REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mutunga, CJ & P; Rawal, DCJ & V-P; Tunoi, Ojwang, Wanjala, Njoki, SCJJ.)

PETITION NO. 29 OF 2014

-BETWEEN-

JUDGES AND MAGISTRATES VETTING BOARD.....APPELLANT

-AND-

KENYA MAGISTRATES AND
JUDGES ASSOCIATION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal sitting at Nairobi (Gatembu, M'Inoti and Murgor JJ.A) delivered on 11th July, 2014 in Civil Appeal No. 93 of 2014)

JUDGMENT

A. INTRODUCTION

[1] This is an appeal from the Judgment of the Court of Appeal sitting in Nairobi, dated 11th July, 2014 in *Civil Appeal No. 93 of 2014*, which upheld the decision of the High Court *(Mumbi Ngugi, J)* in Nairobi High Court

Constitutional Petition No. 64 of 2014. The appellant prays for the following Orders:

(i) that the appeal herein be allowed;

(ii) that the Orders of the High Court and Court of Appeal be set aside.

B. BACKGROUND

(a) Proceedings at the High Court

[2] The 1st respondent filed in the High Court *Constitutional Petition No. 64 of 2014,* seeking *inter alia,* a declaration that the Judges and Magistrates Vetting Board (JMVB) cannot lawfully investigate the conduct, acts, omissions and information on the part of a judicial officer purportedly arising after the promulgation of the Constitution on 27th of August, 2010 (the effective date).

[3] The High Court set out the following issues for determination:

(i) whether the issues raised before it were ***res judicata;***

(ii) whether the Board can vet a judicial officer with respect to acts or omissions occurring after the effective date;

(iii) whether judicial officers subjected to vetting in respect of allegations arising after 27th August, 2010 were subjected to lawful and fair treatment, as required under the Constitution; and;

(iv) *whether the Court has jurisdiction to 'read-in' into Section 18(1) of the Judges Magistrate Vetting Act, so as to confine the vetting to acts and omissions occurring on or before the effective date.*

[4] In a judgment dated 26th March, 2014, *Mumbi Ngugi J inter alia* declared that:

> *"JMVB in the exercise of its functions as stipulated under Section 23 of the Sixth Schedule to the Constitution of Kenya, 2010, could not determine the suitability of judicial officers based on the acts or conduct that occurred after the promulgation of the Constitution."*

[5] Aggrieved by that High Court decision, the appellant herein and the 2nd respondent herein filed an appeal in the Court of Appeal being Nairobi Civil Appeal No. 93 of 2014. In a Judgment dated 11th July, 2014 the learned Judges of Appeal concluded that the High Court rightly held that JMVB had no mandate to consider complaints against judges and magistrates arising after the promulgation of the Constitution. The Court of Appeal affirmed that it was the JSC that had the legal mandate to investigate allegations of misconduct of judicial officers purportedly committed after the 27th of August 2010.

[6] Further aggrieved by the finding of the Court of Appeal, the appellant filed this appeal to the Supreme Court as of right under Article 163(4)a of the Constitution. The appeal raised the following issues:

(a) *whether the Vetting Board is permitted (or indeed required) to consider the conduct of a Judge or Magistrate after 27th August,*

2010 when it determines whether that Judge or Magistrate is suitable to continue to serve in the Judiciary;

(b) *how does the Constitution envisage the disciplinary power being exercised while the vetting requirement is being implemented, and is there any overlap in the allegations of misconduct, to which they are applicable?*

(c) *how should Section 18 of the Vetting of Judges and Magistrates Act, which sets out the relevant considerations for determining the suitability of a Judge or a Magistrate, be understood in light of these constitutional provisions?*

(d) *whether the interpretation that Section 18 of the Act permits the Vetting Board to inquire into judicial conduct after the effective date, is consistent with Articles 27, 47 and 50 of the Constitution;*

(e) *what remedy can the Court issue if indeed Section 18 is unconstitutional, in the above mentioned extent?*

[7] The appellants were represented by learned counsel, Messers Rao and Kanjama; learned counsel, Mr. Obura holding brief for Mr. Njoroge appeared for the 2nd respondent; and learned counsel, Mr. Ongoya appeared for the 1st respondent.

C. PARTIES' RESPECTIVE SUBMISSIONS

(a) Appellant's Case

[8] Learned counsel for the appellant, Mr. Rao submitted that the crux of this case is the significant differences between the constitutional objectives served by vetting (through JMVB), and the disciplinary mechanism (through the Judicial Service Commission (JSC)). Counsel urged that the Courts below appear to have lost sight of those differences, by portraying the two mechanisms as competing versions of the same process, and in so doing they imposed restrictions not only on the JMVB but also on the JSC.

[9] Counsel submitted that the Court of Appeal had taken an artificial and a restrictive approach to the disciplinary jurisdiction of the JSC, since the limitations it sought to impose are at odds with the wording of the relevant provisions, and with the constitutional objectives of accountability, and good governance. Such curtailment, he urged, had no legal basis. It was his submission that the Constitution, and the legislation passed under it, have provided in clear terms, for the JMVB and JSC to overlap without occasioning any inherent unfairness.

[10] Counsel urged the Court to recognize vetting as a comprehensive and holistic assessment of suitability, which entails the conduct of the judicial officer as at the date of the vetting interview. He submitted that both the High Court and Court of Appeal erred, by holding that the JMVB was prevented from considering any judicial conduct occurring after the promulgation of the Constitution.

[11] Learned counsel further submitted that, the Vetting of Judges and Magistrates Act was consistent with the Constitution. The principle of 'reading in', therefore, could only be resorted to if a statutory provision was found to be in breach of the Constitution. He urged that 'reading in' is not a form of interpretation but a remedy which Courts only resort to in exceptional circumstances. Counsel submitted that the Courts below failed to appreciate that

in the comparative jurisdictions cited, Courts exercised great caution when deciding whether to read-in words into a statute. Counsel referred to the case of ***Schacheter v. Canada*** (1992) 2 SCR 679, which sets out the strict conditions to be met before reading-in can be ordered. Also cited was the South African case of ***National Credit Regulator v. Opperman*** 2013(2) SA 1 (CC), which bears a note of caution, regarding reading-in.

[12] It was counsel's submission that the superior Courts did not interpret the Constitution as required under Article 259(1), by failing to differentiate the distinct objectives served by JMVB (the scope of the inquiry into suitability and the transitional nature of this mechanism which requires every Judge and Magistrate to undergo a one-off process of scrutiny), and the permanent disciplinary mechanism of JSC. Counsel stated that while vetting is a broad and holistic inquiry into whether a Judge is suitable to remain in the judiciary and uphold the principles and values of Articles 10 and 159 of the Constitution, the disciplinary process under JSC focuses on specific allegations of misconduct, gross misbehavior or incompetence, and these grounds must be established to a high degree in order to justify removal of a Judge or Magistrate.

[13] Counsel referred to the language in Section 23(1) of the Sixth Schedule to the Constitution, *"suitability…to continue to serve",* and urged that the language looks into the future, and any conduct prior to the *vetting interview* will be relevant. Counsel urged the Court to find that no Magistrate or Judge should be allowed to slip through, when there is evidence that they *do not meet the constitutional threshold*, due to their conduct whether before or after the promulgation of the Constitution.

[14] Counsel further submitted that the Court of Appeal erred in adopting a restrictive interpretation of Section 18 of the Vetting of Judges and Magistrates

Act, because some of the institutions listed in Section 18(1) were created by the Constitution of 2010, or by subsequent legislation, and did not exist under the same name before the effective date; thus, the use of their new names suggests that the Act contemplates JMVB having access to complaints that were filed with the new bodies.

[15] On the issue of differential treatment between Judges and Magistrate appointed on the effective date, counsel submitted that Judges and Magistrates appointed under the old constitutional dispensation had been subjected to scrutiny based on the conduct that occurred even after the effective date, unlike those who were appointed in the new set-up, whose appointments were conducted with much greater transparency and accountability by the new JSC.

[16] Learned counsel, Mr. Kanjama urged this Court to find that the High Court and Court of Appeal had no jurisdiction to hear and determine this petition. Counsel relied on this Court's decision in the case of ***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, which affirmed the finality of the Vetting Board's decision. As a result of this Judgment, counsel urged this Court to find that the High Court and Court of appeal proceedings were *void ab initio*. He referred to this Court's decision in the cases of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal And Others***, Supreme Court Petition No 10 Of 2013, and ***Mary Wambui Munene v. Peter Gichuki King'ara and 2 Others,*** Supreme Court Petition No.7 of 2014; [2014] eKLR and ***Anami Silverse Lisamula v. IEBC and Others*** Supreme Court Petition No. 9 of 2014, urging this Court to adopt and apply the principles set out in those cases.

[17] Counsel also cited the cases of ***Samuel Kamau Macharia v. Madhu paper International Limited and Others;*** Supreme Court Application No.2 of 2011; [2012] eKLR; ***Re the Matter of the Interim Independent Electoral Commission (IEBC);*** Sup. Ct. Advisory Opinion No. 2 of 2011; [2011] eKLR and ***Jasbir Singh Rai and 3 Others v. Tarlochan Singh Rai and 4 Others;*** Sup. Ct. Petition No. 4 of 2012; [2013] eKLR—which emphasise that jurisdiction is derived from the Constitution or legislation, and no Court should assume jurisdiction by any other means.

[18] Mr. Kanjama urged that the High Court and Court of Appeal had addressed the wrong question, as the test to be applied is the "suitability of a judicial officer to serve." It was his contention that suitability is only determined on the "date of the Board's decision". The Board, in learned counsel's view, was entitled to ensure that any matter that came before it, even after the effective date, fell within its mandate. Counsel concluded by urging the Court to adopt the holistic approach in the interpretation of the Constitution, and to hold that the intention of the framers was to have the JMVB give a finding restricted by the timelines prescribed.

[19] It was counsel's submission that the proceedings at the two superior Courts amounted to a challenge to the competence of the Board, and hence offended the earlier decision of this Court.

(b) 2nd Respondent's Case

[20] Learned counsel for the 2nd respondent, Mr. Obura supported this petition, and fully concurred with the appellants' submissions.

(c) 1st Respondent's Submissions

[21] Learned counsel for the 1st respondent, Mr. Ongoya restated the principle that the vetting process for Judges and Magistrates is a transitional-justice process.

[22] He submitted that the Constitution contemplates that the new constitutional order has its institutions and structures consistent with its transformative character, to deal with transgressions of its officers. Consequently, he urged, the acts and omissions on the part of judicial officers occurring after the effective date, should be dealt with by the substantive, and not the transitional institutional arrangements under the Constitution. Counsel submitted that there was no lacuna in the vetting processes, as envisaged under the Constitution and the enabling Statute.

[23] To support this argument counsel referred to the articles on, "*Constitutions without Constitutionalism: Reflections on an African Political Paradox*", by HWO Okoth-Ogendo in Isa G. Shivji (Ed), ***State and Constitutionalism: An African Debate on Democracy; and*** *"Constitutionalism: A Comparative Analysis of Kenya and South Africa"* by J. Mutakha Kangu in ***Moi University Law Journal*** Vol. 2 April 2008 No. 1.

[24] It was counsel's submission that section 23(1) of Sixth Schedule to the Constitution bears two broad schematic arrangements: the Judges and Magistrates who were in office on the effective date must pass the test of the constitutional threshold set out in Article 10 and 159 of the Constitution, in order to continue to serve, and the vetting process itself must be subjected to the same test; while those that were appointed after the effective date, had to live within the same value system embodied in the said Articles, failing which they would be

subjected to the disciplinary process contemplated under Articles 168 and 172 of the Constitution.

[25] In regard to the differential treatment between Judges and Magistrate appointed on the effective date, counsel posed the question as to what would happen if two judicial officers, one serving before the effective date and one appointed after the effective date, were to engage in a misconduct based on the same transaction? Counsel submitted that since only one judicial officer in such a case would be qualified for vetting, such would amount to discrimination, and unfair treatment contrary to Article 27.

[26] Counsel further submitted that the Vetting Board having adopted an interpretation of its mandate under the statute that culminated, in effect, in discriminatory treatment, it had subjected the affected officers to unlawful and unfair treatment. He urged that this Court should give an interpretation to Section 18 of the Vetting of Judges and Magistrate Act, the effect of which is not discriminatory in nature.

[27] On jurisdiction, it was counsel's submission that this was a non-issue, as parties had conceded to this Court having jurisdiction to hear and determine this appeal.

[28] Counsel urged this Court to find that the vetting of judicial officers on matters outside the scope of the jurisdiction of the vetting Board, defeats the express requirements of Articles 47, 50, and 27 of the Constitution. He urged the Court to sustain the concurrent findings of the High Court and Court of Appeal, and dismiss the instant appeal with costs.

D. ISSUES FOR DETERMINATION

[29] The two main issues arising for determination are:

(a) *whether this Court has jurisdiction to hear and determine this appeal in light of its Judgment in* ***Judges and Magistrates Vetting Board and Others v. Center for Human Rights and Democracy and Others;*** *Supreme Court Petition No. 13A, 14 and 15 of 2013; and*

(b) *whether the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can investigate the conduct of Judges and Magistrates who were in office on the effective date, on the basis of alleged acts and omissions arising after the effective date.*

[30] Before determining the two issues set out above, it is necessary to recall the main provisions of the Constitution, around which the questions to be determined revolve.

[31] The Constitution provides for the vetting of Judges and Magistrates in Sections 23(1) and 23(2) of the Sixth Schedule ("Section 23"). Section 23(1) provides:

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

[32] Section 23(1) prescribes that vetting will occur in terms of legislation enacted by Parliament. The legislation contemplated in Section 23(1) is the Judges and Magistrates Vetting Act, 2011 (Act No. 2 of 2011). This is clear from the Preamble to the Judges and Magistrates Vetting Act, which provides that it is:

> *"An Act of Parliament to provide for the vetting of judges and magistrates pursuant to Section 23 of the Sixth Schedule to the Constitution."*

[33] In short, Section 23(1) of the Sixth Schedule to the Constitution requires that the mechanisms and procedures for vetting occur in terms of the Judges and Magistrates Vetting Act, subject to the values and principles set out in Articles 10 and 159 of the Constitution.

[34] Section 23(2) of the Sixth Schedule to the Constitution provides:

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

[35] Section 23(2), read with Section 23(1), provides that the removal and process leading to a removal of a Judge "by virtue of the operation of legislation" — being the Judges and Magistrates Vetting Act — "shall not be subject to question in, or review by, any court". The essence of this Section is that the removal, or process leading to a removal "by virtue of" the Judges and Magistrates Vetting Act, *is not subject to a review by a Court.*

E. ANALYSIS

(a) Jurisdiction

[36] It was argued before this Court that the ruling in ***Judges and Magistrates Vetting Board & Others v. The Centre For Human Rights And Democracy***, Petition No 13A of 2013 consolidated with Petition No 14 of 2013 and Petition 15 of 2013 (JMVB (I)) precludes this Court from answering the question before it – *whether the Board can investigate allegations of impropriety on the part of judges and magistrates who were in service on the effective date, arising from acts or omissions by the said judicial officers after the effective date.* The contention by Counsel was that the decision in *JMVB (I)* means this Court does not have jurisdiction to entertain this appeal.

[37] On the foregoing point, two basic questions arise, namely:

(i) what was the main question before this Court in JMVB (1)? And

(ii) what was the answer to (1) above, and what was the consequential decision by this Court?

[38] The main question before this Court in JMVB(1) was *whether Section 23(2) of the Sixth Schedule to the Constitution, as read with Section 22(4) of the Vetting of Judges and Magistrates Act, ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board.*

[39] Having extensively considered the frontiers of Section 23(2) of the Sixth Schedule to the Constitution, this Court (at paragraph 202) stated categorically as follows:

"For the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, it is our finding that none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act."

[40] In other words, this Court consciously articulated the state of the law, in accordance with the Constitution: *the removal of a Judge or Magistrate, or a process leading to such removal by virtue of the operation of the Judges and Magistrates Vetting Act by the Vetting Board, cannot be questioned in any court of law*. That remains the valid position, under the law.

[41] Today this Court, is faced with a different question: *whether the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can investigate the conduct of Judges and Magistrates who were in office on the effective date, on the basis of alleged acts and omissions arising after the effective date.*

[42] In answering this question, the two superior Courts had to interpret Section 23 of the Sixth Schedule to the Constitution, as read with Section 18 of the Judges and Magistrates Vetting Act. It is their interpretation that has led to this appeal before us. This appeal, was filed as of right, pursuant to Article 163 (4) (a) of the Constitution, because it involves the interpretation or application of the Constitution.

[43] We do not see how our decision in JMVB (1), which was responding to a different question, can deprive this Court of its jurisdiction to interpret and apply the Constitution, in conformity with Article 163 (4) (a) thereof.

[44] Learned counsel, Mr. Rao was well aware of the jurisdictional position when he submitted thus:

> ***"Today's case is different; it is not about individual vetting decisions. It is about a mandate itself. What is at stake in this case is fidelity in the interpretation of that mandate and giving true and accurate effect to the Constitutional and Legislative provisions that define it."***

[45] We have no hesitation in finding that this appeal is properly before us, and that this Court has jurisdiction in every respect, to determine the issue. In this regard, we are unconvinced by the submissions of learned counsel, Mr Kanjama to the contrary. To decline to determine the question as framed, on the basis of an unsubstantiated claim of lack of jurisdiction, would defeat the vetting process, notwithstanding the clear terms of the Constitution.

(b) Authority of the Vetting Board, and Acts or Omissions occurring after the Constitution's Effective Date

[46] It is the appellant's contention that the Judges and Magistrates Vetting Board can legitimately determine the suitability of a Judge or Magistrate who was in service on the effective date, to continue to serve under the new constitutional dispensation, *on the basis of conduct occurring after the effective date*. The respondent contends, however, that the Vetting Board can only determine the suitability of judicial officers to continue to serve, *on the basis of conduct occurring before the effective date.*

[47] The provisions of Section 23(1) of the Sixth Schedule to the Constitution squarely come into play.

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

[48] The historical context and rationale of the vetting process have been fully considered by this Court in JMVB (1). What remains to be clarified in light of the main issue before us, is the *extent and reach of that vetting process. How far back, and how far ahead, can the Vetting Board go in determining the suitability of Judges and Magistrates who were in office to continue to serve?* This, in our view, is the essence of the issue before us. To it may be added the ancillary, yet equally important question, *for how long?*

[49] The answer to the last of these three questions is to be found in the wording of Section 23(1) of the Sixth Schedule to the Constitution, and that is: *"within a time-frame to be determined in the legislation"* (meaning the Judges and Magistrates Vetting Act). However, this time-frame even as determined by legislation, is not elastic. It is to serve a limited purpose, that of determining the suitability of those judicial officers who were in office on the effective date to continue to serve. All the three superior Courts have remarked the time-limited scope of the vetting process. Towards this end, the majority in JMVB (1) observed as follows at paragraph 194:

> *"It is to be recalled that the Vetting process for judicial officers was the peoples' command, for the purpose of aligning the Judicial Branch to the new Constitution.* ***Such decision is clear from the fact that***

the vetting process was defined by a restricted transitional timeframe the logistics of which were regulated by a dedicated schedule to the Constitution."

And later at paragraph 197:

"It is in that broad context of principles and values, that the Judges and Magistrates Act is to be seen. ***Its operations, centred on the Vetting Board, were conceived as transitional; it would conclude its mandate during the transitional period."***

[50] In her concurring opinion, learned *Justice Rawal* also weighed in on this matter at paragraph 222 thus:

"Section 23 of the Sixth Schedule to the Constitution …bears certain noble elements: first, the time-prescription of the Constitution for the enactment of required legislation; ***and secondly, the limitations of time attached to the vetting mechanisms and procedures. Such time prescription reinforces the transitional nature of the vetting process."***

[51] Therefore, the answer to the short but important question: *"for how long?"* is, *"not for long"*

[52] This now brings us to the twin questions of *how far back* and *how far ahead?* The answer to the first limb again lies in the wording of Section 23(1) of the Sixth Schedule to the Constitution. In this regard, the operative words are:

"the suitability of all judges and magistrates who were in office on the effective date to continue to serve..."

[53] The inescapable conclusions from this wording are as follows:

(i) That the Judges and Magistrates Vetting Board is at liberty to inquire into the conduct of all the Judges and Magistrates "who were in office on the effective date", to determine their suitability to continue to serve.

(ii) That the Judges and Magistrates Vetting Board has no jurisdiction to inquire into the conduct of any Judge or Magistrate "who was not in office on the effective date". The logic of this exclusion from vetting is that the latter, not having been in office before the promulgation of the Constitution of 2010, could not have done or omitted to have done anything in his/her capacity as a judicial officer to warrant the scrutiny of the Vetting Board. Conversely, a Judge or Magistrate "who was in office on the effective date" may or may not have done something at the time he was in office before the promulgation of the Constitution of 2010 to warrant the scrutiny of the Vetting Board.

[54] These conclusions have a fundamental bearing on the issue before us. They lead to one critical question: on what basis can the Vetting Board determine that a Judge or Magistrate who was in office on the effective date is *suitable to transit from the old constitutional order to the new one?* Or, in the words of Section 23(1), *to continue to serve?*

[55] The Vetting Board, in our view, can only make such a momentous determination on the basis of what the Judge or Magistrate is alleged to have done or omitted to do during his tenure in office before the Constitution of 2010;

for it is his actions or omissions, that will determine whether he/she is to be vindicated or condemned. The Board cannot wait to act on the basis of what such Judge or Magistrate will do after the promulgation of the Constitution of 2010.

[56] It is not in question that the vetting process was embedded in both the Constitution and the Judges and Magistrates Vetting Act, before the Board itself came into being and commenced operations. Is it conceivable then, that the drafters of the Constitution, or indeed Parliament, could have fathomed a scenario where the Board would determine the suitability of a Judge or Magistrate to continue to serve within the context of Section 23 (1) of the Sixth Schedule to the Constitution on the basis not of what he/she had done or omitted to do, but on the basis of what he/she would do, or omit to do after the effective date? That the Board would lie in wait and pounce later upon the said Judge or Magistrate, having not come across any past misdeeds or impropriety? And this, even in the face of the Judicial Service Commission whose constitutional mandate it is to deal with all cases of unethical conduct on the part of judicial officers after the due date? Would such a scenario not defeat the rationale of vetting as a transitional process?

[57] The Constitution has in-built mechanisms which have ensured a harmonious coexistence between the vetting process for Judges and Magistrates who were in office on the effective date (an exclusive mandate of the Board), and the disciplinary process for all judicial officers who were not in office on the effective date, including those who have already been vetted (an exclusive mandate of the JSC). The Constitution does not envisage vetting to be a continuous process. Yet this is what it (vetting) could become if the Vetting Board encroaches upon the jurisdiction of the JSC.

[58] Questions were raised by counsel for the appellant as to what would happen, for example, in a case in which a Judge or Magistrate who has been vetted faces a real prospect of disciplinary proceedings also being commenced against him/her by the JSC? Or where a judicial officer appears at the Vetting Board while inebriated? Or where the Vetting Board comes across an incident of misconduct on the part of a judicial officer after the due date?

[59] The general answer to all these questions lies in what Mr Ongoya for the respondent termed as "the comity of the multiplicity of institutions under our constitutional set-up". These institutions were not established to pursue sibling rivalries, at the expense of the public good. They must consult and, where necessary, coordinate their operations, so as to maximize the public good, in conformity with their constitutional responsibilities.

[60] We perceive such questions as hypothetical in nature, having been raised by counsel for purposes of argument. Our attention was not drawn to a real situation of conflict between the Judges and Magistrates Vetting Board, and the Judicial Service Commission. Indeed in JMVB(1), the two institutions, together with the Attorney-General and the Law Society of Kenya, prosecuted their cause in concert as the appellants. We also take judicial notice of the fact that upon commencement of the vetting process by the Board, the Judicial Service Commission handed over to it all complaints within the Commission's possession, relating to the conduct of judicial officers before the effective date. This was in conformity with the requirements of the Judges and Magistrates Vetting Act.

[61] In answer to the first hypothetical question, there would be no reason for the JSC not to hold its hands until the officer in question has been vetted. In answer to the second and third hypothetical questions, there would be no reason

as to why the Board should not report an officer to the Commission, for appropriate disciplinary action.

[62] It follows that as to the question, *how far back?* the answer is *from the date of appointment under the retired Constitution up to and until the effective date.* The answer to the question as to *how far ahead?* is *only as far as the effective date but not beyond.*

[63] We find and hold that the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can only investigate the conduct of Judges and Magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date. To hold otherwise would not only defeat the transitional nature of the vetting process, but would transform the Board into something akin to what Lord Mersey once called *"an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be" (Lord Mersey* in ***G & C Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd (1913).*** Lord Mersey used the analogy of *"a dog"* to refer to the *"Equity of Redemption"* in the law of mortgages. Here, we use it to refer to *"a jurisdictional mandate"* within our constitutional set-up; and not, the Board *per se.*

DISSENTING OPINION OF NJOKI NDUNGU, SCJ

[64] The main issue for determination in this appeal as set out in the Petition of Appeal was *whether the Judges and Magistrates Vetting Board (Vetting Board), in determining the suitability of a Judge or Magistrate to continue to serve in*

the Judiciary, is permitted or required to consider conduct after the effective date (27th August, 2010).

[65] During the hearing of the appeal, the Appellant argued that it had been erroneous for the Superior Courts to approach the process of vetting as though the mandate of the Judicial Service Commission (JSC) and that of the Vetting Board were two competing versions of the same process. The Appellant emphasized that the mandate of the Vetting Board was the consideration of the Judges and Magistrates *'suitability'* to serve in the Judiciary, while that of the JSC's mandate was disciplinary. It was argued further, that while the vetting process was transitory, the disciplinary mandate of the JSC was permanent. The Appellant argued that *continuity* as used in Section 23(1) of the Sixth Schedule of the Constitution was futuristic, covering all the relevant aspects prior to the vetting process.

[66] The 1st Respondent in turn was of the view that the Court should give effect to the meaning of Section 18 of the Vetting of Judges and Magistrates Act (VJM Act) in consonance with the Constitution and particularly Article 27 of the Constitution. The 1st Respondent argued that it was not in dispute that the Vetting of Judges and Magistrates was one looking into the conduct of judicial officers, and was a transitional process from the old to the new constitutional order. However, Counsel for the 1st Respondent urged that any acts or omissions on the part of judicial officers *after* the effective date of the Constitution, that is 27th August 2010, were the preserve of substantive and not transitional institutional arrangements under the new Constitution.

[67] It is imperative to proceed from a holistic interpretation of the Constitution. Section 23(1) of the Sixth Schedule is the premise upon which a consideration of the pertinent legal questions arising ought to be made. It provides as follows:

> "23. (1) Within one year after the effective date, Parliament **shall enact legislation**, which **shall operate <u>despite</u>** Article 160, 167 and 168, **establishing mechanisms and procedures for vetting,** within a timeframe to be determined in the legislation, the **suitability** of all **judges and magistrates** who **were in office** on the **effective date** to continue to serve **in accordance with the values and principles set out in Articles 10 and 159**." [Emphasis added]

The various components of this provision ought to be carefully considered: the contemplated legislation (VJM Act) and its operation ***despite*** Articles 160, 167 and 168 of the Constitution; the subject(s) of vetting (the Judges and Magistrates in office on the effective date); and the consideration of suitability to serve in accordance with the values and principles set out in Articles 10 and 159 of the Constitution. The application of the VJM Act, which is in line with Section 23(1) of the Constitution, is clearly set out under Section 4 of that Act:

> "4. For the avoidance of doubt, the provisions of this Act ***shall apply only*** *to persons who were serving as Judges and Magistrates and who were in office on or before the effective date."*

The Purpose of Vetting

[68] The new constitutional order places a high premium on *integrity, transparency, accountability and a code of values for public conduct* that those who hold public offices must satisfy. Where, as in Section 23(1), the dictates of Articles 10 and 159 provide requisite criteria for admission into public office, or a continuation of holding of public office, an extensive interrogation must be

undertaken so as to ensure that only persons who satisfy these criteria hold or continue to hold offices. Such is the clear intention and purpose of vetting; the separation of the suitable from the unsuitable based on character and performance of public duty. No doubt, the national values and principles of governance and judicial conduct articulated in Article 10 and 159(2) of the Constitution apply to *all* persons and state officers without the exemption of time. One of the key considerations for appointment of Judges under the new Constitutional Order and in line with Article 166(2)(c) of the Constitution is the *possession of high moral character, integrity and impartiality*. This elaborate addition to the prerequisites of public service informed the need for vetting, to ensure that those transitioning from the old constitutional order held the same values as required of those incoming under the new constitutional order.

[69] The intention of the vetting process was to bring all judicial officers appointed under the repealed constitution in line with the 2010 constitutional framework. This process was conceptualized to legitimize the concerned judicial officers' exercise of *people-drawn judicial authority* in accordance with Article 159 and as expounded by Rawal, Deputy Chief Justice & V.P in her concurring opinion in the ***Judges and Magistrates Vetting Board & Others v. The Centre For Human Rights And Democracy***, Petition No 13A of 2013 consolidated with Petition No 14 of 2013 and Petition 15 of 2013, (***JMVB (I)*** at paragraph 221:

> *"[221] The vetting of Judges and Magistrates was one of the constitutional precursors to the enforcement of Chapters Six and Ten of the Constitution, and was intended as a mechanism for the judicial fulfillment of Articles 10 and 159 of the Constitution. Based upon the intended objective of the vetting process, it was also a filter, to ensure that according to the dictates of Article 73, the*

authority entrusted to Judges and Magistrates as State Officers would be exercised in a manner that enhances public confidence in the integrity of the office (and the institution) of the Judiciary. In order to ensure that this was effected, Section 13 of the Vetting of Judges and Magistrates Act (Cap 8B, Laws of Kenya) [VJM Act] sanctioned the vetting of Judges and Magistrates, conducted in accordance with the provisions of the Constitution and the VJM Act. This requirement, as elaborated under Section 23 to the Sixth Schedule, underscored vital object of examining the suitability of judicial officers appointed in the pre-2010 constitutional era, to continue serving in accordance with the Constitution, and in the reformulated framework of constitutional governance in Kenya. As such, the foundational objective of the vetting process was the psychic alignment of the Judiciary to the dictates of the Constitution, both in institutional and leadership capacities. This transformation or realignment was to be guaranteed primarily through the process of vetting, to ensure the commitment of the Judges and Magistrates in office, to constitutional imperatives, in values and principles. As a point of emphasis, the examination of this constitutional alignment was to be conducted in accordance with the Constitution."

[70] The mandate of the Vetting Board was to determine the suitability of Judges and Magistrates to *continue to serve* in accordance with the values under Article 10 and 159. This shows that the intention of the vetting process was to the individual conduct of every serving Judge or Magistrate, appointed under the repealed Constitution as well as the institutional reformulation of the Judiciary. The process was also intrinsically linked to the overall objectives of Chapter Six of the Constitution, which includes *suitability* as one of the guiding principles of

leadership and integrity in accordance with Article 73(2)(a) of the Constitution. In the premises, the following questions arise: *What is suitability as demanded by the Constitution?* W*hat are the measures of suitability?* And, *when does examinable conduct for the basis of determining suitability abate in the case of vetting?*

[71] The determination of suitability will involve an extensive interrogation of one's essential quality of nature, conduct and disposition when adjudged against the parameters of Article 10 and 159 must take into account a multiplicity of factors including past and present dealings and inclinations. Such values such as patriotism, human dignity, integrity, transparency and accountability are matters intrinsically tied to a person's attributes, conduct and character in both public and private spheres of life. A person's ethical and moral values are a product of nurture, observable in the day-to-day relationships and dealings with others.

To find that a judicial officer does not exhibit integrity, is unpatriotic or has been disregardful of human dignity of litigants is a conclusion that can only be drawn after an assessment of a series of previous personal traits, habits, ethos and behavior in both private and public life. *It is an assessment done in total disregard of a point in time when they happened*. It is therefore not plausible to argue that a Judge cannot be declared unsuitable to continue to serve because evidence of gross misconduct leading to a removal was in relation to things that happened after the effective date.

