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*.

F. ORDERS

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

(ii) The Judgment of the Court of Appeal dated 11th 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 **CHIEF JUSTICE & PRESIDENT** **OF THE SUPREME COURT**	**K. H. RAWAL** **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**
.....	.....
P. K. TUNOI **JUSTICE OF THE SUPREME COURT**	**J. B. OJWANG** **JUSTICE OF THE SUPREME COURT**

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA