding over this matter was mandatory and could not be waived since Judges have an obligation to avoid participating in a matter where they have hitherto taken sides.

12. **[44]** Mr. Omtatah argued that the standard for recusal of a judge is largely based on perception. However, it was his submission that in this matter, evidence of the purported bias had been presented and as such there was a real risk of actual bias. Hence he argued that in this matter, the standard was not based on that of *"Caesar's wife",* that is, mere suspicion, but here we had hard facts.

13. **[45]** Mr. Omtatah urged the Court to depart from the doctrine of necessity as applied by this Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others***

petition no. 4 of 2012 *[2013] eKLR* (***Rai*** case) arguing that that principle was an out dated principle, Mr. Omtatah added that the reading of Article 163(2) of the Constitution was of a discretionary nature and as such the wording of the Article countenances this Court to decline jurisdiction in some occasions.

14. **[46]** Further, it was urged that in the Bill of Rights under the Constitution, the right to a fair trial supercede the right to appeal. By Article 50(1), it was submitted that impartiality of the Court is now enshrined in the Bill of Rights. By impartiality, it was submitted that it refers to the perception of the court while biasness is more profound and provided in Statutes.

15. **[47]** Mr. Omtatah submitted that there are established two apex courts (Court of Appeal and the Supreme Court) in Kenya and their access is depended on the nature of the subject matter. Hence, it was submitted that the Supreme Court should decline to assume jurisdiction in the instant matter so that the Court of Appeal determinations are deemed terminal on the issues that have now been made the subject of the applications herein.

16. **[48]** Citizen Mr. Omtatah submitted that there was a need to distinguish between the duty of a judge to sit and the responsibility to sit. He contended that Article 50(1) as read with Articles 159(2)(e),73 and 75 of the Constitution requires that a judge should not hear a case in which his or her impartiality and independence may be questioned. He urged that the doctrine of the duty to sit contradicts this concept by forcing judges to rule in situations where their impartiality is questioned. He argued that even though there exists a relationship between the doctrine of necessity and the duty to sit, the concepts are in fact distinct in that the rule of necessity states that judges must be able to hear and determine a matter

even where it tangentially affects the bench because our system of governance demands that the courts be available to make decisions. However, the circumstances in the matter currently before the Court do not allow the application of the rule of necessity.

17. **[49]** That the duty to sit must be limited only to the connotation based on judicial courage and dedication and must never be extended to a situation where the facts of the case as presented suggest that impartiality is patently evident. That the doctrine of duty to sit is an outdated doctrine that is ultimately unhelpful to 21st century questions of disqualification of a judge. It was further submitted that the parties' right to a judiciary above suspicion outweighs any misplaced notion that there is shame in stepping aside from cases in which judges' impartiality is raised.

18. **[50]** He urged the Court to depart from the ***Rai*** case holding on the necessity to sit and quoted a scholarly paper titled: ***Chief William's Ghost: The Problematic Persistence of the Duty to Sit Doctrine***, by ***Jeffrey W. Stempel***. It was submitted that whereas the duty to sit counsels the judge to be diligent and unafraid in decision making, it in no way suggests that the judge should hear cases in which the his/her impartiality is questioned and that a judge's disqualification is necessary to protect the rights of the litigants and preserve public confidence, integrity and impartiality of the judiciary.

19. **[51]** On the issue of right to appeal it was submitted that there is a hierarchy of rights. It was submitted that the right to appeal is inferior to and is trumped by the entrenched and absolute human right to a fair hearing and that where they conflict, the right to a fair hearing must prevail. It was submitted that the right to appeal can only be exercised where the Court being appealed to is impartial and independent, and is

seen to be so as required by Article 50(1) as read with Articles 25(c),73 (2) (b) and 75(b) of the Constitution. Mr. Omtatah contended that since the intended appellants had already exercised their right to appeal before the Court of Appeal, they would suffer no injustice where they cannot appeal to the Supreme Court.

20. **[52]** Mr. Omtatah urged each individual judge to consider whether they could be conflicted at the individual level given that each individual judge's conflict had been questioned. Mr. Omtatah argued that the prospect of having two eminent judges of the Supreme Court litigating in this Court, where they sit as part of a seven judge bench and where it is more probable that the judges have a close working relationship, would not augur well with the requirement of justice and that the solution would be for the Supreme Court not to take up the matter by reason of the currently constituted bench being professionally conflicted.

21. **[53]** Citing the South African Constitutional Court case of ***Hlophe versus Premier of the Western Cape Province and Another*** *2012(6) SA 13 (CC),* Mr. Omtatah urged that where the apex Court is incapacitated because of conflicts disabling its members from sitting, it should not determine the merits of any substantive proceedings before it despite being vested with the jurisdiction and as such the decision of the Court of Appeal be deemed final.

22. **[54]** In his reply, Mr. Omtatah submitted that Article 2(4) of the Constitution provides that even doctrines of law that are in conflict with the Constitution are null are void. Hence the doctrine of necessity is one such doctrine and should be disregarded. Mr. Omtatah further reiterated that Article 48 of the Constitution was about access to justice and not access to Courts.

23.

b) 1st and 2nd Respondents' in Application No. 11 of 2016

24. **[55]** Learned Counsel Mr. Kanjama was led by Senior Counsel Mr. Abdullahi (acting for the JSC and the Secretary, JSC) supported the preliminary objection by Mr. Omtatah. Mr. Kanjama reiterated that the preliminary objection was valid and that indeed the Supreme Court by sitting on a matter where there could be an appearance of impartiality could end up undermining the very Constitution of the Republic of Kenya that it was set up to protect.

25. **[56]** He submitted that that even though members of the Bar took an oath to act in the interest of the law and more so the rule of law, members of the Bench took an even stronger oath and as such the requirement in the judges' oath, that is, the requirement of *impartially do justice,* was one that a judge could not go against. He urged that judges ought not to be placed in a situation where he or she would be required to go against his/her oath of office. Learned Counsel also made reference to Article 73 of the Constitution in submitting that the office of a judge is one of public trust to be exercised with objectivity and impartiality.

26. **[57]** Learned Counsel was emphatic that the unique provisions in our Constitution required a unique Kenyan solution in determining whether it is possible for a judge to sit where there is clear conflict of interest.

27. **[58]** As to whether the right to appeal was sacrosanct, the learned Counsel made reference to Article 24 of the Constitution and submitted that certain rights under the Constitution are subject to limitation and as such even the right to appeal can be limited. The right to appeal is not among the

rights in Article 25 of the Constitution that cannot be limited. Only four rights under the Constitution could not be limited and one amongst those rights was the right to fair trial.

28. **[59]** Mr. Kanjama opposed the arguement that the right to fair trial is synonymous to the right to fair hearing. He contended that Article 50 refers to the right to a fair hearing and that indeed all rights under Article 50 were part of fair hearing but that Article 50(2) was indeed part of the right to fair hearing but solely and wholly dedicated to a criminal trial.

29. **[60]** It was submitted that while indeed the right to fair hearing includes the right to an appeal, the overriding concern was that the right is subject to limitation under Article 24 0f the Constitution. He also cited the ***Hlophe*** case in buttressing the argument that the right of appeal is not an absolute right and that since the intended appellants had already had the benefit of an appeal they would not be prejudiced.

30. **[61]** He submitted that while the test in determining bias was that of the perceived appearance of bias, in the instant matter it was not a matter of oblique conflict but rather direct conflict which was precipitated by a decision co-authored by some members of the currently constituted bench. He cited the case *of* ***Nicholas Kiptoo arap Salat versus Independent Electoral and Boundaries Commission and 7 Others,*** *Petition No. 23 of 2014,* (**Salat** case**)** in this regard. He also made reference to a memoranda drafted by some members of this bench and submitted that indeed a reasonable person would be able to discern that there is a conflict.

31. **[62]** Replying to a question as to whether the Supreme Court in exercise of its constitutional mandate could have been restrained by ongoing proceedings in the High Court? Learned Counsel submitted that the Court ought not to have pronounced

itself in the manner in which it did in the **Salat** case for the simple reason that there were live proceedings before the High Court whose jurisdiction had been invoked by members of the Supreme Court bench.

32. **[63]** Mr. Kanjama invoked the 'double possibility test' and submitted that where a Judge's mind is made up then the essence of a fair trial and rule of law is lost. it was his contention that the doctrine of necessity must not be invoked but for good reasons and that even where it is invoked there was no absolute duty to sit.

33. **[64]** Distinguishing the Authorities and caselaws cited by Counsel Mr. Kilukumi for the applicants, Mr. Kanjama stated that the factual context of those authorities is distinct from the matter before the Court.

34.

c) 1st and 2nd Respondents in Civil Application No.12 of 2016

35. **[65]** Senior Counsel Mr.Muite appeared with Mr. Issa Mansur for the 1st and 2nd Respondents in Civil Application No. 12 of 2016. They aligned themselves with the submissions of Mr. Kanjama. Senior Counsel Mr. Muite submitted that indeed there was no doubt that the Court has the Jurisdiction but reiterated that the Court was being urged to decline to exercise that jurisdiction.

36. **[66]** Counsel submitted that judicial authority is derived from the people and as such public interest was central. Consequently, it was submitted that when an issue before the Court, public interest must constitute a legitimate matter for consideration. That it was in the public interest that the Republic of Kenya must have a fully constituted Supreme Court

of Kenya with members who do not have a cloud or doubts hanging over their heads.

37. **[67]** Learned Counsel argued that as long as each of the seven members of the Court was a person of integrity and credibility, public interest would be served by having a fully constituted Court. He assailed the suggestion that the Learned Judges, now intended appellants in the matter before the Court, could be able to sit in judgment in their own causes as patently absurd. According to learned Counsel Sections 23, 24 and 26 of the Supreme Court Act cannot be deemed to have amended Article 163(2) of the Constitution. It was submitted that the provisions of the Supreme Court Act that permit a single judge to sit and issue orders were not contemplated by Article 163(2) of the Constitution.

38.

d) 1st Amicus in Civil Application No. 11 of 2016 (ICJ)

39. **[68]** Learned Counsel for the International Commission of Jurists (K), Mr Nyaundi supported the Preliminary objection. Counsel relied on the Notice of Grounds for affirming the preliminary objection to the extent only that this Court should decline jurisdiction to receive and determine this matter filed on 2nd June, 2016. He submitted that this Court as currently constituted would not be suitable to determine the issues set in the substantive application or intended appeals as the bench had indeed espoused a great propensity of being conflicted since sitting members were intimately connected to the proceedings now before Court. he urged that the Court as constituted would not be able to render a fair hearing to the parties and in the process parties to the litigation stood a chance of being prejudiced by a Court set up by the Constitution to prevent such an eventuality.

40. **[69]** Counsel submitted that the competing principles of natural justice and necessity to sit must always be counter balanced by the need to render justice impartially. Appreciating the exceptional circumstances that precipitated the current quandary, counsel urged that the Doctrine of Necessity was not applicable to this case.

41.

42.

43.

e) 3rd Amicus in Civil Application No. 11 of 2016 (The Law Society of Kenya).

44. **[70]** Mr. Anzala learned Counsel appeared for the Law Society of Kenya. He supported the preliminary objection and proceeded to state that the right to fair hearing included the impartiality of the tribunal and that the likelihood of bias was not just probable on a reasonable mind but also from the bar. he submitted that there was a meeting of the minds that there was a real likelihood of bias and that being the case, the Court could very easily be put in an awkward position should the bench proceed to handle this matter.

45.

f) Hon. Lady Justice Rawal, applicant in Civil Application No. 11 of 2016

46. **[71]** Learned Counsel Mr. Kilukumi, opposed the preliminary objection on behalf of Hon. Lady Justice Rawal. He contended that it was in the public interest that the highest Court in the land pronounces itself on the matters before it. He argued that the preliminary objection was meant to urge the Court to abrogate its constitutional mandate to sit. He emphatically submitted that the Court ought to distinguish

public interest from narrow private interest of those who wish to have a say on who succeeds the Chief justice upon his retirement.

47. **[72]** Mr. Kilukumi submitted that the Court exercises appellate jurisdiction as per Article 163(4) (a) and (b) of the Constitution and must not be confused with the right to fair trial or fair hearing. It was his contention that distinguishing fair hearing from fair trial was a futile distinction. He submitted that the applicant's case both at the High Court and the Court of Appeal was that the right to fair administrative action had been infringed and as such this Court must be given an opportunity to give a constitutional interpretation on the same. It was urged that there was an absolute necessity for the Court, however constituted, to sit on this matter because the Court of Appeal can never substitute the Supreme Court on matters of interpretation and application of the Constitution.

48. **[73]** Counsel cited Section 3 of the Supreme Court Act in support of the proposition that the Supreme Court is the final judicial authority in Kenya and must in the circumstance be afforded the opportunity to interpret and apply the Constitution. It was submitted that the applicant was entitled, just like all other Kenyans, to access to justice as provided under Article 48 of the Constitution.

49. **[74]** Mr. Kilukumi contended that no evidence has been placed before the Court to show that the Judges of this Court had taken a position in a judicial determination. Counsel submitted that the memorandum alluded to as originating from members of this bench was not a judicial finding. This is a position taken outside the court and it cannot be a ground for raising the question of impartiality. He gave an example of Hon. Justice Prof. Ojwang who publishes articles and books. He submitted that judges are always available to be persuaded and

that the fact that a judge had taken a position outside of Court was not evidence enough of impartiality.

50. **[75]** Learned Counsel submitted that the Doctrine of Necessity has its roots in the rule of law. Hence it is not a common law doctrine only. He argued that a judge who is partial is better than no judge at all. It was submitted that the doctrine of necessity was applicable to prevent a failure of justice or frustration of statutory provisions, it was reiterated that if the Court fails to hear and determine the substantive application, the same would be frustrated. He submitted that the necessity to hear the matters placed before the Supreme Court arises from the Constitution and that failure to apply the Doctrine of Necessity would have the effect of denying litigants the forum. He cited the ***Rai*** case of this Court and the Indian case of ***Tata Cellular vs Union of India,*** *1996 AIR 11,1994 SCC (6)651* where the doctrine of necessity was endorsed.

51. **[76]** Learned Counsel sought to distinguish the case of ***Hlophe*** *case* stating that the position obtaining in South Africa is that one must secure leave to appeal first and the application before the Court sought the leave to appeal which position is different since the applicants herein have right to appeal. It was also submitted that that in the ***Hlophe*** case the matters was not concluded as the parties were referred back to the JSC unlike the present matter where this Court is the ultimate forum.

52. **[77]** In reference to the judgement in the ***Salat*** case in which it is contended that some members of this Court expressed themselves on the question before the Court**,** counsel submitted that at paragraph 102 of the High Court judgment in ***Kalpana H. Rawal versus Judicial Service Commission and 4 Others*** *Petition 386 of 2015*, it was evident that the High Court found that the Supreme Court in ***Salat*** case never

determined the issue of the age of retirement age of judges and as such the **Salat case** cannot be taken to be evidence of bias.

53.

54.

g) 2nd Amicus, Kituo cha Sheria

55. **[78]** Kituo cha Sheria as amicus curiae in this matter from the High Court, was represented by learned Counsel Mr. John Khaminwa and Ms Jenniffer Shamalla. Mr. Khaminwa submitted that this Court was properly constituted even with the Chief Justice and Hon. Justice Wanjala sitting.

56. **[79]** He submitted that by the time someone is appointed a judge of the Supreme Court, he/she has spent colossal time associating herself/himself with the law, that, is, about 33 years reading. Hence a judge of this Court is not of a simple mind but a complex one. To buttress this, he submitted that while the High Court decision in this matter was rendered by judges appointed after the Constitution 2010, the Court of Appeal decision was made by a mixed bench of judges: those appointed pre and post-Constitution 2010. That these Court of Appeal judges were able to rise above their prejudices and make such a decision knowing very well that it will impact negatively on them, shows their ability to rise above biasness. He submitted that in the highest Court in the land, in which its members are conflicted, the doctrine of necessity allows them to sit and make a determination.

57. **[80]** Making reference to Hon. Justice Ibrahim when he first granted bail in a murder case upon the promulgation of the new Constitution, it was submitted that rights of individuals are paramount in the Constitution.

58. **[81]** Counsel argued that contrary to people's views, the Supreme Court cannot be abolished given the peculiar jurisdiction given only to it by the Constitution, namely: Article 58(5), to determine the validity of a declaration of a State of Emergency; Article 140, to determine presidential election petitions; Article 163(6) to render advisory opinions; and under Article 168(8), the Court has the last say on the decision of a tribunal for removal of a judge.

59. **[82]** Citing Article 1(3) of the Constitution, it was submitted that the sovereign power of the people had been delegated to this Court to exercise judicial authority and under Article 259, the role of interpreting the Constitution fell on this Court and it should so do in advancing the rule of law.

60. **[83]** It was submitted that a judge of the Supreme Court also has a right to go to the court of law if aggrieved and that this Court should not restrain itself from exercising jurisdiction just because some people have said.

61. **[84]** Counsel Ms Shamalla submitted that judges took an oath to defend the Constitution and they should so do. That access to justice also connotes right to a fair hearing. Counsel wondered if it is difficult for a judge of this Court to access this court, what of a Wanjiku!

62. **[85]** It is however imperative to note that Kituo cha Sheria subsequently applied to withdraw from these proceedings. The application was allowed by the Court and it formally withdrew from this proceedings. Hence it naturally follows that I will not make reference to its submissions in this case.

63.

h) Hon. Tunoi, applicant in Civil Application No 12 of 2016

64. **[86]** Learned Counsel Mr. Nowrojee faulted the preliminary Objection by stating that it has not met the principles well set in relation to Preliminary Objections in the case of ***Mukisa Biscuit Manufacturing Company versus West End Distributors Lld*** *[1969]E.A 696.* He submitted that the preliminary objection was not valid as what was contained in the preliminary objection are matters of a factual nature which have to be ascertained and that what had been contested was an exercise of judicial discretion contrary to the principles set in the ***Mukisa Biscuit*** case. He contended that indeed the objection was devoid of any point of law and was laden with facts, which could be considered and properly determined in another forum.

65. **[87]** Learned Counsel was categorical that contrary to Mr. Omtatah's submissions that the right to appeal is a civil right, the right to appeal a decision was actually a human right like all others.

66. **[88]** It was contended that the public interest claimed by Mr. Omtatah in the matter had been claimed without any basis at all. He submitted that a person exercising a right of appeal could not be barred from exercising that right whether the appeal is a first appeal or a second appeal. He argued that any attempt to deny the applicant access to this Court was an attempt to amend the Constitution. He was emphatic that the appellants had not exhausted their rights as vested under the Constitution and to deny the appellants the right would be an affront on the Constitution.

67. **[89]** Learned Counsel Mr. Kiragu, appearing together with Mr. Pheroze, submitted that a judge was like any other litigant and Kenya was not the first jurisdiction where judges had gone to Court to have their rights protected. Mr. Kiragu argued that substantial justice demands that the applicants are

heard and procedural technicalities must not be upheld. He pointed out that the preliminary objection ought to demonstrate how the Court as currently constituted would breach the rights to a fair hearing. He urged that there was no basis at all in trying to distinguish between a first appeal and a second appeal.

68. **[90]** Learned Counsel Mr. Kiragu while distinguishing the ***Hlophe*** *case,* argued that in that case, a majority of the judges were litigants while in the current scenario, only two of the judges of the Supreme Court are litigants. He took the view that every case must be decided on its own peculiar facts.

69. **[91]** Mr. Kiragu took the view that the Supreme Court of Kenya cannot be deemed to be synonymous with the seven judges and that to suppose that where a bench is conflicted, then the Court of Appeal judgement automatically stands would deny the Applicants access to justice.

VI. ANAYSIS AND DETERMINATION

[92] The issue for determination in this preliminary objection is whether indeed it is true that this Court has no jurisdiction to entertain the matter before us because all its judges have either supported or opposed the contention that judges appointed under the repealed Constitution should retire upon attaining the age of 70 years.

[93] Before delving into the determination of this matter, I would like to clarify an issue raised by learned Counsel Mr. Pheroze in opposing Mr. Omtatah's Preliminary Objection.The learned Senior Counsel submitted that as a matter of fact, Mr. Omtatah's Preliminary Objection was not a competent one. That it did not fall within the four corners of the law governing preliminary objections as stated in the ***Mukisa Biscuits*** case.

In particular, he contended that it did not raise a pure point of law. He argued that apart from submitting that the Court lacks jurisdiction, which issue he contended that Mr. Omtatah proceeded to concede and urged the Court to decline to exercise that jurisdiction, all the other grounds were matters of fact which do not qualify to be raised by way of a preliminary objection.

[94] I agree with Senior Counsel on the jurisprudence in ***Mukisa Biscuits*** which I have already referred to in this ruling. However, I would like to reiterate that the matter before us took a peculiar trajectory, a fact that was repeatedly stated by the Hon. Chief Justice in Court. More importantly, Mr. Omtatah's Notice of Motion application, *Civil Application No. 13 of 2016* was indeed collapsed into his Preliminary Objection and heard together. As a result, besides the points of law set out in the Preliminary Objection that Mr. Omtatah canvassed, there was also the *Civil Application No. 13 of 2016* which was supported by an affidavit. This was unusual combination but since the two raised the same issue in different ways, and since all counsel accepted to proceed on this basis, then Mr. Omtatah's Preliminary Objection together with the Notice of Motion application to disqualify allowed reference to evidence. I hasten to add that the Memorandum which Mr. Omtatah referred to is a matter in the public domain.

[95] Submissions were also made to the effect that we have two apex courts, being the Court of Appeal and the Supreme Court. The law is clear on this. While some matters will end up at the Court of Appeal and only specific appeals come to the Supreme Court, it in no way mean that we have two apex courts. The Supreme Court is the apex court as established by Article 163 of the Constitution.

[96] A lot of submissions were made as regards the distinction to be drawn between the right to a fair hearing and fair trial. All these aspects have to be understood within the settled principles of natural justice that no man should be a judge in his own cause.

[97] In determining this matter, there is also need for a distinction to be made between disqualification of a judge which boarders on the likelihood of bias and recusal where a judge at the instance of a party or on his own volition, may decide to withdraw from participating or delving into a matter because of conflict of interest or bias. Further disqualification is mostly triggered by the parties; hence one seeks an express order of disqualification by making a formal application. Since I did not at the first instance raise the issue of recusal on my own, I must now deal with matter, the Preliminary Objection by Omtatah and *Civil Application No. 13 of 2016,* on the basis that it is an application for disqualification at the instance of an application by one of the parties.

[98] In the case of ***Bernert v Absa Bank Ltd*** *[2010] ZACC 28* the Constitutional Court set down the applicable legal principles in a case that concerned the apprehension of bias thus:

“The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not

only be independent and impartial, but they must be seen to be independent and impartial."

[99] The Court held that the test for recusal which had been adopted by the Court was whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. Further, it was stated that judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice. That their oath of office requires them to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

[100] The applicants were emphatic that the doctrine of necessity has to be invoked so that even if we find that indeed, issues of perception of bias arise, we should be able to rise above them and sit. They invoked the ***Rai*** case where the Court declined an application for recusal of a judge invoking the Doctrine of Necessity. I would reiterate that the Doctrine of Necessity as I stated in ***Rai*** case is a valid doctrine and applicable to any legal system where the over-riding principle of the rule of law has to be championed. However, the ***Rai*** decision must be understood as having been decided on the basis of its own peculiar facts.

[101] In that case, indeed the issue was that the learned judge had recused himself in the Court of Appeal. No party gave the reason why he had recused himself and even the judge himself stated that he could not remember the reason. Further, the issue was raised against a single judge of the Court unlike here where the averments of Mr. Omtatah and those who support the Preliminary Objection allegedly touches on each and every judge of this Court. Of more significance is that Mr. Omtatah

has placed before this Court material in support of his application.

[102] In my case, I concede that I was a co-author of correspondence to the 1st respondent with regard to the retirement age. I will not wish to give any opinion or observations of the alleged grounds of conflict of interest imputed on my colleagues for they can speak for themselves respectively. Further, in the present case, two of the judge in the Supreme Court are parties in *Civil Application No. 11 of 2016* (Lady Justice Rawal) and *Civil application No. 12 of 2016* (Hon. Justice Tunoi). Further, the matter by these litigants has been placed before five of their colleagues in the Supreme Court.

[103] Hence, the ***Rai*** case is distinguishable from this matter before us and each case must be decided on its peculiar facts and even where legal doctrines and principles are cited, they too have to be evaluated and applied bearing in mind the peculiar facts of each case before the court.

[104] Mr. Omtatah sought our disqualification, but while such an application lies in law, there is also in the concept and practice of recusal *suo moto* whereby a judge on the basis of his conscience, may opt to recuse or withdraw from hearing a matter if he/she is of the view that his /her conduct in the past or his views on the subject at hand has put him in a position where his views or decision is clearly known and would be prejudicial to any party if he/she hears the matter.

[105] Even where a judge finds that even after holding a particular position, he is still able to rise above that position and is willing to be persuaded, in such a case, a judge may wish to possibly persuade the parties that he wishes to hear the matter and he will be open-minded and objective. Where parties after

being so informed agree, the judge may continue to sit. This happened in the case of ***National Bank of Kenya vs Anaj Ware Housing Corporation limited,*** *Petition No. 36 of 2014,* in which I had heard the matter as a High Court judge. When the matter finally reached the Supreme Court on appeal, I revealed to the parties that I had heard the matter in the High Court and invited the parties if they so wished that I opt out. However, I indicated that I was open to be convinced otherwise on merit since I had made my decision in the High Court by only applying the principles of *stare decisis*. Both parties before the Court submitted that they did not wish that I recuse myself, I heard the case and agreeing with my colleagues, we rendered a unanimous decision that reversed my holding in the High Court.

[106] To justify his allegations of bias, Mr. Omtatah in his supporting affidavit at paragraph 8 stated;

8. I aver that there is practically no way the Supreme Court can entertain the proceedings herein, or any other on the subject matter, given that all the seven judges of the Court are disqualified from entertaining the case because they have in one way or other publicly taken a position on the question of whether judges appointed under the repealed Constitution should retire at age 70 or 74 years.

[107] Mr Omtatah proceeded to cite four instances involving one or more of the judges and how they took a position on the issue thus:

Further and in particular:

a. *Chief Justice Dr. Willy and Hon. Justice Smokin Wanjala, being members of the 1st respondent which had decreed that the judges must retire upon attaining the age of 70 years, cannot preside in their own cause.*

b. *Hon. Lady Justice Kalpana Rawal and hon. justice Philip Tunoi are litigants who have challenged the decision to retire them at the age of 70 years, hence, they cannot preside in their own cause.*
c. *Hon. Justice Mohammed Ibrahim, Hon. Justice Ojwang, and Hon. Justice Njoki Ndungu were part of the bench which, in Supreme Court Petition No. 23 of 2014, expressed itself in support of Hon. Justice Philip Tunoi's and Hon. Lady Justice Kalpana Rawal's position that the retirement age of judges appointed under the old Constituion was 74 and not 70 years.*
d. *The Judicial Service Commission has made a finding of misconduct in the subject matter against Hon. Lady Justice Kalpana Rawal, Hon. Justice Philip Tunoi, Hon. Justice Mohammed Ibrahim, Hon. Justice Jackton Ojwang, and Hon. Justice Njoki Ndungu, and admonished them.*

[108] However, before the proceedings started, I pointed out to Mr. Omtatah that I was not a member of the bench in the ***Salat*** case. As a result, he applied to the Court for that part of paragraph 8 to be expunged from his Supporting Affidavit, which application was acceded to. It is also my view that the matter pertaining to a letter written by Hon. Justice Ojwang, Lady Justice Njoki and myself, leading to a complaint by Mr. Apollo Mboya to the JSC 'strictly' did not deal with the question of retirement age. I will hesitate to say more on this as there are still pending live proceedings relating to the decision of JSC on the finding of misconduct that lead to admonishment of the said judges on the basis of that letter. Having said this, I agree with paragraph 8 of Mr. Omtatah's Supporting Affidavit that previously and in particular,even before Hon. Lady Justice Rawal and Hon. Justice Tunoi filed their matters in the High

Court, I had given an opinion on the question whether judges appointed before the Constitution 2010 should retire at the age of 70 or 74.

[109] Mr. Omtatah in his oral submissions referred to a memorandum written by four judges of the Supreme Court: The Deputy Chief Justice, Lady Justice Kalpana Rawal, Hon. Justice Tunoi, Hon. Justice Ojwang and myself to the Judicial service Commission in which we raised the question of the retirement age. I have perused the Court record in *Civil Application No. 13 of 2016* and the Affidavit in Support of the application but I did not see the Memorandum although it was referred to by Mr, Omtatah.

[110] The existence of the said memorandum is a matter known to all the parties in this matter before the Court and to the members of the Supreme Court. It is a fact that indeed the memorandum was written by four of the Supreme Court Judges, two of whom are the applicants now before this Court. The said memorandum was addressed to the Hon. Chief Justice and President of the Supreme Court. The memorandum was referenced: ***THE CONSTITUTIONAL RIGHTS OF THE KENYA JUDICIARY'S EMPLOYEE-JUDGES UPON ASSIGNMENT TO DIFFERENT SUPERIOR COURTS OR STATIONS***. In the said memorandum which I strongly believe it is my duty to disclose we stated *interalia*:

1. *This Memorandum reflects the considered opinion of four affected Justices of the Supreme Court, who are seeking urgent action to safeguard their Constitutional rights, and rectify the effects of actions taken in relation to them over the last two-and-a-half years.*
2. *This Memorandum should be considered and acted upon by the Judicial Service Commission, and should be*

the basis of appropriate advice to all relevant organs of the State, by the honourable The Attorney-General.

...

22. From the individual-rights perspective, the judges who were beneficiaries of the promise (and guarantee) of retirement-at-74, will, if retired at 70, be prejudiced in their pension-entitlement...

[111] After what we considered a thorough evaluation of the law and drawing from comparative practice and caselaw, the memorandum then concluded with the following recommendation:

40. We conclude our argument and recommendation by calling for urgent action as follows:

(i) The Honourable The Attorney General do advise all relevant State organs, that we are not new Judges under the Kenya judiciary, and that we are entitled to all our rights and benefits related to our longevity of service as Judges.

(ii) All lawful decisions regarding our rights and benefits as from the time we were elevated to the Supreme Court Bench, to-date be duly taken; and that in this regard, all our dues "forfeited" so far be re-evaluated and duly restored.

(iii) The Judiciary do formally acknowledge and express on record, to which we be accorded access, our retirement age of seventy-four (74) years, as applied when we were employed by the Kenya judiciary, and this be honoured and safeguarded.

(iv) The judiciary do establish and maintain permanent records of our pensionable judicial service, reckoning from the exact dates when each one of us commenced service as a Judge under the employ of the Kenya Judiciary, by virtue of a valid Constitution.

(v)As we sense that our current remuneration-benefits are not properly aligned, as the Judiciary and the Salaries Review Commission have not in the past addressed the fundamental Constitutional and legal issues set out in this memorandum, we ask them to re-work all such benefits, to ensure that henceforth, we receive all that is due to us, with all accrued arrears.

(vi) These matters be conscientiously and objectively deliberated upon, and a formal record of actions taken as we have asked, be brought to our attention.

(vii) it is our humble and earnest request that all due actions taken on our requests based on this memorandum, shall be formally communicated to us in written form, duly signed, by the relevant authorities."

[112] At the time of the opinion in the memorandum to the JSC, who in law is my employer as a judge, I believed that honestly I could share my views because it was an impending issue that had been touched on before among judges. As that memorandum is the subject of the application and submissions for my disqualification, I reckon that this goes to my conscience. I must state on record what those were my legal views on that issue at that time.

[113] Notably, enough, at that time, there was no litigation between the parties and I did not consider at that time that it

was even possible for any of us the judges to refer the matter to court. I verily believed that the matter will be mutually settled and even at one stage, when the matter became contentious, I was among the judges who proposed that the matter be referred to arbitration. With hindsight, I am now of the view that that memorandum ought not to have been written or that opinion given. At that time, I strongly believed that litigation was remote, if not impossible.

[114] What are my views on that issue at present? That is the dilemma that as a judge of the Supreme Court sitting in this matter I now face. Given the prevailing jurisprudence that I have given above, it cannot not be gainsaid that in the eye of a reasonable man I Justice Mohammed Ibrahim may hold a different opinion on the matter now, or can even be persuaded otherwise. That is the public perception and it matters not that I may be open-minded to exercise my mind.

[115] I would invoke the Constitution which starts by acknowledging the people of Kenya in its preamble: *We the people of Kenya*. Notwithstanding any submissions to the contrary, our Constitution has placed public interest at a higher pedestal that personal interest or what I may term as the discretion power of a judge to consider whether or not he will be open minded. By Article 1(1) of the Constitution: *All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution*. As a judge of the Supreme Court within the Judiciary, I exercise only delegated power as provided by Article 1(3) of the Constitution.

[116] I have also reflected on the National Values in Article 10(2) of the Constitution and read them alongside the guiding principles in exercise of judicial authority as provided in Article 159(2) of the Constitution, particularly Article 159(2)(e) thus: *the purpose and principles of this Constitution shall be*

protected and promoted. All this, and a holistic reading of our Constitution leads to one conclusion: *that public participation, public interest and the people has to come first* where a judge, more so a Supreme Court Justice, sits to hear and determine a matter.

[117] The objectives of the Supreme Court as provided for under section 3 of the Supreme Court Act are also very important and need emphasizing. The objects of the Court are *interalia* to:

> **(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;**
> **(b) provide authoritative and impartial interpretation of the Constitution**
>
> **(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;**
> **(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;**
> **(e) improve access to justice; and**
> **(f) provide for the administration of the Supreme Court and related matters.**

[118] From this, it is discernable that the Supreme Court in exercise of its jurisdiction, will and must always have a focus on the public interest. Its decisions bind all other courts as provided by article 163(7) of the Constitution. Evidently then, in the Supreme Court, it cannot be gainsaid that public interest comes first.

[119] This position is further fortified by the appellate jurisdiction of this Court as provided for in Article 163(4) of the Constitution. Not all matters come on appeal before the Supreme Court from the Court of Appeal. Appeals only lie as of right, if the subject matter touches on interpretation and application of the Constitution. The application and interpretation of Constitution is a matter of interest to the public and all the people of Kenya and not just the parties before the Court. Secondly, one has to get certification that his/her intended appeal to the Supreme Court involves issues of general public importance. Suffices it to say that one can only pursue 'personal reliefs/interests' before the Supreme Court if that cause of action has a public interest bearing/alignment. Consequently, I am convinced that in considering whether to sit, hear and determine this matter, I should put public interest first before my interests or those of the individual parties.

[120] From the foregoing factual disclosure and parties' submissions, I must concede that I am seriously conflicted and cannot be able to hear the preliminary objections or interlocutory applications pending or any appeals in future on this matter. This is very unfortunate and it is with a sad heart that I have to disqualify myself given that I am aware of the bigger issue of quorum and its deficit. This is a quorate Court and at the moment, the Court is facing the most serious challenges it has ever faced before.

[121] In an opinion I gave to the Chief Justice, which is my duty to disclose, and also shared with other judges of the Court, I opined that the number of judges of the Supreme Court is insufficient because it could lead to a crisis due to quorum deficits where a judge may be unwell or a vacancy has arisen. We cannot also rule out the possibility of other scenarios

happening leading to the absence of a judge(s). In the said opinion of 30th May, 2012, I stated:

"... It is, therefore, of great significance and realization that a Bench of seven (7) Supreme Court Judges is not appropriate and may in fact be a great danger in the future and could lead to a Constitutional crisis if the Court lacks quorum.

I think, that at the first opportunity the Hon. Chief Justice and the Judicial Service Commission consider approaching the Attorney General to consider amendment of the Constitution to increase the number of Supreme Court judges to a minimum of 9 or 11 Judges"

[122] If I was rise above any past opinions and positions I held without fear or favour, I believe that I may possibly reach a different finding from what I held previously if so persuaded. However this is a risk I am not willing to take because, first, the interested party has already raised the issue of bias expressly and sought my disqualification. Secondly, the question of perception as relates more so to the parties and the public is extremely important. Even if I am persuaded to change my position, it is still not possible for the interested party, parties and more important, a reasonable man, to believe that I was not biased in my judgement in this matter. The judgement will still not be acceptable. And supposing, having expressed as holding such views previously, I reach the same verdict, again it will still not be possible for a reasonable man not to believe that I was not influenced by my previous standing but persuaded by the parties and the law to maintain the same position.

[123] Mr. Omtatah submitted that when the judges of the Constitutional Court of South Africa found that they were

conflicted and that as a result it was not able for the Court to constitute a bench, they refused to grant leave to appeal. He urged that we should be persuaded to therefore, where we find that we are conflicted and cannot constitute a bench to hear this matter, let the Court of Appeal decision stand. The applicants invoked the Doctrine of Necessity and sought to distinguish the ***Hlophe*** *case.* Mr. Kilukumi argued that in the ***Hlophe*** case, the matter was being taken back to the Judicial Service Commission, hence not closed unlike in the case before us where this is the final stage.

[124] After considering the ***Hlophe*** case, I am persuaded by its holding. It is my conviction also that the facts are not far apart. In the ***Hlophe*** case, members of the Constitutional Court challenged a decision of the Judicial Service Commission. Equally, looking at the matter before us and referring to our first memorandum some members of the bench wrote to the JSC, two of the members in the memorandum are now applicants before this Court. That memorandum has been cited in asking for our disqualification and indeed it has clearly demonstrated that conflict.

[125] Recusal is indeed a judicial duty and it does not amount to a judge abrogating his/her duty. A part from personally recusing to safeguard one's integrity and the sanctity of proceedings, recusal also helps protect the integrity and dignity of the bigger institution, that is, the judiciary and aids in championing its independence. While it may be argued that recusal in this matter or disqualification may compromise the parties' right to appeal, the integrity of the institution of the judiciary is a matter not to be eroded or treated cursorily or of secondary importance.

[126] As a judge of the Supreme Court, I have considered and I firmly believe that I should be guided by my oath of office. My

fidelity to the law of the land is first to the Constitution which enshrines the sovereignty of the people. It is my solemn belief that the right thing for me to do therefore, which I hereby do is to invoke my oath of office thus:

"I <u>Mohammed K. Ibrahim</u>, a judge of the Supreme Court, do swear in the name of the Almighty God to diligently serve the people and the Republic of Kenya and to impartially do justice in accordance with this Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to me, I will at all times, and to the best of my knowledge and ability, protect, administer and defend this Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it. So help me God."

[127] As a result, and with a heavy heart, I hold that not only am I disqualified by conflict of interest in this matter, but I am also under a duty to recuse myself from sitting in any proceedings in this matter. And I hereby do so. It is therefore my view that all applications and preliminary objections or any other matter which comes before this Court arising from the Intended Appeal or the Intended Appeal itself, be heard by a bench excluding myself. As a consequence therefore it naturally follows that I do not have to delve into the other preliminary objections before the Court or any other matter in these proceedings.

[128] Since there is no constitutional quorum of judges of this Court to sit and hear any matter in these proceedings at this point in time, the result is that the Interim Orders granted on *27th May, 2016* can no longer stand until there is a bench with the required quorum, and none of the judges are disqualified on grounds of conflict of interest and are able to hear the appeals.

[129] I hereby order that a certified copy of this ruling be placed in *Civil Application No. 13 of 2016* to constitute as part of the said record. I would propose that costs of this preliminary objection as heard together with *Civil Application No. 13 of 2016* to be costs in the cause.

Dated and Delivered this 14th Day of June 2016 at Nairobi.

……

MOHAMMED IBRAHIM

JUSTICE OF THE SUPREME COURT

I certify that this is a true
Copy of the original

REGISTRAR
SUPREME COURT OF KENYA

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

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

A. THE PRELIMINARY OBJECTION, AND THE SUBMISSIONS

[1] The applicants raised a preliminary objection, contesting the legal basis of the Orders made in this matter by the Chief Justice on 30th May, 2016. The said Orders, learned Senior Counsel, Mr. Nowrojee submitted, purported to vary pre-existing Orders of 27th May, 2016 but were made without jurisdiction.

[2] Learned counsel highlighted the Chief Justice's words, *"Granted the urgency under which Orders are sought, I invoke my administrative power*s," urging that the making of the later Orders had seriously "*compromised the reputation of the Supreme Court, and the future of the Judiciary.*"

[3] Mr. Nowrojee submitted that administrative powers cannot validate an interference with *judicial Orders*. He submitted that the Judiciary, as constituted under Article 160(1) of the Constitution, is only subject to the Constitution, and not to courses of action taken in exercise of administrative powers.

[4] In learned counsel's words:

> *"When a Chief Justice acts in an administrative capacity, he is not acting in a judicial capacity. He invokes administrative powers and becomes someone other than the Court."*

[5] Counsel submitted that a person issuing administrative directions is not seized of the matter in question, which has already been the subject of pertinent Orders by another Judge.

[6] Learned counsel referred to a relevant decision of the High Court, ***Justice Philip K. Tunoi & Another v. The Judicial Service Commission & Another,*** Petition No. 244 of 2014, in which it was thus held (para.70):

> *"…it is explicit, and we so determine, that substantive directions are to be issued by the court actually seized of the matter, and not any other 'person' or 'authority'. Directions when issued, form part of the judicial exercise or the road map in the overall conduct of a matter. In our view,* ***the situation is fraught with danger where the Chief Justice issues directions as to the hearing date or the date when the Court ought to render Judgement, because this ceases to be an administrative function and can be construed as bordering on interfering in the judicial conduct, or road map, of a matter****. In any case, the Court seized of the matter is obliged in law to dispose of all matters in an expeditious manner"* [emphasis supplied].

[7] Learned counsel submitted that any directions regarding the conduct of a case already laid before the Bench, ought to issue forth from the Judge or Judges seized of the matter. He urged that on that principle, the Orders made in the instant matter by *Njoki, SCJ* on 27th May, 2016, formed an integral part of the *judicial* exercise, in the overall conduct of the matter – and was not amenable to administrative variation. On that principle, it was not tenable in law, that the Chief Justice may subject the case to administrative powers, be it in relation to hearing dates, or Judgment dates. The process of hearing cases is a judicial function – especially where a certain Judge has, or certain Judges have already taken action.

[8] Learned counsel further submitted that the foregoing High Court decision had been taken between the same parties who have now come before the Supreme Court; and so, over and above the binding rule that judicial Orders are not for administrative variation, as between the parties herein, that position is binding, on the basis of the doctrine of *res judicata;* none of the parties had appealed against the High Court's prescription of the rule of law in question. Moreover, none of the parties has moved this Supreme Court seeking a departure from that rule of law as defined by the Judges of the High Court. It can no longer be reopened: for there must be an end to litigation.

[9] That the High Court prescribed the rule in a case between these very parties; that the rule related to the Chief Justice's administrative acts; and that the Chief Justice in the instant case, has overlooked that same rule of law – counsel urged – now raised the further question as to whether the litigant has been accorded the protection of the Court as required under the law.

[10] Learned counsel submitted that the Judicial Service Commission, a public agency under the Constitution, has a duty of fairness towards persons falling within its mandate, and consequently, it has a duty of fairness towards the Judges involved in this matter. In this instance, failure of due performance of that remit has become evident, making this case one of the most important constitutional matters coming up before the Supreme Court. The matter has come up when, yet-untested issues of transition from the former to the current Constitution are live: and a fair and judicious resolution of these will have impacts upon citizen-rights in future times.

[11] A just and fair disposition is now called for in the functioning of the Judicial Service Commission, Mr. Nowrojee

urged, as a group of some 40 senior Judges are transiting between the former and the current Constitution.

[12] Learned counsel submitted that this Court should bear in mind the special questions of constitutional transition; the rights of those to whom the Judicial Service Commission has to render service; and the disturbing historical past, when raw power claimed by personalities in the judicial service, would validate the "calling up of files", to the intent that duly-made Orders be varied, to serve private interests. Learned counsel cautioned, as a matter of prudence in the discharge of Court work, that signals such as, "the Chief Justice has left directions", or "has left instructions", to be acted upon by officials, when the referent is a judicial matter, are for avoiding – especially since they open up the scope for judicial review Orders such as *certiorari, mandamus, prohibition*, which would predictably, occasion contretemps in the conduct of the operations of the Judiciary. He cited a past case, ***Muriithi v. Attorney-General*** [1986] KLR 767, which superbly exemplifies the grave impropriety of a Chief Justice departing from the orderly and collegial conduct of affairs, to bluffing administrative techniques that compromise order and civility in the discharge of Court work. Learned counsel submitted that such a roughshod scheme of judicial administration, under the Constitution of Kenya, 2010 has fallen into redundancy; it is "a retrogressive mechanism never to be brought back in this transformed judiciary."

[13] Learned counsel asked the Court to annul the file-demand notice attributed to the office of the Chief Justice, as it "*will create a pernicious precedent for the next Chief Justice.*"

[14] Learned counsel submitted that the Chief Justice's administrative action, insofar as it purported to vary properly-taken judicial orders, was unconstitutional, and contrary to the

relevant statute law; more particularly so, as the notion such act purveyed, was that of absolute discretionary powers, which are alien to the Constitution of Kenya, 2010.

[15] Counsel submitted that it was untenable for the Chief Justice's said exercise of power to be justified on the basis of subsidiary legislation. For all such legislation must not be so imprecise as to create unregulated openings, by virtue of which unconstitutional exercises of power might be exercised. The Chief Justice had cited no valid source of the power he purported to exercise; and so such exercise of power was a nullity.

[16] Mr. Nowrojee made the prayers that:

> *(i) the preliminary objection be upheld;*
>
> *(ii) the Judicial Service Commission's Notice of Motion in Application No. 12 of 2016 be dismissed;*
>
> *(iii) the Court do set the boundaries of administrative powers, as distinct from judicial powers.*

[17] In response, learned Senior Counsel, Mr. Muite adopted the Judicial Service Commission submissions made by learned Senior Counsel, Mr. Ahmednasir and learned counsel, Mr. Kanjama, in a related application, Civil Application No. 11 of 2016. He considered that the notice of preliminary objection had extended beyond objection, becoming an answer to the application by the Judicial Service Commission: insofar as the objector was contending that the learned Chief Justice lacked the jurisdiction to make the Orders of 30th May, 2016 by which he purported to vary judicial Orders already in place. Mr. Muite contended that it was improper to raise the point as a preliminary objection, and that this was a matter for submissions within the framework of an application.

[18] Mr. Muite submitted that a distinction was to be drawn between a Judge's decisional independence, on the one hand, and the issuance of administrative directions, on the other hand: and he maintained that the Chief Justice had left intact the decision taken by the single Judge in a judicial capacity. He contended, however, that by virtue of Article 161(2)(a) of the Constitution which made the Chief Justice "head of the Judiciary", he was the custodian of powers of general control, and quite rightly exercised the same in varying the single Judge's Orders of 27th May, 2016. He contended that no person in the Judiciary can have precedence over the Chief Justice as regards the setting of hearing date; in his words: "*The Chief Justice had the mandate and the jurisdiction; if he was to constitute the Bench, he would have authority to give the date; so he can also give dates for other matters….He could not close his eyes to the fact that on 16th June, 206 he would not be in office.*"

[19] Such a position was adopted by learned counsel, Mr. Issa for the Judicial Service Commission, who contended that whereas the single Judge had a clear mandate to certify a matter as urgent, the law was silent on the setting of hearing arrangements – and so the Chief Justice could very well vary the prior Orders and prescribe a new hearing date.

[20] Learned counsel, Mr. Kiragu submitted that, by Section 24(1) of the Supreme Court Act, any Judge of the Supreme Court may make interlocutory Orders, and issue attendant directions. He then posed the question as to whether anyone, outside the framework of Section 24(2) of the said Act, may interfere with such an Order. Making interlocutory Orders, and assigning hearing date therefor: can these be separated?

[21] Mr. Kiragu's answer was that the correct position is that, one is not concerned with the particular office-holder who assigns that date; the matter is about observance of the rule of law. Can the Chief Justice's administrative powers be used to review the judicial Orders of a Judge? Counsel submitted that there is a proper procedure for moving a Judge who has issued Orders, to vary the same.

[22] Learned Senior Counsel, Mr. Nowrojee in his reply, submitted that the single-Judge Orders had been made in judicial proceedings, whereas those of the Chief Justice had been made in the course of administration. He submitted that if the Chief Justice's Orders were contrary to the Constitution, it meant that there was no basis for a sitting of the Court to consider matter that was covered by his Orders.

[23] Learned counsel submitted that even though it was right for the Chief Justice, in a proper case, to set hearing dates, once a Judge has been seized of the matter, the Chief Justice had no further role. He urged that the Chief Justice cannot reverse a hearing date specifically assigned by a Judge in judicial proceedings; for otherwise, there would be a wide scope for abuse of power. Thus, the Chief Justice's Orders of 30th May, 2016 fell outside the granted powers – as a Judge had already taken the appropriate action. In the circumstances, the fixing of hearing date was contrary to law, and the Court should down tools, as regards the date assigned by the Chief Justice.

B. OVERVIEW: EXTRACTING THE FUNDAMENTAL PRICNPLE

[24] It is a fact that closely-related, highly significant events came to pass in Kenya's Law Courts on *27th May, 2016*. Firstly, a case of the greatest interest to the Judicial Branch, to Judges and judicial staff, to the totality of the national governance structures, and to the Kenyan people in general, was decided

upon by the Court of Appeal. That Court took a unanimous stand in favour of the Judicial Service Commission, and against the two Supreme Court Judges whose retirement-age contest had come up for determination – with far-reaching implications touching on a good number of other Judges in service. The fact that it was this vital organ, the Judiciary, that was at the centre of the Appellate Court's Orders, was significant furthermore, insofar as those Orders intimately affected those *relationships that are the subject of declared constitutional values and principles, as well as specific constitutional rights*. Quite clearly, *the complex set of constitutional-interpretation and application issues involved, directly called for the most serious, and most enlightened interpretations.* Naturally, the affected Justices of the Supreme Court promptly invoked the ultimate appellate jurisdiction of that Court.

[25] Notwithstanding the logistical obstacles beleaguering their efforts, such as the non-availability of essential process-documents of the Appellate Court, the applicants lawfully moved the Supreme Court, at the preliminary stage of applications, and *secured requisite conservatory Orders.*

[26] *While it is to be assumed from the foregoing account, that the Kenyan public now awaits the most effective, and juridically resourceful resolution of the emerging questions by this apex Court, the Judicial Service Commission contests any prospect of the adjudicatory process moving one more step.*

[27] This is the context in which the applicants have come by the instant preliminary objection, seeking to annul the Chief Justice's administrative Orders of 30th May, 2016 which sought to vary the specifics of the single-Judge Orders of 27th May, 2016 which had duly fixed a convenient date for the *inter partes*

hearing of the interlocutory applications, ahead of the main appeal cause.

[28] *It is for certain, that the Supreme Court, as the ultimate seat of justice, ought to entertain this matter, not only for the purpose of upholding the rights of the litigants, but also for that of giving fulfilment to a rights-responsive, a progressive, and a democratic Constitution of Kenya, 2010.*

[29] *Guided by the foregoing principles, and taking the stand that the meritorious Constitution thus perceived, has no space for authoritarian inclinations – least of all in relation to the functioning of the judicial process – I have to uphold the substance of the applicants' preliminary objection*.

C. ORDERS

[30] From my assessment of the merits of the submissions of learned counsel in this matter; and arising from my insights set out in the last six paragraphs of this Ruling, I have to make the following Orders:

(a) The substance of the applicants' objection is upheld; and consequently, the Chief Justice's administrative Orders and directions of 30th May, 2016 are declared null.

(b) The Judicial Service Commission's application by Notice of Motion in Civil Application No. 12 of 2016, dated 30th May, 2016 is, consequently, dismissed.

(c) Costs shall abide the *inter partes* ***hearing and determination of the pending applications and/or causes.***

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

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

G. INTRODUCTION

[1] In the background to a multi-faceted set of claims, lies a cause emanating from both applicants, who are Justices of Kenya's apex Court. It is emerging distinctly at this preliminary stage, marked by threshold applications and objections, that *an ultimate interpretation of the Constitution of Kenya, 2010 is being sought:* regarding the lawful period of service of those Superior Court Judges who were already duly appointed and were in service under the earlier Constitution [the Constitution of Kenya 1969], and who then continued in service under the Constitution of Kenya, 2010. It is clear that the applicants have taken the position that the new Constitution had safeguarded their service and benefit rights derived from the earlier Constitution. And it is definitely the case, that both the High Court and the Court of Appeal have held in perfect unanimity, that the applicants have *no such rights*. Now apprehending forfeiture of rights, of safeguards, and of benefits, the nature and scope of which are the subject of *constitutional delineation,* the applicants are invoking *the final judicial competence, held by this Supreme Court.*

[2] However, the respondents have left nothing to chance, controverting and challenging the applicants' path towards the ultimate resolution of the *fundamental issues of constitutional*

interpretation and application, before this Supreme Court. This explains the appearance of a plethora of participants in this matter, each coming to advance some preferred standpoint in policy, law or principle.

[3] The stage is set for a resolution through a mandate which, by the terms of the Constitution of Kenya, 2010 devolves to the plane of adjudication by the Judiciary. I have had occasion to articulate this principle in my work, ***Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order*** (Nairobi: Strathmore University Press, 2013) (p.41), in the following terms:

> *"While the Constitution requires all State organs to perform their part in giving fulfilment to the Constitution, the ultimate arbiter is the Judiciary, which has unlimited powers of interpretation. Interpretation of the Constitution and of any law,* ***is far-removed from a condition of violence, tumult, or hurt to anyone, as the Judiciary's operations are minutely governed by known law and procedure; and this justifies the standing of the judicial function as the essential underpinning of the new constitutional dispensation"*** [emphasis supplied].

[4] Is this Supreme Court, in all the circumstances of the matter herein, the proper repository of the ultimate judicial competence to resolve the controversy which has arisen between two private citizens (the applicants), on the one hand, and the public, State agency, which is the Judicial Organization?

[5] As this matter centres upon the Judiciary itself, which I had typified (*op.cit.*, p.44) as "the core agency in the maintenance of constitutionalism…, armed with independence, as the foundation of its exercise of….competence…, part of the

armoury of constitutionalism", the *matter now before this Supreme Court stands out as one of utmost gravity, with a fateful place in the evolution of a civilized constitutional order.*

B. MOVING HE SUPREME COURT: PRELIMINARIES

[6] Following the delivery of the Court of Appeal's Judgment of 27th May, 2016 the applicants, in accordance with Rule 26 of the Supreme Court Rules, 2012, came before *Lady Justice Njoki* who, on that occasion, issued conservatory Orders pending the filing of appeals for an ultimate determination by this Court. But three days later, the Hon. The Chief Justice, allegedly by virtue of administrative competence, and moving *suo motu*, publicized a variation to the Order of the single Supreme Court Judge, which related to *inter partes* hearing of the earlier application for conservatory Orders – bringing forward that date to 2nd June, 2016. This forms the background to the various preliminary applications and objections that are the subject of the Ruling herein.

[7] Specifically, an applicant filed an objection to the Chief Justice's Orders aforesaid; an interested party filed a preliminary objection to those very Orders; a respondent filed an application seeking the setting aside of the single Judge's Orders of 27th May, 2016; an *amicus curiae* filed grounds of opposition to the first applicant's preliminary objection.

[8] Over a period of several days, the Supreme Court heard the various claims, even though some are still outstanding. With the preliminary claims thus running in parallel, and with a potential strife in the mode of disposal becoming real, the Court, upon hearing counsel on this issue, gave guidance by its Order of 10th June, 2016: the two preliminary objections in Application No. 11 of 2016, and the one in Application No. 12 of 2016, to be determined in today's Ruling – *this to settle the*

question whether and how the Supreme Court would entertain the real causes brought forth by the primary litigants: the Hon. Lady Justice Kalpana H. Rawal; the Hon. Justice Philip K. Tunoi; the Judicial Service Commission.

H. RESOLVING THE PRELIMINARY QUESTIONS

(i) Civil Application No. 11 of 2016: Preliminary Objection to Chief Justice's Order of 30th May, 2016

[9] The applicant field a notice of preliminary objection to the expedited hearing scheduled by the Chief Justice in his Orders of 30th May, 2016.

[10] Canvassing the said objection, learned counsel, Mr. Kilukumi submitted that the Chief Justice's Order was null, insofar as the administrative authority which it invoked, could not permit the variation of the proper judicial Order already made by the single Judge, granting stay of the Orders of the Appellate Court, and setting a date for *inter partes* hearing. Counsel submitted that a party who was dissatisfied with the single-Judge decision under Section 24(1) of the Supreme Court Act, had just one opening: securing a hearing of the matter by a five-Judge Bench under s.24(2) of the said Act; and the Chief Justice as a single Judge, acting *suo motu,* had no capacity in law to effect a variation of the Orders in force. Learned counsel submitted that the administrative powers of the Chief Justice, while enabling him to take certain actions in general case management, conferred upon him no authority to intervene in the exercise of judicial discretion by Judges.

[11] Learned counsel relied on comparative case law, to buttress the argument that the constitutional concept of the independence of the Judiciary secured the independence of the

Judge in the determination of a case, from those entrusted with administrative responsibilities, as well as from the influence of other Judges – and that this independence was secured by the individual Judge's oath of office.

[12] Counsel urged it to be not tenable, that there had been a special consideration of urgency such as would, in law, justify the variation of hearing date by virtue of the Chief Justice's administrative powers: for the parties themselves had not moved the Court seeking change of date, nor did a case come before a competent Bench, for a reconsideration of the earlier Orders.

[13] Among other cases, counsel relied on a decision from the United States of America, ***Calloway v. Ford Motor Company*** 189 S.E. 2d. 1972; 281 N.C. 496, in which, on the foregoing question, the Supreme Court of North Carolina thus held:

> ***"The question presented by this appeal is whether Judge Ervin, in his discretion, had authority to permit an amendment which Judge Hasty, in his discretion, had denied earlier.***
>
> ***"The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court Judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action."***

[14] The parity rule in the standing of decisions emanating from the different Judges serving on Superior Court Benches, learned counsel urged, is a meritorious one of principle, which

assures that Judges honestly and dutifully perform their constitutional mandate of dispute resolution, without cowering to forces inclined to abuse their power, or to ingratiate their private predilections. He called in aid, for this principle, the Canadian case, ***Her Majesty The Queen v. Marc Beauregard*** [1986] 2 S.C.R. 56, in which the subject was thus elucidated:

> ***"Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.'***

[15] Learned counsel, founding his argument on a line of judicial decisions, as well as the reflections of experts on modern judicialism, urged that this Court should countermand the administrative action of the learned Chief Justice, in the form of the Orders of 30th May, 2016 – with the effect that *inter partes* hearing of the conservatory-Orders question be reinstated to the date originally set, namely, 24th June , 2016. In that regard, learned counsel urged that this Court's view should be kept clear of unrelated, momentary situations, such as the impending retirement of the current Chief Justice.

(ii) The Preliminary Objection: Responses of Counsel

[16] Mr. Kilukumi's submissions found concurrence in those of learned counsel, Dr. Khaminwa, who recounted a long history in Kenya's judicial experience prior to the promulgation of the

current Constitution – with Chief Justices arbitrarily recalling files already laid before Superior Court Judges, and issuing contrary directions. Dr. Khaminwa recalled certain recorded instances of such a kind, submitting that the affected Judges had been the subject of intimidation and blackmail, and that this undermined their independence, and impaired the cause of the rule of law, and of the principles of constitutionalism.

[17] In Dr. Khaminwa's perception, the incident which is the subject of this preliminary objection appeared to be emanating from certain active extra-judicial forces, endeavouring to pre-empt the progressive judicial-governance set-up of the new constitutional order, for private ends. Such a prospect, learned counsel submitted, would be grossly inimical to the rule of law, and to the recent achievements in constitutional governance.

[18] Learned counsel Mr. Anzala, for the Law Society of Kenya, was in support of the single-Judge Orders, urging that it takes a five-Judge Bench of the Supreme Court to reconsider the said Orders on merit. Counsel, however, shifted from the point of law and principle, urging that "clearly, the matter is extremely urgent," in light of the impending retirement of the learned Chief Justice. All the same, counsel urged that if the said Orders were to be varied, in relation to hearing-date for the conservatory Orders, then a decision to that effect is to emanate from a five-Judge Bench. Hence, learned counsel submitted, "the Chief Justice had no jurisdiction to interfere with the [single Judge's] directions and Orders"; "it may well be that it was expedient, but it was contrary to law"; "it was usurpation of the powers that vest in a five-Judge Bench"; "whatever the case, the manner of variation of these Orders was invalid"; "by Article 161, the Judiciary is subject only to the Constitution and the law"; "there is a clear dichotomy between judicial and

administrative powers"; "the Constitution donates no powers to the Chief Justice to take over the judicial powers of a Judge."

[19] Both the respondents, through their learned counsel, Mr. Ahmednasir and Mr. Kanjama, contested the preliminary objection. Senior Counsel, Mr. Ahmednasir was concerned to demonstrate that the applicant's initiative did not even amount to a "preliminary objection" in a proper sense: for it only raises a procedural question which falls short of a "pure point of law." He went on, however, to urge that the Chief Justice had broad powers beyond that of a mere figurehead and that, given his position under Article 161, he is empowered to "give directions to the Judiciary, and to all Judges." He said the Chief Justice could very well make the Orders in question, because, by the Judicial Service Act, s.5(2)(c), he exercises "general direction and control"; and so, when the Chief Justice made the Orders in question, he was giving "general direction."

[20] Mr. Ahmednasir did not limit his submissions to contesting the applicant's preliminary objection, he went further to contest the terms of the single-Judge Order of 27th May, 2016: contending that the learned Judge intruded into improper territory by bestowing upon the applicants herein "new tenure"; he maintained that stay of Orders in the Judgment should have come forth from the Appellate Court, but not from the Supreme Court; in counsel's own words: "the Order was a breach of the Constitution. This was a *coup,* in effect. It was a nullity. So a preliminary objection cannot be based on it." He contended that the preliminary objection was "being laid on something that does not exist." He asked this Court to set aside the single-Judge Orders of 27th May, 2016. Mr. Ahmednasir spurned outright the applicants' appeal cases before the Supreme Court, contending that the two Judges were already retired, as far back in time as six months ago; and so the preliminary objection was all for dismissing.

[21] And learned counsel, Mr. Kanjama urged that "the single Judge cannot determine proceedings," and that the Supreme Court is only validly constituted with a Bench of five Judges. It was his submission that the single Judge lacks authority, and can only sit "subject to directions of the Chief Justice and the Supreme Court Registrar." Mr. Kanjama urged that the Chief Justice was duly empowered to make the Orders he had made, by virtue of being head of the Judiciary, and as President of the Supreme Court in the terms of Article 163(1) (a) of the Constitution; and that he may properly exercise administrative powers in the discharge of essential tasks in the Judiciary. Counsel submitted that the Chief Justice in exercising administrative powers, duly acted in terms of Articles 10 and 259 of the Constitution; and that he had averted anarchy, by giving direction for the sitting of the Court. Counsel submitted that the instant matter, in which the Chief Justice only dealt with the "progress of hearings", was different from the position in the *Tunoi Case* in the High Court, where it had been held that the Chief Justice acted unlawfully, by purporting to consolidate cases in progress before that Court.

[22] The interested party, Mr. Okiya Omtata Okoiti, contested the applicant's preliminary objection, though on a large range of considerations that go beyond the proper basis for disposing of the objection.

[23] Mr. Omtata proceeded on his case by general argument, not limited to the defining format of a preliminary objection – especially the recognized template of the "pure point of law" (***Mukisa Biscuit Manufacturing Co. Ltd. V. West End Distributors Ltd*** [1969] EA 696). He went on to incorporate evidentiary matters which should not occasion a decision, at this time: for instance, that there was urgency in stopping the single-Judge Orders; that the Chief Justice should not be reduced to a figurehead without powers; etc.

[24] Learned counsel, Mr. Kilukumi further illuminated the setting of the single-Judge Orders, by underlining their standing in law: it is the notice of appeal that paves the way for interlocutory Orders – which then have a foundation in law; there is no requirement that the appeal itself should have already been filed; the filing of the appeal itself is dependent on actions within the forum wherefrom the ultimate judicial contest proceeds; there is a proper legal setting for the invocation of the Court's discretion to grant conservatory orders – hence the single-Judge Orders rest on a proper foundation of law.

[25] Learned counsel had responses for a wide range of contentions advanced from the opposite side; for instance: the single-Judge Order granted no "new tenure" – for the workings of the Supreme Court have continued, to-date, to include *Lady Justice Kalpana Rawal* as Justice, and Deputy Chief Justice, to-date; the rapid pace of moving the single-Judge Bench was the legal and constitutional entitlement of the applicant; this preliminary objection raises a "pure point of law," in the terms of the ***Mukisa Biscuits*** case.

[26] Mr. Kilukumi submitted that, as it was clear that the single-Judge Order was properly secured, and given by virtue of the recognized judicial competence of the single Judge, the Chief Justice's varying Orders had no basis in law, quite apart from standing out as an affront to the constitutional principle of the independence of Judges.

[27] Learned counsel submitted that the Chief Justice, as he exercises his administrative powers in that capacity, lacks competence to reverse to any extent, the judicial Orders already made by another Judge.

F. FINDINGS

[28] The essential issues, including the background, the legal issues, the assertions and arguments of the participants, emerge clearly from the foregoing paragraphs. The applicants object to the Chief Justice's Orders of 30th May, 2016 – because they contradict the single-Judge Orders of 27th May, 2016. The legal foundation of the single-Judge Orders is crystal-clear; and contests of them emerge only as general lines of persuasion, by no means anchored in succinct bases of law, or established authority. *The argument that the sustenance of single-Judge Orders is an integral outflow from the fundamental constitutional principle of judicial independence, is beyond question.*

[29] In contrast, the Orders of 30th May, 2016 can only claim an argued, and general rationale – one that cannot transcend the crisp points of law attendant upon the earlier Orders.

[30] *It follows, as a matter of judicial integrity, that it is the Orders of 30th May, 2016 that must be held to give way to those of 27th May, 2016.*

[31] *Accordingly, I hereby uphold the single-Judge Orders of 27th May, 2016. I allow the objection to the later Orders, strike them out, and direct, subject to the position of the Bench-majority, that there shall be a hearing of the applicants' interlocutory applications, as ordered by the single Judge on 27th May, 2016.*

[32] I would order that the costs herein shall abide the disposal of the said applications and/or subsequent proceedings.

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

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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

THE RULING BY THE HON. JUSTICE S.C. WANJALA

RULING

A. BACKGROUND

[1] The applicant in Civil Application No. 11 of 2016, moved this Court by way of a Notice of Motion filed under a certificate of urgency dated 27th May, 2016. Similarly, the 1st applicant in Civil Application No. 12 of 2016, approached the Court by way of a Notice of Motion filed under a certificate of urgency dated 27th May, 2016. Both applications invoke this Court's jurisdiction under Article 163(4)(a) of the Constitution. The applications seek conservatory Orders against the Judgment and Orders of the Court of Appeal, dated 27th May, 2016, issued separately, which dismissed the applicants' appeals and affirmed the respective High Court's decision.

[2] On 27th May, 2016, the applicants were issued with *ex parte* conservatory Orders by *Njoki SCJ*. [Reference to the term applicants means the applicant in Civil Application No. 11 of 2016 and the 1st applicant in Civil Application No. 12 of 2016. On the other hand reference to term applications means both applications in Civil Appeal. No 11 & 12 of 2016.]

[3] With regard to Civil Application No. 11 of 2016, the *ex parte* Orders issued were in the following terms:

> ***(a) The application is certified urgent and service of the certificate of urgency is dispensed with at this instance.***
> ***(b) Pending** inter partes **hearing and determination, a conservatory Order is***

hereby issued, directing that the decision of the High Court affirmed by the Court of Appeal, to the effect that the retirement age of Judges appointed before 27/8/2010 is 70 years, be suspended.

(c) ***Pending the hearing*** *inter partes,* ***a conservatory Order is issued directing that the applicant will continue to discharge her constitutional, judicial and administrative duties.***

(d) ***Pending the hearing*** *inter partes* ***of the application, a conservatory Order is hereby issued prohibiting the respondents, the Chief Registrar of the Judiciary, from advertising in any media whatsoever, a vacancy in the Office of the Deputy Chief Justice and Vice President of the Supreme Court of Kenya, or to commence in any manner whatsoever the recruitment process of the applicant, as a Judge of the Supreme Court.***

(e) ***Conservatory Orders issue directing the respondents, the Chief Registrar of the Judiciary from issuing any retirement notices to the applicant.***

(f) ***All respondents be immediately served with the Order of the Court.***

(g) *Inter partes* ***hearing of this application shall be heard and argued before the Court on Friday 24th June, 2016 at 10.00 a.m.***

[4] Further, the *ex parte* Orders issued in Civil Application No. 12 of 2016 were as follows:

(a) That this application be marked and certified as urgent.

(b) That a stay of execution is issued upon the entire Judgment and Orders of the Court of Appeal Judgment in Nairobi, Court of Appeal No. 6 of 2016.

(c) That the applicant continue to discharge his duties as a Supreme Court Judge pending hearing and determination of this application.

(d) That all parties affected should be served with these Orders with immediate effect.

(e) That all parties concerned be served with the necessary documents to facilitate an *inter partes* ***hearing of this application before the Court at 10.00 a.m on Friday June, 24th 2016.***

(f) For avoidance of doubt, there should be no steps taken by the respondent or its agents to retire Justice Philip K. Tunoi until the hearing *inter partes* ***of this application.***

[5] Subsequently, on 30th May, 2016, two days after the issuance of the conservatory Orders, *Mutunga CJ & P,* issued the following directions:

"Granted the urgency under which the hearing of the application was sought, and the public interest in this application, I hereby invoke my administrative powers as the Chief Justice and President of the Supreme Court, to fast track the hearing of the application. My directions are, therefore, as follows:

1) The Registrar of the Supreme Court serves the parties to appear for the hearing of this application *inter partes* ***before a 5-Judge Bench of the Supreme Court on Thursday, 2nd June, 2016 at 10.00am . 2) The Registrar also serves the parties with notices to appear for directions on the said hearing on 31st May, 2016 at 10.00 am before Wanjala and Njoki, SCJJ.***

[6] Following the Chief Justice's direction, parties appeared for directions on 31st May, 2016, before *Wanjala and Njoki SCJJ,* where the following Orders were issued as regards to each application respectively. In Civil Application No. 11 of 2016 as follows:

(a) All intended *Amicus* ***to file and serve their applications on all parties in this matter.***

(b) All the applications filed by the intended *amicus* ***will be heard on 2nd June, 2016 at 10.00 am before the five Judge Bench.***

(c) The Notice of preliminary objection filed by counsel for the applicant dated 30th May, 2016 to be served upon all parties and will be heard by the five Judge Bench on 2nd June, 2016 at 10.00 am.

(d) The preliminary objection filed by Okiya Omtatah Okoiti, dated 31st May, 2016, will be heard by the five Judge Bench on 2nd June, 2016 at 10.00am.

(e) The Notice of Motion application filed by Muma & Kanjama, to be served on all the parties and the same will be heard by the five Judge Bench on 2nd June, 2016 at 10.00am.

(f) These are the directions issued by this Court.

[7] With regard to Civil Application No. 12 of 2016, the Court issued the following Orders:

> ***(a) All intended*** *Amicus* ***to file and serve their applications on all parties in this matter.***
>
> ***(b) All the applications filed by the intended*** *amicus* ***will be heard on 2nd June, 2016 at 10.00am before the five Judge Bench.***
>
> ***(c) The Notice of preliminary objection filed by counsel for the applicant Mr. Kiragu Kimani, dated 31st May, 2016 to be served upon all parties and will be heard by the five Judge Bench on 2nd June, 2016 at 10.00am.***
>
> ***(d) The Notice of Motion application dated 30th day of May, 2016 filed by Issa & Company Advocates to be served on all the parties and the same will be heard by the five Judge Bench on 2nd June, 2016 at 10.00am.***
>
> ***(e) These are the directions issued by this Court.***

[8] On 2nd June, 2015, a five Judge bench convened as ordered. To begin with, the Law Society of Kenya (LSK) canvassed its application seeking to be admitted as *amicus curiae* in both applications. Upon considering the respective parties arguments, the Court allowed the LSK application and formally admitted it as an *amicus curiae* in both applications.

[9] In addressing the Court, the LSK submitted that this matter strictly fell within the purview of Alternative Dispute Resolution. It is only if that position was untenable, should the judicial process be allowed to take its cause. LSK informed the Court that the proposed mediation process was consistent with Article 159 of the Constitution and it would be undertaken within a limited time. All parties addressed the Court with regard to LSK

proposal to have the matter settled out of Court. Thereafter, the Court allowed the LSK request to give time for further consultations among the parties and their clients.

[10] On 6th June, 2016, LSK informed the Court that the extensive consultations did not bear fruits and the proposed mediation process was not mutually acceptable prompting the hearing of the applications.

[11] The first application to be dispensed with was a Notice of Motion by Mr. Osundwa Sakwa, filed under a certificate of urgency, dated 2nd June, 2016 seeking to be enjoined as an interested party. The interest he sought to advance were strictly speaking related to Application No. 12 of 2016, in which he submitted that a lot of public money had been expended in the constitution of the on-going tribunal that is investigating Hon. Justice Phillip Tunoi against the allegations of bribery levied against him. Mr. Osundwa, through his counsel Mr. Havi, submitted that it was in the public interest that the Tribunal be allowed to conclude its mandate so that the truth is known. He was apprehensive that if the conservatory Orders issued are not confirmed following *inter partes* hearing, the effect would tantamount to summarily terminating the proceedings of the Tribunal.

[12] Parties took opposing views with regard to that issue of joinder. The Court, by a majority decision dismissed that application. Mr. Osundwa thereafter filed another application seeking a review of the Court's decision denying him leave to be enjoined as an interested party. That application was canvassed and unanimously dismissed by the Court.

[13] At the commencement of the hearing of the substantive applications before Court, it was directed that all preliminary objections would be disposed off first before hearing the main

applications on whether or not conservatory Orders issued *ex parte* should be confirmed, varied or dispensed with.

[14] There were a total of three Preliminary Objections filed in Court. The first Preliminary Objection was by the applicant in Application No. 11 of 2016. The Preliminary Objection dated 30th May, 2016, questioned the directions of the Chief Justice given on the same day which resulted in the empaneling of a two Judge Bench on 31st May, 2016 and a further 5 Judge Bench on 2nd June, 2016. The crux of the Preliminary Objection was that the Chief Justice had no legal power to vary the Orders of a single Judge.

[15] The second Preliminary Objection was in all ways similar to the first one. The 1st applicant, in Civil Application No. 12 of 2016, raised a point of law to the effect that the Chief Justice had no jurisdiction to make any Orders following the *ex parte* Orders given on 27th May, 2016.

[16] The final Preliminary Objection was by the interested party in Civil Application No. 11 of 2016. The Preliminary Objection dated 30th May, 2016 sought to have the Court disqualify itself from hearing and determining the substantive applications on account of perceived impartiality of the Court as currently constituted. Though the Interested Party was not a party in Civil Application No. 12 of 2016, the Court directed him to serve his Preliminary Objection on all parties under Civil Application No. 12 of 2016, since its effect thereof upon determination had the potential to have adverse consequences on their application.

[17] Before the conclusion of the hearing of the applications, the 2nd *amicus curiae* requested to withdraw from the proceedings. This request was allowed by the Court.

[18] It is through this background that parties made their respective submissions in Court. This Ruling consolidates all

parties' case in both Applications No. 11 & 12 of 2016. Though I acknowledge that there was no consolidation of the two applications, a proper consideration and disposition of the issues raised in this case, justifies a determination in one breath.

B. PARTIES RESPECTIVE CASE; CANVASSING THE APPLICANT'S PRELIMINARY OBJECTION ON CIVIL APPLICATION NO. 12 OF 2016

(i) Applicant's submissions

[19] Mr. Kioko Kilukumi, learned counsel for the applicant, submitted that the Preliminary Objection was necessitated by the Chief Justice's directives issued on 30th May, 2016 which in essence, varied the Orders of the single Judge. He argued that the Chief Justice has no legal power and authority to single handedly vary an Order issued by any Judge of the Court.

[20] Counsel stated that the Chief Justice's inherent desire to sit as a single Judge, was well exhibited and documented through email correspondences, which are now in the public domain. He referred the Court to Article 160 of the Constitution which underlines the principle of independence of Judiciary and echoed that a Judge is only subject to the Constitution and the law. As such, the Chief Justice's actions amounted to an attempt to interfere with the judicial independence of a Judge, and hence unconstitutional.

[21] Counsel pointed out that the Chief Justice's purported administrative authority cannot override a judicial decision. Counsel also relied on Section 24 of the Supreme Court Act, (Act No. 7 of 2011) which clothes a single Judge with authority to issue any interlocutory Orders and give any interlocutory directions. Mr. Kilukumi emphasized that, the aforementioned provision also provides a remedy to any person dissatisfied with

the decision of a single Judge in that one can formally move the Court to have the matter reviewed by a five Judge Bench. Counsel posited that, the Chief Justice in giving the directions of 30th May, 2016, was not sitting in a Bench of five.

[22] Counsel further submitted that the role of the Chief Justice is clearly defined in the Constitution, the Judicial Service Act, 2011 and the Supreme Court Act. He heightened that it was even more improper for the Chief Justice to attempt to interfere with the single Judge's Order, particularly when the Chief Justice and one other Judge of the Court 'represent' the respondents in this case.

[23] Counsel extensively referred the Court to various authorities that underscored the sacrosanct place of an independent judiciary and distinguished the extent to which a Chief Justice can invoke his administrative powers.

[24] Amongst his authorities, counsel cited a paper titled, ***The Administrative Authority of Chief Judicial Officers in Australia,*** *Kathy Mack and Sharyn Roach Anleu, Newc LR Vol.8 No.1 (2004).* Page 6 of the said article provides that directions which are administrative in form, can indirectly constrain adjudicative independence. He also quoted an excerpt at page 7 which states thus−

"Such administrative guidance should be directed to matters of case management and court administration but should not refer to the exercise of the judicial function itself, i.e the procedural and substantive decision-making aspect of adjudication."

[25] Further, counsel emphasized that superiors in Judiciary should not make the other Judges to be subservience to them. He referred to page 10 of the above cited article which provides that:

"…hierarchical administrative authority can be misused, whether deliberately or not, with a risk of…latent pressures on Judges which may result in subservience to judicial superiors."

[26] Also cited was a paper by Hon. John Z. Vertes (President of the Commonwealth Magistrates and Judges Association 2012-2015), entitled ***Judicial Independence and the Role of the Chief Justice Powers, Limitations and Challenges*****.** At page 10, the author referred to the case of ***The Queen v. Beauregard***, [1986] 2 S.C.R. 56, where Dickson, the Chief Justice of the Supreme Court of Canada, emphasized that not even another Judge should interfere or attempt to interfere with the way a Judge conducts his or her case and makes his or her decision.

[27] Yet another article cited by counsel was by the former Chief Justice of the Supreme Court of Western Australia; ***The Role of the Chief Justice***, David K. Malcolm, Southern Cross University Law Review, Vol. 12(2008), the author posits that there is no power in a Chief Justice to intrude upon the independent exercise by a Judge of that Judge's judicial function. Also quoted was page 352 of the book titled, ***The Culture of Judicial Independence; Conceptual Foundations and Practical Challenges***, S. Shetreet & C. Forsyth, Leiden. Boston (2012).

[28] Counsel also referred to the case of ***Re Colina v. Ex Parte Torney*** (1999) HCA 57, where the High Court of Australia stressed on the independence of Judges particularly the fact that a Chief Justice has no capacity to direct or even influence Judges of the Court in the discharge of their adjudicative powers and responsibilities. Other relevant cases referred to include ***Phillip K. Tunoi & 2 Others v. Judicial Service Commission & Another,*** High Court Petition No. 244

of 2014; [2015] eKLR; ***Donna Oliverez v. Mark Oliverez***, Court of Appeal of the State of California No. FL024506; R v Lippe [1991] 2 SCR 114 and ***Canada (Minister of Citizenship and Immigration) v. Tobiass*** [1997] 3 SCR 391.

[29] With reference to assertion by the applicant that there were no proceedings in Court to warrant the issuance of interlocutory Orders, Mr. Kilukumi submitted that the first step that a party takes in commencing proceedings in Court is the filing of Notice of Appeal. That notice gives the Court jurisdiction to grant interlocutory Orders. Additionally, counsel submitted that a party has 30 days within which to file an appeal following the filing of a Notice of Appeal. In conclusion, counsel urged the Court to uphold the Preliminary Objection and hold that the Court as currently constituted has no jurisdiction to adjudicate the foregoing proceedings.

(ii) 3rd Amicus Curiae Submissions

[30] Mr. Masika, Counsel for the 3rd *amicus curiae* argued in support of the applicant's Preliminary Objection. He recapped the applicant's submissions that indeed Section 24 of the Supreme Court Act confers jurisdiction on a single Judge to issue any interlocutory Orders. The Section further provides the procedure to follow in case any of the parties is dissatisfied by the Orders of a single Judge.

[31] Counsel expressed the view that though the Chief Justice's directions may have been well intentioned bearing in mind the constraints of time, his directions were nonetheless unlawful.

(iii) 1st & 2nd Respondents' Submissions

[32] Senior Counsel, Ahmednassir begun by cautioning the Court against taking a presumptive position that the applicant's Notice of Motion is valid. He submitted that Section 24 of the

Supreme Court Act under which the stay Orders were granted presupposes the existence of proceedings before the Court. Counsel referred the Court to an excerpt of the ***Halsbury's Laws of England,*** 4th (ed), Vol. 37, paragraph 326 which provides that interlocutory applications are invariably necessarily in order to deal with the rights of the parties in the interval, between the commencement of the proceedings and their final determination.

[33] Counsel opined that, there are no proceedings before Court which capacitates the Court to issue any Orders. He argued that since the applicants invoke this Court's appellate jurisdiction under Article 163(4) (a), the proper invocation of such would firstly require the filing of an appeal. It is that appeal that initiates proceedings before Court. Counsel contested that no Order can be given by the Court until the appeal is filed. He submitted that the applicants had not yet filed an appeal. Additionally, he pointed out that there was nothing in the Supreme Court Rules akin to Rule 5(2) (b) of the Court of Appeal Rules, that empowers the Court to grant stay Orders, pending the filing of an appeal.

[34] Counsel further submitted that the Preliminary Objection raised does not meet the threshold set in ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.***, Civil Appeal No. 9 of 1969 (The ***Mukisa Biscuit*** Case). He argued that a Preliminary Objection must be based on a pure point of law which if successful, must determine the matter conclusively. In this case, counsel submitted that the Preliminary Objection so raised, concerns procedural issues on whether the case should be heard on 24th June, 2016 or any other date.

[35] It was counsel's argument that, the Chief Justice has the power to prioritise the hearing dates of any matter. In line with that, he relied upon Article 161(2) (a) of the Constitution which

refers to the Chief Justice as the head of Judiciary. Article 161(1) on the other hand, defines the Judiciary as consisting of the Judges of the superior Courts, Magistrates, other judicial officers and staff. Further, Section 5(2) (c) of the Judicial Service Act delineates the functions of the Chief Justice as *inter alia* to exercise general direction and control over the Judiciary. Thus the Judiciary in this case, should be read to mean the Judges of the superior Court. Accordingly, counsel submitted that part of that general directions includes bringing forward the date of a hearing.

[36] Senior counsel affirmed that the Chief Justice acted in defense of the Constitution because the gravity of the situation warranted him to expedite the hearing.

[37] Mr. Charles Kanjama appearing also for the respondents took the position that the Supreme Court is rightly constituted if it is made up of 5 Judges. He urged that under Section 24 of the Supreme Court Rules, a single Judge of the Court cannot determine proceedings. Consequently, if the Orders of a single Judge purport to vary the status quo, they would need to be confirmed by a 5 Judge Bench.

[38] With regard to the exercise of the Chief Justice's administrative powers, counsel urged that the Chief Justice, as the head of Judiciary, has the power to issue administrative directions over all levels of Judiciary. Such administrative functions are found under Rule 4 of the Supreme Court Rules.

[39] Counsel also advanced the argument that under Section 21 of the Supreme Court Act, the ultimate powers to make any Order rests with the Court. He submitted that a Court is properly constituted if it is composed of 5 Judges. It was Counsel's submission that the Chief Justice took into consideration the governing principles found under Article 10,

159 and 259 of the Constitution. Counsel concluded by underscoring that the applicant had failed to distinguish between the powers of the Chief Justice as the head of Judiciary and as the President of the Supreme Court. Additionally, counsel sought to distinguish some of the authorities cited by the applicant and urged the Court to find that they did not apply in the present circumstances.

(iv) Interested Party Submissions

[40] Mr Okiya Omtatah, appearing in person for the interested party opposed the Preliminary Objection and submitted that it had been overtaken by events by virtue of the applicant's appearing before the two Judge Bench constituted by the Chief Justice for the purpose of giving directions on the steps to be undertaken regarding hearing of the applicant's Notice of Motion.

[41] Mr. Omtatah argued that *Njoki SCJ,* exceeded her powers by fixing the hearing date. The Chief Justice on the other hand only exercised his administrative powers in line with Rule 4 of the Supreme Court Rules.

[42] The 1st *amicus curiae* refrained from making submissions with regard to the merits or otherwise of the applicant's Notice of Preliminary Objection.

C. SUBMISSIONS IN CIVIL APPLICATION NO. 12 0F 2016 WITH REGARD TO THE 1st APPLICANT NOTICE OF PRELIMINARY OBJECTION DATED AND FILED ON 31ST MAY, 2016

[43] The Preliminary Objection raised by the 1st applicant in Civil Application No. 12 of 2016, is contextually analogous to the applicant's Notice of Preliminary Objection in Civil Application No. 11 of 2016. Both applications question the Chief

Justice's purported authority in issuing the directives of 30th May, 2016. Thus, it is only new issues argued on Civil Application No. 12 of 2016 are highlighted in this part of the Ruling.

(i) 1st Applicant's submissions

[44] Senior Counsel, Mr. Nowrojee, emphatically submitted that the administrative directions of the Chief Justice cannot set aside judicial decisions. Counsel argued that invocation of such powers is unconstitutional and the directives given thereof find no basis in law. He referred the Court to Article 160(1) of the Constitution which provides that in exercise of judicial authority, a Judge shall only be subject to the Constitution and the law and not be under the control or direction of any person or authority. Consequently, when the Chief Justice acts in his administrative capacity, he is not acting on his judicial capacity but he assumes the capacity of any person or authority.

[45] It was counsel's further submission that the extent of the legality of a Chief Justice's directive in exercise of his administrative authority was determined by the High Court in the case of ***Philip K. Tunoi & 2 Others v. Judicial Service Commission & Another*** [2015] eKLR, which concerns same parties. He accentuated that the respondents did not appeal that respective finding of the High Court and hence, should be bound by its pronouncement. Counsel cited paragraph 70 where the Court held that:

> ***"[S]ubstantive directions are to be issued by the Court actually seized of the matter, and not any other 'person' or 'authority'. Directions when issued, form part of the judicial exercise or the road map in the overall conduct of a matter. … the situation is fraught with danger where the Chief Justice issues directions as to the hearing***

date or the date when the Court ought to render Judgment, because this ceases to be an administrative function and can be construed as bordering on interfering in the judicial conduct, or road map, of a matter. In any case, the Court seized of the matter, is obliged in law to dispose of all matters in an expeditious manner."

[46] Counsel expounded that the highlighted decision is *res judicata* as between the parties and since the respondents did not cross-appeal on that issue, they could not at this stage contest it. Counsel further advanced that the issuance of two related directives on the same case by the Chief Justice creates a perception among the public, of his keen intent to interfere with judicial process. To reinforce his argument, counsel submitted that the Chief Justice even went further in this particular case to call for the file after the single Judge had issued the conservatory Orders. He argued that the manner in which the file reached the Chief Justice's chambers was not the normal cause of business and such actions amounts to judicial interference.

[47] Counsel disputed that the Chief Justice's power to determine sittings of the Court includes setting a hearing date. He referred the Court to Rule 7C of the Supreme Court (Amendment) Rules, 2016 which provides that, the Court shall have three sittings in every year. It was his submission therefore that sittings are not hearings.

[48] Mr. Kiragu Kimani, appearing also for the 1st applicant, informed the Court that the Orders given by the single Judge are all part of a judicial decision and one cannot purport to separate between the conservatory part and the part indicating the hearing date. He submitted that the exercise of the Chief Justice's general power cannot be used to review an Order

given by a judicial officer. The only available avenue for any person dissatisfied with such a decision would be to move the Court for constitution of a 5 Judge Bench to hear the matter.

(ii) 3rd Amicus Curiae Submissions

[49] Mr. Muriithi, counsel for the 3rd *amicus curiae,* supported the Preliminary Objection and submitted that though the Chief Justice's directions were well intended, he did not have the power to vary the Orders of the single Judge. He argued that the guiding factor should be the powers donated to the Chief Justice and the extent to which such powers should be exercised.

(iii) 1st & 2nd Respondents' Submissions

[50] Senior Counsel, Mr. Paul Muite, submitted that the jurisdiction that is in contestation is with regard to the Chief Justice's directives but not the jurisdiction of the Court as constituted. Consequently, counsel urged, the 1st applicant's Preliminary Objection fails to meet the pre-requisites in the ***Mukisa Biscuit*** case. Counsel drew related insights by giving an example that if a person is aggrieved by the fact that the High Court exceeded its jurisdiction, on appeal to the Court of Appeal, one would not raise such an argument by way of a Preliminary Objection but by a substantive ground in the petition.

[51] It was counsel's position that the Court needed to make a distinction between a decision within a Judge's discretion and an administrative matter within the decision. He submitted that, the Chief Justice left intact the conservatory Orders of a single Judge, which were a demonstration of the Judge's discretionary power. In his reasoning, the Chief Justice only constituted a Bench and issued a hearing date.

[52] Additionally, counsel opined that the Chief Justice's position as the head of Judiciary is not in vain. It was counsel's submission that the Chief Justice's roles in that regard are well elaborated in the Judicial Service Act and the Supreme Court Act.

[53] Counsel distinguished the 1st applicant's submission with regard to the Chief Justice's directives issued in the case of ***Philip K. Tunoi & 2 Others v. Judicial Service Commission & Another*** [2015] eKLR. He submitted that there was a clear distinction between the current situation and the one referred to in that case. He explained that, in the current case, the Chief Justice was acting as the President of the Supreme Court and his position thereof gives him precedence in deciding hearing dates. Further, counsel urged that this Court is not bound by any decision of the High Court.

[54] Senior counsel also argued that the Chief Justice was cognisant of the prevailing circumstances which warranted a speedy hearing of this matter, taking into consideration the fact that in a few days' time, the current Chief Justice would have retired from office, leaving the Court without a quorum of Judges to legally constitute a Bench. It was therefore in public interest that the Chief Justice fast-tracked the hearing of this matter.

[55] Learned counsel, Issa Mansur, also for the respondents reiterated that Rule 4 of the Supreme Court Rules only gives the Chief Justice the mandate to determine when a matter ought to be heard. Any other Judge cannot make such a determination. He advanced the argument that even if a Judge has such discretionary powers, the empaneling of a Bench would be subject to the direction of the Chief Justice.

D. PARTIES SUBMISSIONS WITH REGARD TO THE INTERESTED PARTY NOTICE OF PRELIMINARY OBJECTION IN CIVIL APPLICATION NO. 12 OF 2016

[56] Mr. Omtatah's Preliminary Objection is based on the following grounds:

(i) That this Honourable Court has no jurisdiction to entertain the instant application or any other application or appeal filed in respect of the Judgment and Order of the Court of Appeal in Civil No. 1 of 2016, delivered on the 27th of May 2016, because all its Judges have either supported or opposed the contention that Judges appointed under the repealed Constitution should retire upon attaining the age of 70 years.

(ii) That by dint of Article 50(1) of the Constitution jurisdiction of a Court can only be exercised where the Court is impartial. Otherwise, a Court which is not impartial is stripped of jurisdiction. Further and in particular:

(a) A Court cannot exercise jurisdiction where doing so violates the enjoyment of the absolute right to a fair trial;

(b) a Court which is not impartial has no jurisdiction under the Constitution;

(c) jurisdiction must be declined where a Court is so conflicted that it cannot be impartial;

(d) all matters must be presided over or decided by Judges whose detachment and neutrality is not clearly compromised as is the case with the current Judges of the Supreme

Court on the subject matter of the retirement of Judges appointed under the repealed Constitution.

(iii) That pursuant to Articles 50(1),73(1)(a)(iii) and 73(2)(b) of the Constitution, the disqualification of all current Supreme Court Judges from entertaining any applications or appeal filed against the Judgment and Order of the Court of Appeal, delivered on the 27th of May, 2016, in Civil Appeal No. 1 of 2016, is mandatory and cannot be waived as the learned Judges have an obligation to avoid participating in this case, where they have taken sides and the grounds for their disqualification are undeniably clear.

(iv) That the issue herein is outright disqualification of all Supreme Court Judges and not voluntary recusal of the Judges.

(v) That disqualification based on the precise criteria in Article 50(1) of the Constitution is non-discretionary and cannot be waived by anybody or authority.

(vi) That the rule of necessity (also known as the Concept/Doctrine of the Duty to sit) cannot be applied herein.

(vii) That under the hierarchy of rights enshrined in the Constitution of Kenya, civil right to appeal, is inferior to, and is trumped by the entrenched and absolute human right to a fair hearing and, where they conflict, the right to a fair hearing and, where they conflict, the right to a fair hearing prevails.

(viii) That because it is disqualified from entertaining this matter, the decision of the Court of Appeal in Civil Appeal No. 1 of 2016, delivered on May 27th 2016, stands as the final decision in the matter.

(ix) That there is an overwhelming public interest to sustain the decision of the Court of Appeal in Civil Application No. 11 of 2016 as the final decision in this matter.

(x) That Civil Application No. 11 of 2016 is an abuse of the Court process.

(i) Interested Party's Submissions

[57] Mr. Omtatah in support of his application submitted that this Court had no jurisdiction to entertain the applications for conservatory Orders currently pending before this Court. He advanced the argument that a Court is properly constituted where it is staffed by the requisite judicial officers, be they Judges or Magistrates. Where no such judicial officers exist, then there can be no Court. Consequently, where judicial officers are perceived to be impartial, the scenario presents a great hindrance of access to justice.

[58] Mr.Omtatah submitted that Article 50 of the Constitution as read with Article 25 (c), constitutes an absolute bar to the exercise of jurisdiction where a Judge is impartial. He took the view that Judges are important public officials whose authority is felt in every corner of the society and in doing so, the enforcement of judicial Orders ultimately depends on public perception. He added that where the citizenry perceives that matters before the Courts are decided on the basis of favoritism and prejudice rather than the law, it would be impossible to enforce the rule of law.

[59] His further contention was that Article 50(1) of the Constitution strips off any Judge perceived to be partial with jurisdiction to preside over any dispute. Mr. Omtatah relied on the case of ***United States v. State of Alabama*** 828 F2d 1532, whereby, the Court of Appeal, in the Eleventh Circuit held that a guarantee to litigants of a totally fair and impartial tribunal and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the centre of any judicial system.

[60] It was Mr. Omtatah's strong conviction that virtually the entire Bench as currently constituted was conflicted by reason of various acts of individual Judges or by reason of two of its

members being members of the Judicial Service Commission. He made reference to the case of ***Caperton v. A.T Massey Coal*** 556 U.S 868, (2009) in support of the proposition that where judicial bias is probable then there was a requirement for disqualification from the concerned Judge.

[61] Mr. Omtatah further submitted that in the event that any Judge in the current Bench was persuaded to disqualify himself from determining the matters currently pending, there would be a lack of quorum with the ultimate effect being confirming the decision of the Court of Appeal. In support of this submission, he relied on the case of ***American Isuzu Motors v. United States,*** United States Court of Appeal Second Circuit No. 07-919.

[62] He was emphatic that pursuant to Articles 50(1) ,73(1)(a) and 73(2)(b) of the Constitution, the disqualification of all current Supreme Court Judges from presiding over the pending matters was mandatory and cannot be waived since Judges have an obligation to avoid participating in matters where they have hitherto taken sides. Mr Omtatah expressed the view that the Supreme Court as a collective Bench, is disqualified to entertain this matter, since the individual Judges constituting the Bench are already deemed to be disqualified.

[63] Mr. Omtatah also contested that the standard for recusal of a Judge is largely based on perception but that even so in the current circumstance, evidence of the purported bias had been presented and as such, there was a real risk of actual bias in the event the subject matters are to be determined by this Bench as currently constituted. He urged the Court not to be bound by the precedent as set in the case of ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others;*** Petition No. 4 of 2012 [2013] eKLR, on the basis that the principle set therein, that is the doctrine of necessity was an out dated principle. He added that the reading of Article 163(2) was

of a discretionary nature and as such the wording of the Article countenances this Court to decline jurisdiction in some occasions.

[64] Mr. Omtatah further added that there had been established two apex Courts in Kenya depending on the subject matter i.e the Court of Appeal and the Supreme Court. Accordingly, this amounted to a recognition in the Constitution that the Court of Appeal is also an apex Court. It was submitted hence that the Supreme Court should decline to assume jurisdiction in the instant matter and instead adopt the position that the Court of Appeal made terminal determinations on the issues that have now been made the subject of the applications herein.

[65] It was his further assertion that there was a need to distinguish between the duty to sit and the responsibility to sit. He advanced that Article 50(1) as read with Articles 159(2)(e), 73 and 75 of the Constitution, requires that a Judge should not hear a case in which his or her impartiality and independence may be questioned. Accordingly, Mr. Omtatah submitted that the duty to sit doctrine contradicts this concept by forcing Judges to rule in situations where their impartiality is questioned.

[66] In examining the role of the doctrine of necessity, Mr. Omtatah posited that even though there exists a relationship between the doctrine of necessity and the duty to sit ,the concepts are in fact distinct in that the rule of necessity states that Judges must be able to hear and determine a matter even where it tangentially affects the Bench because our system of governance demands that the Courts be available to make decisions but that the circumstances in the matters currently pending before Court do not allow the invocation of the rule of necessity.

[67] It was Mr. Omtatah's contention that the duty to sit concept must be limited only to the connotation based on judicial courage and dedication and the same must never be extended to a situation where the facts of the case as presented suggest that impartiality is patently evident. Mr. Omtatah further added that the doctrine of duty to sit is an outdated doctrine that is ultimately unhelpful to twenty first century questions of disqualification of a Judge. It was further submitted that the parties' right to a judiciary, arises above any suspicion, outweighs any misplaced notion that there is shame in stepping aside from cases in which Judges' impartiality is raised.

[68] According to Mr. Omtatah, whereas the duty to sit counsels the Judge to be diligent and unafraid in decision making, it in no way suggests that the Judge should hear cases in which the Judge's impartiality is questioned and that a Judge's disqualification was then necessary to protect the rights of the litigants and preserve public confidence, integrity and impartiality of the judiciary.

[69] On the issue of right to appeal, it was submitted that there was indeed a hierarchy of rights and as such the Court must balance all the rights that is, the right to a fair trial versus the right to an appeal. It was also submitted that the right to appeal is inferior to and is trumped by the entrenched and absolute human right to a fair hearing and that where they conflict, the right to a fair hearing must prevail. It was further submitted that the right to appeal can only be exercised where the Court being appealed to is impartial and independent, and is seen to be so as required by Article 50(1) as read with Articles 25(c), 73 (2) (b) and 75(b). Mr. Omtatah contended that since the intended appellants had already exercised their right to appeal, they would suffer no injustice where they cannot appeal to the Supreme Court.

[70] Mr. Omtatah urged that each individual Judge should consider whether they could be conflicted at the individual level. He reiterated that any manifestation of bias or prejudice requires disqualification. He also submitted that since the impartiality of each individual Judge had been questioned, there was hence a need to consider the record, facts and the law and decide on whether a reasonable person knowing and understanding the relevant facts would consider the existence of impartiality on the part of the individual Judge.

[71] According to Mr. Omtatah, the prospect of having two Judges of the Supreme Court being litigants in this Court, would not augur well with the requirement of justice and that the solution would be for the Supreme Court not to take up the matter, by reason of the currently constituted Bench being professionally conflicted.

[72] Mr. Omtatah urged that where the apex Court is incapacitated because of conflicts disabling its members from sitting, such a Court should not determine the merits of any substantive proceedings before it, despite being vested with the jurisdiction and as such the decision of the Court of Appeal be deemed final. In support of this proposition, Mr. Omtatah relied on the South African Constitutional Court case of ***Hlophe v. Premier of the Western Cape Province and Another*** 2012(6) SA 13 (CC).

[73] It was finally submitted that on the basis of equity, the reputation of the administration of justice will suffer where 12 Judges i.e. five at the High Court and seven at the Court of Appeal have unanimously held the same way and later on, a conflicted Bench overrides them. In the circumstances, Mr. Omtatah urged the Court to uphold his Preliminary Objection.

[74] In rejoinder, Mr. Omtatah submitted that Article 2(4) of the Constitution provides that even doctrines of law that are in conflict with the Constitution are null and void. Accordingly,

the doctrine of necessity was one such doctrine. He reiterated that Article 48 of the Constitution was about access to justice and not access to Courts. Mr.Omtatah also took the view that the test for impartiality happens outside the proceedings and not necessarily in the course of proceedings.

(ii) 1st and 2nd Respondents Submissions in Civil Application No. 11 of 2016

[75] Learned Counsel Mr. Charles Kanjama, commenced his submissions by stating that the core issue in question, in the preliminary objection was valid and that indeed the Supreme Court by sitting on a matter where there could be an appearance of impartiality could end up undermining the very Constitution it was set up to protect.

[76] It was Mr. Kanjama's contention that even though members of the bar take an oath of office, they ought to act in the interest of the law and more so the rule of law. He submitted that the members of the Bench take an even stronger oath and as such the requirement of *impartially to do justice* was binding. Counsel further contended that Judges ought not to be placed in a situation where they would be required to go against their oath of office. He made reference to Article 73 and proceeded to state that the office of a Judge is one of public trust to be exercised with objectivity and impartiality.

[77] Learned Counsel was emphatic that the unique provisions in our Constitutional provisions required a unique Kenyan solution in determining whether it is possible for a Judge to sit where there is clear conflict of interest.

[78] On the question as to whether the right to appeal was sacrosanct, learned counsel made reference to Article 24 of the Constitution and further took the view that certain rights even

under the Constitution are subject to limitation and as such even the right to appeal can be limited.

[79] Counsel submitted that only four rights under the Constitution could not be limited and one amongst those rights was the right to fair trial. He assailed the proposition that the right to fair trial is synonymous to the right to fair hearing. It was his contention that Article 50 refers to the right to a fair hearing and that indeed, all rights under Article 50 were part of fair hearing but that Article 50(2) was indeed part of the right to fair hearing but solely and wholly dedicated to a criminal trial.

[80] In detailing whether the right to fair hearing includes the right to an appeal, learned counsel submitted that indeed it does, but the overriding concern was that the right is subject to limitation under Article 24 0f the Constitution. Mr. Kanjama relied on the South African case of ***Hlophe v. Premier of the Western Cape Province and Another*** 2012(6) SA 13 (CC), in support of the position that the right of appeal is not an absolute right and that since the intended appellants had already had the benefit of an appeal they would not be prejudiced.

[81] His further submissions was that the test in determining bias was that of the perceived appearance of bias but that being the case in the instant matter, it was not a matter of oblique conflict but rather direct conflict which was precipitated by a decision co-authored by members of the currently constituted Bench and as such the circumstances that gave rise to the decision in ***Nicholas Kiptoo arap Salat v. Independent Electoral and Boundaries Commission and 7 Others*** Petition No. 23 of 2014, [The **Nick Salat** case], began with Memorandum drafted by some members of this Bench and

indeed a reasonable person would be able to surmise that there is an intimate connection.

[82] In response to a question as to whether the Supreme Court in exercise of its constitutional mandate could have been restrained by ongoing proceedings in the High Court, counsel submitted that the Court ought not to have pronounced itself in the manner in which it did in the ***Nick Salat*** case for the simple reason that there were live proceedings before the High Court, whose jurisdiction had been invoked by members of the Supreme Court Bench.

[83] Learned Counsel Mr. Kanjama invoked what he referred to as the double possibility test and proceeded to state that where a Judge's mind is made up, then the essence of a fair trial and rule of law is lost. It was counsel's submission that the doctrine of necessity must not be invoked but for good reasons and that even where it is invoked, there was no absolute duty to sit.

[84] In distinguishing the authorities relied upon by Mr. Kilukumi, Mr. Kanjama stated that the authorities demonstrate a distinct set of circumstances from what is already in Court.

(iii) 1st and 2nd Respondents in Civil Application No.12 of 2016

[85] Senior Counsel Mr. Muite adopted fully the submissions of Learned Counsel Mr. Kanjama and proceeded to submit that indeed there was no doubt that this Court has the jurisdiction but that the Court was simply being urged to decline to take up jurisdiction.

[86] Mr. Muite took the view that judicial authority is derived from the people and as such public interest was central, consequently it was submitted that when an issue is in Court, what is in the public interest must constitute a legitimate matter before the Court.

[87] It was learned counsel's submission that public interest being the dominant submission, it was in the public interest that the Republic of Kenya must have a fully constituted Supreme Court of Kenya members who have no clouds or doubts hanging over their heads. He submitted that as long as each of the seven members of the Court were persons of integrity and credibility, public interest would be served by having a fully constituted Court.

[88] Counsel attacked the suggestion that the litigants who were members of this Court would be able to sit in Judgment of their own cause. He submitted that Sections 23, 24 and 26 of the Supreme Court Act cannot be deemed to have amended Article 163(2) of the Constitution. Thus the provisions of the Supreme Court Act that permits a single Judge to sit and issue Orders, were not contemplated by Article 163(2) of the Constitution.

(iv) 1st Amicus Curiae Submissions in Civil Application No. 11 of 2016

[89] Mr. Nyaundi, in support of the Preliminary Objection submitted that this Court as currently constituted would not be suitable to determine the issues set in the substantive application or intended appeals. It was his submissions that the Bench as currently constituted had indeed espoused a great propensity of being conflicted since sitting members were intimately connected to the proceedings now before Court.

[90] Counsel took the view that the Court as constituted would not be able to render a fair decision to the parties and in the process parties to the litigation stood a chance of being prejudiced by a Court set up by the Constitution to prevent such an eventuality.

[91] He submitted that the competing principles of natural justice and necessity to sit must always be counter balanced by the need to offer impartial justice.

[92] Learned Counsel indeed acknowledged the exceptional circumstances that precipitated the current quandary and proceeded to state that this was not a proper case in which the doctrine of necessity should be applied. It was his view that the preliminary Objection by Mr. Omtatah be upheld.

(v) 3rd Amicus in Civil Application No. 11 of 2016; The Law Society of Kenya Submissions

[93] Mr. Anzala in support of the Preliminary Objection submitted that the right to a fair hearing included the impartiality of the tribunal and that the likelihood of bias was not just probable on a reasonable mind but also from the bar. He asserted that there was a real likelihood of bias and that being the case, the Court could very easily be put in an awkward position should the Bench proceed to hear the applications on merits.

(vi) Applicant's Submissions in Civil Application No. 11 of 2016

[94] Mr. Kilukumi , counsel for the applicant, submitted that it was in the public interest that the highest Court in the land pronounces itself on the matters before it. He was emphatic that the Court ought to distinguish public interest from narrow private interest. He took the view that the Court's exercises of appellate jurisdiction as per Article 163(4) (a) and (b) of the Constitution must not be confused with the right to fair trial or fair hearing.

[95] It was counsel's contention that distinguishing fair hearing from fair trial was a distinction without merit. He submitted that the applicant's case both at the High Court and the Court of Appeal was that the right to fair administrative action had

been infringed and as such this Court must be given an opportunity to give an ultimate interpretation.

[96] Learned counsel was also of the view that indeed the prevailing situation is not ideal but that the doctrine of necessity is applicable in the circumstance. According, there was an absolute necessity to sit because the Court of Appeal can never substitute the Supreme Court on matters of interpretation and application of the Constitution.

[97] Mr. Kilukumi made reference to Section 3 of the Supreme Court Act in support of the proposition that the Supreme Court is of final judicial authority in Kenya and must in the circumstance be afforded the opportunity to interpret and apply the Constitution. It was submitted that the applicant was entitled like all other Kenyans to access to justice as provided for under Article 48 of the Constitution.

[98] Counsel further contended that no evidence has been placed before this Court to show that the Judges comprising this Bench have taken a position outside judicial determination. He added that the memorandum alluded to as originating from members of this Bench is not a finding in the proper sense of the word. Learned Counsel submitted that Judges are always available to be persuaded and that the fact that a Judge had taken a position outside of Court was not evidence enough of partiality. Counsel also submitted that the doctrine of necessity has its roots in the rule of law. It was his contention that a Judge who is partial is better than no Judge at all.

[99] Mr. Kilukumi also submitted that the doctrine of necessity was applicable to prevent a failure of justice or frustration of statutory provisions. He reiterated that if the Court fails to hear and determine the substantive application, the same would be frustrated. It was further submitted that the necessity to hear the matters placed before the Supreme Court arises from the Constitution. Counsel was emphatic that failure to apply the

doctrine of necessity would have the effect of denying litigants a right to be heard. He cited the case of ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others*** petition no. 4 of 2012 [2013] eKLR, and the Indian case of ***Tata Cellular v. Union of India*** 1996 AIR 11,1994 SCC (6)651, which endorses the doctrine of necessity.

[100] Counsel also sought to distinguish the case of ***Hlophe v. Premier of the Western Cape Province and Another*** 2012(6) SA 13 (CC), by stating that the position in South Africa is that one must secure leave to appeal and the application before the Court sought the leave to appeal which position is different since the applicants herein have right to appeal.

[101] In reference to the Judgment in the **Nick Salat** case, counsel submitted that at paragraph 102 of the Judgment in ***Kalpana H. Rawal v. Judicial Service Commission and 4 Others*** High Court Petition 386 of 2015, it was evident that the High Court decision never determined the age of retirement age of Judges and as such the **Nick Salat** case cannot be taken to be evidence of bias.

(vii) 1st Applicant's Submissions in Civil Application No. 12 of 2016

[102] Senior Counsel Mr. Nowrojee faulted the Preliminary Objection by stating that it does not meet the principles well set in relation to preliminary objections in the ***Mukisa Biscuit*** case. He submitted that what is contained in the Preliminary Objection are matters of a factual nature which have to be ascertained and that what had been contested was an exercise of judicial discretion contrary to the principles set in the ***Mukisa Biscuit*** case.

[103] It was Mr. Nowrojee's further contention that indeed the application was devoid of any point of law and was laden with

facts, which could only be considered and properly determined in another forum.

[104] Learned Counsel was categorical that contrary to Mr. Omtatah's submissions, the right to appeal is a civil right, the right to appeal a decision was a human right like all other rights in the Bill of Rights. Learned Counsel also submitted that according to the ***Mukisa Biscuit*** case, a preliminary objection had to be brought by way of a notice of motion which was not the case here.

[105] It was also learned counsel's contention that the public interest claimed by Mr. Omtatah in the matter had been claimed without any basis at all. Furthermore, learned counsel stated that a person exercising a right of appeal could not be barred from exercising that right whether the appeal is a first appeal or a second appeal.

[106] Mr. Nowrojee was emphatic that any attempt to deny the applicant access to this Court was an attempt to amend the Constitution. In conclusion, he stated that the applicants had not exhausted their rights as vested under the Constitution and to deny them the right would be an affront on the Constitution.

[107] Learned counsel Mr. Kiragu Kimani, on his part submitted that a Judge was like any other litigant and Kenya was not the first jurisdiction where Judges have gone to Court to have their rights protected. He submitted that substantial justice demands that the applicants are heard and procedural technicalities must not be upheld. He pointed out that there was no basis at all in trying to distinguish between a first appeal and a second appeal.

[108] Mr. Kiragu also distinguished the case of ***Hlophe v. Premier of the Western Cape Province and Another*** 2012(6) SA 13 (CC). He stated that in that case a majority of the Judges were litigants while in the current scenario only two are

litigants. He took the view that every case must be decided on its own peculiar facts.

[109] Further, Mr. Kiragu submitted that the Supreme Court of Kenya cannot be deemed to be synonymous with the seven Judges and that to suppose that where a Bench is conflicted, then the Court of Appeal Judgment automatically stands, would deny the applicants access to justice.

E. ISSUES FOR DETERMINATION

[110] The main issue for determination raised by the Preliminary Objections in applications number 11 and 12 of 2016 is *whether, by directing that applications 11 and 12 be heard on 2nd June, 2016 instead of 24th June as had been earlier directed by the duty Judge; the Chief Justice acted in breach of the Constitution and the law.*

[111] Both Messrs. Kilukumi and senior counsel Nowrojee for the applicants, submitted that the Chief Justice had no powers under the Constitution and/or any other law to interfere with the Orders issued by *lady Justice Njoki* on 27th of May, 2016, wherein the learned Judge had set down the 24th of June, 2016 as the date of hearing. Counsel argued that, by bringing the hearing date forward, the Chief Justice had interfered with the decisional independence of the duty Judge and by extension, the independence of the Judiciary contrary to Article 160(1) of the Constitution. The said Article provides that in exercise of judicial authority, the judiciary shall be subject only to the Constitution and the law, and shall not be subject to the control and direction of any other person or authority.

[112] It was counsel's further submission that the Chief Justice could not interfere with a judicial decision by any Judge of the Supreme Court. Mr. Nowrojee in particular urged this Court to be guided by the history of this country where past Chief Justices had interfered in the decisional independence of Judges

by calling for files to the detriment of justice. Mr. Kilukumi on the other hand submitted that only a five-Judge Bench of this Court could vary the Order of a single Judge of the Court. This submission, was supported by Mr. Kiragu, counsel for the applicants in application number 12 of 2016.

[113] Senior Counsel Mr. Ahmednassir, in opposing the submission, argued that the very Orders by the duty Judge on which the preliminary objection was anchored were themselves illegal as they had not been based on an existing appeal before the Court. Counsel submitted that an irregular or illegal Order cannot be the basis for a preliminary objection such as the one raised by the applicant. Every proceeding which is founded on a nullity, is also a nullity, counsel concluded.

[114] Counsel further submitted that what the Chief Justice had done was not to interfere with any judicial decision by the Judge, but to simply expedite the hearing of the matter in view of the heightened public interest and the interests of justice. The action by the Chief Justice, counsel submitted, was in complete accord with the provisions of Article 159 of the Constitution which *inter alia,* requires that justice shall not be delayed.

[115] Mr. Kanjama submitted that the Chief Justice had acted in accordance with the administrative powers vested in him by the Constitution, the Judicial Service Act and the Supreme Court Act. Counsel contended that the Chief Justice had in fact struck the right balance between independence of the judiciary and administrative efficiency. It was his submission that in the scheme of the practice of the Supreme Court, only the Chief Justice, the Deputy Chief Justice and the Registrar can exercise administrative powers. In counsel’s view, if the Chief Justice were to be stripped of administrative powers necessary for case management and general direction of business, the Supreme

Court would descend into chaos. The preliminary objection in counsel's view, had failed to make a critical distinction between judicial and administrative functions of the Chief Justice. In furtherance to Mr. Kanjama's contention, Mr. Omtata submitted that the CJ had acted to preserve the integrity of the Court and had simply interfered with the administrative directions of the duty Judge and not the judicial function.

[116] Senior counsel Mr. Muite supported the submissions of Messrs. Ahmednassir and Kanjama. It was his argument that the administrative powers of the Chief Justice are well provided for in the Constitution, the Judicial Service Act and the Supreme Court Act. It was counsel's submission that this was not a preliminary objection properly so called. Mr. Muite contended that it was not the jurisdiction of this Court that was being challenged but the powers of the Chief Justice. Counsel submitted that whether the Chief Justice had jurisdiction or not is a question that should have been raised in answer to the Notice of Motion. Counsel also submitted that the Chief Justice took the actions he did as the President of the Supreme Court of Kenya. In that capacity, counsel contended, the Chief Justice acted within his administrative powers as per the Constitution and the law. It was Mr. Muite's contention that the Chief Justice could not have closed his eyes to the fact that come the 24th of June 2016, there would be no Bench of five to hear the applications as had been directed by the duty Judge. Counsel emphasized the need to make a clear distinction between the decisional independence of a Judge hearing a matter and administrative directions.

F. ANALYSIS

[117] It is important to establish the proper context within which the current controversy has arisen. In direct contention are the powers of a single Judge sitting to determine an *ex parte*

application and the administrative powers of the Chief Justice to manage the Judiciary of which he is head and the Supreme Court of which he is President. The position of Chief Justice in this regard is one that defies exact categorization. In one instant, the Chief Justice is a Judge like any other, who is called upon daily to discharge judicial functions in the company of fellow Judges of the Supreme Court. He has to adjudicate disputes and render decisions in accordance with the Constitution and the law.

[118] In another instant, the Chief Justice oversees the daily operations of the judiciary in general and the Supreme Court in particular. Regarding the Supreme Court, the Chief Justice must ensure that the calendar of the Court in terms of Court sittings, vacations, hearings and disposal of cases is observed and implemented efficiently and effectively. On occasion, the Chief Justice will be called upon to make administrative decisions as dictated by the exigencies of the Court's business. The administrative powers of the Chief Justice in his dual capacity as head of the Judiciary and President of the Supreme Court are donated by the Constitution, the Judicial Service Act, the Supreme Court Act and the Supreme Court Rules.

[119] The institution of a single Judge of the Supreme Court is a creature of the Supreme Court Act and the Supreme Court Rules. Towards this end, Section 24(1) of the Supreme Court Act provides that:

"In any proceedings before the Supreme Court, any Judge of the Court may make any interlocutory Orders and give any interlocutory directions as the Judge thinks fit, other than an Order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding."

Rule 4 (3) of the Supreme Court (Amendment Rules) 2016 provides that:

"Without prejudice to the provisions of sub-rule (1) or sub-rule (2), a single Judge of the Court may hear applications and make Orders with regard to –

(i) change of representation;
(ii) admission of consent;
(iii) consolidation of matters;
(iv) Dismissal of a matter for want of prosecution;
(v) correction of errors on the face of the record;
(vi) withdrawal of documents;
(vii) review of the decision of the registrar;
(viii) leave to file additional documents;
(ix) admission of documents for filing in the Registry; or
(x) substitution of service."

Article 161 (2)(a) of the Constitution provides that:

"There is established the Office of the Chief Justice who shall be the Head of the Judiciary"

Article 163 (1) (a) of the Constitution provides that:

"There is established the Supreme Court which shall consist of the Chief Justice who shall be the President of the Court".

Section 5(1) of the Judicial Service Act provides that:

"the Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government"

Section (5) (2 (c) provides that:

"…the Chief Justice shall exercise general direction and control of the Judiciary"

Rule 4 (1) of the Supreme Court Rules provides that:

"the Chief Justice shall coordinate the activities of the Court, including:

> ***(a) Constituting a Bench to hear and determine any matter filed before the Court;***
> ***(b) determining the sittings of the Court and the matters to be disposed of at such sittings; and***
> ***(c) determining the vacations of the Court."***

[120] At the outset, it is important to note the fact that the Orders that are the subject matter of this preliminary objection were issued *ex parte;* quite simply, in the absence of the other party, or without hearing the other party. It is also crucial to note that the said Orders were hybrid in nature, in that they comprised of judicial decisions on the one hand and judicial directions on the other hand. The decisional aspects of the said Orders were in the first instance, *the certification of the applications as urgent by the duty Judge, the suspension of the Judgment of the Court of Appeal and the prohibition of the respondents i.e. the Judicial Service Commission from declaring vacancies in the offices of the respective respondents.* The main directional component of the *ex parte* Orders was *the requirement of the parties to appear for an* ***inter partes*** *hearing on the 24th of June, 2016, quite simply, the fixing of a hearing date by the duty Judge.*

[121] A judicial decision in my view is *a determination by a Judge or judicial officer of a certain situation arising from a set of facts in dispute.* In making a determination, a Judge or other judicial officer considers the issues in contestation and arrives

at a conclusion taking into account the submissions of the parties and the applicable law. Where a determination is made by a Judge *ex parte,* that is, in the absence of the other party, the Judge relies solely upon the facts, documents and arguments presented to him or her by the applicant. That is why *ex parte Orders* are very temporary in nature for they are issued without the benefit of counter argument. The certification of an application as urgent by a Judge is based on the urgency of what is to be determined. When a Judge certifies a matter urgent, he or she would have been satisfied that, on the basis of the pleadings and documentation placed before him or her, the adjudicatory machinery of the Court must be activated if a cause is not to be lost.

[122] A judicial direction on the other hand is not a determination. A direction entails an instruction by a Judge or other judicial officer directed at the parties to the dispute requiring the undertaking of specified action. Such direction is largely administrative in nature. A direction therefore falls within the range of case management functions aimed at ensuring the efficient and effective administration of justice. The fixing of a hearing date is either a judicial or non judicial direction which is administrative in nature. So administrative in nature is the fixing of hearing dates that this function is performed by Court administrators referred to as Registrars. In the Supreme Court of Kenya, given the fact that the Court sits *en banc,* the setting down of cases for hearing on specific dates is a function undertaken by the Deputy Registrar in consultation with the Chief Justice, other Judges of the Court, and at times, the parties to the dispute. All five-Judge matters are set down for hearing in this manner. The Chief Justice exercises overall supervision over the execution of the Court diary.

[123] It is in this context that one must determine the merits or otherwise of the preliminary objection before us. I have taken into account the submissions of senior counsel Mr. Ahmednassir, to the effect that the so called preliminary objection is not a preliminary objection strictly speaking. According to counsel, the objection does not meet the criteria established in the ***Mukisa Biscuits*** case, as it does not deal with a pure point of law. Mr. Muite echoed the sentiments of Mr. Ahmednassir. In his view, the objection should have been raised as an answer to the motion by the respondents. The applicant cannot bring a preliminary objection in his own application. However in view of the fact that this objection raises a substantial question of law, I would invoke the provisions of Article 159 (2) (d) of the Constitution to consider the submissions of the objectors on merit.

[124] The facts leading to the preliminary objection are not in dispute. What is in dispute is whether the action by the Chief Justice of bringing the matter forward for an *inter partes* hearing on 2nd June, 2016 as opposed to 24th June, 2016 violated the Constitution or the law. In doing so, the Chief Justice invoked his administrative powers under the Constitution or the law. It was strongly submitted that the Chief Justice has no administrative powers under the Constitution or the law as would permit him to vary a hearing date fixed by a Judge of the Court.

[125] It is clear to me that the Constitution, the Judicial Service Act, and the Supreme Court Act and the Rules thereunder, vest the Chief Justice with general powers of control and direction over the judiciary and the Supreme Court. What does being the head of the judiciary actually mean? What about being the President of the Supreme Court? It must mean having powers, duties and responsibilities of an administrative nature whose

exercise is to ensure the efficient and effective administration of justice. That is what the judiciary is established and actually exists for. An important caveat is that the exercise of administrative powers by the Chief Justice or any other Judge or judicial officer should not interfere with the decisional independence or adjudicative function of another Judge. I would also add that the use of administrative powers should not be actuated by the intention to subvert the ends of justice. In fact, the administrative powers vested in the Chief Justice, must be exercised in such a manner as to guarantee the independence of the judiciary. In Mr. Kilukumi's list of authorities, there is to be found a scholarly article entitled *"The Administrative Authority of Chief Judicial Officers in Australia"* authored by **Kathy Mack'and Sharyn Roach Anleu** in which the writers cite with approval the following paragraph:

"**Generally, one cannot deny the need for administrative supervision over Judges to promote efficiency of judicial administration. Therefore, Judges must submit to administrative guidance by other Judges who are in charge of the administrative management of the court. *Such administrative guidance must be directed to matters of case management and court administration but should not refer to the exercise of the judicial function itself, i.e. the procedural and substantive decision making aspect of adjudication"*** (see authority number 1 in the applicants list of authorities at page 7 of the bundle of authorities)

[126] I agree with senior counsel Nowrojee when he cautions against the dangers of forgetting history in reference to the actions of past Chief Justices. I am alive to this dark era in our country when the judiciary lent its imprimatur to the oppressive actions of the State. Fortunately, the Constitution of 2010 is designed in such a manner as to make it near impossible for a

State or public officer to use the authority conferred on him or her in a whimsical manner. What are we to make of Article 10 of the Constitution which decrees that any state officer who interprets and applies the Constitution is bound by a gamut of national values and principles of governance including the rule of law, inclusiveness, human rights, good governance, integrity, transparency and accountability?

[127] We must now interrogate the circumstances that informed the actions by the Chief Justice. On the morning of 27th May, 2016, a seven-Judge Bench of the Court of Appeal delivered Judgment in an appeal by the applicants herein in which it affirmed a five-Judge Bench decision of the High Court to the effect that all Judges in Kenya must retire upon attaining the age of 70. On the same day, and to use the words of Mr. Kilukumi, "with lightening speed" the applicants moved to the Supreme Court where they obtained *ex parte Orders* issued by the duty Judge. I have already described the nature and scope of the Orders in question. The duty Judge not only certified the matter urgent, but also issued conservatory Orders suspending the Judgment of the Court of Appeal, and restraining the respondents from declaring vacancies in the offices held by the applicants. The duty Judge also issued a direction setting the matter down for hearing on the 24th of June, 2016.

[128] Now, it is a matter of common knowledge that the Chief Justice had declared his intention to retire as head of the judiciary and President of the Supreme Court on 16th of June, 2016. In the circumstances, if the date of 24th June set down for hearing by the duty Judge stood, it would bring into play a number of scenarios. The first of these scenarios is that come 24th June, there would be no quorum of five Judges to hear the matter substantively. The Deputy Chief Justice, and Mr. Justice Tunoi, being parties and applicants in the matter would be

expected to steer clear of the Bench, leave alone constituting one. The Judgment of the Court of Appeal would remain suspended, the respondents would remain hamstrung by the conservatory Orders, and the applicants would remain in office until they attained the age of 74 since no five-Judge Bench could ever be raised to pronounce itself on the matter.

[129] The *ex parte* Order of a single Judge of the Supreme Court, granted in chambers, would effectively have overturned the Judgments of a five-Judge Bench of the High Court and a seven-Judge Bench of the Court of Appeal.

[130] The second scenario is that come the date of 24th of June set down for hearing by the duty Judge, the Deputy Chief Justice, perhaps acting on the advice of her lawyers would decide that there was nothing illegal, irregular or ethically wrong in personally constituting a bench of five with herself as a member. Such action on the part of the Deputy Chief Justice would probably trigger a very strong protest by the respondents. The latter would, perhaps acting on the advice of their lawyers pull out of the case altogether, citing the futility of engaging in what would have become a clear circus.

[131] Where would these scenarios leave the Supreme Court? The apex Court in the land would have been dealt a fatal blow to its legitimacy. The Court would become the subject matter of ruthless ridicule. The other Judges of the Court would have been thrown into the ignominy of the incomprehensible. This story is the stuff of things that make Oscar winning Hollywood movies. The damage done to the Court, the Judges of this Court, and by extension the entire judiciary would justifiably claim frontline coverage in the world’s media, and provide comic relief to overworked students of law in established law schools and faculties.

[132] Faced with these scenarios, what was the Chief Justice expected to do? To sit pretty and watch the drama unfold, because to take any administrative action, would violate the Constitution? The Chief Justice elected to take administrative action so as to arrest the unfortunate developments. Hear his own words:

"Granted the urgency under which the hearing of the application was sought, and the public interest in this application, I hereby invoke my administrative powers as the Chief Justice and the President of the Supreme Court to fast track the hearing of the application.

My directions are therefore, as follows: 1) The Registrar of the Supreme Court serves the parties to appear for the hearing of this application *inter-partes* ***(sic) before a 5-Judge Bench of the Supreme Court on Thursday, June 02, 2016 at 10 am. 2) The Registrar also serves the parties with notices to appear for directions on the said hearing tomorrow, May 31, 2016 at 10 am before Wanjala and Njoki SCJJ."***

[133] On the same day that the Chief Justice issued these directions, the respondents vide application No. 11 of 2016, filed a Notice of Motion seeking to vacate the Orders of the duty Judge and setting the matter for hearing before the Chief Justice retired. The next day, on the date of mention for directions before the two-Judge bench, the respondents filed another Notice of Motion No. 12 seeking the same Orders as in application No. 11.

[134] Can it be argued, as has been submitted by counsels for the applicants, that by taking administrative action to fast track the hearing of the application; the Chief Justice interfered with the adjudicative function and decisional independence of the

duty Judge? Both counsels for the applicants (Messrs. Kilukumi and Kiragu) submitted that only a five Judge Bench can vary the decision of a single Judge of the Supreme Court. This contention is meritorious, nor is it without precedent in the practice of this Court. On a number of occasions, a five-Judge Bench of this Court has varied the decisions of a single Judge. But, before such a Bench sits to vacate the Orders of a single Judge, it must be constituted in the first place. Who has the legal authority to constitute such a Bench? Is it not the Chief Justice and in his absence the Deputy Chief Justice? For example, one of the prayers in the Notices of Motion No. 11 and 12 of 2016 is for the Court to hear and determine the applications before the Chief Justice retires. How is such an application to be disposed of unless the hearing date is brought forward?

[135] Not so long ago, in the course of these proceedings, Mr. Osundwa Sakwa appeared before this very Bench through his lawyer seeking to be admitted as an interested party. His application was dismissed by a majority of this Bench. The next day, Mr. Osundwa filed yet another application, under certificate of urgency, seeking a review of the Order dismissing his application for joinder. The application was placed before me as the duty Judge for directions. Upon hearing counsel for the applicant, I certified the matter urgent and directed that the file be placed before this Bench for further directions and action. If I had certified the matter urgent but then proceeded to set it down for hearing say, two weeks from the date of certification, would the applicant not have been aggrieved? Would he not have been justified to seek the intervention of the Chief Justice so as to bring the hearing of his application forward during the pendency of these proceedings?

[136] The action by the Chief Justice left intact the decisional Orders of the duty Judge. As matters now stand, thanks to those

Orders, the applicants herein are still in office, while the respondents cannot declare a vacancy in the offices of the latter. It is my view that the directions by the Chief Justice, were purely administrative and were invoked in the interests of the justice of the case. Otherwise, why would a litigant who has moved to Court under a certificate of urgency and who has been granted conservatory Orders *ex parte,* be aggrieved when administrative action is taken to expedite the determination of his/her application? Where is the constitutional violation here? Where is the aggrieved respondent supposed to seek refuge?

[137] Counsels for the applicants submitted that the duty Judge had acted pursuant to the provisions of Section 24 (1) of the Supreme Court Act. This Section provides that:

"In any proceedings before the Supreme Court, (Emphasis added)***, any Judge of the Court may make any interlocutory Orders and give any interlocutory directions as the Judge thinks fit, other than an Order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding."***

[138] This Section grants a single Judge of the Supreme Court considerable discretionary latitude. Yet, however far-reaching the discretion, it must be exercised judiciously and cautiously. The discretion cannot be exercised without regard to the circumstances surrounding each case. Mr. Nowrojee submitted that the Chief Justice cannot be said to have absolute discretion in exercising his administrative powers. Neither can a single Judge of this Court exercise absolute discretion in issuing interlocutory directions. Such directions, especially when they concern matters administration, such as fixing a hearing date for a five-Judge Bench, cannot be issued without reference to the Chief Justice and consultation with the other Judges of the Supreme Court.

[139] It is my view that Section 24(1) of the Supreme Court Act must be read alongside Article 163 (2) of the Constitution, which provides that:

"the Supreme Court shall be properly constituted *for the ` purposes of its proceedings* ***if its composed of five Judges."***

[140] Strictly speaking therefore, in the light of Article 163(2) of the Constitution, a single Judge sitting before the empaneling of a five-Judge Bench cannot constitute the Supreme Court. A single Judge issues *ex parte Orders* not in his or her capacity as the Supreme Court, but as an agent of the yet to be empaneled Bench of the Court. This explains why such orders must be very temporary in nature and only last up to and until a five-Judge Bench is constituted by the Chief Justice. An *ex parte direction* that fixes a hearing date usurps the administrative powers of the Chief Justice, the consultative privilege vested in other Supreme Court Judges and the powers of the Registrar of the Court.

[141] In view of the foregoing reasons, ***I hereby dismiss the two Preliminary Objections in applications number 11 and 12 of 2016. The costs shall abide the cause.***

G. THE PRELIMINARY OBJECTION BY Mr. OMTATA – THE INTERSTED PARTY

[142] My dismissal of the two Preliminary Objections in applications number 11 and 12 of 2016 ought to pave the way for me to be part of the Bench that should dispose of the pending applications together with the main application for conservatory orders by the applicants. But alas! another hurdle has been placed in my way by Mr. Omtata who has participated in this matter as an interested party, all the way from the High Court. This hurdle is a formidable one. I have set out in my

account the nature of Mr. Omtata's objection, and his submissions in support of the same.

[143] Mr. Omtata contends that this Court lacks jurisdiction to entertain any application arising from and touching upon this dispute in view of the fact that all the seven of us are conflicted in one way or another. The applicants who are themselves Judges of this Court cannot be expected to sit in Judgment over their own cause. The Chief Justice and Justice Smokin Wanjala are members of the Judicial Service Commission which is a party to this dispute. Justices Ibrahim and Ojwang are said to have written a memo in which they expressed an opinion as to what is the retirement age for Judges. Lady Justice Njoki is said to have filed a case in the High Court against the Judicial Service Commission. In the circumstances, Mr. Omtata submits that this Court ought to disqualify itself from entertaining this matter. In the alternative Mr. Omtata submits that each individual Judge should recuse him or herself from this case on grounds of the personal conflict of interest.

[144] The interested party prays that once it becomes evident that this Court cannot determine this dispute due to the resultant lack of quorum, the Judgment of the Court of Appeal should become final. In support of his submissions, Mr. Omtata has cited many authorities ranging from the Constitution to case law. The interested party has received support for his preliminary objection from the respondents, the first *amicus curiae*, and the second *amicus curiae*. Again, I shall not revisit the arguments and submissions in support. The applicants oppose this preliminary objection. I have equally documented their reasons for opposition.

[145] Mr. Nowrojee opposed this preliminary objection on the ground that it does not satisfy the criteria set in the ***Mukisa Biscuits Case*.** For the same reasons I rejected this line of

reasoning by Mr. Ahmednassir in relation to the two other preliminary objections, I shall proceed to determine Mr. Omtata's objection on the merits.

[146] The interested party's application is such that it must be determined first before this Court can proceed to entertain the substantive application for conservatory Orders. In this regard, this application contains one element of a preliminary objection, i.e., it has the potential of disposing of the case, at least for now, were it to succeed.

[147] Mr. Omtata placed heavy reliance on Article 50 (1) of the Constitution in urging the Court to disqualify itself for lack of jurisdiction. This Article provides that:

" Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or, if appropriate, another independent and impartial tribunal or body."

[148] In the applicant's view, Article 50(1) envisages only an independent and impartial tribunal. Any Court, or Tribunal that is not independent, is automatically disqualified for want of jurisdiction. I must at the outset declare that the right to a fair and public hearing before an independent Court or other competent tribunal lies at the heart of a functional judiciary. But in jurisdictional terms, one must read the Constitution as a whole. In this regard, I agree with Messrs. Kilukumi and Kiragu and senior counsel Nowrojee that it is to Article 163 (4) of the Constitution that one must turn to ascertain whether this Court has jurisdiction to entertain this matter. I would further confirm that in terms of this Article, this Court is indeed clothed with the subject matter of jurisdiction to entertain the intended appeal.

[149] The real question that this Court has to grapple with is whether it should exercise jurisdiction or decline to exercise jurisdiction should any of its members recuse him/herself from determining the dispute on grounds of conflict of interest. It would not be the first time that this Court has found that it has jurisdiction but for stated reasons declined to exercise such jurisdiction. In ***Re the Matter of the Interim Independent Electoral Commission*** (2011) eKLR, this Court held that it had jurisdiction to issue an advisory opinion but declined to exercise its jurisdiction on the basis of stated reasons.

[150] To dismiss Mr. Omtata's application at this stage on the basis of the ***Mukisa Biscuits case***, would deny me the opportunity to address calls for my recusal.

H. ISSUES FOR DETERMINATION

[151] The only issue for determination is *whether this Court should decline to exercise its jurisdiction on grounds that all or certain members of this Bench are conflicted.* Put differently, the issue for determination is whether *I, Justice Smokin Wanjala, being a member of this Bench should recuse myself from determining this dispute because I sit on the Judicial Service Commission, which is a party to this case.*

[152] In the course of submissions by counsel for all the parties in support of this application, I was urged to recuse myself from sitting on this Bench on grounds that, being a member of the Judicial Service Commission, which is a party to this suit, had generated a perception in the eyes of the public that I would not be impartial. Mr. Omtata even attached a popular and widely read cartoon strip published by one of the mainstream media wherein I was portrayed as having made up my mind. I had not come across the said cartoon strip until, it was waved in front my face in open Court by the interested party.

[153] At first, Mr. Omtata's cartoon waving motions stirred in me feelings of amusement as I promptly joined those in Court in mirthful outbursts of laughter. But my laughter was short-lived, as it almost immediately, turned into a terrified smile, and later faded into an agonized grimace. In a matter of seconds, I had been ravaged by a complex and excruciating array of emotions. Here I was, faced with a very serious dispute in which two senior members of the Court in which I sit, were seeking justice, by way of intended appeal, in the very same Court. Yet, the people of Kenya, on whose behalf, I exercise judicial authority in the highest Court in the land had formed the opinion that I could do no justice, that I was not free from bias. Even the third *amicus curiae*, the Law Society of Kenya, through Messrs. Anzala and Masika rose to caution me against sitting on this Bench to determine the dispute.

[154] In answer to all those who have urged me to recuse myself because of being a member of the Judicial Service Commission, I would hold that membership in the JSC does not automatically disqualify a Judge from adjudicating a dispute to which the former (JSC) is a party. Membership in the Commission is a constitutional imperative. Indeed, this would not be the first case, to which the Commission is a party, and in which I have participated as a member of a five-Judge Bench.

[155] But there may arise a situation where a Judge, who is a member of the Judicial Service Commission, becomes so intimately involved in the process leading to an impugned decision, that no amount of judicial ingenuity can extricate him/her from either real or perceived bias. I am afraid to declare that, this indeed, is my situation in this case. During the deliberations at the Commission, regarding the question whether Judges should retire at the age of 70 or 74, not only did I vote in support of the resolution requiring Judges to retire at

the age of 70, I did also proffer extensive legal opinion to justify such a position. Similarly, long before this question became a subject matter of judicial adjudication, I had expressed a similar opinion during informal discussions with the other Judges of this Court including the applicants herein.

[156] While I am capable of being persuaded to change my opinion in open Court, by learned submissions of counsel; it is clear to me that it is not possible to surmount the perception of bias in this case, which has gripped the public psyche. All counsel for the respondents submitted that if the Court were to down its tools on grounds of recusal by individual Judges of this Bench, it would shut out the applicants from accessing justice in the apex Court. Counsel urged us to invoke the doctrine of necessity so as to prevent the injustice that would be visited upon the applicants. While I am not without sympathy for this cause, I am also acutely aware that refusal to recuse myself has the potential of inflicting far-reaching damage to the credibility of the Supreme Court. Sometimes, not even the doctrine of necessity can override the overwhelming demands of natural justice. I do not even think that, this Court's reasoning in the ***Jasbir Rai*** case established a principle that the doctrine of necessity would apply in all cases before this Court in which a Judge is called upon to recuse him/herself from the matter at hand.

[157] The effect of my recusal will no doubt affect the capacity of this Court to raise a quorum. The effect of the inability of the Supreme Court to entertain the intended appeal is that the decision of the Court of Appeal, to the effect that all Judges must retire upon attaining the age of 70 stands, until it is affirmed or reversed by a properly constituted Bench of the Supreme Court. By the same token, the *ex parte Orders* issued on the 27th of May, 2016 must lapse with this recusal because

the Bench on whose behalf the Orders were issued is no longer in existence. The said Orders cannot exist in futility.

[158] On the basis of the foregoing reasons, I hereby ***allow the application by Mr. Omtata and recuse myself from any further participation in this dispute as a Judge of the Supreme Court of Kenya.***

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

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original
REGISTRAR
SUPREME COURT OF KENYA

THE RULING BY THE HON. JUSTICE N. S. NDUNGU

RULING

A. INTRODUCTION

[1] The Applicant in this matter is raising a preliminary objection challenging the jurisdiction to make any other orders following the directions given on 27th May, 2016.

B. BACKGROUND

[2] The Applicant's appeal to the Court of Appeal challenging the retirement

age of judges was dismissed. The Court of Appeal's judgement delivered on 27th May, 2016 upheld the High Court's judgment in declaring that the retirement age of all judges serving on the effective date is 70 years. Aggrieved, the Applicant
sought *ex parte* conservatory orders in this Court. Njoki SCJ on 27th May, 2016 granted the conservatory reliefs. Thereafter, the Chief Justice gave the following

directions which for purposes of clarity and reference are reproduced below.

> ***"CORAM:***
>
> ***MUTUNGA CJ &***
>
> ***PRESIDENT DIRECTIONS***
>
> *[1]I have perused the Orders in this application granted Ex-parte by Njoki SCJ on May 27, 2016.*
>
> *[2]The said Orders were granted under an application that sought to be certified urgent and be admitted for hearing on a priority basis.*
>
> *[3] Njoki SCJ made the certification of urgency, granted interim orders, and fixed hearing inter-partes on* ***Friday June 24, 2016****.*
>
> *[4]Granted the urgency under which the hearing of the application was sought and the public interest in this application, I hereby invoke my* ***administrative powers as the Chief Justice and President of the Supreme Court*** *to fast track the hearing of the application.*
>
> *[5]My directions are therefore as follows: (1) The registrar of the Supreme Court serves the parties to appear for the hearing of this application inter-partes before a 5 judge bench of the Supreme Court on* ***Thursday, June 02, 2016 at 10.00am****. 2) The Registrar also serves the parties with notices to appear for directions on the said hearing* ***tomorrow, May 31, 2016 at***
>
> ***10am before Wanjala and Njoki SCJJ."***

[3] These directions are what the Applicant is challenging.

C.PARTIES' RESPECTIVE CASES.

(i) The Applicant's case

[4] Senior Counsel Pheroze Nowrojee for the Applicant disputed the Chief Justice's jurisdiction to issue the directions. He contended that administrative directions cannot set aside a judicial order. It was his submission that the invocation of the administrative powers violated Article 160 (1) of the Constitution which stipulates that judges are only subject to the Constitution in the exercise of judicial authority.

[5] Further, he urged, the Chief Justice while making the directions was not seized of the matter as the single-judge was. He urged that for that reason, the Chief Justice acted illegally, *suo motu.* Counsel urged that the directions were contrary to Statute; specifically Section 3 (c) and (d) of the Supreme Court Act. He submitted that

this case touched on the history of this Country particularly on the age of retirement of judges.

[6] Counsel contended that calling for the file, or giving directions on the file while another judge was seized of the matter was synonymous with interference with judicial independence which implied that the file did not reach the office of the judge who called for it in the normal course of business. He cited various incidences embedded in the history of this country relating to interference with judicial independence.

[7] One of the instances counsel cited was an incident in which Chief Justice Miller (as he then was) called for a file in a criminal matter that Justice Schofield was seized of. In that regard, he urged that the Constitution sought to address such issues of interference with judicial independence and such actions cannot be allowed to happen in this day and age in light of Section 3 of the Supreme Court Act.

[8] Counsel urged that the directions of the Chief Justice amount to use of absolute discretion which is a hallmark of tyranny and dictatorship. In addition, he contended that no public officer should grant themselves such power. He submitted that subordinate legislation should never be imprecise, and he underscored that the power exercised by the Chief Justice was imprecise, vague and its source ought to have been stated in the directions given. Counsel urged that it was a cardinal rule of law that, the exercise of powers affecting rights have to be anchored on a provision of law, otherwise misinterpretation of law would result. He concluded by urging this Court to delineate the precincts for exercise of the Chief Justice's administrative powers.

(ii) LSK's Case (3rd Amicus Curiae)

[9] Counsel Dennis Muriuki held brief for Mr Masika for the Law Society of

Kenya. He submitted that the Chief Justice may have meant well in a bid to expedite the matter. However, he urged that the Chief Justice did not have power to vary orders in view of the prescriptions in Section 24 of the Supreme Court Act, 2011. He contended therefore, that the directions did not lie in law.

(iii) 1st and 2nd Respondents' case

[10] Senior Counsel Paul Muite urged that the preliminary objection raised

by the applicant was not strictly speaking a preliminary objection since it did not raise a point of law pleaded and did not comply with the principles set out in
Mukisa Biscuit Manufacturing co. Ltd. v West End Distributors ltd
(1969) EA 696. He submitted that the Chief Justice is empowered by Article 161
(2) (a) of the Constitution as the head of the Judiciary and Section 5(2)(c) of the Judicial Service Act to exercises general direction and control over the Judiciary. He urged that the Chief Justice Could issue the directions in a bid to expedite the case in light of Article 159 of the Constitution. Counsel urged that all the historical examples cited were of executive interference and hence not on all fours with the instant case.

[11] Senior Counsel's co-counsel, Mr. Mansur submitted that Article 163 (8) of the Constitution mandates the Supreme Court to make Rules in exercise of its power. He submitted that Article 163 (8) of the Constitution as read with Rule 4 of the Supreme Court Rules, 2012 grant the Chief Justice power to make directions. He urged that as soon as the matter was certified urgent, the Chief Justice had power to determine the sittings and the Bench pursuant to Rule 4. He buttressed this assertion with the decision in ***Samuel Macharia & Another v. Kenya Commercial Bank Limited & 2 Others*** Application 2 of 2011; [2012] eKLR.

(v) Rejoinder

[12] In response, Kiragu Kimani submitted Rules cannot trump an Act of Parliament. He urged that no person could interfere with a judicial order and that the right recourse was to seek review before a five-judge bench in accordance with the Supreme Court Act. Counsel urged that although Section 5(2)(c) of the Judicial Service Act allowed the Chief justice to exercise general direction and control over the Judiciary, Section 6 of the same Act allowed the president of the Court of Appeal, the Principal Judge of the High Court and the County Judge and Division heads to supervise and administer their respective stations.

[13] Senior Counsel Pheroze Nowrojee in reply submitted that what was in issue was whether the Chief Justice could vary a judicial Order. He contended that the Chief Justice could not. He urged that 'sittings' of the Court are not 'hearings' of the Court as allege by Mr. Mansur and concluded by urging that by varying an Order of the court, the Chief Justice exercised absolute jurisdiction which cannot be countenanced in law.

D. ISSUES FOR DETERMINATION

[14] Having read the pleadings, the written submissions and the authorities presented to this Court, and having listened to the oral submissions of all the parties in this matter, the following issue for determination crystallizes: Whether the Chief Justice had jurisdiction to make other orders following the orders issued on 27th May, 2016?

E. ANALYSIS

Did the Chief Justice have jurisdiction to make other orders following the orders issued on 27th May, 2016?

[15] To effectively dispose of this issue three questions must be answered.

(a) Did the Chief Justice exercise absolute discretion, if yes, is this permissible under the Constitution?

(b) What constitutes an order of the Court?

(c) Do Rules of procedure take precedent over statutory provisions?

(a) Did the Chief Justice exercise absolute discretion?

[16] Counsel for the Applicant contended that the Chief Justice exercised

absolute discretion in issuing the directions and in so doing disregarded Section 3
(c) and (d) of the Supreme Court Act. Counsel for the Respondent urged that the Chief Justice properly issued the directions in accordance with Article 161 (2) (a) of the Constitution as the head of the Judiciary and Section 5(2)(c) of the Judicial Service Act. These assertions are examined below.

[17] The Chief Justice is the Head of the Judiciary as stipulated by Article

161(2)(a) of the Constitution and section 5 (2) (c) of the Judicial Service Act. Under the Supreme Court Rules, the role of the Chief Justice is stipulated in the following terms under Rule 4(1):

> *"(1) The Chief Justice shall **co-ordinate** the activities of the Court, including—*
> *(a) **constituting a Bench** to hear and determine any matter filed before the Court;*
>
> *(b) **determining the sittings of the Court and the matters to be disposed of at such sittings**; and*
>
> *(c) . . ."*

[18] It is not in dispute that the Chief Justice is the head of the Judiciary and that he is vested with administrative powers. In exercise of this powers, the Chief Justice can therefore exercise administrative and judicial discretion.

Administrative discretion is defined in ***Black's Law Dictionary***, 8th edition, at page 499 to mean:

> **"*A public official's or agency's power to exercise judgment in the discharge of duties.*"**

[19] Judicial discretion is also defined on the same page as:

> ***"The exercise of judgment by a judge or court based on what is fair under the circumstances guided by the rules and principles of law; a Court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right."***

[20] Given that the directions of the Chief Justice invoked his

administrative powers, by parity of reason, he was exercising administrative discretion as there is no specific provision in law that gives the Chief Justice power to 'fast track' the hearing of an

application. Use of absolute administrative discretion is at odds with the Constitution. Absolute as used here refers to the total and final action of acting on your own judgment of which action is subject to none. This cannot be countenanced under Articles 10 and 73 of the Constitution which espouse National values and principles of governance and responsibilities of leadership respectively. Our prescriptive and progressive Constitution demands that all State Officers, of whom the Chief Justice is one, to exercise their administrative discretion within the confines of the Constitution.

[21] This situation is aggravated by the fact that the Chief Justice's

directions were not in keeping with the Supreme Court's obligations as set out in Section 3 of the Supreme Court Act, 2011. This Court elaborated on the significance of this Section in ***Speaker of the Senate & another v Attorney-General & 4*** others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR in the following terms:

> ***[162]It is in recognition of this duty to nurture Kenya's new order, that the Supreme Court Act, in Section 3(d), has extended an open invitation to the Supreme Court to pronounce itself in constitutional and legal 'matters relating to the transition from the former to the present constitutional dispensation… having due regard to the circumstances, history and cultures of the people of Kenya'. The creation of the Supreme Court as the apex Court in the new Constitution was itself informed by a desire and a need to have a fresh Court oversee the constitutional birth of a new order, and also respond to the risks that our judicial history posed to this new Constitution.***
>
> ***[163] In executing its mandate the Court must, therefore, be appreciative of its unique constitutional mission as a substantive rather than a decorative device, deliberately created to oversee Kenya's successful constitutional and institutional transition.***
> (emphasis added)

[22] It is a matter of history and public knowledge that Sir James Wicks who served between 1971- 1982 worked at the behest of the Executive as pointed out by Counsel for the Applicant. Counsel's fear is that if these directions are allowed to stand, this precedent will bind all Courts in accordance to Article 163 (7) of the Constitution. In my view, it would also create some hazy source of power for a Chief Justice in the future, to fall upon and which cannot be questioned. This would inevitably take us back to the dark days of the imperial CJ like Sir James Wicks. This is not permissible under our Constitution and such an act if allowed to stand would form precedent that may begin to extinguish the gains of a reformed Judiciary, under the new Constitutional order.

B. What constitutes an order of the Court?

[23] ***Black's Law Dictionary***, 8th edition, at pages 1129 and 1130 defines the term "Order" to mean:

"2. A written direction or command delivered by a Court or a judge. The word generally embraces final decrees as well as interlocutory directions or commands. Also termed court order; judicial order. "An order is the mandate or determination of the Court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudication a preliminary point or directing some step in the proceedings". 1 Henry Campbell Black, A Treatise on the law of judgments. 1 at 5 (2d ed. 1902).

While an order may amount to a judgment, they must be distinguished, owing to the different consequences flowing from them, not only in the matter of the enforcement and appeal but in other respects, as for instance the time within which proceedings to annul orders rather than judgments. <u>The class of judgments and of decrees formally called interlocutory is included in the definition given in (modern codes) of the word 'order'</u>. 1. AC. Freeman, a Treatise of the Law of judgments 19 at 28 (
Edward W. Tuttle ed., 5th ed. 1925." *[Emphasis supplied]*

[24] Flowing from the foregoing, it is without doubt that the Conservatory

Orders constitute valid Court Orders which could only be varied or altered in the manner prescribed under Section 24(2) of the Supreme Court Act. The directions by the Chief Justice varying the date of the *inter partes* hearing set by Njoki SCJ are a nullity and amounts to a contravention of the Constitution and the Supreme Court Act. Administrative directions cannot, in law, vary a Court Order. To hold otherwise would be to pave way for arbitrariness and exercise of absolute discretion.

[25] It is inaccurate therefore to argue, as the respondents have, that the Court Order was not varied. Once the single Judge of this Court was seized of the matter, she was obligated to render justice and issue any orders she deemed fit in line with Section 24 of the Supreme Court Act. The only recourse available to the aggrieved party was to seek review of the order by a five-judge bench. Any other avenue for recourse would be in direct contravention of Section 24(2) of the Supreme Court Act.

[26] It was argued that Section 5 (2)(c) of the Judicial Service Act empowers the Chief Justice to "exercise general direction and control over the Judiciary". Judiciary in this case, means Judges, Magistrates, Kadhis, etc. In my view Article 160(1) is uncompromising that in the

exercise of judicial authority Judges are subject to the Constitution, *only*. That means that any statutory provision that purports to take away that judicial independence is unconstitutional to the extent of that inconsistency, as dictated by Article 2(4) of the Constitution.

[27] It is also expected that provisions of law are to be interpreted in a manner that conforms to the Constitution. Therefore, Section 5 (2) (c) of the Judicial Service Act must be construed in a manner that is in conformity with Article 160(1) of the Constitution so as to safeguard the independence of the judiciary.

Consequently, Section 5 (2)(c) cannot be construed as empowering the Chief Justice to interfere with the judicial independence reposed on the Judges by Article 160(1).

[28] In the same token, statutory provisions that make specific prescription on a subject trump general provisions on the same subject. In this instance, Section 24(2) of the Supreme Court Act is very specific as to how to vary an order issued by a single Judge whereas, Section 5 (2)(c) of the Judicial Service Act is in very general terms. Therefore, Section 24(2) of the Supreme Court Act overrides Section 5(2)(c) of the Judicial Service Act.

(c) Whether Rules of procedure take precedence over statutory provisions.

[29] It was the Respondent's submission that Article 163 (8) of the Constitution as read with Rule 4 of the Supreme Court Rules granted the Chief Justice power to make the directions. Article 163(8) of the Constitution provides that 'the Supreme Court shall make Rules for the exercise of its jurisdiction.' Article 163

(9) provides that 'an Act of Parliament shall make further provision for the operation of the Supreme Court.' Section 31 of the Supreme Court Act refers to Article 163 (8) and without limiting it makes a potential list of Rules that may be made by the Supreme Court. The Supreme Court Rules, 2012 as amended in 2016 are made pursuant to Article 163 (8) and Section 31 0f the Supreme Court Act.

[30] Article 2 of the Constitution asserts the Supreme of the Constitution. The ***Judicature Act, cap 8 Laws of Kenya***, in Section 3(1) thereof embodies the time-hallowed principle of the hierarchy of norms. The section creates a deliberate and hierarchical sequence of laws, starting with the Constitution, followed by Statutes, subsidiary legislation and next the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897. ***Section 31 (c) of the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya)*** provides that no subsidiary legislation shall be inconsistent with the provisions of an Act.

[31] Taking all the foregoing into account, I am of the view that the Rules cannot be said to be superior to the Supreme Court Act. Seeing that there was provision for review of the orders of the single Judge in the Supreme Court Act, the respondents cannot claim that the Chief Justice's directions were pursuant to the Rules ignoring the fact that the

Act provides the mechanism for review. The Supreme Court Rules must be construed to complement but not substitute or outrank the Supreme Court Act. In addition, both the Act and the Rules must be read in conformity with the Constitution and not contradict or detract from it.

[32] Further, the Supreme Court Rules, being subsidiary legislation must be read in a manner consistent with the Supreme Court Act which are ranked higher in the sources of law in Kenya. Similarly, powers conferred by subsidiary legislation must be exercised in a manner that does not contravene an Act of

Parliament and if the relevant provisions are irreconcilable the statutory provisions trump the provisions of the subsidiary legislation, as I had alluded earlier.

[33] I am convinced that the Chief Justice's directions amount to a conflict between Court administration and judicial independence. The effect of the directions was to encroach on the internal independence of the Judge. In Shimon Shetreet article; ***"The limits of Judicial Accountability: A hard look at Judicial Officers Act 1986' (1987) 10 UNSW Law Journal* 4,11** he states that:

> ***"a significant aspect of judicial independence is the internal independence of a judge which refers to his independence vis-a-vis his judicial superiors and his colleagues."***

[34] In ***The Queen v. Beauregard***, [1986] 2 S.C.R. 56, the matter related to Financial security of federally appointed judges. This decision is however of persuasive relevance as it considered the principle of judicial independence. Then Chief Justice Dickson of the Supreme Court of Canada held:

> ***"21. Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider be it government, pressure group, individual or even another judgeshould interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence."***

[35] The independence of the Judiciary is jealously guarded by the Constitution. Article 160(1) provides that:

> ***"In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."***

[36] Professor W.R. Leberman [Professor Emeritus of the Faculty of Law,

Queen's University, Kingston, Ontario, Canada] in his learned article, *"Judicial Independence and Court Reforms in Canada for the 1990's"*, in Queen's Law Journal Vol 12 (187) 385 [at p. 389] observed as follows:

> ***"Judges are not civil servants. They are, so to speak, servants only of the law itself. They are***

judges and judges only, with no other career employment or interest. They have guaranteed tenure in office with assured public salaries and pensions. They cannot be instructed how to decide cases that come before them."

[37] Although it is said that the directions were issued in view of the public interest nature of the matter, the fact that the matter belongs to the litigants should never be overlooked. As Counsel Nowrojee stated - the actions of the Chief Justice may to an independent observer create the impression that he either had a personal interest in the matter or that he was an aggrieved party - even though this may not have been his intention. It did not help matters that he is a member
of the 1st Respondent. It cannot be emphasised enough that it was incumbent upon the aggrieved party to seek the review of a decision of a single Judge. Only then could a five-judge Bench review the orders made by the single Judge. There is no provision for the Court or the Chief Justice to do so *suo motu*.

[38] It cannot be overstated that it is vital in a democracy that individual judges and the judiciary as a whole are impartial and independent from all external pressures and from each other so that persons who appear before Court and the wider public can have confidence that their cases will be decided fairly and in accordance with the law.

F. ORDERS

[39] Iam inclined to make the following orders:

(a) The application dated 31st May 2016 is hereby allowed.

(b) Costs in the cause.

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

.....

N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA

THE RULING BY THE HON. JUSTICE N. S. NDUNGU

RULING

C. INTRODUCTION

[3] The Applicant Mr.Okiya Omtatah, an interested party in this matter, filed a

Notice of Preliminary Objection on 31st May, 2016. He urged various issues which I set out below.

[4] Firstly, he urged that the Supreme Court has no jurisdiction to entertain the present matter since all the Judges of the Court have either supported or opposed the contention that Judges appointed under the repealed Constitution should retire upon attaining the age of 70 years.

[5] He submitted that by provision of Article 50(1) of the Constitution, the jurisdiction of a Court can only be exercised where the Court is impartial and that if the Court is partial, it is stripped of its jurisdiction. Elaborating on this issue, Mr. Omtatah submitted that a Court cannot exercise jurisdiction where doing so would violate the enjoyment of the absolute right to a fair trial and that jurisdiction must be declined where a Court is so conflicted that it cannot be impartial.

[6] It was his submission that pursuant to Articles 50(1), 73(1)(a)(iii) and 73(2)(b) of the Constitution it is mandatory for the Supreme Court Judges to disqualify themselves since they have taken sides on the subject matter. He urged that the Judges were required, by virtue of Article 50(1), to disqualify themselves and they were not being

requested to recuse themselves which would only be the case if it was voluntary to do so. He contended that the *rule of necessity* or the *doctrine of duty to sit* is not applicable in this case.

2 Mr. Omtatah submitted that under the *hierarchy of rights* in the Constitution, the right to appeal is inferior to, and is trumped by the entrenched and absolute right to a fair hearing and in the event of conflict, the right to fair hearing prevails.

3 He urged that since this Court is disqualified from hearing the matter, the decision of the Court of Appeal should stand as the final decision in this matter necessitated by the overwhelming public interest.

4 Mr. Omtatah cited various authorities in support of his arguments. These include ***United States v Alabama***, 828 F.2d 1532, ***Caperton v A.T. Massey Coal Co. Inc.,*** 556 U.S. 868 (2009), ***United States v Cooley,*** 1F3d 985, In ***re***

Boston's Children First, 244 F3d 164.

5 He further urged the Court to depart from the *principle of necessity* adopted by this Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others,*** Sup. Ct. Petition No. 4 of 2014 ; [2013] eKLR (***Jasbir***). Instead, he implored the Court to adopt the principle in ***Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other 2012*** (6) SA 13 (CC) (***Hlophe***), in which the Constitutional Court of South Africa denied the applicant leave to appeal.

6 He submitted that since the cases before the Supreme Court related to other Judges of the Supreme Court, this Court should not sit since it is *"professionally and personally conflicted"*. He urged that Article 71, 73 and 75 of the Constitution bar a judge from sitting if his or her impartiality is in question.

7 Mr. Omtatah contended that the doctrine of the duty to sit has no place in our Constitution since it requires a judge to sit at all times under whatever circumstances yet Article 50(1), in his opinion, bars a judge from hearing a matter if his impartiality and independence "may" be questioned. He added that

the duty to sit is in essence the rule of necessity and it was not applicable in the matter before the Court. He urged this Court to allow his notice of preliminary objection with costs.

[11] Mr. Kanjama, for the respondents, in support of the preliminary objection, submitted that the oath of office taken by Judges is an indicator on how to look upon the application of the doctrine of necessity. He submitted that judges cannot go against their oath of office which requires them to:

> ***—... diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with [the] Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to [them] at all times, and to the best of [their] knowledge and ability, protect, administer and defend [the] Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it.‖***

[12] He urged that under Article 73 public officers must comply with the guiding principles of leadership and integrity which include: ***—objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, improper motives or corrupt practices.‖***

[13] He submitted further that Judges are bound by Article 75 which stipulates that:

—(1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

> ***(a) any conflict between personal interests and public or official duties;***
>
> ***(b) compromising any public or official interest in favour of a personal interest; or***
>
> ***(c) demeaning the office the officer holds.‖***

[14] In relation to the doctrine of duty to sit, counsel submitted that Article 19(3) which stipulates the rights and fundamental freedoms in the Bill of Rights gives the *hierarchy of rights.* He urged that the right to fair hearing as enshrined in Article 50(1) is not the same as the right to fair trial that is stated to be non-derogable under Article 25; He avers that the two are different. He urged that the right to appeal stipulated in Article 50(2)(q) is a component of the right to a fair hearing and can thus be limited pursuant to Article 24.

[15] Mr. Kanjama submitted that it would not be proper for the Court to sit due to the conflict of interest that the members of the Bench have and more so, because the applicants have already had one right of appeal. He implored the Court to find that it lacks the competence to deal with the matter since four Supreme Court Judges three of whom are members of the current bench had forwarded a letter to the Judicial Service Commission

and that also two of the members of the current bench wrote the judg ment in ***Nicholas Salat v IEBC &***

7 others Sup. Ct. Pet. No. 23 of 2014; [2015] eKLR (***Nick Salat)*** in which they expressed their position on the current matter.

[9] He urged that an observer would actually hold the position that the Supreme Court waded into the issue of the age of retirement of a Judge. He referred to proceedings on the allegations made against some of the Judges of the Court by one Mr. Apollo Mboya, urging that that could give rise to the apprehension that the Judges will not be fair.

[10] He further argued that the on-going matter between Njoki SCJ and the Judicial Service Commission (JSC) pending before the High Court would occasion bias.

[11] Distinguishing the present matter from ***Jasbir*** (above), Mr. Kanjama urged that in ***Jasbir*** the Judge (Hon. Justice Tunoi) had been requested to recuse himself merely because he had recused himself in the same matter while it was at the Court of Appeal. He contended that recusal from a previous Court was not a legal or factual ground requiring recusal on the basis of bias.

[12] In respect of the duty to sit, counsel, submitted that there was no absolute duty to sit and the principles of recusal set by the Court should be used even if it would result in incapacitating the Court. He contended that this was especially applicable in case of a second appeal as in the present matter. He urged the Court to rely on the Constitutional Court of South Africa decision in ***Hlophe*** (ab0ve).

[13] Senior Counsel Muite for the respondents in *S.C. Application 12 of 2016*, submitted that according to Article 159 (1) read together

with Article 1, judicial

authority is derived from the people and it is delegated authority hence *public interest* is a dominant consideration in the present matter.

[10] He however, countered the argument that there was an appearance of bias on the part of the Chief Justice and Smokin Wanjala SCJ by virtue of their membership in the JSC. He contended that the two were not respondents in the present matter and there was no evidence presented before the Court to sugg est that they have *personal interest* in the matter, which is different from Kalpana Rawal DCJ, sitting to hear the matter since she is a litigant. He urged the Court to adopt ***Hlophe*** and indicated that the consequences of recusal will be to vacate the orders of the Court. He urged that the Court has jurisdiction but it should decline jurisdiction since it is conflicted.

[11] Mr. Nyaundi for the 1st *amicus curiae*, in support of the preliminary objection by the interested party, submitted that the Court has jurisdiction but it

should decline to exercise it since it will not be quorate to determine the matter as required by Article 163(2) of the Constitution. He urged that ***Jasbir*** is not applicable in the present matter since the facts are distinct and that the doctrine of necessity may not be utilized to override the basic tenets of natural justice.

[12] Mr. Anzala for the Law Society of Kenya was in support of the preliminary objection. He urged that the right to fair hearing is linked to the right to impartial court. He submitted that there is a real likelihood of bias and the Court has not met the test of impartiality.

Therefore, he urged the most appropriate thing to do is for this Court to allow the Court of Appeal"s judgement to stand as the final decision in this matter.

[11] Mr. Kilukumi for the applicant in *S.C Application 11 of 2016* opposed the preliminary objection urging that it was not accurate that the applicant had indicated that she would forego her right to appeal to the Supreme Court. He urged that the right of appeal is not a stand-alone right – it goes hand in hand with the right to a fair hearing. He urged that Article 163(4) provided for when to exercise jurisdiction and Article 50(1) prescribed the right to a fair hearing, therefore the two rights are distinct. He submitted that there is no distinction between the right to a fair hearing and the right to a fair trial – the applicant is entitled to a fair hearing and that right cannot be limited under Article 24.

[12] He urged that this Court was under an obligation to uphold the applicant"s right to fair hearing and exercise its jurisdiction since it is a fundamental right under the Bill of Rights. He urged that if his client felt that she would be denied her fundamental right she would be the one to complain first about the vested interest of the Bench.

[13] Counsel submitted that the Court developed the doctrine of necessity because it considered that exceptional circumstances may arise. He urged that there is a constitutional imperative and necessity for this Court to hear the present matter since: the Supreme Court is the only organ with the final say in matters of interpretation and application of the Constitution and the Court of Appeal *cannot* substitute this Court; this Court is obligated to assert the supremacy of the Constitution pursuant to Section 3 of the Supreme Court Act, 2011; the applicant is entitled to access to justice as stipulated in Article 48.

[14] He urged further that positions taken by Judges outside the Court are not judicial positions and it does not mean that they cannot be persuaded t o take different positions and therefore, it cannot be said that the Court lacks

impartiality. He urged that in certain circumstances a judge who is not impartial is preferable to no judge at all. He urged the Court to apply the doctrine of necessity since there is no other Court that the applicant can appeal to. This, he submitted, was an exception that finds its source in the rule of law and the rule of law is one of the national values stipulated in Article 10. He implored this Court to follow its decision in ***Jasbir.*** He urged that ***Hlophe*** does not apply in the present matter since the parties in that matter had recourse before the Judicial Service Commission of South Africa while in this case there is no further recourse available to the parties.

2 Senior counsel Pheroze Nowrojee, for the applicant in *Application 12 of 2016* opposed the preliminary objection by Mr. Omtatah urging that it does not meet the requirements of a preliminary objection as laid down in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors ltd.,*** (1969) EA 696. This, he submitted, was because it did not raise any issues that related to a pure point of law without requiring the ascertainment of any facts. On the request that this Court should rely on Hlophe and decline to exercise jurisdiction, counsel urged that the Court should take into consideration that there is an application for review of the decision in ***Hlophe*** which is pending before the Constitutional Court of South Africa.

3 Mr. Kiragu, co-counsel to Mr. Nowrojee, urged that the Judges oath of office mandated them to act impartially as required by law. He urged that it was not in the public interest to decline to hear the application before the Court on merit. He submitted further that there

was no need to distinguish between the first and the second right of appeal since that is not a consideration made in the Constitution. He contended that in ***Hlophe*** the majority of the Judges were parties in the matter which is not the case in the present matter. In relation to

the consideration by the Constitutional Court that the parties had had one right of appeal, Mr. Kiragu submitted that it was in light of the fact that they would go back to the JSC for resolution. He urged that the case was decided on its own peculiar facts and did not lay down any general principle.

[30] It was counsel"s submission that having some members of the bench conflicted does not mean that there is no quorum neither does it extinguish the appeal.

B.ISSUES FOR DETERMINATION

[31] Does this preliminary objection meet the standards required of it as established ***in Mukisa Biscuit Co. v West End Distributors?***

Is this a preliminary objection?

[32] It is trite law that a preliminary objection must be on a pure point of law and it must be on the assumption that all the facts pleaded by the other party are correct. A preliminary objection cannot be raised if ascertainment of the facts is required or if what is sought by it, is the exercise of judicial discretion. These principles were enunciated by the Court of Appeal for Eastern Africa in ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*** where it held, *per Newbold P.,* (page 701):

—A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the

other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.‖

[33] This Supreme Court adopted the principles in ***Mukisa*** in its decision in

Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others, Sup. Ct. Election Petition No. 5 of 2013; [2013] eKLR, (***Raila***) in which it held as follows, at paragraph 14:

The nature and scope of a "preliminary issue" is cogently defined in the statement of Law J.A., in the case of ***Mukisa Biscuit***

Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696 at 700*:*

—So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation.‖

[34]The first ground of objection raised by the Applicant is that this Court has no jurisdiction to entertain the matter currently before it because all the judges have either supported or opposed the issue of retirement of Judges at the age of 70 years. This ground calls for ascertainment of the allegation that “all the judges” are conflicted.

[35] I noticed that Mr. Omtatah during his oral submissions at some point did concede that this Court has jurisdiction but urged the Court to decline jurisdiction on the basis that the members of the bench are conflicted, such that the parties shall not be accorded fair hearing. This is a plea to this Court to exercise its judicial discretion and decline jurisdiction; which sets the preliminary objection outside the parameters set by ***Mukisa Biscuit.***

[36] The second ground of objection is based on the contention that this Court is stripped of jurisdiction by Article 50(1) since it is partial. The issue of lack of impartiality of this Court calls for ascertainment of facts. It is an issue to be determined by this Court once cogent evidence is tendered to that effect, hence it would be more appropriately canvassed during the hearing of the application on merit. However, it must be pointed out that this Court derives its jurisdiction from Article 163 and not Article 50. As such, the basis of this ground of objection is misplaced.

[37]The third ground is based on Articles 50(1) and 73(1) which Mr. Omtatah argues make it mandatory for the Judges to disqualify themselves since they have taken sides on the subject matter of the suit before the Court. Again this allegation requires the ascertainment

of facts especially as by the same token the applicants (intended appellants) opposing contest that the Judges are impartial.

[38] The fourth and fifth grounds are assertions that what is sought is disqualification as mandated by law, as opposed to recusal which is voluntary; and the contention that disqualification based on Article 50(1) is non-discretionary, respectively. Senior counsel Nowrojee submitted that the preliminary objection collapsed; the jurisdiction of the Court having been conceded by Mr. Omtatah. Mr. Omtatah, in his reply during oral submissions, tried to revert back to his initial stance as stated in his pleadings, but this Court cannot overlook the fact that he did in the first instance concede jurisdiction.

[39] The proper question of law is whether the jurisdiction of the Supreme Court is affected by the claim of bias and apprehension of impartiality. The desired outcome by the Applicant is recusal by each Judge. Recusal is a personal decision. It is different from the matter of jurisdiction, which is the power of the Court to hear a matter. The litigants seeking the right of audience in a matter that is allowed under Article 163(4)(a), do so on the basis of a constitutional guarantee that all the avenues of appeal ought to be explored. To suppose that bias, if it exists, strips this Court of its jurisdiction is to presume that the decision of one Justice to recuse him or herself has a bearing on the power of the Court to hear the matter altogether. This is not the case; a position affirmed in the decision of

United States v. Will, 449 U.S. 200 (1980), in which the jurisdiction of the United States Supreme Court to preside over a matter that concerned the compensation of Federal Judges was challenged. The Court held that:

—Although it is clear that the District Judge and all Justices

of this Court have an interest in the outcome of these cases, there is no doubt whatever as to this Court's jurisdiction.‖

Under the provisions of the Constitution, this Court has jurisdiction to hear this matter. The issue of recusal or disqualification, although an important point of law, does not fall within the province of a preliminary objection.

[40] The sixth ground stated that the Rule of necessity cannot be applied in this matter. Once again this calls for ascertainment of the facts of the case contrary to the principles in ***Mukisa Biscuit.***

[41] The seventh ground was an assertion that the right of appeal is inferior to the right to fair hearing and in the event of conflict the latter trumps over the former. This brings to the fore a contestation that should be resolved by this Court during the substantive hearing. This is an arguable point that this Court will be required to pronounce itself on, in this matter. It does not therefore, fall into the province established for a preliminary objection.

[42]In the eighth ground, it is contended that the Court of Appeal"s decision should be allowed to stand since this Court is disqualified. My view is that the question as to whether this Court should disqualify itself is one that is not based on clear constitutional or statutory provision or case law. Consequently, the requirement that this Court should allow the decision of the Court of Appeal in this matter to stand is arguable.

[43] The ninth ground is that there is an overwhelming public interest to sustain the decision of the Court of Appeal. This is a fact that requires ascertainment and would in fact be an insurmountable task to do so. The final ground is that the application is an abuse of the

Court process. On the face of it, the application before the Court is based on the parties" right of appeal to this Court and it raises

salient issues of Constitutional application and interpretation. It would require concrete evidence to disprove that fact.

[44]Having assessed the grounds for the preliminary objection by Mr. Omtatah, it is my conclusion that even though it has raised some interesting constitutional questions, it does not meet the set requirements for preliminary objections set in ***Mukisa Biscuit*** which have been adopted by this Court in ***Raila***, and a number of other cases before this Court. Consequently the Preliminary Objection fails.

[45] However, I am persuaded that in certain circumstances this Court can make findings on certain constitutional questions that are relevant to the development of jurisprudence in this country. Mr. Omtatah"s application has provided an opportunity for the Court to apply its mind in terms of Section 4 of the Supreme Court Act which states:

"***3. The object of the Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things-***

a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;

b) provide <u>authoritative and impartial interpretation</u> <u>of the Constitution;</u>

c) <u>develop rich jurisprudence</u> that respects Kenya's history and traditions and facilitates its social, economic and political growth;

d) enable important constitutional and other legal matters including matters relating to the transition from the former to the present constitutional dispensation to be determined having due regard to the circumstances, history, cultures of the people of Kenya;

e) improve access to justice; and

f) provide for the administration of the Supreme Court and related matters.‖

[46] Further, in the matter of ***Lemanken Aramat v Harun Meitamei Lempaka and 2 Others*** Petition No.5 of 2014; [2014] eKLR this Court held, at paragraph 113, as follows:

—For it is a logical premise that any matter coming up before this Court by proper motion or proper invocation of jurisdiction, and all that such matter may entail – such as the submissions of counsel; matters of judicial notice; or any issue of relevance and of significance to this Court – will fall within the principle elevated by Mutunga, CJ & P. in the Jasbir Singh Rai case [paragraph 81]:

—It will be good practice for this Court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it"

In view of these provisions and case law, and the rich and varied arguments by different counsel during the submissions of this application, on various constitutional questions relating to access to justice, there are a number of issues that have emerged. I find there is need to address these legal questions now rather than later, when they are likely to emerge in a number of cases that will come before any of our courts. The development of jurisprudence requires the Court to seize upon opportunities that present themselves at the earliest instance. I wish therefore to apply my mind to the following questions:

(i) What is the extent of the right to fair hearing; what are its components and its place in the system of Justice?

(ii) Disqualification: When should Judges invoke recusal?

(iii) The doctrine of necessity: does this court have a duty to sit?

(i) What is the extent of the right to fair hearing; what are its components and its place in the system of Justice?

[47] The Kenyan Constitution is anchored upon a foundation of fundamental rights and freedoms. These rights and freedoms correspond with the State"s duty to provide and decry any State attempts to deprive or negatively interfere. Although the Constitution contains a general limitation clause, it also contains various absolute rights. Article 24 gives this Court a formula of assessing the extent of limiting any right given under the Constitution. Limitation of rights under the Kenyan

Constitution is an exercise of great exception. This Court"s jurisprudence has been developed on this basis and I will be hesitant to depart from that tradition.

[19] The extent of the right to fair hearing is a fairly straightforward question. The Constitution gives every Kenyan certain presumptive constitutional entitlements. Presumptive because they can be evaluated under a limitation clause. However, certain rights, such as the right to fair hearing are absolute. They simply cannot be denied. The right to fair hearing bears various components including: the right to a fair and impartial Court or Tribunal, the right of access to justice, the right to a public hearing, the right to be heard within a reasonable time, and the right of appeal in accordance with the Constitution and the law.

[20] This Court has had the opportunity, through a concurring opinion by myself, to establish a persuasive, although not necessarily binding precedent, on the right to fair hearing in the ***Evans Kidero & 4 others v Ferdinand Waititu & 4 others,*** Sup. Ct. Petition No. 18 & 20 of 2014, [2015] eKLR, from which I quote extensively on the scope of the right to a fair hearing:

—The scope of the right to a fair hearing

> ***[253]*** *It is apt, first, in examination of the question before us to determine whether the Judges of the High Court and Court of Appeal in any way, at any stage of trial of this matter, violated the right to a „fair hearing." Consequently therefore it is important to understand the distinctive meaning, scope and implication of this right.*

[254] *This right is clearly spelt out in the Constitution. Article 50(1) of the Constitution provides that:*

—Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.ǁ

Article 25 of the Constitution stipulates 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.ǁ

[255] *Article 50(1) refers to the right to a fair hearing for all persons, while Article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited.*

Often the terms „fair hearing" and „fair trial" are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these

two provisions may be misconstrued in some quarters to mean that Article 50(1) deals with the right to fair hearing in any disputes including those of a civil,

criminal or quasi criminal nature whereas Article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of Articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect.

[256] *Indeed, the African Commission on Human and People"s Rights established general principles to all legal proceedings applicable by Member States, of which Kenya is one. Therefore the principles are binding under Article 2(5) and (6) of the Constitution, and include the following:*

—GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS:

1. Fair and Public Hearing

In the determination of any criminal charge against a person, or of a person‘s rights an d obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

2. Fair Hearing

The essential elements of a fair hearing include:

…

(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

(f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

…

(i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and

(j) an entitlement to an appeal to a higher judicial body.‖

…

[258] *What then are the norms or components of a fair hearing? The Supreme Court of India, in* ***IndruRamchandBharvani& Others v. Union of India & Others****, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing* ***BalKissenKejriwal v. Collector of Customs, Calcutta & Others****, AIR 1962 Cal. 460).*

…

[261] *It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial*

applying the right in both civil and in

criminal matters. The European Court of Human Rights (European Court) has severally explained that: ***—it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.‖*** *(See* ***Steel and Morris v. United Kingdom****, [2005] ECHR 103, paragraph 59).*

> ***[263]*** *It is, therefore, trite law that all persons who come to the Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in Article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters alike.* ‖

[50] That, then settles the question as to whether the right to fair hearing set out in Article 50(1) and the right to a fair trial set out in Article 50(2) are different. The two rights are the same and they are both non-derogable by the provisions of Article 25 of the Constitution. It is imperative to note at this instance – since it was raised in argument by counsel – that Article 24 is very clear that derogable rights under the Bill of Rights can only be limited by law and only to the extent that the limitation is reasonable and justifiable. Article 24 states that:

> ***(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then***

only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,

equality and freedom, taking into account all relevant factors, including--

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom

so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or

other authority that the requirements of this Article have been satisfied.‖

[51] This provision attaches to the rights under the Bill of Rights such that limitations can only be made under clear constitutional and statutory demarcations.

[52] It is important to note the specific provision that limitation of any right under Article 24 must be done by law and this lies within the province of Parliament through legislation and not through the Courts. To ask this Court to limit any right would in effect be an attempt to amend the Constitution; we have no such powers. On this point the applicant is best advised to seek limitation through a legislative intervention in accordance with Article 24.

The Right of Appeal as a component of the Right to Fair Hearing

[53] Under the previous Constitution, parties were often made to feel as if the right of appeal on any issue (even constitutional interpretation and application) rested with the discretion of the Judge. Indeed, that used to be the case. Kenyans however recognized the centrality of the Constitution and opened the avenue for appeals to the Supreme Court *as a matter of right* in any case involving the interpretation or application of the Constitution. The Constitution also gave every Kenyan, an obligation to respect, uphold and defend this Constitution (Art. 3(1). That obligation extends to Judges who sit to hear and determine cases. This provision, alongside that of Articles 10

(the rule of law, equality and human rights), Article 19(1), (importing the Bill of Rights as an integral part of Kenya"s democratic State), Article 27(1) (equality before the law), 48 (access to Justice),

50(1) (fair hearing) and Article 159 (judicial authority), bind Judges to ex ercise a duty to defend the Constitution

[54] The Respondents in this case have urged the Court to recuse itself on this matter, while the Applicant (intended appellant) has urged the Court to uphold her right to be heard. She bases her arguments on the right to a fair hearing.

[55] Classical constitutional interpretation has always viewed the right to fair hearing as a negative right. There is however a case to be made about the *dual-nature* of this right. The right to fair hearing decries state deprivation but also thrives on State provision. There is a *positive duty* by the State to ensure that every Kenyan has the right to fair hearing which involves the right of appeal where conferred by the law or the Constitution. This obligation includes the Judiciary"s own participation as an Organ of the State. The obligation equally applies to the Judicial Service Commission as an institution of the State. This interpretation has been enabled by the Constitution, particularly:

“Article 21(1) It is 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.”*

To whom does the right to fair hearing belong?

[56] Having said that, it is important to consider the question as to whom the right to fair hearing belongs. Article 19 states that:

—(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

> ***(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.***
>
> ***(3) The rights and fundamental freedoms in the Bill of Rights—***

(a) belong to <u>each individual</u> and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.‖

[57] *The rights and fundamental freedoms in the Bill of Rights belong to each individual.* Therefore, every individual has their own distinct entitlement to the said rights and fundamental freedoms which is separate from that of another individual.

[58] In relation to enforcement of the Bill of Rights, Article 22 states 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.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

> ***(a) a person acting on behalf of another person who cannot act in their own name;***
>
> ***(b) a person acting as a member of, or in the interest of, a group or class of persons;***
>
> ***(c) a person acting in the public interest; or***
>
> ***(d) an association acting in the interest of one or more of its members.***‖

[59] In ***Kidero,*** I stated in my concurring opinion, at paragraph 350, that:

—As I have stated earlier, under Article 25(c) of the Constitution, the right to a fair trial is a right that cannot be limited. However, it is an individual's right, that is a right in personam.‖

[60] An application for recusal such as the one before us brings to reality the essence of considering an individual"s right to fair hearing *vis-a-vis* public interest. The interests of the public were eloquently presented by the interested party, and supported by the respondents. Due to the consequences of the Orders resulting from the Interested Party"s application upon the Applicant and

Respondents who are the primary parties to this matter, the formula given by Article 24 mandates me to consider the nature of the right to appeal as a component of the right to hearing (in relation to the primary litigants) *vis-a-vis*,

the importance of limiting this right on the basis of impartiality (the claim brought by the interested party and supported by the respondents).

[61] In the course of enforcement of the right to fair hearing, when balancing the rights of different claimants before the Court over the same right, and because of the personal nature of rights, priority must *first*, be given to the parties that are directly affected by the violation of that right, for instant the accused person, plaintiff, applicant, appellant, defendant, respondent, etc.; *secondly,* other parties to the suit that are indirectly affected, such as interested parties; *thirdly*, the general public; and *lastly,* the interests of the State. In the present matter therefore, this Court ought to have regard to the right to fair hearing of the applicants and the respondents, first after which it will consider the right of the interested parties to a fair hearing of the suit and then the right of the general public.

[62] In view of the foregoing, it is my observation that in this matter, the primary applicant namely Justice Kalpana Rawal has not herself raised the issue of an impartial bench, bias or prejudice that would arise if the bench as currently constituted should sit on her matter. In fact she states that she has no issue with any of the Judges as empanelled. Similarly, the primary respondent the Judicial Service Commission has not pleaded specific prejudice that it would suffer if the Judges so presently constituted were to sit. If it had, it would have presented an interesting opportunity to explore whether a State organ can in any case suffer prejudice by a constitutional claim of an individual citizen"s right to be heard. It is my considered opinion that

the State cannot claim prejudice or bias in the face of an individual"s right to a fair hearing.

[63] The claim, if any, of the interested party - Mr. Omtatah - who brings forward the issue is too remote as to undermine the rights of the individual to whom the right to be heard belongs. He suffers no prejudice that is discernable even in the public interest. The issue of impartiality and bias has been presented as an abstract concept and does not directly impact the primary parties who should invoke the right.

[64] Taking this hierarchy of rights into consideration, it follows that the Court ought to consider the right to fair hearing of the applicants (intended appellants) and the injustice that is likely to be occasioned to them in the event of denial of that right, before considering any concern of the interested party or the perceived interest by the general public if the right is denied. A claim of a third party in the abstract form will not suffice to deny an individual"s claim under the Bill of Rights.

(ii) Disqualification: When should Judges invoke recusal?

[65] Do Judges of the Supreme Court have any interest in the outcome of this case? It may be argued that all Judges have a direct interest in the outcome of this case, including those who heard it at the High Court and the Court of Appeal. The case, after all, touches on the age of retirement of all Judges and whether the transitional mechanisms preserve the age of 74 years for Judges who were

appointed before the promulgation of the new Constitution. We must therefore, carefully question „interest" and place it in appropriate context in relation to the case before us. The forms of interest have been discussed by the Courts for many centuries. Various dilemmas have however accosted Judges and parties in the

course of judicial determination, requiring Parliament in various jurisdictions to enact statutes marking recusal boundaries. The United States Federal Recusal Statute is one such mechanism. Our constitutional system however allows Judges and Magistrates the discretion to determine questions of disqualification but we do also have a statutory guideline.

[66] There are clear principles laid out in the **Judicial Service Code of Conduct and Ethics** as gazetted by the Judicial Service Commission pursuant to the requirements of Section 5(1) of the **Public Officer Ethics Act**, 2003. This Code contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the judicial service. The parameters for recusal are set out in Rule 5. This Rule states that a judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which:

a. he has a personal bias or prejudice concerning a party or his lawyer or personal knowledge of facts in the proceedings before him;

b. he has served as a lawyer in the matter in controversy;

c. he or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings; or

d. he, or his spouse, or a person related to either of them or spouse of such person or a friend is party to

the proceedings.

These Rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service. All judges are bound by this Code.

[67] Judges ought to be objective. Sometimes, this objectivity will be mistaken for motive, but the nature of our democracy is on e nurturing transparency and accountability. Judges ought to remain steady and impartial. They cannot afford to bend the Constitution on the basis of perceptions, capture or passing trends. As Justice Aharon Barak observed in ***Efrat v. Dir. of Population Registry at Ministry of Interior, 47(1) P.D. 749:***

"*This requirement for objectivity imposes a heavy burden on the judge. He must be able to distinguish between his personal desire and what is generally accepted in society. He must erect a clear partition b etween his beliefs as an individual and his outlooks as a judge. He must be able to recognize that his personal views may not be generally accepted by the public. He must carefully distinguish his own credo from that of the nation. He must be critical of himself and restrained with regard to his beliefs. He must respect the chains that bind him as a judge.*"

[68] There is a presumption of impartiality of a Judge which must be disproved by a party alleging bias on the part of the Judge. Similarly, it is expected that a judge will disqualify him or herself if he or she is biased. According to Professor Groves M, in "The Rule Against Bias" [2009] U Monash LRS 10, bias may be actual or apprehended. He observes that:

—Bias may take many different forms but the main

distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had

prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind.‖

[69] Prof. Groves M, explains further that the question of whether a pecuniary or other form of interest may give rise to a reasonable apprehension of bias ought to be determined by a single test. He elaborates the test applicable, citing ***Dimes v. Grand Junction Canal*** (1852) HLC 75 where Gleeson CJ, McHugh, Gummow and Hayne JJ, found in the following terms:

—First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an ‗interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.‖

[70] He explains further that parties may now bear a greater burden to prove the apprehension of bias. He states that:

—Allegations of bias arising from a pecuniary interest must now be determined on a more reasoned basis than was the case with automatic disqualification. Although the court ultimately decides whether the connection between the interest and the apprehension of bias can be articulated to the relevant degree, the parties may now bear a heavier onus. A party cannot simply rest on a

—bare assertion‖ of a pecuniary interest. A party who does not, or cannot, articulate the connection between the interest and the resulting apprehension, or least provide some basis to do so, risks the objection being dismissed as a —bare assertion‖.

[71] In *The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others,* the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters. In disallowing an application for the recusal of members of the bench, the Constitutional Court held [paragraph 48]:

—It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the

applicant. The question is whether a reasonable, objective

and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience.

It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.‖

[72] According to the New South Wales Bench Book (last updated on 29 th November, 2015) the expression of a judge"s views in previous decisions or publications in matters related to the suit before the Court will not ordinarily form a basis for disqualification:

—The fact that the trial judge has expressed views in previous decisions, or in extra-judicial publications in relation to the kind of litigation before the court, which may have questioned an existing line of authority is not normally a reason for disqualification unless those views were expressed with such trenchancy, or in such unqualified terms, as to suggest that the judge could not hear the case with an —open mind‖: Timmins v Gormley [2000] 1 All ER 65, Newcastle City Council v Lindsay [2004] NSWCA 198 and Gaudie v Local Court of New South Wales [2013] NSWSC 1425 at [175] ff.‖

[73] It is incumbent upon the person who alleges bias to prove it. It was therefore, imperative for the applicant (interested party) in this matter and the rest of the parties that allege bias on the part of the bench to prove it and demonstrate the nexus *between* the interest *and* the resulting apprehension of bias. This test is to be applied to the Applicant"s assertions of impartiality:

[74] For example, Mr. Omtatah had urged that Chief Justice and Justice Smokin Wanjala by virtue of their membership in the JSC are disqualified from hearing and determining the present matter, due to the perception of bias. He contended that this is especially so because they did not disqualify themselves when the JSC was deliberating on the issue of the age of retirement of a Judge which culminated in the applicants in this matter being required to retire.

[75] Should Judges be found conflicted merely due to their

membership in the JSC? The Constitution is unequivocal about the composition of the JSC. Article 171 provides that:

(1) There is established the Judicial Service Commission.

(2) The Commission shall consist of—

(a) the Chief Justice, who shall be the chairperson of the Commission;

(b) one Supreme Court judge elected by the judges of the Supreme Court;

[76] According to Article 163(2) the Chief Justice is the President of the Supreme Court.