The concurrent jurisdictions of the Vetting Board and the JSC

[72] A removal of a judge or magistrate from office by the vetting Board pursuant to Section 23(1) and (2) of the Sixth Schedule upon a finding of *unsuitability* on account of complaints emanating from conduct after the effective date cannot in

any way be perceived as the usurpation of the role of JSC under Articles 168(2) and 172(1)(c). This is because the evidential material led in proof of suitability, under Article 10 and 159, or failure thereof shall have been tendered by any person or body in pursuance of a lawful and constitutionally sanctioned process of vetting of the then serving judicial officers. As the constitutional foundation and pillar for Kenya's judicial vetting process, Section 23(1) has been given effect by the Judges and Magistrates Vetting Act No. 2 of 2011, particularly Section 18(1) which does not specify a time-limitation for occurrence of complaints to be considered in determining suitability of a judge or magistrate.

[73] As a basis of institutional transition, the Vetting Board is not barred either by the Constitution or legislation from examining complaints on the basis of conduct after the effective date. The consideration of post-effective date allegations by the Vetting Board does not usurp the investigative and disciplinary powers of the JSC. The restricted timeframe of the Vetting Board points to the temporary nature of its existence and the JSC's constitutional duty for the continuous facilitation of judicial independence and accountability.

[74] The mandate of the Vetting Board is transitional, both in individual and institutional scope. Once the vetting process is complete, and the mechanisms constitutionally and statutorily given to the Vetting Board are exhausted, then the Vetting Board is precluded from ***recalling*** an already vetted Judicial Officer on the basis of evidence emerging; whether of a pre or post constitutional duration. Such command constitutionally belongs to the JSC.

[75] The essence of the vetting process is to bring major reforms into the institution of the Judiciary through the evaluation of suitability of individual Judges and Magistrates. *Considerations of suitability ought not to be confined to specific periods of time, unless expressly provided by the Constitution or statute*.

The critical aspect of vetting in the Kenyan context, is judicial service in accordance with, the values and principles under Articles 10 and 159 of the Constitution. Articles 10 and 159 have a continuous lifespan, which applies prospectively from the effective date. As such, the duty by every judicial officer to uphold the Constitution at all material times warrants the consideration of acts or omissions after the effective date on the strength of the continuous applicability of the Constitution. While the vetting process is a transitional requirement bearing on the holistic institutional transformation, the mandate of the Judicial Service Commission, is in its disciplinary mandate isolated to individual Judicial Officers.

The prospective applicability of the Constitution therefore guides the role of the Vetting Board as well as that of the JSC during the life of the Vetting Board; nothing bars the JSC or the Vetting Board from legitimately carrying on their mandates concurrently. Section 23 of the Sixth Schedule insulated the vetting procedure and the Vetting Board from the limitations of Articles 160, 167 and 168, in consequence of the inquiries by the Board and the probable collision with the mandate of the JSC. (It is to be noted, however, that this insulation is only applicable during the life of the Vetting of Judges and Magistrates Act).

[76] Article 168 of the Constitution outlines the procedure for the ***removal*** of a Judge from office. This Article requires that the process initiating the removal of a Judge be initiated only through the JSC or upon the petition of any person to the JSC. The import of having Section 23 of the Sixth Schedule and Article 168 of the Constitution can only mean that there were various measures put in place to govern the *constitutional transition* and *continuity* of the Judiciary. This can be drawn from the *ratione temporis* of the Vetting Board and the language of Section 23 of the Sixth schedule sanctioning the operation of the VJM Act

despite Articles 160, 167 and **168**. An interpretation of Section 23(1) can only be complete with that of Section 23(2). The ***operation*** of the **VJM Act** is imperative in the sense that it ***overrides*** Articles 160, 167 and 168 (Section 23(1). This clears the path for the Vetting Board to consider the suitability of Judges and Magistrates to continue to serve using the relevant considerations provided for under Section 18 of the VJM Act, including those arising after the effective date.

The removal of a Judge, or the *process leading to such removal*, by virtue of ***its operation*** is further insulated from consideration by any Court by virtue of the Ouster clause (Section 23(2). Such removal is based on considerations of suitability, which therefore and in line with the VJM Act, are constitutionally sanctioned and guarded against any interference. Mutunga CJ reinforced the importance of the Ouster clause in ***JMVB (1)*** at paragraphs 213 and 214 of the Judgment (Concurring) in the following terms:

> *"[213] Thus, the ouster clause in issue in this matter ought to be strictly construed as a transitional clause, in the context of Kenya's unique historical background. The supervisory jurisdiction of the High Court, and indeed the jurisdiction of any other Court, should remain in abeyance during the vetting process – as this is what the Kenyan people demanded. The people's voice is clearly and unambiguously sounded in the Constitution, and it remains supreme. What Kenyans wanted and envisaged was a new Judiciary, that they would have confidence in – with the new Judges being selected through a competitive process by the Judicial Service Commission, and the sitting Judges undergoing a vetting process, undertaken by an independent body, the Vetting Board. The voice of the people cannot be silenced or subverted by any Court of law,* ***or any other institution."***

"[214] This Court has also found that no provision of the Constitution is "unconstitutional". Thus, although the Constitution does not obliterate judicial review, the fundamental principles of judicial review can be suspended as a transitional matter. The Vetting of Judges and Magistrates Act bears fidelity to the ouster clause, signalling that the intention was to suspend judicial review, in the transitional period…"

[77] Article 173 (1)(c) of the Constitution on the other hand, gives the JSC the mandate to appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary, in the manner prescribed by a *separate* Act of Parliament (the Judicial Service Act, No. 1 of 2011). The process of vetting is therefore very different from that of removal of a Judge or Magistrate from office through the JSC, thus eliminating the panic of consequence, of the concurrent jurisdictions of the Vetting Board and the JSC.

[78] Based on the provisions of the Constitution, the VJM Act and the Judicial Service Act, the mechanisms of the Judicial Service Commission are neither pegged upon those of the Vetting Board nor are those of the Vetting Board pegged upon the JSC. The system created by the Constitution in this regard is one of *institutional parallelism* but with different purposes and review mechanisms, each on its own foundation and lifespan. This arrangement is designed to yield optimal results in institutional alignment and not necessarily lead to an *institutional paralysis*. The Constitution of Kenya, 2010 is replete with concurrent jurisdictions in important spheres of national governance. An example of this is the Fourth Schedule to the Constitution, which outlines a clear scheme of vertical devolution with various national organs performing similar functions for various differentiated or reinforcing purposes.

As drawn from the comparative perception of Mahomed J in the South African case, ***State v. Makwanyane & Another*** (CCT3/94) (1995) ZACC3 [para.262]:

> *"All Constitutions seek to articulate, with differing degrees of intensity and detail, the* ***shared aspirations of a nation****; the values which bind its people, and which* ***discipline its government and its national institutions****; the basic premises upon which* ***judicial, legislative and executive power is to be wielded****; the constitutional limits and the* ***conditions upon which that power is to be exercised****; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future."*

[79] In this case, none of the parties asserted the existence of any institutional paralysis. The consideration of the interference in the JSC's mandated sphere of operation was merely hypothetical. In the absence of the presentation of a *hard case* of collision of these mandates and the emergent collision leading to an institutional paralysis or constitutional negation, the arguments and assertions of the 1st Respondent, belong squarely in domain of speculation.