[77] This Court cannot, therefore, lose sight of the fact that at any given time two Justices of the Supreme Court will be members of the JSC. Would it then mean that those two Justices will automatically be exempt from hearing any matter relating to the JSC? To find that membership of a Judge in the JSC, as a single ground - automatically disqualifies him or her – on the basis of perceived bias – from hearing and determining any matter relating to the JSC would be to stretch the perception of bias too far. Needless to say, it would compromise the delicate composition of the Supreme Court in which quorum is already strained.

[78] Further one would have to demonstrate how the main parties in the matter will be prejudiced by the Chief Justice and Smokin Wanjala SCJ sitting. As such sufficient evidence must be adduced to prove conflict of interest or bias on the part of such a Judge in order for

recusal to apply.

[79] It is my observation that, to hold that a Judge who is a member of the JSC cannot sit in a matter involving the JSC would have the effect of paralyzing the judicial system. It would mean that matters involving the JSC would, more often

than not, be determined by the Court of Appeal as the final Court; which is an outright contravention of the Constitution. This Court has no latitude to hold that the Court of Appeal shall be the final Court of Appeal in any matter contemplated by Articles 163. One cannot fathom how this Court would make such a pronouncement which is tantamount to re-writing the Constitution.

[80] In furtherance of that point, I wish to state that this Court has previously dealt with matters in which the JSC has been a party and no issue of conflict of interest had arisen.

[81] A good exemplar is the ***Judges and Magistrates Vetting Board and***

Others v Centre for Human Rights and Democracy and Others

Supreme Court Petition No. 13A, 14 and 15 of 2013; [2014] eKLR, in which this Court heard and determined a matter that involved the JSC as one of the respondents. It is worthy of note that the Chief Justice and Smokin Wanjala SCJ were part of the bench that heard and determined that matter despite being members of the JSC at the time. Disqualification of these two Justices on the sole ground that they are members of the JSC, in this matter only, is indefensible under the Constitution.

[82] Another issue of relating to apprehension of bias of judges of this Court,

was raised by counsel for the 2$^{n\ d}$ and 3rd Respondent, Mr. Kanjama. He contended that the judgment in ***Nick Salat*** was co-authored by two members of

the bench and that this decision evidences partiality and bias. He also contended that an observer would have concluded that the Supreme Court waded in the issue of retirement age of judges in that decision. He urged that the Court should not have addressed the issue of the retirement age as this matter was the subject

of determination in the High Court at the relevant time. It is necessary to examine these contentions.

[83] A thorough reading of the ***Nick Salat*** decision reveals that the Judges in that bench were addressing a letter written by Mr. Koceyo who was appearing for the appellant therein. Counsel had raised issues which he thought were likely to affect the validity of the imminent Court judgment. He was concerned that the appeal was pending judgment and apprehensive about the legal ramification that could ensue if the Judgment was delivered after the lapse of 60 days as contained in Order 21 of the Civil Procedure Rules and '***the fact that it is now in the public domain that the Judicial Service Commission [JSC] has directed Judges over 70 years [of age] not to preside over matters.***'

[84] The bench majority (K.H. Rawal, DCJ & V-P; Tunoi, Ojwang, and Njoki, SCJJ) with the Chief Justice dissenting, at paragraph 76 delivered itself thus:

> ***[76] This Court takes the position that the security of tenure for all Judges under the Constitution of Kenya, 2010 is sacrosanct, and is not amenable to variation by any person or agency, such as the Judicial Service Commission which has no supervisory power over Judges in the conduct of their judicial mandate. We find and hold that the Judicial Service Commission lacks competence to direct or determine how, or when, a Judge in any of the Superior Courts may***

perform his or her judicial duty, or when he or she may or may not sit in Court. Any direction contrary to these principles, consequently, would be

contrary to the terms of the Constitution which

unequivocally safeguards the independence of Judges. It follows that the said directive concerning Judges of the Superior Courts, issued by the Judicial Service Commission, is a nullity in law.

[85] To my mind, all that the Bench did was to point out the legal position on security of tenure of Judges and articulated on the sanctity of the independence of Judges. They certainly did not make a determination on the retirement age of Judges. This is also the finding of the High Court on the same question, in

Kalpana H. Rawal v Judicial Service Commission & 4 others, Petition No. 386 OF 2015; [2015] eKLR. In this matter, (which was determined after the ***Nick Salat*** decision), Counsel Dr. Khaminwa argued that a decision on the retirement age of judges had been made by the Supreme Court in the ***Nick Salat*** matter. He was of the opinion that such decision was binding on this Court. In response, Mr. Ahmednassir for the JSC, submitted that the said decision was absurd, alleging that the Supreme Court had transgressed into a matter pending before the High Court and that it was an abuse of the court process. The High Court in response to the issues as raised by both Dr. Khaminwa, on the one hand and Mr. Ahmednasir, on the other, determined as follows:

—100. It must be remembered that the appellant's counsel before the Supreme Court had raised a query about the constitutionality of the Supreme Court bench, which concerns the Court deemed appropriate to address.

101. It would appear that at the time of the judgment, the

JSC had issued a directive to judges aged over 70 years directing them not to preside over any matters. <u>We note from the proceedings in Nairobi High Court Constitutional</u>

Petition No. 244 of 2014, Justice Phillip Tunoi and another v The Judicial Service Commission and another, of which we are seized, that there was in existence a valid conservatory order issued by our brother Odunga, J. The orders restrained the JSC from taking any steps towards the retirement of Tunoi, SCJ and Onyancha, J, pending the hearing and determination of their Petition. No doubt the Supreme Court, being the apex Court in the land, was irked by the JSC's action, which they would not countenance.

102. In our reading, the effect of the Supreme Court judgment as relates to the query was, first, to restate the sanctity of tenure of judges: it determined that such tenure is not amenable to variation by any person or agency; second, it held that the JSC lacks competence to direct or determine the sittings of judges or how they exercise their judicial mandate; and third it determined that the directive of JSC on sittings of judges was a nullity. The Court did not, however, touch upon or determine the question of the retirement age of judges. That, we note, is the key live issue before us."(emphasis added)

[86] Consequently, there is *no* nexus between the ***Nick Salat*** decision and the instant matter that would create any conflict, bias or partiality while determining the matter at hand.

[87] Counsel for the ICJ (*1st Amicus Curiae*) Dr. Nyaundi, submitted that Njoki SCJ's filing of proceedings in the High Court against the JSC recently, is

intimately connected with the instant matter and creates a perception of bias

which will in turn negate fair hearing. I point out here that the subject in that matter and the instant case are entirely different. There is no nexus established between the facts of the matter before the High Court and the matter before us. The said proceedings before the High Court cannot, therefore, be said to render her incapable of according the parties a fair hearing. Furthermore, a Judge is bound by his or her oath of office to defend the Constitution, and to perform their judicial duties with fairness, independence, competence and integrity. It is to be noted that from time to time Judges will engage their employer, including in legal disputes. Judges too, just like the ordinary citizens, are beneficiaries of the rights conferred by the Constitution. If they perceive their rights as violated they can seek redress from the very law they are sworn to uphold.

[88] Citizen Omtatah for the interested party contended that the whole bench in this matter is conflicted and must down their tools on the basis that they are peers and work closely together. He was emphatic that the bench cannot adjudicate on matters involving their peers and must disqualify themselves. I am compelled to observe that Judges will sometimes have to adjudicate over their peers. A case in point is the ***Judges and Magistrates Vetting Board and two others v The Centre for Human Rights and Democracy and 11 others,*** Sup. Pet. 13A of 2013 as consolidated with Pet 14 and 15 of 2013; [2014] eKLR ***(JMVB 1).*** The issue for determination in this matter was whether Section 23 of the Sixth Schedule to the Constitution ousts the High Court's supervisory jurisdiction to review the decisions of the Vetting Board. The parties in this case included Judges of the High Court, Court of Appeal and Supreme Court.

[89] The matter commenced in the High Court in ***Judicial Review No. 295 of 2012*** and was determined by the bench (*Havelock, Mutava, Nyamweya, Ogola & Mabeya, JJ)* who found for the Judges. On appeal, in ***Nairobi Civil***

Appeal No. 308 of 2012 (*Kiage, Murgor, Sichale, J. Mohammed & Otieno-Odek)* affirmed the decision of the High Court. In this Court (*Mutunga CJ & P, Rawal DCJ & V-P, Tunoi, Ojwang, Wanjala & Njoki, SCJJ)* we overturned the decision of the Court of Appeal and in effect the decision of the High Court. This is a model example of how Judges are able to formulate issues for determination to the matter before them, apply their judicial minds (irrespective of who the parties are) and make a determination. Judges are able to adjudicate over their peers by placing a high premium on judicial fidelity to the Constitution and the national values and principles of governance. It is therefore inaccurate to assert that Judges cannot adjudicate over their peers impartially.

[90] Counsel for the 1st Respondent Mr. Kilukumi contended that inviting the Court to down its tools on the basis that we cannot adjudicate over our peers is tantamount to asking the Court to abdicate its constitutional duty. I agree. I hasten to add that it is also tantamount to violating both the Judicial Code of conduct which reveres the oath of office taken by Judges and **Section 10(1) of the Public Officers Ethics Act** which requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law.

[91] Mr. Omtatah also referred the Court to a letter to the JSC by three members of this Bench, which, according to him, illustrates a position taken, by the members of the bench that the retirement age of Judges is 74. He urged that

this shows lack of impartiality. Mr. Kanjama for the 1st and 2nd Respondents, also referred to the same and urged the Court to decline to sit, based on Articles 73

and 75 and the Judge's oath in the Third Schedule of the Constitution, if it found

that it had a direct conflict. Mr. Kilukumi for the 1st Respondent (intended appellant in application 11 of 2016), urged the letter was not a finding of the

Court and it reflected a position taken outside of Court proceedings. He

contended that it was not evidence of partiality. However, a perusal of the record shows that the letter referred to, entailed issues on the Constitutional mandate of the JSC *vis-a-vis* the independence of Judges and the administration and operation of the Supreme Court.

[92] In a nutshell, the Judges were concerned about raising a quorum on a regular basis for the proper discharge of the functions of the Court. No more. I am therefore not convinced that these memos create justifiable doubt on the ability of the Judges to handle this matter impartially. If anything the letter shows that the authors were concerned about the performance of their constitutional duties as Judges. More importantly the letter does not create a direct conflict that would be the basis for the recusal or disqualification of any Judge on this bench.

(iii) When ought the doctrine of necessity apply: does this Court have a duty to sit?

[93] We have been urged not to apply the doctrine of necessity or the duty to sit in this case. The *doctrine of necessity* was well laid down in F. Pollack, A First Book of Jurisprudence 270 (6th ed.1929):

"*....although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may, but must, do so if the case cannot be heard otherwise.*"

[94] The duty to sit and the principle of necessity are distinguishable. In

United States v. Will, 449 U.S. 200 (1980), the Supreme Court held that:

"Necessity does not operate to disqualify all federal judges, including the Justices of this Court, from deciding the issues presented by these cases. Where, under the circumstances of these cases, all Article III judges have an interest in the outcome, so that it was not possible to assign a substitute district judge or for the Chief Justice to remit the appeal, as he is authorized to do by statute, to a division of the Court of Appeals with judges who are not subject to the disqualification provisions of § 455, the common law Rule of Necessity, under which a judge, even though he has an interest in the case, has a duty to hear and decide the case if it cannot otherwise be heard, prevails over the disqualification standards of § 455. Far from promoting § 455's purpose of reaching disqualification of an individual judge when there is another to whom the case may be assigned, failure to apply the Rule of Necessity in these cases would have a contrary effect by denying some litigants their right to a forum. And the public might be denied resolution of the crucial matter involved if first the District Judge and now all the Justices of this Court were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented."

[95] This Court has had the opportunity of pronouncing itself on the doctrine of necessity and on the duty to sit, in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others,*** Sup. Ct. Petition No. 4 of 2012; [2013] eKLR (***Jasbir***) in which it held:

—B. RECUSAL BY SUPREME COURT JUDGE: THE RELEVANT ISSUES

[4] This is the first application of its kind before this new Supreme Court, and, on that account, it is necessary to identify the most relevant issues, as a basis for establishing guiding principles, considering especially the fact that this Court of restricted numerical strength, is the ultimate judicial forum, bearing the mandate of defining the jurisprudential terrain for this country.

[5] It is pertinent to consider several specific questions, the answers to which will yield guiding principles from which more specific rules would emerge. In this regard, we pose to ourselves the following questions:

(a) in what circumstances should the recusal of a Judge be sought by a party?

(b) when ought a Judge, as a matter of personal conviction, or of ethical considerations, to recuse himself or herself from decision-making by the collegiate Bench?

(c) should the grounds for single-Judge-Bench recusal apply in an identical manner to the case of the collegiate-Bench Judge?

(d) should the principles of recusal for other superior Courts, such as the High Court and the Court of Appeal, apply in an identical manner to the Supreme Court, the membership of which is limited to seven, under the Constitution?

(e) should the principles of recusal for other superior Courts apply unexceptionably to the Supreme Court, even where this Court requires a full Bench, as for instance, where it is sitting to reconsider its earlier precedent rendered by a majority of the Judges?

(f) how ought the Supreme Court to guide itself on the issue of recusal by its members, in the light of its unique position in relation to the integrity of the Constitution, as spelt out in the Supreme Court Act, 2011 (Act No. 7 of2011), s.3 (a) and (b), thus –

—The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things –

(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;

(b) provide authoritative and impartial interpretation of the Constitution....?‖

[96] In recognizing that the composition of the Supreme Court was one that posed a challenge, and that the issue of recusal had to be treated distinctly from the issue of recusal in other Courts which, did not have a numerical challenge in respect of quorum, this Court held:

—(a) The Supreme Court's Limited Numerical Strength

[15] By Article 163(2) of the Constitution, the Supreme Court

*membership comprises **seven** Judges; and this Court is properly composed for normal hearings only when it has a quorum of **five** Judges. We take judicial notice that, for about a year now, the*

Court has had a vacancy of one member; and also that half of the current membership were previously in service in other superior Courts – and so having the possibility of having heard matters which could very well come up now before the Supreme Court. Recusal, in these circumstances, could create a quorum-deficit which renders it impossible for the Supreme Court to perform its prescribed constitutional functions.

[16] Such a possibility would, in our view, be contrary to public policy and would be highly detrimental to the public interest, especially given the fact that the novel democratic undertaking of the new Constitution is squarely anchored firstly, on the superior Courts, and secondly, on the Supreme Court as the ultimate device of safeguard.

(b) Good Cause

[17] The recusal principle, therefore, with regard to the Supreme Court, must not be invoked but for good cause; and neither is it to be invoked without weighing the merits of such invocation against the constitutional burdens of the Court, and the public interest."

[97] Further, in dismissing the application for recusal of one of the Judges, the Court held that:

—(e) The Supreme Court Concept

[22] Even as this Court takes cognizance of the merits of the individual Judge"s personal convictions, and of matters of ethics, in such a situation, it is inclined in favour of a choice which begins with the Judge"s commitment to the protection of the Constitution,

as the basis of the oath of office. The shifting scenarios of personal inclination should, in principle, be harmonized with the incomparable public interest of upholding the Constitution, and the immense public interest which it bears for the people, whose sovereignty is declared in ***Article 1(1).*** *It follows that the recusal of a Judge of the Supreme Court is a matter, in the first place, for the consideration of the collegiate Bench, whose decision is to set the matter to rest.*

> *[23] It follows that the Supreme Court concept, as it stands in the Constitution, and as a symbol of ultimate juristic authority, imports a varying set of rules of recusal, in relation to the practice in other superior Courts.*
>
> *[24] Being guided by the comparative lesson, and by the principles drawn from Kenya"s special constitutional experience, we have no trepidation in disallowing the applicant"s preliminary objection which sought the recusal of the Honourable Mr. Justice Tunoi."*

[98] In the same matter, the Court in citing ***Perry v. Schwarzenegger,*** **671 F. 3d 1052 (9th Circ. February 7, 2012)** held that the test that is applicable in establishing impartiality of a Judge is the perception of a reasonable person who is a well-informed, thoughtful observer who understands all the facts and who has examined the record and the law. Consequently it held, at paragraph 11, that:

—[Thus] —unsubstantiated suspicion of personal bias or prejudice ***will not suffice.***

[99] In Pennsylvania the Judicial Code of conduct requires that judges recuse themselves in matters where they have personal interest. It however, proceeds to state as follows:

> ***—A judge cannot always disqualify himself/herself, even when the judge has a personal interest in a case. A legal principle known as —the rule of necessity‖ may require the judge to hear a case and make a decision. Under the rule of necessity, it is more important for a judge to decide a case—even when burdened with a conflict of interest— than to leave litigating parties in limbo by failing to render a decision. Judges in that situation must set aside all personal interest and rule with complete neutrality.‖***

[100]In ***State ex rel. Mitchell v Sage Stores Co.,*** 157 Kan. 622, 143 P.2d 652 (1943), the Supreme Court of Kansas observed as follows in respect of the doctrine of necessity:

> ***—[I[t is well established that actual disqualification of a member of a Court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of litigant‘s constitutional right to have a question, properly presented to such Court, adjudicated.‖***

[101] In ***Evans v Glore,*** 253 U.S. 245(1920) the Supreme Court of the U.S. in upholding the doctrine duty to sit observed that:

—Because of the individual relation of the members of this Court to the question … we cannot but regret that its solution falls to us. … But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects of his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go.‖

[102] The role of a Judge is to ensure that cases are determined in accordance with the Constitution and the law. I am persuaded by the opinion of Justice Scalia (as he was) in ***Cheney v. U.S. Dist. Court, 541 U.S. 913, 915*** (2004) that an application for recusal of a Supreme Court Judge cannot be determined in a similar manner as that of a Judge of the other superior Courts due to the special consideration that must be given to its quorum. Justice Scalia opined as follows:

"Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." That might be sound advice if I were sitting on a Court of Appeals. But see ***In re Aguinda****, 241 F. 3d 194, 201 (CA2 2001). There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices stated in their 1993 Statement of Recusal Policy: "We*

do not think it would

serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. ***Even one unnecessary recusal impairs the functioning of the Court****."* *(Available in Clerk of Court's case file.) ”****...***

—A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling.‖

[103] It is therefore undisputable that a party is entitled to be heard, by a Court before which he or she appears even though it is perceived to be conflicted, if there is no other Court to which he or she can go. The Applicants (intended appellants) want to be heard; they invoke their right to come on appeal to the Court of final determination. There is no other Court under our constitutional framework with this mandate and therefore necessity and the duty to sit would have to apply in these present circumstances.

The Constitutional Court of South Africa – is it of persuasive precedent?

[104] The 1st and 2nd respondents and the interested party urged this Court to recuse itself *en banc* and rely on the decisions of the Constitutional Court of South Africa in ***Judge President Mandlaka Yise John Hlophe v Premier of the Western Cape Province,*** CCT 41/2011, (***Hlophe***) which was cited with approval in ***Baaitse Elizabeth Nkabinde & Another v Judicial Service***

Commission & 3 Others, CCT 71/2016, (***Nkabinde***) and disqualify themselves *en banc.*

[105] In order to know the applicability of the said decisions it is important to consider the facts of the cases. We note that ***Nkabinde*** was decided summarily without a statement of the facts of the case by the Court hence, it is not suitable as persuasive precedent since it is not possible to tell whether it is *pari materia* to the present matter.

[106] In ***Hlophe*** the applicant sought leave to appeal to the Constitutional Court of South Africa against two decisions of the Supreme Court. In 2008 the Constitutional Court heard arguments in four matters relating to the prosecution of certain corruption charges. Before judgment was delivered, the applicant approached two Constitutional Court Judges in their chambers. Consequently, the Constitutional Court Justices on the bench, at the time, lodged a complaint with the Judicial Service Commission of South Africa (JSC SA), against the applicant. The applicant in turn lodged a complaint of judicial misconduct against the Justices.

[107] The JSC SA made a determination that the evidence before it did not justify a finding of gross misconduct on the part of the applicant or the Constitutional Court Justices. Two applications were made separately in the High Court, challenging that decision of the JSC SA. Appeals were made to the Supreme Court of Appeal and finally, leave was sought to appeal to the Constitutional Court.

[108] In declining to grant leave to appeal the Court held, at paragraph 46, that:

—A balance needs to be struck between the Court's obligation to provide finality in this matter (as it would be intolerable to have a case pending indefinitely) and possible injustice to the applicant. These factors weigh heavily in determining the extent to which it is in the interests of justice to enter into the merits, and thus whether to grant leave to appeal.‖

[109] Further, the Court held, at paragraph 23 as follows:

—In addition, although the parties have consented to the conflicted Judges' sitting in the present matter, regard must still be had to the fact that they would ordinarily have to recuse themselves. For this reason, this Court should deny leave to appeal to preserve the fairness of its own process.‖

[110] In ***Nkabinde***, the Constitutional Court merely issued an order dismissing an application for leave to appeal reiterating its earlier decision in ***Hlophe.*** There are a number of significant differences between the circumstances inHlophe and those we now find ourselves in the matter now before us.

Distinctions between *Hlophe* ***and the applications currently before the Supreme Court***

[111] It is worth of note that in in ***Hlophe*** the applicants had sought the leave of the Court to lodge an appeal before the Court. This significantly differs with the current applications before the Supreme Court since the applicants are before the

Court as of right as provided under Article 163(4)(a) of the Constitution and need not seek the leave of Court to appeal.

[112] It is also evident that in the matters before the Constitutional Court the Justices of the Court were directly involved in the matter since they had lodged the complaint against the applicant. Their complaint triggered the decision by the JSC which was the basis of the causes in the various Courts, culminating in the application before the Constitutional Court. In the current matter, the Judges of the Court, other than Hon. Justice Tunoi and Hon. Lady Justice Rawal, are not personally involved. The rest of the Judges have no direct interest in current the matter.

[113] In ***Hlophe*** the parties had recourse despite the denial of leave to appeal. They were to go back to the JSC for resolution of the matter. This is not an option available to the parties in the present matter – the Supreme Court is the final place of recourse for the parties in this matter hence an enhanced necessity to protect their constitutional right of appeal.

[114] The serious numerical challenge of the Supreme Court cannot be understated. Whereas the Constitutional Court of South Africa has eleven Justices and a quorum of eight, the Supreme Court of Kenya has only seven Judges and a quorum of five. In the event of recusal the Supreme Court judicial processes are more likely to be paralyzed more often as compared to those of the Constitutional Court which is expected to sit as at least eight Judges.

[115] In the event of a vacancy in the Constitutional Court, acting Judges may be appointed to ensure that the Court retains quorum. This is not an option available to the Supreme Court.

[116] There cannot be partial waiver. Once a Judge has disqualified themselves from hearing the matter at the pre -trial stage, they stand disqualified from hearing it during the trial itself. Unlike the pre-trial stage where a matter can be heard by a bench of on or two judges, the trial requires five Judges to constitute quorum. The constitution, unlike that of South Africa, does not envision a situation where Judges can be seconded from other Courts to fill the possible void that may emerge from the disqualification of a Supreme Court Judge, hence the principle of necessity. Such is our *jurisdictional conundrum*, activating this
Court"s *ratio* in ***Jasbir***.

The Supreme Court as Guardian of the Constitution

[117] The role of the Supreme Court of Kenya as the apex court of the land and the final arbiter in judicial determination must never be understated. In ***The Matter of the Attorney General,*** Advisory Opinion No. 2 of 2012, this court said:

> ***— We would state that the Supreme Court, as the custodian of integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enable to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution***‖

[118] This court is the final bastion in the architectural design of our Constitution that protects and defends the rights of every citizen and enforces the obligations of State towards them. To decline to sit in a matter such as this, where a citizen of this country invokes the right to be heard; the right of appeal and access to justice in this court; would to my mind - be an abdication of duty and of the solemn oath taken up by each Judge of this court. The Supreme Court is the guardian of the Constitution and its intervention ought to be available to the citizens of this county.

[119] Mr. Omtatah suggests that because the Judges of this court have been depicted in caricatures in the press and the matter before us has been widely reported in certain negative slant in both mainstream and social media, that we ought to be aware of public perception and take this into account when we make a judicial decision. It is an established fact that the delivery of justice in an adversarial system such as ours is hardly ever popular. Popularity contests rightly belong to beauty pageants, socialites and politicians, and not to courts of law. Favour with the public is a political prerequisite not a judicial component. It matters not what the *perception* of the public is; what does matter is the quality of *justice given* to those who come before us. Perceptions may change overnight; but it is the defence of Justice that is engraved in our national values and fossilized in the sediments of legal history.

Conclusion:

[120] As we come to the final orders in this matter, I am of a different mind from the Chief Justice, my brothers Justices Mohammed

Ibrahim, and Smokin Wanjala SCJJ as to the disposal of the conservatory orders given in this matter on the 27th May 2016. They propose that the inability to convene a quorate Court at this present time - due to recusal of some Judges - would mean that the

conservatory orders be vacated, as a consequence of convenience - as it is unclear as to *when,* (not if) there shall be a bench of this Court to hear the substantive matter and intended appeal.

[121] Those conservatory orders were issued by Njoki SCJ sitting as a one-judge bench under the provisions of Section 24 of the Supreme Court Act, and were made in the following terms:

—ORDERS

[1] The Application is certified urgent and service of certificate of urgency is dispensed with at this instance.

[2] Pending interpartes hearing and determination of this application – a conservatory order is hereby issued directing that the decision of the High Court affirmed by the Court of Appeal today, the 27/5/2016 to the effect that the retirement age of judges appointed before 27/8/20101 is 70 years – be suspended.

> ***[3] Pending the hearing interpartes a conservatory order is issued directing that the applicant will continue to discharge her constitutional, judicial and administrative duties.***
>
> ***[4] Pending the hearing interpartes of the application, a conservatory order is hereby issued prohibiting the respondents, the Chief Registrar of the Judiciary from advertising in any media, whatsoever, a vacancy in the office of the Deputy Chief Justice and Vice President of the Supreme Court of Kenya or to commence in any matter,***

whatsoever, the

recruitment process of the applicant as a Judge of the Supreme Court.

> ***[5] Conservatory orders issue directly upon the Respondents, the Chief Registrar of the Judiciary from issuing any retirement notices to the Applicant.***
>
> ***[6] All respondents be immediately served with the orders of the Court as issued.***
>
> ***[7] Interpartes hearing of this application shall be heard and argued before the Court on Friday 24th June 2016 at 10 am.***‖

[122] I believe that it would not be proper to vacate the said orders of this Court within the confines of a Ruling on a preliminary objection. The correct and legal manner to vacate such orders would be at the *interpartes* hearing of the application. We have not yet reached that stage. Any finding to vacate the conservatory orders at this preliminary stage is premature and not within any legal procedure that I know of. *Ex parte* orders do not lapse: if they have to be lifted it is only after the primary litigants" are heard in an *interpartes* application as granted in the body of the Order. This has not been done.

[123] Failure to conduct the *interpartes* hearing would leave the applicant parties unheard on whether or not they ought to be granted

a stay of the Judgment of the Court of Appeal, until their appeal is heard. The concern that lifting the stay order may have the effect of rendering the appeal nugatory will not have been addressed. It would indeed be ironic, if the stay were lifted at this preliminary stage - given that the *right to be heard* took centre stage in all of the

arguments in this matter - the outcome as a result, is that the parties most affected remain unheard.

ORDERS:

[124] I am inclined to make the following orders:

1. ***The Preliminary Objection is hereby dismissed.***
2. ***The Parties to proceed to be heard interpartes on the main application as a matter of course.***
3. ***Costs in the cause.***

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

……

N. S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a

true copy of the

original

REGISTRAR, SUPREME COURT

THE RULING BY THE HON. JUSTICE N. S. NDUNGU

RULING

A. INTRODUCTION

[1] The Applicant in this matter is raising a preliminary objection challenging the legal basis of directions in this matter, issued by the Chief Justice on 30th May, 2016.

D. BACKGROUND

[7] The Applicant's appeal to the Court of Appeal challenging the retirement age of Judges was dismissed. The Court of Appeal's judgement delivered on 27th May, 2016 upheld the High Court's judgment in declaring that the retirement age of all judges serving on the effective date of the *Constitution of Kenya 2010,* is 70 years. Aggrieved, the Applicant sought *ex parte* conservatory orders in this Court. Njoki SCJ on 27th May, 2016 granted the conservatory reliefs. Thereafter, the Chief Justice gave the following directions:

"CORAM:

MUTUNGA CJ & PRESIDENT

DIRECTIONS

8 I have perused the Orders in this application granted Ex-parte by Njoki SCJ on May 27, 2016.

9 The said Orders were granted under an application that sought to be certified urgent and be admitted for hearing on a priority basis.

10 Njoki SCJ made the certification of urgency, granted interim orders, and fixed hearing inter-partes on Friday June 24, 2016.

11 Granted the urgency under which the hearing of the application was sought and the public interest in this application, I hereby invoke my administrative powers as the Chief Justice and President of the Supreme Court to fast track the hearing of the application.

12 My directions are therefore as follows: (1) The registrar of the Supreme Court serves the parties to appear for the hearing of this application inter-partes before a 5 judge bench of the Supreme Court on Thursday, June 02,

2016 at 10.00am. 2) The Registrar also serves the parties with notices to appear for directions on the said hearing tomorrow,

May 31, 2016 at 10am before Wanjala and Njoki SCJJ.

[3] These directions prompted the applicant to file the instant preliminary objection.

(d) PARTIES' RESPECTIVE CASES.

[16] The Applicant's case

[4] Mr. Kioko Kilukumi for the Applicant disputed the lawfulness of these directions. He gave a brief background to this matter. He pointed out that on 27th May, 2016 the Court of Appeal delivered its Judgement in the
Applicant's matter. He submitted that he promptly filed an application under a *certificate of urgency* before this Court seeking stay of execution pending appeal. He submitted that the matter was placed before the duty Judge, Njoki SCJ. He urged that he sought for the Court to grant an order of temporary stay, *ex-parte* pending an *interpartes* hearing within 28 days. The Court in allowing the *ex-parte* application declined the period requested for, which was 28 days, and ordered for the

application to be heard on 24th June, 2016.

[14] He urged that on 30th May, 2016 the Chief Justice issued the aforestated directions, which were unconstitutional, outrightly, illegal and

unlawful. He contended that the directions were derived from a nebulous source described as 'administrative powers of the Chief Justice and President of the Supreme Court.' He urged this Court to determine the issue as to whether an administrative direction – even by the Chief Justice himself – can override a judicial decision. Counsel submitted that the Chief Justice had neither legal power nor authority to act *suo motu s*o as to vary an order issued by any Judge of the Supreme Court under section 24

[13] of the Supreme Court Act.

[15] Mr. Kilukumi urged that in accordance with Section 24(1) and (2) of the Supreme Court Act, 2011 a person aggrieved by the decision of the single-judge bench ought to have applied for review of the decision by a five-judge bench. He submitted that none of the parties sought for the Chief Justice to exercise his administrative powers and bring forward the hearing date. This act of moving *suo motu*, he urged, was improper considering

that: firstly, it had the effect of interfering, altering and/or varying a single Judge's orders, and secondly, that the Chief Justice is a member of the 1st Respondent in this matter.

[7] Counsel urged that the directions violated and eroded the independence of Judges enshrined in Article 160(1) of the Constitution. He contended that neither the Constitution nor the Supreme Court Act confers powers on the Chief Justice to alter or vary the decisions of a single Judge of the Court. Counsel urged that judicial independence is sacrosanct; that in a collegiate bench, other judges must not be made to feel subservient and that there is a distinction between discharge of administrative functions and of judicial functions. Counsel reinforced these arguments with numerous local and foreign authorities namely; *The administrative Authority of Chief Judicial Officers in Australia-Kathy Mack and Sharyn Roach Anleu; Judicial independence and the Role of the Chief Justice, Powers, Limitation and Challenges, Hon. Z Vertes-President of the commonwealth Magistrates and judges Asscociation (2012-2015); the Role of the Chief Justice-Professor the Honourable David K Malcolm AC KCSJ; the Culture of Judicial Independence; Conceptual foundation and Practical Challenges-Simon Shetreet and Christopher Forsyth;* ***Re Colina; Ex Parte Torney*** *[1999] HCA 5721 October 1999 m85/1998;*

Phillip K Tunoi & 2 Others v Judicial Sevice Commission & another *[2015] eKLR para 70 of the Ruling;* ***Justice Alliance of***

South

Africa (JASA) v President of the Republic of South Africa and others *[2011] ZACC 23. Para 82;* ***In Re: the Marriage of Donna and Mark Oliverez,*** *H040955;* ***Calloway v Ford Motor Company,*** *281*

N.C. 496, 189 S.E 2d 484 (1972); the ***Queen v Beauregard,*** *[1986] 2*

S.C. R. 56; ***R v Lippe*** *[1991] 2 S.C. R 114;* ***Canada (Minister of Citizenship and Immigration) v Tobiass,*** *[1997] 3 SCR 391; The Bangalore Principles of Judicial Conduct and United Nations Basic*

Principles on the Independence of the Judiciary.

Kituo cha Sheria's case (2nd Amicus Curiae)

[8] Counsel for the 2nd *Amicus Curiae* Dr. Khaminwa submitted that Mr. Kilukumi raised issues of paramount importance that go beyond Kenya

and take an international dimension. He urged the Court to take into account the history of the Judiciary. He reminded the Court of former Chief Justice James Wicks who once took a file from a Judge in Kisumu while the matter was part heard. He urged that this was contrary to judicial ethics. He also made reference to a matter in which he was involved which was fixed for hearing before Justice Cotran but the Chief Justice ordered the file to be transferred to Justice Hancox. He submitted that this was contrary to judicial independence which must be protected at all

costs.

[40] Dr. Khaminwa contended that blackmail trends were creeping into the Judiciary reminiscent of the times of Chief Justice Wicks. He urged

that the Court must not allow this to happen and submitted that the Rule of Law must be maintained. Counsel urged that the Chief Justice might have made the directives in good faith but it was wrong and contrary to law. He urged this Court to quash the directives issued by the Chief Justice to serve as a lesson to all other Chief Justices in the future.

[10] Dr. Khaminwa's co-counsel Ms. Jennifer Shamalla adopted both Mr. Kilukumi's and Dr. Khaminwa's submissions. She urged that the people of Kenya did not give the Chief Justice powers to make or issue directives to vary a Court Order. She urged that a Court can only vary a Court Order *suo motu* pursuant to Section 14 of the Supreme Court Act, 2011. Kituo cha Sheria, however, withdrew from the suit before judgment was delivered.

(iii) LSK's Case (3rd Amicus Curiae)

[11] Counsel for the Law Society of Kenya Mr Masika urged that Njoki SCJ had jurisdiction to sit pursuant to Section 24 (1) of the Supreme Court Act, 2011 particularly if it was established that there was a Notice of Appeal on record. He contended that the directions by the Chief Justice may have been the right thing to

do, given the urgency of the matter, but that nonetheless they were unlawful. He urged that the Chief Justice usurped

the powers of a five-judge bench as set out in Section 24 (2) of the Supreme Court. He submitted that pursuant to Article 161(1) the Judiciary is subject only to the Constitution and the law.

(iv) 1st and 2nd Respondents' case

[12] Senior Counsel Ahmed Nassir for the 1st and 2nd Respondent opposed the application. He urged that the preliminary objection raised by the applicant was not strictly speaking a preliminary objection since it did not raise a point of law pleaded. He submitted that the preliminary objection raised a procedural issue as to whether the matter should be heard or not. He urged that that there was no proper appeal before Njoki SCJ since the applicants had not filed a petition of appeal before the Court. Further, he urged that the order of the single judge gave the applicant a new tenure as Deputy Chief Justice since there was no stay by the Court of Appeal. He contended that it was a constitutional transgression that the application was premised on Article 163(4)(a) of the Constitution which relates to an appeal but not a notice of motion such as the one in this matter. Therefore, he urged, the orders made by the single Judge were granted outside the law.

[13] Counsel urged that the Chief Justice is empowered by the Constitution, the Supreme Court Act and the Judicial Service Act to direct that a matter be heard on a priority basis. He contended that the stipulation by Article 161 of the Constitution that the Chief Justice is the head of the Judiciary, he is the "*real head*" and not merely an executive head. Counsel cited Section 5(1) of the Judicial Service Act, which echoes the contents of Article 161 (2) (a) of the Constitution that the Chief Justice is the head of the Judiciary. He urged that pursuant to Section 5(2)(c) of the Judicial Service Act the Chief Justice exercises general direction and control over the Judiciary.

[14] Ahmed Nassir's co-counsel, Mr. Kanjama submitted that Article 172 mandates the 1st and 2nd respondents to promote independence and accountability. He urged that accountability is a demand under Article 159(2) while independence is under Article 160 of the Constitution. He submitted that judicial officers must be accountable and judicial independence is never absolute. He urged that the same is constrained by demands of good judicial governance. He contended that the directions of the Chief Justice created the right balance between independence and accountability.

[17] Counsel submitted that that the Chief Justice's administrative powers are derived from Articles 161 (2), 163 (1) (a) of the Constitution and section 6 of the Supreme Court Act and Rules 4 of the Supreme Court (Amendment) Rules 2016.

[18] He contended that disallowing the Chief Justice to exercise these powers would put the Judiciary in a state of anarchy. Counsel also contended that all the authorities cited by the applicant could be

distinguished from the present case and were not *pari materia.* Counsel urged that the applicant has not shown that any reasonable prejudice has been suffered as a result of the direction by the Chief Justice. It was Mr.

Kanjama's submission that the Chief Justice has administrative powers over all levels of courts and that under Section 10 of the Supreme Court Act, 2011, the Registrar is answerable to the Chief Justice.

Interested party's case

(iv) The interested party associated himself with the views of

the 1st and 2nd Respondent. He also submitted that in light of mandatory provisions of Article 163(8) of the Constitution, this Court is empowered to make its own

rules and therefore the Supreme Court Rules outrank the Supreme Court

Act. He also submitted that Njoki SCJ exceeded her mandate by fixing an *inter partes* hearing date as she should have left the matter for the registrar to fix.

(vi) ICJ (1st Amicus Curiae)

[18] ICJ Kenya who was the 1st *amicus curiae* in this matter curiously chose not to address the Court on this matter, despite ICJs international

reputation, publications and works on the independence and

accountability of judges' world-wide.

[264] Rejoinder

[51] In response, Mr. Kilukumi submitted that he filed all the requisite pleadings, which were on record, and once that was done, the jurisdiction of this Court was triggered. He submitted that this is preliminary objection as it raises a pure point of law which when determined will effectively determine these proceedings. He submitted that it was not in contention that the Chief Justice has administrative powers. Rather, what was being

challenged was whether he could singularly vary a judicial order in force.

D. ISSUES FOR DETERMINATION

[20] Having read the pleadings, the written submissions and the authorities presented to this Court, and having listened to the oral submissions of all the parties in this matter, the following issues for determination crystallise:

(f)Whether a single-judge bench of this Court had jurisdiction to grant the orders issued on 27th May, 2016.

(g) Whether the Chief Justice could exercise his administrative powers to vary a decision of a single-judge bench of the Court and, if so, whether he could do so suo motu?

E.ANALYSIS

(d) Whether a single-judge bench of this Court had jurisdiction to grant the orders issued on 27th May, 2016?

[21] To effectively dispose of this issue, other sub-issues and questions

must be determined:

[53] Whether there existed pleadings upon which the conservatory orders could be granted;

[54] Whether this Court has jurisdiction to grant interlocutory orders and, if yes, whether a single-judge bench can issue such interlocutory orders;

[55] What constitutes an order of the Court?

[56] Whether Rules of procedure take precedence over statutory provisions?

[57] What are the powers of a single judge?

(a) The Pleadings before Njoki SCJ.

[22] From the onset, it is imperative to state that this issue must be considered as Counsel Ahmed Nassir for the respondents vehemently urged that there were no proceedings known to law

upon which Njoki SCJ could grant the conservatory reliefs. He was categorical that the orders

could only have been made if the Court was seized of an appeal but this was

not the case. A careful perusal of the pleadings before the Court reveals a Notice of Appeal dated 27th May, 2016.

[23] It is important to point out that the Applicant moved this Court on the same date that the judgement of the Court of Appeal was delivered. The Applicant, being apprehensive that her position could be declared vacant at any time, hence rendering the appeal nugatory, rushed to this Court with speed. In so doing, she filed a Notice of Appeal in compliance with Rule 31(1) of the Supreme Court Rules, 2012. This Court (Wanjala and Njoki SCJJ) determined in ***Law Society of Kenya v Centre for Human Rights and Democracy & 12 Others,*** Sup. Ct. Petition No. 14 of 2013,
[2014] eKLR that:

"[t]he Notice [of Appeal] as its title indicates, is a signification of intent by the potential appellant, to challenge by way of appeal the decision of a lower Court."

[24] The logical conclusion therefore is that the Notice of Appeal brought

the applicant into the realm of 'intending appellant' who could now seek to

persuade the Court that her matter warranted grant of Conservatory orders and if so persuaded, the Court could grant the reliefs.

[25] The pleadings also reveal a Notice of Motion application under certificate of urgency together with an affidavit showing the urgency dated 27th May 2016. It is therefore pertinent to point out that the applicant complied with Rule 26 of the Supreme Court Rules, which provides:

"Urgent applications.

26.(1) a Party who seeks to have an application heard on priority basis shall file an application which shall be-

[56] accompanied by a certificate of urgency; and

[57] Supported by an affidavit setting out the urgency.

2 a single judge of the Court may grant or decline to certify the application as urgent.

3 Where the single judge declines to

certify an application as urgent, the applicant may apply informally at the time the decision is made or formally within seven days, for the matter to be

placed before the single judge for the hearing inter partes.

> ***(4) At the hearing of an application previously decided by a single judge, no additional evidence shall be adduced.***
>
> ***(5) The provisions of these rules shall apply to the hearing of urgent applications during the term of the Court or during vacation."*** *[Emphasis added]*

[26] It is therefore improper and incorrect to assert that there were no pleadings known to law upon which the orders were granted.

(b) Can this Court grant interlocutory orders?

[27] Section 24 (1) of the Supreme Court Act is instructive in this regard.

It provides:

24. (1) In any proceedings before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the

judge may think fit, other than an order or direction that

determines the proceedings or disposes of a question or issue before the Court in the proceeding.

(2) Any person dissatisfied with the decision of one judge in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of five judges.

[63] Thus, not only does the Supreme Court Act grant any Judge of this Court power to grant interlocutory relief but it also allows an aggrieved party to seek review of the single judge's grant or denial of interlocutory orders. Further, this Court has, in a number of decisions queried whether it has jurisdiction to grant interlocutory relief and has answered in the affirmative.

[64] In Board ***of Governors, Moi High School, Kabarak & Another v. Malcolm Bell,*** *SC Applications Nos. 12 and 13 of 2012,* the Court (Ibrahim and Ojwang SCJJ) at paragraph 33 and 39 delivered itself as follows:

33.“It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court’s capability to arrive at a just decision on the merits of an appeal, would be substantially diminished. Both the Constitution and the Supreme Court Act have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case…”

39.*“Apart from considering several questions of law and principle bearing on the matter before us, it is clear that the core question was, whether the Supreme Court has the jurisdiction to grant interlocutory orders, and more particularly, orders of stay of execution of decrees issued by other superior Courts. This question is, by this Ruling, now set to rest: where the Supreme Court has appellate jurisdiction derived from the Constitution and the law, it is equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum. A typical instance of such exercise of ancillary power is that of safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues.*"

[30] In ***Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others***, Sup. Pet. No. 27 of 2014; [2014] eKLR, Ibrahim SCJ sitting as a single Judge determined that the matter fell outside the jurisdiction of the Supreme Court. He observed:

> ***[25] As I make the determination herein, I am conscious of the provisions of Section 24, (1) of the Supreme Court Act, 2011 which provides as follows:-***
>
> ***24. (1) In any proceeding before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding.***
>
> ***The meaning and effect of the said provision is that a single judge in a proceedings or proceedings may give any interlocutory order and give any interlocutory directions as he/she think fit other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceedings.***
>
> ***[26] I touched on the propriety of the pleadings of the Applicant herein at the outset. The question to be***

asked is whether there is any "proceedings" before this Court in the first place and whether there is any interlocutory application/matter before the Court. I think that the question of deciding whether to certify the matter as urgent could be deemed to be an "Interlocutory matter".

[31] In ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** Sup.Ct Application No. 5 of 2014 [2014] eKLR one of the issues for the Court's determination was whether that case was a proper case where the interlocutory reliefs sought by the applicant could be granted. The Court (Ojwang and Wanjala SCJJ) observed:

[85] .....The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take

action until the Court has given the green light.

[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

[*87] The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:*

[66] the appeal or intended appeal is arguable and not frivolous; and that

[67] unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

[88] These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

[32] In ***T.S.C v K.N.U.T and 3 others,*** Sup. Ct. Application 16 of 2015,

the Court (*Mutunga, CJ& P; Rawal, DCJ& V-P; Ibrahim, Ojwang,*

Wanjala, SCJJ) stated as follows:

[*30] "The general stand of the law, therefore, is that there will be a pending, or an intended appeal, as a basis for this Court to entertain an application for stay of execution, or for grant of an injunction. We affirm the statement of legal principle as stated in Malcolm Bell, regarding the inherent jurisdiction of this Court to grant stay of execution, or injunction, so as to preserve the substratum

of an appeal, or intended appeal."

[33] The emerging principle is therefore that the powers granted to this Court under section 24(1) are of fundamental importance so as to allow the Court to do justice by either granting or denying interlocutory orders in an appeal or an intended appeal.

[34] Of importance too is the composition of the Court as set out in Article 163 (2) of the Constitution. There have been arguments that a single Judge had no jurisdiction to issue the interlocutory orders in this matter, as one Judge cannot conduct proceedings of this court as the constitutional quorum is five Judges. Article 163(2) of the Constitution is clear that the Supreme Court is properly constituted for purposes of its proceedings if it is composed of five Judges. This is reiterated by Section 23(1) of the Supreme Court Act, 2011 (the Act) which states as follows:

"For the purposes of the hearing and determination of any proceedings, the Supreme Court shall comprise of five Judges."

[35] This Court, however, (Ojwang and Njoki SCJJ) in ***Erad Suppliers***

& General Contractors Limited v National Cereals &

Produce Board, Sup. Ct. Petition No. 5 of 2012,[2012] eKLR,

(Erad) determined

the meaning of the word “**proceedings”** in the Supreme Court in the

following terms:

“[5A] We are conscious of the fact that both the Constitution and the accompanying statutes and rules, which are new instruments, will for some time be the subject of basic interpretations and, essentially, unless initiatives are taken within other institutions than the Judiciary, it will be the responsibility of the Court to fix the operative meanings of the relevant provisions.

> ***[6] The Court, in giving meaning and effect to the drafts-person’s language, cannot be purely technical or literal. The Court must take into account the reality and the context as a whole – so as to give meaning to the provisions: in particular the definition of the word “proceedings” under***

Art.163(2) of the Constitution. We find that the steps of this Court run in a series of events – and it is the last event, namely, the hearing and determination of the substantive cause, that must come before <u>the full Bench of five Judges; and this is what amounts to hearing-proceedings before this Court</u>.

> ***[7] In the run-up to the hearing before the five-***

Judge Bench, there are preparatory steps – beginning with proceedings on record before the Supreme Court

Registrar, to any settling of deserving legal-procedural issues before a more limited Bench of the Court, and ending up with the substantive hearing before a Bench of five Judges. Without this mode of case-management, the task of the Court under the Constitution would be incapacitated. This would be contrary to the provisions of Art.159(2)(d) of the Constitution. It is, therefore, our duty to give full meaning to the terms of the Constitution as regards the determination of contested questions – i.e., the questions of merit.

[8] In that context, we find that this [two judge] Bench as constituted today, is a valid and lawful framework for clearing initial and preliminary questions preceding the hearing and determination of the substantive cause, before arriving at the stage of a Bench of five Judges. We also rule that, while the category of preliminary issues preparatory to a hearing before five Judges is by no means closed, this Bench is a lawful forum for determining and directing on issues of jurisdiction – as a basis for intended hearings before the full Bench.”

(c) What constitutes an order of the Court?

[36] ***Black's Law Dictionary***, 8th edition, at pages 1129 and 1130

defines Order to mean:

2. A written direction or command delivered by a Court or a judge. The word generally embraces final decrees as well as interlocutory directions or commands. Also termed court order; judicial order. "An order is the mandate or determination of the Court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudication a preliminary point or directing some step in the proceedings".1 Henry Campbell Black, A Treatise on the law of judgments.1 at 5 (2d ed. 1902).

While an order may amount to a judgment, they must be distinguished, owing to the different consequences flowing from them, not only in the matter of the enforcement and appeal but in other respects, as for instance the time within which proceedings to annul orders rather than judgments. <u>The class of judgments and of decrees formally called</u>

interlocutory is included in the definition given in (modern codes) of the word 'order'. 1. AC. Freeman, a Treatise of the Law of judgments 19 at 28 (Edward W. Tuttle ed., 5th ed. 1925.(emphasis added)

[37] Flowing from the foregoing, it is without doubt that the Conservatory orders constitute valid Court Orders which could only be varied or altered in the manner prescribed under section 24(2) of the Supreme Court Act.

(d) Whether Rules of procedure take precedence over statutory provisions.

[38] It was the interested party's submission that the Rules of procedure outranked the statutory provisions. Article 163(8) of the Constitution provides that '***the Supreme Court shall make rules for the exercise of its jurisdiction.***' Article 163 (9) provides ***that 'an Act of***

Parliament shall make further provision for the operation of the Supreme Court.' Section 31 of the Supreme court Act

refers to Article 163 (8) and without limiting it makes a potential list of Rules that may be made by the Supreme Court. The Supreme Court Rules 2012 as

amended in 2016 are made pursuant to Article 163 (8) and section 31 0f the

Supreme Court Act.

[39] Article 2 of the Constitution asserts the Supremacy of the Constitution. The ***Judicature Act, cap 8 Laws of Kenya***, in Section 3(1) thereof embodies the time-hallowed principle of the hierarchy of norms. The section creates a deliberate and hierarchical sequence of laws, starting with the Constitution, followed by Statutes and next the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897. ***Section 31 (c) of the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya)*** provides that no subsidiary legislation shall be inconsistent with the provisions of an Act. Taking all the forgoing into account, I am of the view that the Rules cannot be said to be superior to the Supreme Court Act. The Supreme Court Rules must be taken to complement and not substitute or outrank the Supreme Court Act. Consequently, both the Act and the Rules must be read in conformity with the Constitution and not contradict or detract from it.

[40] Further, the Supreme Court Rules, being subsidiary legislation must

be read in a manner consistent with the Supreme Court Act. Similarly,

powers conferred by subsidiary legislation must be exercised in a manner that does not contravene an Act of Parliament and if the relevant provisions are irreconcilable the statutory provisions trump the provisions of the subsidiary legislation.

(e) Powers of a single judge.

[41] A single judge of the Supreme Court can, as outlined above, pursuant to Section 24 (1) of the Supreme Court Act, (a) make any interlocutory orders and give any interlocutory directions as long as such orders or directions do not determine the proceeding or dispose of an issue before the Court and; (b) grant or decline to certify applications as urgent pursuant to Rule 26 of the Supreme Court Rules 2012. Further, a single judge can, in accordance to section 11 of the Supreme Court Act confirm, modify or reverse a decision of the Registrar.

[42] Rule 3 of the Supreme Court Amendment (Rules) 2016 also allows a single judge to hear applications and make orders with regard to change of representation; admission of consent; consolidation of matters; dismissal of a matter for want of

prosecution; correction of errors on the face of the record;

withdrawal of documents; review of decisions of the Registrar;

leave to file additional documents; admission of documents for filing in the

Registry; or substitution of service. Rule 4(4) is also instructive as it discloses that a single judge can indeed make decisions. Rule 4(4) provides:

(4) A party aggrieved by the <u>decision</u> of a single judge may file an application for review of the <u>decision</u> to the Court.

[43] The consequence of all of the above is the inescapable conclusion that Njoki SCJ had jurisdiction to issue the Conservatory orders dated 27th May, 2016 pursuant to Section 24 (1) of the Supreme Court Act. She considered the relevant circumstances surrounding the case, found the pleadings proper and conscientiously ascertained the best course. She also took into account the principles set out in ***Erad*** that this Court runs in a series of events which culminate in the hearing and determination of the substantive cause to come before five judges. As such, once seized of the matter, she was obligated to render justice.

2.)Whether the Chief Justice could exercise his

administrative powers to vary a decision of a single-judge bench of the Court and, if yes, whether he could do so suo motu?

[44] Counsel for the Applicant urged that the Chief Justice invoked a nebulous source described as 'administrative powers of the Chief justice and President of the Supreme Court to grant him powers to give the directions. Counsels for the Respondents contended that the Chief Justice had power to issue the directions pursuant to Articles 161(2) (a) and163 (1)

(a) of the Constitution, Section 6(1) of the Supreme Court Act, sections 5(1) and 5(2) (c) of the Judicial Service Act and Rules 4 of the Supreme Court (Amendment) Rules 2016. These provisions of law are examined next. Dr.

Khaminwa for the 2nd *amicus curiae* urged that to allow the Chief Justice to make such directives fell short of upholding the Rule of Law and

infringed on Article 160 (1) of the Constitution. His co-counsel Shamalla submitted that the Chief Justice exercised, on his own motion, powers that he did not have.

[45] The Chief Justice is the Head of the Judiciary and President of the Supreme Court, as stipulated by Articles 161(2)(a) and 163(1)(a) of the Constitution, respectively. He has precedence over other Supreme Court Judges in terms of seniority. Section

5(1) provides thus:

"As the head of the Judiciary, the Chief Justice shall have precedence over the other judges of the Supreme Court."

[46] The Chief Justice is to preside over the matter before the Supreme Court and in his absence the Deputy Chief Justice presides. Section 6(1) of the Act provides as follows:

"The Chief Justice shall preside over the Supreme Court and in the absence of the Chief Justice, the Deputy Chief Justice shall preside."

[47] And importantly in the absence of the Chief Justice and Deputy Chief Justice, then the other Judges of the Court take precedence on administrative and judicial matters based on seniority**.**

[48] Under the Rules, the role of the Chief Justice is provided as follows. Rule 4(1) provides that:

> *(1) The Chief Justice shall* ***co-ordinate*** *the activities of the Court, including—*

(a) ***constituting a Bench*** *to hear and determine any matter filed before the Court;*

(b) ***determining the sittings of the Court and the matters to be disposed of at such sittings****; and*

(c) . . .

[88] It is not in dispute that the Chief Justice is the head of the Judiciary and President of the Supreme Court and that he is vested with administrative powers. The issue is whether he can invoke his administrative powers and his rank in the Supreme Court to vary a Court Order in force. As illustrated in paragraph 30 above, the conservatory orders granted amount to a valid Court Order. In Shimon Shetreet article; ***"The limits of Judicial Accountability: A hard look at Judicial Officers Act 1986' (1987) 10 UNSW Law Journal*4, 11** he states that:

"a significant aspect of judicial independence is the internal independence of a judge which refers to his independence vis-a-vis his judicial superiors and his colleagues."

In ***The Queen v Beauregard***, [1986] 2 S.C.R. 56, the matter related to Financial security of federally appointed judges. This decision is however of persuasive relevance as it considered the principle of

judicial independence. Then Chief Justice Dickson of the Supreme Court

of Canada held:

21. Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

[51] The independence of the Judiciary is jealously guarded by the

Constitution. Article 160(1) provides that:

"In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject

to the control or direction of any person or authority."

[52] Professor W.R. Leberman [Professor Emeritus of the Faculty of Law,

Queen's University, Kingston, Ontario, Canada] in his learned article,

"Judicial Independence and Court Reforms in Canada for the 1990's", in

Queen's Law Journal Vol 12 (187) 385 [at p. 389] observed as follows:

"Judges are not civil servants. They are, so to speak, servants only of the law itself. They are judges and judges only, with no other career employment or interest. They have guaranteed tenure in office with assured public salaries and pensions. They cannot be instructed how to decide cases that come before them."

[53] Dr. Khaminwa urged that decisional independence of Judges must be protected at all costs. He was of the opinion that the Chief Justice's directives, although in good faith, took us to the dark days of Chief Justice Wicks where he could call for files

which were part heard and assign them to another Judge or even interfere and interrupt ongoing proceedings in Court and call for the file.

[54] Dr. Khaminwa referred us to the ***Muriithi case*** in a bid to show the excesses of a former Chief Justice. In ***Mwangi Stephen Muriithi v Attorney General*** Civil Case No. 1170 of 1981 [1981] eKLR, Dr. Khaminwa was acting for the Plaintiff. The judgment by Hancox J, states in part:

"On the same day Mr Khaminwa, who has acted throughout for the plaintiff, as he has said in his submissions on the present objection, personally approached Cotran J in the court building, and, as the record shows, said he had an urgent application which had to be heard that day……

This application was heard by me and dismissed after full argument on Mr Shield's preliminary objection on behalf of the Attorney-General, and it is this which now gives rise to Mr Khaminwa's present preliminary objection. The objection is that I should not hear the case; that it was fixed before Cotran J

and the file wrongly transferred from him as a result of a telephone conversation said to have taken place with the Chief Justice from the Judge's chambers. Cotran J's accord does indeed show that he was directed that the case should not come before him but before me, but it is equally clear from it that the file itself was not before him on what was erroneously stated to be in April 30. In fact all the proceedings took place on April 29, both before Cotran J and myself, and the Ruling on the application delivered on the 30th.

In the course of his argument before me at that time Mr Khaminwa did take the point that once Cotran J was properly seized of the case the Chief Justice did not have power to take away his jurisdiction and give the case to another Judge. Mr Khaminwa did not, however, at that stage, pursue the matter to the point of objecting to my hearing the interlocutory application, but he did,

as he says lodge an appeal upon this ground. That appeal has been abandoned."

[55] This excerpt shows some veracity to Dr. Khaminwa's claim that Chief Justice Wicks could not only instruct a Judge not to hear a particular matter but also pass it over to another Judge. I note that Dr. Khaminwa who is a friend of the Court as well as an officer of the Court pointed out that the Judgments such as the aforestated one, would never really reveal the 'behind the scenes' story that culminated in it. It is my considered opinion that Dr. Khaminwa's concerns about decline of decisional independence of judges, are valid.

[56] With respect, *the Chief Justice in calling for a file that was part heard before another Judge and varying the Court Orders therein, without being moved by a party, and without reference to the Judge already seized of the matter acted contrary to Article 160 (1) of the Constitution*. This action was also in violation of section 3 of the Supreme Court Act wherein he is mandated to assert the Supremacy of the Constitution and develop rich jurisprudence that respects Kenya's history. Taking into account Kenya's judicial history and the rife external interference by the Executive at the time, we must jealously guard and protect the independence of Judges enshrined in

Article 160(1) of the Constitution. To open the door to allow again for a Chief Justice that lords over judicial officers and interferes with judicial decisions would be taking

us back to the dark days of our oppressive judicial history in the 1970’s and 1980’s.

[57] Although Counsel Ms. Shamalla referred to Section 14 of the Supreme Court Act, I must point out that this section was declared unconstitutional in this Court's (*W.M. Mutunga, P.K. Tunoi J.B. Ojwang, S.C. Wanjala & N.S. Ndungu)* decision in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*** Civil Application No. 2 of 2012[2012] eKLR. However, I am persuaded by her argument that the Kenyan people did not intend to give the Chief Justice *suo motu* powers to vary Court Orders given by any Judge and that nothing would have been simpler that to make provision for this under the Constitution if that was the intention of the people.

[58] To my mind therefore, the Chief Justice's directions did amount to a conflict between Court administration and judicial independence. The effect of the directions was to encroach on the internal independence of another Judge.

[59] The directions issued by the Chief Justice on 30th May, 2016 – which

are stated to be in exercise of his administrative powers as the Chief Justice

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and President of the Supreme Court – are not *in tandem*- with Section 24 of the Supreme Court Act which provides for the review of a single-Judge decision by five Judges. The Chief Justice's powers are restricted to co-ordination of the activities of the Court such as constituting a Bench, determining the date and time of the sittings of the Court and the matters to be disposed of during those sittings. It is without a doubt, that these powers cannot be exercised so as to alter or in any way interfere with the decisions of the Court (whether by one or more Judges).

[60] It is noteworthy that the power of the Chief Justice to determine the date and time of the sittings of the Court are stipulated in the Supreme Court Rules, *while* the provision that an order of a single Judge is to be reviewed by a five-Judge Bench is stipulated in an Act of Parliament. As already observed, powers conferred by subsidiary legislation must be exercised in a manner that does not contravene an Act of Parliament and if the relevant provisions are irreconcilable, the statutory provisions trump the provisions of the subsidiary legislation.

[61] It is important at this stage to make a few remarks on the

duty roster of the Supreme Court. There is a duty roster that is an administrative

mechanism which details which Supreme Court Judge is on duty each day. The approval of, and any changes to this roster, are made by the Chief

Justice or in his absence by the Deputy Chief Justice. In her absence the most senior Judge present will make such a decision. In this way the 'bench' that sits on a daily basis and which normally hears urgent matters is constituted properly under the rules. It is pursuant to the duty roster that Njoki SCJ could hear the urgent application.

[62] Before I conclude, I wish to make some observations on the workings of a collegial court like the Supreme Court: The Court operates in such fashion that the Chief Justice is first amongst equals amongst the seven Judges. Each Judge has an equal vote in judicial matters. The Court uses the mode of conferencing to discuss matters both administrative and judicial in a manner that gives the court rhythm; where each Judge has his or her own step that matches that of the other, either through persuasion, negotiation or through respect for each other's independent decision making. This is why the President of the Supreme Court *coordinates* the activities of the Court.

[63] The meaning of the word *coordinate* is to be found in the **Oxford English Dictionary** in the following terms:

"[as a verb]

1. ***bring the different elements of a complex activity or organization) into a harmonious or effecting relationship … Negotiate with others in order to work together effectively.***

[as an adjective]

2. ***Equal in rank of importance…***

Equal in rank and fulfilling identical functions"

[64] It is to be noted that the word "Coordinate" is not used to describe the workings of the administration of any other court in our judicial System. The President of the Court of Appeal, under *the Court of Appeal (Organization and Administration) Act 2016,* "**oversees** proper management and administration of the Court". The Presiding Judge of the High Court under the *High Court Organization and Administration* Act "is **responsible** to the Chief Justice for the **overall** administration and management of the court".

[65] Further, the wording of the a institution, where the Court works recognizes the special nature of

Supreme Court Act deliberately

small and operationally intimate in harmony and through mutual

respect. An Act by one Judge that undermines another Judge is a situation best avoided as it may upset the collegiate foundation of the Court.

Conclusion

[66] As I return to the specific issue at hand**,** it has been said that the CJ's directions were issued in view of the public interest nature of the matter. Nevertheless the fact that the matter belongs to the litigants cannot be overlooked. It cannot be emphasized enough that it was incumbent upon the aggrieved party to seek the review of a decision of a single Judge. Only then could a five-judge Bench review the orders made by Njoki SCJ. There is no provision for the Court or the Chief Justice to do so *suo motu*.

[67] It cannot be overstated that it is vital in a democracy such as ours that individual judges and the Judiciary as a whole are impartial and independent of all external and internal pressures and of each other, so that persons who appear before Court and the wider public can have confidence that their cases will be decided fairly and in accordance with the law.

[68] I find the preliminary objection has merit and that the directions of

the Chief Justice changing the date of return for the *interpartes* hearing from the 24th to the 2nd June 2016 - more so, where none of the parties has

raised an application challenging the said orders and where no reference was made to the Judge who was already seized of the matter - are in contravention of Section 24 of the Supreme Court Act and are tantamount to interference with the independence of a judge safeguarded in Article 160 of the Constitution.

ORDERS:

[69] I am inclined to make the following orders:

(a) The application dated 30th May, 2016 is hereby allowed.

(b) The date for interpartes hearing is confirmed as the 24th of June 2016.

(c) Parties to bear their own costs.

DATED and **DELIVERED** at **NAIROBI** this **14TH Day of June, 2016.**

……

N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true
copy of the original

REGISTRAR
SUPREME COURT OF KENYA

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