Application of the 'notwithstanding' clause.

[80] Any approach of interpretation ought to consider the import of the use of the word ***'despite'*** as used in Section 23(1). The use of the word ***'despite'*** under Section 23 of the Sixth Schedule may be likened to the use of the word ***'notwithstanding'*** under Section 33(1) of the Canadian Charter of Rights and Freedoms commonly known as the '*notwithstanding clause*'.

"33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

This mechanism of constitutional and legal drafting as employed in the Canadian Charter is meant to provide a fine balance of the competing principles in Canada's constitutional traditions i.e. the primacy of rights and the sovereignty of parliamentary institutions. Its enactment in 1982 brought to an end a laborious process of compromise between the divergent voices in the development of Canadian law. Similarly, the enactment of Section 23 into the transitional schedule of our Constitution was a laborious exercise calling for the invocation of a ***'notwithstanding mechanism'*** to find a compromise and a balance of the competing but reinforcing constitutional principles. In concurring with the Majority in ***JMVB (I),*** and in view of my past role as a Member of the Committee of Experts that drafted the Constitution 2010, I sought to elaborate the process of Section 23's inclusion in the opening paragraph of that opinion, which I restate here for continuity:

[229] .....There were two submissions in relation to the transition of the Judiciary presented to the Committee of Experts for consideration. The first submission proposed a complete overhaul of the institution, with the requirement that all judicial officers reapply to continue serving in the Judiciary. The other submission was the conceptualization of a vetting process to bring the Judiciary into conformity with the new Constitution. After ***intensive deliberations****, the option of vetting was adopted as had been proposed in the Constitution of Kenya Review*

Commission (CKRC) and Bomas Drafts as well as the 2009 Task Force on Judicial Reforms. ***The vetting process was adopted and as a result, Section 23 of the Sixth Schedule was enacted****. This process was not designed to strip the Judiciary of power to enforce the Constitution and the law. Rather, it was a mechanism to ensure that the concerns of the people with regard to the institution were addressed. The vetting process was designed as an isolated process with the consideration that any disruption to the functioning of the Judiciary was undesirable. This consideration therefore informed the time prescription with regard to the process."*

[81] *Unlike* Section 33(1) of the Canadian Charter that gives the legislatures an open window in enactment of laws that override certain provisions of the Charter and which has been sparingly invoked, Section 23(1) of the Sixth Schedule to our Constitution ***is very narrow and squarely restricted to only three Articles of the Constitution and a defined category of persons (Judges and Magistrates serving before the effective date)***. It only allows the operations of the VJM Act to ***override*** Article 160 (Independence of the Judiciary), Article 167 (Tenure of Office of the Chief Justice and other Judges) and Article 168 (Removal from Office). This narrow and pointed approach bears comparative jurisprudential approval from the decision of the Supreme Court of Canada in ***Ford vs. Quebec*** **[1988] 2 S.C.R. 712**. In Ford, at page 33, the Supreme Court confirmed that Section 33 does not impose any obligation on a legislative body to substantively justify or explain its use of the notwithstanding clause, as long as the requirement of an ***express declaration*** is met. The Court held that:

"A legislature may not be in a position to judge with any degree of certainty what provisions of the Canadian Charter of Rights and Freedoms might be successfully invoked against various aspects of the Act in question. The essential requirement of form laid down by s. 33 is that the override declaration must be an express declaration that an Act or a provision of an Act shall operate notwithstanding a provision included in s. 2 or ss. 7 to 15 of the Charter. With great respect for the contrary view, this Court is of the opinion that a s. 33 declaration is sufficiently express ***if it refers to the number of the section, subsection or paragraph of the Charter, which contains the provision or provisions to be overridden****. Of course, if it is intended to override only a part of the provision or provisions contained in a section, subsection or paragraph then there would have to be a sufficient reference in words to the part to be overridden."*

Thus the operation of the VJM Act, ***despite*** the outlined provisions of the Constitution, effectively moots any argument that the Vetting Board risks encroaching into a jurisdiction reserved for the JSC.

Purposive Interpretation of the Constitution

[82] The finding of the majority in this case challenges the procedure of vetting as outlined under Section 19(1) and (2) of the VJM Act. This Section provides that:

"19 (1) The ***Board shall consider information gathered in the course of personal interviews*** *with the affected judges and magistrates as well as their records.*

(2) All information obtained by the Board during personal interviews and records of the Judge or Magistrate being vetted shall be confidential."

In my view, this challenge bears several far-reaching **consequences**:

(a) the reversal of this Court's decision in ***Judges and Magistrates Vetting Board & Others v. The Centre For Human Rights And Democracy***, Petition No 13A of 2013 consolidated with Petition No 14 of 2013 and Petition 15 of 2013 **(JMVB (I))*;***

(b) the introduction of the potential ***question or review*** of the Vetting Board's processes by other Courts including this Court ***contrary to the provisions of Section 23(2) of the Sixth schedule*** and Section 22(4) of the VJM Act, and finally;

(c) the ***inferred*** unconstitutionality of Section 18 and 19 (1) and (2) of the VJM Act, despite the fact that the constitutionality of the VJM Act was in fact affirmed by the High Court in the case of ***Dennis Mogambi Mong'are v. The Attorney-General and Two Others***, Nairobi High Court Petition No. 146 of 2011 *(Ngugi, Majanja and Odunga, JJ)*, and re-affirmed by the Court of Appeal and subsequently by this Court in ***JMVB (I)***

These consequences stem from what I respectfully consider a literal and narrow interpretation of the Constitution and the law. In the ***JMVB (I)*** decision, this Court proceeded from an interpretation that advanced human rights and the rule of law and one that gave effect to the purposes, values and principles of the Constitution, stating at paragraph 166, stating as follows:

*"[166] Now, **what interpretation** ought to be accorded to the Constitution, for the purpose of advancing human rights, and the rule of law? And **what line of interpretation** will give effect to the "purposes, values and principles" of the Constitution" Or to the charge of "developing the law?" Or to the objects of "good governance?"*

[83] That ruling went further and affirmed the solidity of the mechanisms for vetting established under the VJM Act and was categorical that the vetting process was anchored in law, in the shape of the Constitution and the Vetting of Judges and Magistrates Act. At paragraphs 187 and 188, this Court held:

*"[187] Article 262 of the Constitution provides for the coming into effect of certain "transitional and consequential provisions," set out in the Sixth Schedule. Among such provisions is Section 23, which required that within one year, Parliament should enact legislation establishing mechanisms for vetting for suitability all Judges and Magistrates who were in office at the time of the promulgation of the Constitution. The purpose of the vetting is to ascertain, **by the mechanisms of the relevant body**, "the suitability" of such judicial officers "to continue to serve in accordance with the values and principles set out in Articles 10 and 159" (Section 23(1) of the Sixth Schedule to the Constitution).*

*[188] It is a logical inference, in our perception, **that the vetting process was anchored in law, in the shape of the Constitution (Article 262), and the Vetting of Judges and Magistrates Act (Cap. 8B, Laws of Kenya)**……."*

[84] It is my considered opinion that, the transitional aspect of the Vetting Board was conceived to denote the *period within which it would conclude its mandate* as opposed to *a timeframe for limitation of the admissible conduct* for its consideration. This interpretation can be drawn from the holding in ***JMVB (I)*** at paragraph 197, where this Court held that:

> *"[197] It is in that broad context of principles and values, that the Judges and Magistrates Vetting Act is to be seen. Its operations, centered on the Vetting Board,* ***were conceived as transitional****; it would* ***conclude its mandate*** *during the transitional period."*

[85] I agree with the majority decision only to the extent that vetting cannot be a continuous process. I disagree however, with the *worst-case scenario building approach* exhibited at paragraph 56 of the Majority Judgment. Section 18 of the VJM Act outlines the relevant considerations in determining the suitability of a Judge or Magistrate to continue in service after the effective date. Some of these considerations include: past work record of the Judge or Magistrate, including prior judicial pronouncements, competence and diligence, any recommendations for prosecution of the Judge or Magistrate by the Attorney General or the Kenya Anti-Corruption Commission, pending complaints or other relevant information received from any person or body ***including post-effective date institutions*** such as the Commission on Administrative Justice. This section also calls for a consideration of ***integrity*** proven by a demonstrable ***consistent history*** of honesty and high moral character in professional and personal life. These provisions bear the intention of ***a comprehensive consideration of suitability not truncated between the pre and post-2010 periods*** as has been held by the majority.

[86] The contradiction of interpretation in this matter can be traced right from the High Court. The Court of Appeal upheld the decision of the High Court but for varying reasons. It interpreted "pending matters" to mean matters pending as at the effective date and not after, no matter how long the vetting process took after the effective date. The Court noted, at page 9 of its Judgment, that:

> *"the vetting of Judges and Magistrates was part and parcel of the innovative provisions that on the whole, have earned the Constitution of Kenya the description of a transformative document that seeks to effect fundamental and large scale transformation of our political and social institutions through a democratic and legal process."*

In addition, it reaffirmed that in dealing with the issues before it, it had to incorporate the theory of interpretation set by this Court in numerous matters including ***Speaker of the Senate & Another v Hon. Attorney- General & Another & 3 Others*** Supt. Ct. Advisory Opinion Reference No. 2 of 2013; [2013] eKLR, ***(Re Senate)*** taking the constitutional context, design, purpose and values and principles into consideration.

[87] These safeguards are meant to ensure that constitutional interpretation neither changes the law nor overlooks certain critical aspects relevant in its enforcement. To proceed otherwise would place the Judges at risk of changing the law; this I believe is what the High Court did when it applied the tool of ***reading in*** to Section 18 of the VJMA; an act akin to the exercise of political as opposed to judicial power.

Justice Mumbi Ngugi at the High Court invoked the doctrine of reading in the words *"in relation to conduct, acts or omission of judicial officers allegedly*

arising on or before the effective date" into Section 18, and by doing so effectively **amending** the Section. An action, clearly belonging to the sphere of the Legislature, and *not* the Judiciary. The Court of Appeal, however, found no error on the part of the High Court in this regard although it was of the view that the outcome of the High Court would have sufficed without a resort to the concept of 'reading in'.

[88] Despite the fact that Courts have the power to grant *appropriate reliefs* including those under Article 23 of the Constitution, it is imperative in considering the question before us to look at the constitutional text (the provisions of Section 23 to the Sixth Schedule), the statutory context (the VJM Act and the Judicial Service Act, 2011), the intention of the provisions (if discernible), a consideration of broad purposive interpretation guided by our constitutional values and principles, precedent and developed judicial doctrine and considerations of justice, practicality and public policy based on our developing theory of constitutional interpretation.

[89] In this matter, what is in issue is a narrow aspect of Section 23(1) demanding interpretive clarity to enable the Vetting Board to discharge its mandate without jurisdictional challenges. This is a question of the proper province of the Vetting Board to determine '*suitability*' of all judges and magistrates who were sitting in such capacities on or before promulgation of the Constitution of Kenya, 2010 to continue to serve.

Section 23(1) pegs a consideration of the question of suitability to be determined or evaluated against the provisions of Article 10 on national values and principles and Article 159 on the underlying benchmarks for exercise of judicial powers. Neither by its letter nor spirit or tenor does Section 23(1) rationally support a conclusion that evaluation of suitability of serving judicial officers on the basis of

complaints of conduct was subject to a period in *time of occurrence* of such conduct. To do so, is to place undue fetters of time and to unnecessarily ring-fence the mandate of the Vetting Board in respect of conduct under review, in a manner antithetical and unintended, by the clear language, spirit and object of judicial reforms as envisaged by the Constitution. As such, the bar to the admissibility of acts or omissions after the effective date by the Vetting Board is in my respectful view, a constitutional misinterpretation and the disruption of a sanctioned constitutional process.

[90] Most Judges have been vetted and exhausted the review mechanisms of the Vetting Board. There are many other judicial officers whose suitability through vetting has yet to be determined. In light of this, it is my considered view with tremendous respect to the Majority decision in this matter, that the finality and predictability of this Court's decision in ***JMVB (I)*** and the purpose of vetting as the people's command, now stands at a compromise. As such, and for the reasons advanced, I am unable to agree with the outcome of the Majority.

F. ORDERS

(i) The Petition dated 15th August 2014, is hereby disallowed.

(ii) The Judgment of the Court of Appeal dated 11 July 2014 is hereby upheld.

(iii) Costs of this appeal shall be borne by the appellant.

DATED and **DELIVERED** at **NAIROBI** this **19th Day** of **December, 2014**

.....	.....
W. M. MUTUNGA	**K. H. RAWAL**
CHIEF JUSTICE & PRESIDENT	**DEPUTY CHIEF JUSTICE &**
OF THE SUPREME COURT	**VICE-PRESIDENT**
	OF THE SUPREME COURT
.....	.....
P. K. TUNOI	**J. B. OJWANG**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA	**N.S.NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA