REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

APPLICATION NO. 11 OF 2016

(Coram: Mutunga CJ-P, Ibrahim SCJ, Ojwang SCJ, Wanjala SCJ, Njoki SCJ)

HON. LADY JUSTICE KALPANA RAWAL ..... APPLICANT

—AND—

JUDICIAL SERVICE COMMISSION..... .....1ST RESPONDENT

THE SECRETARY JUDICIAL SERVICE

COMMISSION..... .....2nd RESPONDENT

OKIYA OMTATA OKOITI.....INTERESTED PARTY

INTERNATIONAL COMMISSION

OF JURISTS.....1ST AMICUS CURIAE

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

(Being an application for issuance of conservatory orders in respect of the judgement and Order of the Court of Appeal delivered on the 27th May, 2016 by the Court of Appeal (Hon. Justice GBM Kariuki, Hon. Justice Milton Asike Makhandia, Hon. Justice William Ouko, Hon. Justice Patrick O. Kiage, Hon. Justice Kathurima M'inoti, Hon. Lady Justice Jamilla Mohammed, Hon. Justice Prof. Otieno-odek) in Civil Appeal No. 1 of 2016.

RULING

A. INTRODUCTION

[1] The Applicant Mr.Okiya Omtatah, an interested party in this matter, filed a Notice of Preliminary Objection on 31st May, 2016. He urged various issues which I set out below.

[2] Firstly, he urged that the Supreme Court has no jurisdiction to entertain the present matter since all the Judges of the Court have either supported or opposed the contention that Judges appointed under the repealed Constitution should retire upon attaining the age of 70 years.

[3] He submitted that by provision of Article 50(1) of the Constitution, the jurisdiction of a Court can only be exercised where the Court is impartial and that if the Court is partial, it is stripped of its jurisdiction. Elaborating on this issue, Mr. Omtatah submitted that a Court cannot exercise jurisdiction where doing so would violate the enjoyment of the absolute right to a fair trial and that jurisdiction must be declined where a Court is so conflicted that it cannot be impartial.

[4] It was his submission that pursuant to Articles 50(1), 73(1)(a)(iii) and 73(2)(b) of the Constitution it is mandatory for the Supreme Court Judges to disqualify themselves since they have taken sides on the subject matter. He urged that the Judges were required, by virtue of Article 50(1), to disqualify themselves and they were not being requested to recuse themselves which would only be the case if it was voluntary to do so. He contended that the *rule of necessity* or the *doctrine of duty to sit* is not applicable in this case.

[5] Mr. Omtatah submitted that under the *hierarchy of rights* in the Constitution, the right to appeal is inferior to, and is trumped by the entrenched and absolute right to a fair hearing and in the event of conflict, the right to fair hearing prevails.

[6] He urged that since this Court is disqualified from hearing the matter, the decision of the Court of Appeal should stand as the final decision in this matter necessitated by the overwhelming public interest.

[7] Mr. Omtatah cited various authorities in support of his arguments. These include ***United States v Alabama***, 828 F.2d 1532, ***Caperton v A.T. Massey Coal Co. Inc.,*** 556 U.S. 868 (2009), ***United States v Cooley,*** 1F3d 985, In ***re Boston's Children First,*** 244 F3d 164.

[8] He further urged the Court to depart from the *principle of necessity* adopted by this Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others,*** Sup. Ct. Petition No. 4 of 2014; [2013] eKLR (***Jasbir***). Instead, he implored the Court to adopt the principle in ***Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other 2012*** (6) SA 13 (CC) (***Hlophe***), in which the Constitutional Court of South Africa denied the applicant leave to appeal.

[9] He submitted that since the cases before the Supreme Court related to other Judges of the Supreme Court, this Court should not sit since it is *"professionally and personally conflicted"*. He urged that Article 71, 73 and 75 of the Constitution bar a judge from sitting if his or her impartiality is in question.

[10] Mr. Omtatah contended that the doctrine of the duty to sit has no place in our Constitution since it requires a judge to sit at all times under whatever circumstances yet Article 50(1), in his opinion, bars a judge from hearing a matter if his impartiality and independence "may" be questioned. He added that

the duty to sit is in essence the rule of necessity and it was not applicable in the matter before the Court. He urged this Court to allow his notice of preliminary objection with costs.

[11] Mr. Kanjama, for the respondents, in support of the preliminary objection, submitted that the oath of office taken by Judges is an indicator on how to look upon the application of the doctrine of necessity. He submitted that judges cannot go against their oath of office which requires them to:

> ***"... diligently serve the people and the Republic of Kenya and to impartially do Justice in accordance with [the] Constitution as by law established, and the laws and customs of the Republic, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence. In the exercise of the judicial functions entrusted to [them] at all times, and to the best of [their] knowledge and ability, protect, administer and defend [the] Constitution with a view to upholding the dignity and the respect for the judiciary and the judicial system of Kenya and promoting fairness, independence, competence and integrity within it."***

[12] He urged that under Article 73 public officers must comply with the guiding principles of leadership and integrity which include: ***"objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, improper motives or corrupt practices."***

[13] He submitted further that Judges are bound by Article 75 which stipulates that:

> ***"(1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—***
>
> ***(a) any conflict between personal interests and public or official duties;***
> ***(b) compromising any public or official interest in favour of a personal interest; or***
> ***(c) demeaning the office the officer holds."***

[14] In relation to the doctrine of duty to sit, counsel submitted that Article 19(3) which stipulates the rights and fundamental freedoms in the Bill of Rights gives the *hierarchy of rights*. He urged that the right to fair hearing as enshrined in Article 50(1) is not the same as the right to fair trial that is stated to be non-derogable under Article 25; He avers that the two are different. He urged that the right to appeal stipulated in Article 50(2)(q) is a component of the right to a fair hearing and can thus be limited pursuant to Article 24.

[15] Mr. Kanjama submitted that it would not be proper for the Court to sit due to the conflict of interest that the members of the Bench have and more so, because the applicants have already had one right of appeal. He implored the Court to find that it lacks the competence to deal with the matter since four Supreme Court Judges three of whom are members of the current bench had forwarded a letter to the Judicial Service Commission and that also two of the members of the current bench wrote the judgment in ***Nicholas Salat v IEBC &***

7 others Sup. Ct. Pet. No. 23 of 2014; [2015] eKLR (***Nick Salat)*** in which they expressed their position on the current matter.

[16] He urged that an observer would actually hold the position that the Supreme Court waded into the issue of the age of retirement of a Judge. He referred to proceedings on the allegations made against some of the Judges of the Court by one Mr. Apollo Mboya, urging that that could give rise to the apprehension that the Judges will not be fair.

[17] He further argued that the on-going matter between Njoki SCJ and the Judicial Service Commission (JSC) pending before the High Court would occasion bias.

[18] Distinguishing the present matter from ***Jasbir*** (above), Mr. Kanjama urged that in ***Jasbir*** the Judge (Hon. Justice Tunoi) had been requested to recuse himself merely because he had recused himself in the same matter while it was at the Court of Appeal. He contended that recusal from a previous Court was not a legal or factual ground requiring recusal on the basis of bias.

[19] In respect of the duty to sit, counsel, submitted that there was no absolute duty to sit and the principles of recusal set by the Court should be used even if it would result in incapacitating the Court. He contended that this was especially applicable in case of a second appeal as in the present matter. He urged the Court to rely on the Constitutional Court of South Africa decision in ***Hlophe*** (above).

[20] Senior Counsel Muite for the respondents in *S.C. Application 12 of 2016*, submitted that according to Article 159 (1) read together with Article 1, judicial

authority is derived from the people and it is delegated authority hence *public interest* is a dominant consideration in the present matter.

[21] He however, countered the argument that there was an appearance of bias on the part of the Chief Justice and Smokin Wanjala SCJ by virtue of their membership in the JSC. He contended that the two were not respondents in the present matter and there was no evidence presented before the Court to suggest that they have *personal interest* in the matter, which is different from Kalpana Rawal DCJ, sitting to hear the matter since she is a litigant. He urged the Court to adopt ***Hlophe*** and indicated that the consequences of recusal will be to vacate the orders of the Court. He urged that the Court has jurisdiction but it should decline jurisdiction since it is conflicted.

[22] Mr. Nyaundi for the 1st *amicus curiae*, in support of the preliminary objection by the interested party, submitted that the Court has jurisdiction but it should decline to exercise it since it will not be quorate to determine the matter as required by Article 163(2) of the Constitution. He urged that ***Jasbir*** is not applicable in the present matter since the facts are distinct and that the doctrine of necessity may not be utilized to override the basic tenets of natural justice.

[23] Mr. Anzala for the Law Society of Kenya was in support of the preliminary objection. He urged that the right to fair hearing is linked to the right to impartial court. He submitted that there is a real likelihood of bias and the Court has not met the test of impartiality. Therefore, he urged the most appropriate thing to do is for this Court to allow the Court of Appeal's judgement to stand as the final decision in this matter.

[24] Mr. Kilukumi for the applicant in *S.C Application 11 of 2016* opposed the preliminary objection urging that it was not accurate that the applicant had indicated that she would forego her right to appeal to the Supreme Court. He urged that the right of appeal is not a stand-alone right – it goes hand in hand with the right to a fair hearing. He urged that Article 163(4) provided for when to exercise jurisdiction and Article 50(1) prescribed the right to a fair hearing, therefore the two rights are distinct. He submitted that there is no distinction between the right to a fair hearing and the right to a fair trial – the applicant is entitled to a fair hearing and that right cannot be limited under Article 24.

[25] He urged that this Court was under an obligation to uphold the applicant's right to fair hearing and exercise its jurisdiction since it is a fundamental right under the Bill of Rights. He urged that if his client felt that she would be denied her fundamental right she would be the one to complain first about the vested interest of the Bench.

[26] Counsel submitted that the Court developed the doctrine of necessity because it considered that exceptional circumstances may arise. He urged that there is a constitutional imperative and necessity for this Court to hear the present matter since: the Supreme Court is the only organ with the final say in matters of interpretation and application of the Constitution and the Court of Appeal *cannot* substitute this Court; this Court is obligated to assert the supremacy of the Constitution pursuant to Section 3 of the Supreme Court Act, 2011; the applicant is entitled to access to justice as stipulated in Article 48.

[27] He urged further that positions taken by Judges outside the Court are not judicial positions and it does not mean that they cannot be persuaded to take different positions and therefore, it cannot be said that the Court lacks

impartiality. He urged that in certain circumstances a judge who is not impartial is preferable to no judge at all. He urged the Court to apply the doctrine of necessity since there is no other Court that the applicant can appeal to. This, he submitted, was an exception that finds its source in the rule of law and the rule of law is one of the national values stipulated in Article 10. He implored this Court to follow its decision in ***Jasbir.*** He urged that ***Hlophe*** does not apply in the present matter since the parties in that matter had recourse before the Judicial Service Commission of South Africa while in this case there is no further recourse available to the parties.

[28] Senior counsel Pheroze Nowrojee, for the applicant in *Application 12 of 2016* opposed the preliminary objection by Mr. Omtatah urging that it does not meet the requirements of a preliminary objection as laid down in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors ltd.,*** (1969) EA 696. This, he submitted, was because it did not raise any issues that related to a pure point of law without requiring the ascertainment of any facts. On the request that this Court should rely on Hlophe and decline to exercise jurisdiction, counsel urged that the Court should take into consideration that there is an application for review of the decision in ***Hlophe*** which is pending before the Constitutional Court of South Africa.

[29] Mr. Kiragu, co-counsel to Mr. Nowrojee, urged that the Judges oath of office mandated them to act impartially as required by law. He urged that it was not in the public interest to decline to hear the application before the Court on merit. He submitted further that there was no need to distinguish between the first and the second right of appeal since that is not a consideration made in the Constitution. He contended that in ***Hlophe*** the majority of the Judges were parties in the matter which is not the case in the present matter. In relation to

the consideration by the Constitutional Court that the parties had had one right of appeal, Mr. Kiragu submitted that it was in light of the fact that they would go back to the JSC for resolution. He urged that the case was decided on its own peculiar facts and did not lay down any general principle.

[30] It was counsel's submission that having some members of the bench conflicted does not mean that there is no quorum neither does it extinguish the appeal.

B. ISSUES FOR DETERMINATION

[31] Does this preliminary objection meet the standards required of it as established ***in Mukisa Biscuit Co. v West End Distributors?***

Is this a preliminary objection?

[32] It is trite law that a preliminary objection must be on a pure point of law and it must be on the assumption that all the facts pleaded by the other party are correct. A preliminary objection cannot be raised if ascertainment of the facts is required or if what is sought by it, is the exercise of judicial discretion. These principles were enunciated by the Court of Appeal for Eastern Africa in ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*** where it held, *per Newbold P.,* (page 701):

> ***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the***

other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

[33] This Supreme Court adopted the principles in ***Mukisa*** in its decision in ***Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others,*** Sup. Ct. Election Petition No. 5 of 2013; [2013] eKLR, (***Raila***) in which it held as follows, at paragraph 14:

The nature and scope of a "preliminary issue" is cogently defined in the statement of Law J.A., in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696 at 700****:*

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation."

[34]The first ground of objection raised by the Applicant is that this Court has no jurisdiction to entertain the matter currently before it because all the judges have either supported or opposed the issue of retirement of Judges at the age of 70 years. This ground calls for ascertainment of the allegation that "all the judges" are conflicted.

[35] I noticed that Mr. Omtatah during his oral submissions at some point did concede that this Court has jurisdiction but urged the Court to decline jurisdiction on the basis that the members of the bench are conflicted, such that the parties shall not be accorded fair hearing. This is a plea to this Court to exercise its judicial discretion and decline jurisdiction; which sets the preliminary objection outside the parameters set by ***Mukisa Biscuit.***

[36] The second ground of objection is based on the contention that this Court is stripped of jurisdiction by Article 50(1) since it is partial. The issue of lack of impartiality of this Court calls for ascertainment of facts. It is an issue to be determined by this Court once cogent evidence is tendered to that effect, hence it would be more appropriately canvassed during the hearing of the application on merit. However, it must be pointed out that this Court derives its jurisdiction from Article 163 and not Article 50. As such, the basis of this ground of objection is misplaced.

[37]The third ground is based on Articles 50(1) and 73(1) which Mr. Omtatah argues make it mandatory for the Judges to disqualify themselves since they have taken sides on the subject matter of the suit before the Court. Again this allegation requires the ascertainment of facts especially as by the same token the applicants (intended appellants) opposing contest that the Judges are impartial.

[38] The fourth and fifth grounds are assertions that what is sought is disqualification as mandated by law, as opposed to recusal which is voluntary; and the contention that disqualification based on Article 50(1) is non-discretionary, respectively. Senior counsel Nowrojee submitted that the preliminary objection collapsed; the jurisdiction of the Court having been conceded by Mr. Omtatah. Mr. Omtatah, in his reply during oral submissions, tried to revert back to his initial stance as stated in his pleadings, but this Court cannot overlook the fact that he did in the first instance concede jurisdiction.

[39] The proper question of law is whether the jurisdiction of the Supreme Court is affected by the claim of bias and apprehension of impartiality. The desired outcome by the Applicant is recusal by each Judge. Recusal is a personal decision. It is different from the matter of jurisdiction, which is the power of the Court to hear a matter. The litigants seeking the right of audience in a matter that is allowed under Article 163(4)(a), do so on the basis of a constitutional guarantee that all the avenues of appeal ought to be explored. To suppose that bias, if it exists, strips this Court of its jurisdiction is to presume that the decision of one Justice to recuse him or herself has a bearing on the power of the Court to hear the matter altogether. This is not the case; a position affirmed in the decision of ***United States v. Will, 449 U.S. 200 (1980***), in which the jurisdiction of the United States Supreme Court to preside over a matter that concerned the compensation of Federal Judges was challenged. The Court held that:

> ***"Although it is clear that the District Judge and all Justices of this Court have an interest in the outcome of these cases, there is no doubt whatever as to this Court's jurisdiction."***

Under the provisions of the Constitution, this Court has jurisdiction to hear this matter. The issue of recusal or disqualification, although an important point of law, does not fall within the province of a preliminary objection.

[40] The sixth ground stated that the Rule of necessity cannot be applied in this matter. Once again this calls for ascertainment of the facts of the case contrary to the principles in ***Mukisa Biscuit.***

[41] The seventh ground was an assertion that the right of appeal is inferior to the right to fair hearing and in the event of conflict the latter trumps over the former. This brings to the fore a contestation that should be resolved by this Court during the substantive hearing. This is an arguable point that this Court will be required to pronounce itself on, in this matter. It does not therefore, fall into the province established for a preliminary objection.

[42]In the eighth ground, it is contended that the Court of Appeal's decision should be allowed to stand since this Court is disqualified. My view is that the question as to whether this Court should disqualify itself is one that is not based on clear constitutional or statutory provision or case law. Consequently, the requirement that this Court should allow the decision of the Court of Appeal in this matter to stand is arguable.

[43] The ninth ground is that there is an overwhelming public interest to sustain the decision of the Court of Appeal. This is a fact that requires ascertainment and would in fact be an insurmountable task to do so. The final ground is that the application is an abuse of the Court process. On the face of it, the application before the Court is based on the parties' right of appeal to this Court and it raises

salient issues of Constitutional application and interpretation. It would require concrete evidence to disprove that fact.

[44]Having assessed the grounds for the preliminary objection by Mr. Omtatah, it is my conclusion that even though it has raised some interesting constitutional questions, it does not meet the set requirements for preliminary objections set in ***Mukisa Biscuit*** which have been adopted by this Court in ***Raila***, and a number of other cases before this Court. Consequently the Preliminary Objection fails.

[45] However, I am persuaded that in certain circumstances this Court can make findings on certain constitutional questions that are relevant to the development of jurisprudence in this country. Mr. Omtatah's application has provided an opportunity for the Court to apply its mind in terms of Section 4 of the Supreme Court Act which states:

> "***3. The object of the Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things-***
>
> ***a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;***
> ***b) provide <u>authoritative and impartial interpretation of the Constitution;</u>***
> ***c) <u>develop rich jurisprudence</u> that respects Kenya's history and traditions and facilitates its social, economic and political growth;***

d) enable important constitutional and other legal matters including matters relating to the transition from the former to the present constitutional dispensation to be determined having due regard to the circumstances, history, cultures of the people of Kenya;

e) improve access to justice; and

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

[46] Further, in the matter of ***Lemanken Aramat v Harun Meitamei Lempaka and 2 Others*** Petition No.5 of 2014; [2014] eKLR this Court held, at paragraph 113, as follows:

"For it is a logical premise that any matter coming up before this Court by proper motion or proper invocation of jurisdiction, and all that such matter may entail – such as the submissions of counsel; matters of judicial notice; or any issue of relevance and of significance to this Court – will fall within the principle elevated by Mutunga, CJ & P. in the Jasbir Singh Rai case [paragraph 81]:

"It will be good practice for this Court to take every opportunity a matter affords it, to pronounce [itself] on the interpretation of a constitutional issue that is argued either substantively or tangentially by parties before it"

In view of these provisions and case law, and the rich and varied arguments by different counsel during the submissions of this application, on various constitutional questions relating to access to justice, there are a number of issues that have emerged. I find there is need to address these legal questions now rather than later, when they are likely to emerge in a number of cases that will come before any of our courts. The development of jurisprudence requires the Court to seize upon opportunities that present themselves at the earliest instance. I wish therefore to apply my mind to the following questions:

(i) What is the extent of the right to fair hearing; what are its components and its place in the system of Justice?

(ii) Disqualification: When should Judges invoke recusal?

(iii) The doctrine of necessity: does this court have a duty to sit?

(i) What is the extent of the right to fair hearing; what are its components and its place in the system of Justice?

[47] The Kenyan Constitution is anchored upon a foundation of fundamental rights and freedoms. These rights and freedoms correspond with the State's duty to provide and decry any State attempts to deprive or negatively interfere. Although the Constitution contains a general limitation clause, it also contains various absolute rights. Article 24 gives this Court a formula of assessing the extent of limiting any right given under the Constitution. Limitation of rights under the Kenyan Constitution is an exercise of great exception. This Court's jurisprudence has been developed on this basis and I will be hesitant to depart from that tradition.

[48] The extent of the right to fair hearing is a fairly straightforward question. The Constitution gives every Kenyan certain presumptive constitutional entitlements. Presumptive because they can be evaluated under a limitation clause. However, certain rights, such as the right to fair hearing are absolute. They simply cannot be denied. The right to fair hearing bears various components including: the right to a fair and impartial Court or Tribunal, the right of access to justice, the right to a public hearing, the right to be heard within a reasonable time, and the right of appeal in accordance with the Constitution and the law.

[49] This Court has had the opportunity, through a concurring opinion by myself, to establish a persuasive, although not necessarily binding precedent, on the right to fair hearing in the ***Evans Kidero & 4 others v Ferdinand Waititu & 4 others,*** Sup. Ct. Petition No. 18 & 20 of 2014, [2015] eKLR, from which I quote extensively on the scope of the right to a fair hearing:

> ***"The scope of the right to a fair hearing***
>
> ***[253]*** *It is apt, first, in examination of the question before us to determine whether the Judges of the High Court and Court of Appeal in any way, at any stage of trial of this matter, violated the right to a 'fair hearing.' Consequently therefore it is important to understand the distinctive meaning, scope and implication of this right.*
>
> ***[254]*** *This right is clearly spelt out in the Constitution. Article 50(1) of the Constitution provides that:*

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

Article 25 of the Constitution stipulates that:

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

[255] *Article 50(1) refers to the right to a fair hearing for all persons, while Article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. Often the terms 'fair hearing' and 'fair trial' are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that Article 50(1) deals with the right to fair hearing in any disputes including those of a civil,*

criminal or quasi criminal nature whereas Article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of Articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect.

[256] *Indeed, the African Commission on Human and People's Rights established general principles to all legal proceedings applicable by Member States, of which Kenya is one. Therefore the principles are binding under Article 2(5) and (6) of the Constitution, and include the following:*

"GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS:

1. Fair and Public Hearing

In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

2. Fair Hearing

The essential elements of a fair hearing include:

…

(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

(f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

...

(i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and

(j) an entitlement to an appeal to a higher judicial body."

...

[258] *What then are the norms or components of a fair hearing? The Supreme Court of India, in* ***IndruRamchandBharvani& Others v. Union of India & Others****, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing* ***BalKissenKejriwal v. Collector of Customs, Calcutta & Others****, AIR 1962 Cal. 460).*

...

[261] *It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in*

criminal matters. The European Court of Human Rights (European Court) has severally explained that: ***"it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court."*** *(See* ***Steel and Morris v. United Kingdom****, [2005] ECHR 103, paragraph 59).*

[263] *It is, therefore, trite law that all persons who come to the Court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution 2010 in Article 25(c) placed a bar on limitation of the right to a fair trial, in civil and criminal matters alike. "*

[50] That, then settles the question as to whether the right to fair hearing set out in Article 50(1) and the right to a fair trial set out in Article 50(2) are different. The two rights are the same and they are both non-derogable by the provisions of Article 25 of the Constitution. It is imperative to note at this instance – since it was raised in argument by counsel – that Article 24 is very clear that derogable rights under the Bill of Rights can only be limited by law and only to the extent that the limitation is reasonable and justifiable. Article 24 states that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,

equality and freedom, taking into account all relevant factors, including––

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or

other authority that the requirements of this Article have been satisfied."

[51] This provision attaches to the rights under the Bill of Rights such that limitations can only be made under clear constitutional and statutory demarcations.

[52] It is important to note the specific provision that limitation of any right under Article 24 must be done by law and this lies within the province of Parliament through legislation and not through the Courts. To ask this Court to limit any right would in effect be an attempt to amend the Constitution; we have no such powers. On this point the applicant is best advised to seek limitation through a legislative intervention in accordance with Article 24.

The Right of Appeal as a component of the Right to Fair Hearing

[53] Under the previous Constitution, parties were often made to feel as if the right of appeal on any issue (even constitutional interpretation and application) rested with the discretion of the Judge. Indeed, that used to be the case. Kenyans however recognized the centrality of the Constitution and opened the avenue for appeals to the Supreme Court *as a matter of right* in any case involving the interpretation or application of the Constitution. The Constitution also gave every Kenyan, an obligation to respect, uphold and defend this Constitution (Art. 3(1). That obligation extends to Judges who sit to hear and determine cases. This provision, alongside that of Articles 10 (the rule of law, equality and human rights), Article 19(1), (importing the Bill of Rights as an integral part of Kenya's democratic State), Article 27(1) (equality before the law), 48 (access to Justice),

50(1) (fair hearing) and Article 159 (judicial authority), bind Judges to exercise a duty to defend the Constitution

[54] The Respondents in this case have urged the Court to recuse itself on this matter, while the Applicant (intended appellant) has urged the Court to uphold her right to be heard. She bases her arguments on the right to a fair hearing.

[55] Classical constitutional interpretation has always viewed the right to fair hearing as a negative right. There is however a case to be made about the *dual-nature* of this right. The right to fair hearing decries state deprivation but also thrives on State provision. There is a *positive duty* by the State to ensure that every Kenyan has the right to fair hearing which involves the right of appeal where conferred by the law or the Constitution. This obligation includes the Judiciary's own participation as an Organ of the State. The obligation equally applies to the Judicial Service Commission as an institution of the State. This interpretation has been enabled by the Constitution, particularly:

> *"Article 21(1) It is a fundamental duty of the State and every State organ to observe, respect, protect,* ***promote*** *and* ***fulfill*** *the rights and fundamental freedoms in the Bill of Rights."*

To whom does the right to fair hearing belong?

[56] Having said that, it is important to consider the question as to whom the right to fair hearing belongs. Article 19 states that:

"(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.
(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.
(3) The rights and fundamental freedoms in the Bill of Rights—
(a) belong to <u>each individual</u> and are not granted by the State;
(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and
(c) are subject only to the limitations contemplated in this Constitution."

[57] *The rights and fundamental freedoms in the Bill of Rights belong to each individual.* Therefore, every individual has their own distinct entitlement to the said rights and fundamental freedoms which is separate from that of another individual.

[58] In relation to enforcement of the Bill of Rights, Article 22 states that:

"(1) Every person has the right to institute court proceedings claiming that a right or fundamental

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

[59] In ***Kidero,*** I stated in my concurring opinion, at paragraph 350, that:

"As I have stated earlier, under Article 25(c) of the Constitution, the right to a fair trial is a right that cannot be limited. However, it is an individual's right, that is a right in personam."

[60] An application for recusal such as the one before us brings to reality the essence of considering an individual's right to fair hearing *vis-a-vis* public interest. The interests of the public were eloquently presented by the interested party, and supported by the respondents. Due to the consequences of the Orders resulting from the Interested Party's application upon the Applicant and Respondents who are the primary parties to this matter, the formula given by Article 24 mandates me to consider the nature of the right to appeal as a component of the right to hearing (in relation to the primary litigants) *vis-a-vis*,

the importance of limiting this right on the basis of impartiality (the claim brought by the interested party and supported by the respondents).

[61] In the course of enforcement of the right to fair hearing, when balancing the rights of different claimants before the Court over the same right, and because of the personal nature of rights, priority must *first*, be given to the parties that are directly affected by the violation of that right, for instant the accused person, plaintiff, applicant, appellant, defendant, respondent, etc.; *secondly,* other parties to the suit that are indirectly affected, such as interested parties; *thirdly*, the general public; and *lastly,* the interests of the State. In the present matter therefore, this Court ought to have regard to the right to fair hearing of the applicants and the respondents, first after which it will consider the right of the interested parties to a fair hearing of the suit and then the right of the general public.

[62] In view of the foregoing, it is my observation that in this matter, the primary applicant namely Justice Kalpana Rawal has not herself raised the issue of an impartial bench, bias or prejudice that would arise if the bench as currently constituted should sit on her matter. In fact she states that she has no issue with any of the Judges as empanelled. Similarly, the primary respondent the Judicial Service Commission has not pleaded specific prejudice that it would suffer if the Judges so presently constituted were to sit. If it had, it would have presented an interesting opportunity to explore whether a State organ can in any case suffer prejudice by a constitutional claim of an individual citizen's right to be heard. It is my considered opinion that the State cannot claim prejudice or bias in the face of an individual's right to a fair hearing.

[63] The claim, if any, of the interested party - Mr. Omtatah - who brings forward the issue is too remote as to undermine the rights of the individual to whom the right to be heard belongs. He suffers no prejudice that is discernable even in the public interest. The issue of impartiality and bias has been presented as an abstract concept and does not directly impact the primary parties who should invoke the right.

[64] Taking this hierarchy of rights into consideration, it follows that the Court ought to consider the right to fair hearing of the applicants (intended appellants) and the injustice that is likely to be occasioned to them in the event of denial of that right, before considering any concern of the interested party or the perceived interest by the general public if the right is denied. A claim of a third party in the abstract form will not suffice to deny an individual's claim under the Bill of Rights.

(ii) Disqualification: When should Judges invoke recusal?

[65] Do Judges of the Supreme Court have any interest in the outcome of this case? It may be argued that all Judges have a direct interest in the outcome of this case, including those who heard it at the High Court and the Court of Appeal. The case, after all, touches on the age of retirement of all Judges and whether the transitional mechanisms preserve the age of 74 years for Judges who were appointed before the promulgation of the new Constitution. We must therefore, carefully question 'interest' and place it in appropriate context in relation to the case before us. The forms of interest have been discussed by the Courts for many centuries. Various dilemmas have however accosted Judges and parties in the

course of judicial determination, requiring Parliament in various jurisdictions to enact statutes marking recusal boundaries. The United States Federal Recusal Statute is one such mechanism. Our constitutional system however allows Judges and Magistrates the discretion to determine questions of disqualification but we do also have a statutory guideline.

[66] There are clear principles laid out in the **Judicial Service Code of Conduct and Ethics** as gazetted by the Judicial Service Commission pursuant to the requirements of Section 5(1) of the **Public Officer Ethics Act**, 2003. This Code contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the judicial service. The parameters for recusal are set out in Rule 5. This Rule states that a judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which:

a. ***he has a personal bias or prejudice concerning a party or his lawyer or personal knowledge of facts in the proceedings before him;***
b. ***he has served as a lawyer in the matter in controversy;***
c. ***he or his family or a close relation has a financial or any other interest that could substantially affect the outcome of the proceedings; or***
d. ***he, or his spouse, or a person related to either of them or spouse of such person or a friend is party to the proceedings.***

These Rules are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service. All judges are bound by this Code.

[67] Judges ought to be objective. Sometimes, this objectivity will be mistaken for motive, but the nature of our democracy is one nurturing transparency and accountability. Judges ought to remain steady and impartial. They cannot afford to bend the Constitution on the basis of perceptions, capture or passing trends. As Justice Aharon Barak observed in ***Efrat v. Dir. of Population Registry at Ministry of Interior, 47(1) P.D. 749:***

> *"This requirement for objectivity imposes a heavy burden on the judge. He must be able to distinguish between his personal desire and what is generally accepted in society. He must erect a clear partition between his beliefs as an individual and his outlooks as a judge. He must be able to recognize that his personal views may not be generally accepted by the public. He must carefully distinguish his own credo from that of the nation. He must be critical of himself and restrained with regard to his beliefs. He must respect the chains that bind him as a judge."*

[68] There is a presumption of impartiality of a Judge which must be disproved by a party alleging bias on the part of the Judge. Similarly, it is expected that a judge will disqualify him or herself if he or she is biased. According to Professor Groves M, in "The Rule Against Bias" [2009] U Monash LRS 10, bias may be actual or apprehended. He observes that:

> ***"Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had***

prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind."

[69] Prof. Groves M, explains further that the question of whether a pecuniary or other form of interest may give rise to a reasonable apprehension of bias ought to be determined by a single test. He elaborates the test applicable, citing ***Dimes v. Grand Junction Canal*** (1852) HLC 75 where Gleeson CJ, McHugh, Gummow and Hayne JJ, found in the following terms:

"First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed."

[70] He explains further that parties may now bear a greater burden to prove the apprehension of bias. He states that:

> ***"Allegations of bias arising from a pecuniary interest must now be determined on a more reasoned basis than was the case with automatic disqualification. Although the court ultimately decides whether the connection between the interest and the apprehension of bias can be articulated to the relevant degree, the parties may now bear a heavier onus. A party cannot simply rest on a "bare assertion" of a pecuniary interest. A party who does not, or cannot, articulate the connection between the interest and the resulting apprehension, or least provide some basis to do so, risks the objection being dismissed as a "bare assertion".***

[71] In *The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others,* the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters. In disallowing an application for the recusal of members of the bench, the Constitutional Court held [paragraph 48]:

> ***"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective***

and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience.

It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

[72] According to the New South Wales Bench Book (last updated on 29th November, 2015) the expression of a judge's views in previous decisions or publications in matters related to the suit before the Court will not ordinarily form a basis for disqualification:

"The fact that the trial judge has expressed views in previous decisions, or in extra-judicial publications in relation to the kind of litigation before the court, which may have questioned an existing line of authority is not normally a reason for disqualification unless those views were expressed with such trenchancy, or in such unqualified terms, as to suggest that the judge could not hear the case with an "open mind": Timmins v Gormley [2000] 1 All ER 65, Newcastle City Council v Lindsay [2004] NSWCA 198 and Gaudie v Local Court of New South Wales [2013] NSWSC 1425 at [175] ff."

[73] It is incumbent upon the person who alleges bias to prove it. It was therefore, imperative for the applicant (interested party) in this matter and the rest of the parties that allege bias on the part of the bench to prove it and demonstrate the nexus *between* the interest *and* the resulting apprehension of bias. This test is to be applied to the Applicant's assertions of impartiality:

[74] For example, Mr. Omtatah had urged that Chief Justice and Justice Smokin Wanjala by virtue of their membership in the JSC are disqualified from hearing and determining the present matter, due to the perception of bias. He contended that this is especially so because they did not disqualify themselves when the JSC was deliberating on the issue of the age of retirement of a Judge which culminated in the applicants in this matter being required to retire.

[75] Should Judges be found conflicted merely due to their membership in the JSC? The Constitution is unequivocal about the composition of the JSC. Article 171 provides that:

(1) There is established the Judicial Service Commission.
(2) The Commission shall consist of—
(a) the Chief Justice, who shall be the chairperson of the Commission;
(b) one Supreme Court judge elected by the judges of the Supreme Court;

[76] According to Article 163(2) the Chief Justice is the President of the Supreme Court.

[77] This Court cannot, therefore, lose sight of the fact that at any given time two Justices of the Supreme Court will be members of the JSC. Would it then mean that those two Justices will automatically be exempt from hearing any matter relating to the JSC? To find that membership of a Judge in the JSC, as a single ground - automatically disqualifies him or her – on the basis of perceived bias – from hearing and determining any matter relating to the JSC would be to stretch the perception of bias too far. Needless to say, it would compromise the delicate composition of the Supreme Court in which quorum is already strained.

[78] Further one would have to demonstrate how the main parties in the matter will be prejudiced by the Chief Justice and Smokin Wanjala SCJ sitting. As such sufficient evidence must be adduced to prove conflict of interest or bias on the part of such a Judge in order for recusal to apply.

[79] It is my observation that, to hold that a Judge who is a member of the JSC cannot sit in a matter involving the JSC would have the effect of paralyzing the judicial system. It would mean that matters involving the JSC would, more often

than not, be determined by the Court of Appeal as the final Court; which is an outright contravention of the Constitution. This Court has no latitude to hold that the Court of Appeal shall be the final Court of Appeal in any matter contemplated by Articles 163. One cannot fathom how this Court would make such a pronouncement which is tantamount to re-writing the Constitution.

[80] In furtherance of that point, I wish to state that this Court has previously dealt with matters in which the JSC has been a party and no issue of conflict of interest had arisen.

[81] A good exemplar is the ***Judges and Magistrates Vetting Board and Others v Centre for Human Rights and Democracy and Others*** Supreme Court Petition No. 13A, 14 and 15 of 2013; [2014] eKLR, in which this Court heard and determined a matter that involved the JSC as one of the respondents. It is worthy of note that the Chief Justice and Smokin Wanjala SCJ were part of the bench that heard and determined that matter despite being members of the JSC at the time. Disqualification of these two Justices on the sole ground that they are members of the JSC, in this matter only, is indefensible under the Constitution.

[82] Another issue of relating to apprehension of bias of judges of this Court, was raised by counsel for the 2nd and 3rd Respondent, Mr. Kanjama. He contended that the judgment in ***Nick Salat*** was co-authored by two members of the bench and that this decision evidences partiality and bias. He also contended that an observer would have concluded that the Supreme Court waded in the issue of retirement age of judges in that decision. He urged that the Court should not have addressed the issue of the retirement age as this matter was the subject

of determination in the High Court at the relevant time. It is necessary to examine these contentions.

[83] A thorough reading of the ***Nick Salat*** decision reveals that the Judges in that bench were addressing a letter written by Mr. Koceyo who was appearing for the appellant therein. Counsel had raised issues which he thought were likely to affect the validity of the imminent Court judgment. He was concerned that the appeal was pending judgment and apprehensive about the legal ramification that could ensue if the Judgment was delivered after the lapse of 60 days as contained in Order 21 of the Civil Procedure Rules and ***'the fact that it is now in the public domain that the Judicial Service Commission [JSC] has directed Judges over 70 years [of age] not to preside over matters.'***

[84] The bench majority (K.H. Rawal, DCJ & V-P; Tunoi, Ojwang, and Njoki, SCJJ) with the Chief Justice dissenting, at paragraph 76 delivered itself thus:

> ***[76] This Court takes the position that the security of tenure for all Judges under the Constitution of Kenya, 2010 is sacrosanct, and is not amenable to variation by any person or agency, such as the Judicial Service Commission which has no supervisory power over Judges in the conduct of their judicial mandate. We find and hold that the Judicial Service Commission lacks competence to direct or determine how, or when, a Judge in any of the Superior Courts may perform his or her judicial duty, or when he or she may or may not sit in Court. Any direction contrary to these principles, consequently, would be contrary to the terms of the Constitution which***

unequivocally safeguards the independence of Judges. It follows that the said directive concerning Judges of the Superior Courts, issued by the Judicial Service Commission, is a nullity in law.

[85] To my mind, all that the Bench did was to point out the legal position on security of tenure of Judges and articulated on the sanctity of the independence of Judges. They certainly did not make a determination on the retirement age of Judges. This is also the finding of the High Court on the same question, in ***Kalpana H. Rawal v Judicial Service Commission & 4 others***, Petition No. 386 OF 2015; [2015] eKLR. In this matter, (which was determined after the ***Nick Salat*** decision), Counsel Dr. Khaminwa argued that a decision on the retirement age of judges had been made by the Supreme Court in the ***Nick Salat*** matter. He was of the opinion that such decision was binding on this Court. In response, Mr. Ahmednassir for the JSC, submitted that the said decision was absurd, alleging that the Supreme Court had transgressed into a matter pending before the High Court and that it was an abuse of the court process. The High Court in response to the issues as raised by both Dr. Khaminwa, on the one hand and Mr. Ahmednasir, on the other, determined as follows:

"100. It must be remembered that the appellant's counsel before the Supreme Court had raised a query about the constitutionality of the Supreme Court bench, which concerns the Court deemed appropriate to address.
101. It would appear that at the time of the judgment, the JSC had issued a directive to judges aged over 70 years directing them not to preside over any matters. <u>We note from the proceedings in Nairobi High Court Constitutional</u>

Petition No. 244 of 2014, Justice Phillip Tunoi and another v The Judicial Service Commission and another, of which we are seized, that there was in existence a valid conservatory order issued by our brother Odunga, J. The orders restrained the JSC from taking any steps towards the retirement of Tunoi, SCJ and Onyancha, J, pending the hearing and determination of their Petition. No doubt the Supreme Court, being the apex Court in the land, was irked by the JSC's action, which they would not countenance.

102. In our reading, the effect of the Supreme Court judgment as relates to the query was, first, to restate the sanctity of tenure of judges: it determined that such tenure is not amenable to variation by any person or agency; second, it held that the JSC lacks competence to direct or determine the sittings of judges or how they exercise their judicial mandate; and third it determined that the directive of JSC on sittings of judges was a nullity. The Court did not, however, touch upon or determine the question of the retirement age of judges. That, we note, is the key live issue before us."(emphasis added)

[86] Consequently, there is *no* nexus between the ***Nick Salat*** decision and the instant matter that would create any conflict, bias or partiality while determining the matter at hand.

[87] Counsel for the ICJ (*1st Amicus Curiae*) Dr. Nyaundi, submitted that Njoki SCJ's filing of proceedings in the High Court against the JSC recently, is intimately connected with the instant matter and creates a perception of bias

which will in turn negate fair hearing. I point out here that the subject in that matter and the instant case are entirely different. There is no nexus established between the facts of the matter before the High Court and the matter before us. The said proceedings before the High Court cannot, therefore, be said to render her incapable of according the parties a fair hearing. Furthermore, a Judge is bound by his or her oath of office to defend the Constitution, and to perform their judicial duties with fairness, independence, competence and integrity. It is to be noted that from time to time Judges will engage their employer, including in legal disputes. Judges too, just like the ordinary citizens, are beneficiaries of the rights conferred by the Constitution. If they perceive their rights as violated they can seek redress from the very law they are sworn to uphold.

[88] Citizen Omtatah for the interested party contended that the whole bench in this matter is conflicted and must down their tools on the basis that they are peers and work closely together. He was emphatic that the bench cannot adjudicate on matters involving their peers and must disqualify themselves. I am compelled to observe that Judges will sometimes have to adjudicate over their peers. A case in point is the ***Judges and Magistrates Vetting Board and two others v The Centre for Human Rights and Democracy and 11 others,*** Sup. Pet. 13A of 2013 as consolidated with Pet 14 and 15 of 2013; [2014] eKLR ***(JMVB 1).*** The issue for determination in this matter was whether Section 23 of the Sixth Schedule to the Constitution ousts the High Court's supervisory jurisdiction to review the decisions of the Vetting Board. The parties in this case included Judges of the High Court, Court of Appeal and Supreme Court.

[89] The matter commenced in the High Court in ***Judicial Review No. 295 of 2012*** and was determined by the bench (*Havelock, Mutava, Nyamweya, Ogola & Mabeya, JJ)* who found for the Judges. On appeal, in ***Nairobi Civil***

Appeal No. 308 of 2012 (*Kiage, Murgor, Sichale, J. Mohammed & Otieno-Odek)* affirmed the decision of the High Court. In this Court (*Mutunga CJ & P, Rawal DCJ & V-P, Tunoi, Ojwang, Wanjala & Njoki, SCJJ)* we overturned the decision of the Court of Appeal and in effect the decision of the High Court. This is a model example of how Judges are able to formulate issues for determination to the matter before them, apply their judicial minds (irrespective of who the parties are) and make a determination. Judges are able to adjudicate over their peers by placing a high premium on judicial fidelity to the Constitution and the national values and principles of governance. It is therefore inaccurate to assert that Judges cannot adjudicate over their peers impartially.

[90] Counsel for the 1st Respondent Mr. Kilukumi contended that inviting the Court to down its tools on the basis that we cannot adjudicate over our peers is tantamount to asking the Court to abdicate its constitutional duty. I agree. I hasten to add that it is also tantamount to violating both the Judicial Code of conduct which reveres the oath of office taken by Judges and **Section 10(1) of the Public Officers Ethics Act** which requires Judges of the Superior Courts as public officers to carry out their duties in accordance with the law.

[91] Mr. Omtatah also referred the Court to a letter to the JSC by three members of this Bench, which, according to him, illustrates a position taken, by the members of the bench that the retirement age of Judges is 74. He urged that this shows lack of impartiality. Mr. Kanjama for the 1st and 2nd Respondents, also referred to the same and urged the Court to decline to sit, based on Articles 73 and 75 and the Judge's oath in the Third Schedule of the Constitution, if it found that it had a direct conflict. Mr. Kilukumi for the 1st Respondent (intended appellant in application 11 of 2016), urged the letter was not a finding of the Court and it reflected a position taken outside of Court proceedings. He

contended that it was not evidence of partiality. However, a perusal of the record shows that the letter referred to, entailed issues on the Constitutional mandate of the JSC *vis-a-vis* the independence of Judges and the administration and operation of the Supreme Court.

[92] In a nutshell, the Judges were concerned about raising a quorum on a regular basis for the proper discharge of the functions of the Court. No more. I am therefore not convinced that these memos create justifiable doubt on the ability of the Judges to handle this matter impartially. If anything the letter shows that the authors were concerned about the performance of their constitutional duties as Judges. More importantly the letter does not create a direct conflict that would be the basis for the recusal or disqualification of any Judge on this bench.

(iii) When ought the doctrine of necessity apply: does this Court have a duty to sit?

[93] We have been urged not to apply the doctrine of necessity or the duty to sit in this case. The *doctrine of necessity* was well laid down in F. Pollack, A First Book of Jurisprudence 270 (6th ed.1929):

> *"....although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may, but must, do so if the case cannot be heard otherwise."*

[94] The duty to sit and the principle of necessity are distinguishable. In ***United States v. Will, 449 U.S. 200 (1980),*** the Supreme Court held that:

"Necessity does not operate to disqualify all federal judges, including the Justices of this Court, from deciding the issues presented by these cases. Where, under the circumstances of these cases, all Article III judges have an interest in the outcome, so that it was not possible to assign a substitute district judge or for the Chief Justice to remit the appeal, as he is authorized to do by statute, to a division of the Court of Appeals with judges who are not subject to the disqualification provisions of § 455, the common law Rule of Necessity, under which a judge, even though he has an interest in the case, has a duty to hear and decide the case if it cannot otherwise be heard, prevails over the disqualification standards of § 455. Far from promoting § 455's purpose of reaching disqualification of an individual judge when there is another to whom the case may be assigned, failure to apply the Rule of Necessity in these cases would have a contrary effect by denying some litigants their right to a forum. And the public might be denied resolution of the crucial matter involved if first the District Judge and now all the Justices of this Court were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented."

[95] This Court has had the opportunity of pronouncing itself on the doctrine of necessity and on the duty to sit, in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others,*** Sup. Ct. Petition No. 4 of 2012; [2013] eKLR (***Jasbir***) in which it held:

"B. RECUSAL BY SUPREME COURT JUDGE: THE RELEVANT ISSUES

[4] This is the first application of its kind before this new Supreme Court, and, on that account, it is necessary to identify the most relevant issues, as a basis for establishing guiding principles, considering especially the fact that this Court of restricted numerical strength, is the ultimate judicial forum, bearing the mandate of defining the jurisprudential terrain for this country.

[5] It is pertinent to consider several specific questions, the answers to which will yield guiding principles from which more specific rules would emerge. In this regard, we pose to ourselves the following questions:

(a) in what circumstances should the recusal of a Judge be sought by a party?

(b) when ought a Judge, as a matter of personal conviction, or of ethical considerations, to recuse himself or herself from decision-making by the collegiate Bench?

(c) should the grounds for single-Judge-Bench recusal apply in an identical manner to the case of the collegiate-Bench Judge?

(d) should the principles of recusal for other superior Courts, such as the High Court and the Court of Appeal, apply in an identical manner to the Supreme Court, the membership of which is limited to seven, under the Constitution?

(e) should the principles of recusal for other superior Courts apply unexceptionably to the Supreme Court, even where this Court requires a full Bench, as for instance, where it is sitting to reconsider its earlier precedent rendered by a majority of the Judges?

(f) how ought the Supreme Court to guide itself on the issue of recusal by its members, in the light of its unique position in relation to the integrity of the Constitution, as spelt out in the Supreme Court Act, 2011 (Act No. 7 of2011), s.3 (a) and (b), thus –

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

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

(b) provide authoritative and impartial interpretation of the Constitution....?"

[96] In recognizing that the composition of the Supreme Court was one that posed a challenge, and that the issue of recusal had to be treated distinctly from the issue of recusal in other Courts which, did not have a numerical challenge in respect of quorum, this Court held:

"(a) The Supreme Court's Limited Numerical Strength

[15] By Article 163(2) of the Constitution, the Supreme Court membership comprises ***seven*** *Judges; and this Court is properly composed for normal hearings only when it has a quorum of* ***five*** *Judges. We take judicial notice that, for about a year now, the*

Court has had a vacancy of one member; and also that half of the current membership were previously in service in other superior Courts – and so having the possibility of having heard matters which could very well come up now before the Supreme Court. Recusal, in these circumstances, could create a quorum-deficit which renders it impossible for the Supreme Court to perform its prescribed constitutional functions.

[16] Such a possibility would, in our view, be contrary to public policy and would be highly detrimental to the public interest, especially given the fact that the novel democratic undertaking of the new Constitution is squarely anchored firstly, on the superior Courts, and secondly, on the Supreme Court as the ultimate device of safeguard.

(b) Good Cause

[17] The recusal principle, therefore, with regard to the Supreme Court, must not be invoked but for good cause; and neither is it to be invoked without weighing the merits of such invocation against the constitutional burdens of the Court, and the public interest."

[97] Further, in dismissing the application for recusal of one of the Judges, the Court held that:

"(e) The Supreme Court Concept

[22] Even as this Court takes cognizance of the merits of the individual Judge's personal convictions, and of matters of ethics, in such a situation, it is inclined in favour of a choice which begins with the Judge's commitment to the protection of the Constitution,

as the basis of the oath of office. The shifting scenarios of personal inclination should, in principle, be harmonized with the incomparable public interest of upholding the Constitution, and the immense public interest which it bears for the people, whose sovereignty is declared in ***Article 1(1).*** *It follows that the recusal of a Judge of the Supreme Court is a matter, in the first place, for the consideration of the collegiate Bench, whose decision is to set the matter to rest.*

[23] It follows that the Supreme Court concept, as it stands in the Constitution, and as a symbol of ultimate juristic authority, imports a varying set of rules of recusal, in relation to the practice in other superior Courts.

[24] Being guided by the comparative lesson, and by the principles drawn from Kenya's special constitutional experience, we have no trepidation in disallowing the applicant's preliminary objection which sought the recusal of the Honourable Mr. Justice Tunoi."

[98] In the same matter, the Court in citing ***Perry v. Schwarzenegger*****, 671 F. 3d 1052 (9th Circ. February 7, 2012)** held that the test that is applicable in establishing impartiality of a Judge is the perception of a reasonable person who is a well-informed, thoughtful observer who understands all the facts and who has examined the record and the law. Consequently it held, at paragraph 11, that:

"[Thus] "unsubstantiated suspicion of personal bias or prejudice" will not suffice."

[99] In Pennsylvania the Judicial Code of conduct requires that judges recuse themselves in matters where they have personal interest. It however, proceeds to state as follows:

> ***"A judge cannot always disqualify himself/herself, even when the judge has a personal interest in a case. A legal principle known as "the rule of necessity" may require the judge to hear a case and make a decision. Under the rule of necessity, it is more important for a judge to decide a case—even when burdened with a conflict of interest—than to leave litigating parties in limbo by failing to render a decision. Judges in that situation must set aside all personal interest and rule with complete neutrality."***

[100]In ***State ex rel. Mitchell v Sage Stores Co.,*** 157 Kan. 622, 143 P.2d 652 (1943), the Supreme Court of Kansas observed as follows in respect of the doctrine of necessity:

> ***"[I[t is well established that actual disqualification of a member of a Court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of litigant's constitutional right to have a question, properly presented to such Court, adjudicated."***

[101] In ***Evans v Glore,*** 253 U.S. 245(1920) the Supreme Court of the U.S. in upholding the doctrine duty to sit observed that:

"Because of the individual relation of the members of this Court to the question ... we cannot but regret that its solution falls to us. ... But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects of his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go."

[102] The role of a Judge is to ensure that cases are determined in accordance with the Constitution and the law. I am persuaded by the opinion of Justice Scalia (as he was) in ***Cheney v. U.S. Dist. Court, 541 U.S. 913, 915*** (2004) that an application for recusal of a Supreme Court Judge cannot be determined in a similar manner as that of a Judge of the other superior Courts due to the special consideration that must be given to its quorum. Justice Scalia opined as follows:

"Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." That might be sound advice if I were sitting on a Court of Appeals. But see ***In re Aguinda****, 241 F. 3d 194, 201 (CA2 2001). There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices stated in their 1993 Statement of Recusal Policy: "We do not think it would*

serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. ***Even one unnecessary recusal impairs the functioning of the Court****." (Available in Clerk of Court's case file.) "**...*

"A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling."

[103] It is therefore undisputable that a party is entitled to be heard, by a Court before which he or she appears even though it is perceived to be conflicted, if there is no other Court to which he or she can go. The Applicants (intended appellants) want to be heard; they invoke their right to come on appeal to the Court of final determination. There is no other Court under our constitutional framework with this mandate and therefore necessity and the duty to sit would have to apply in these present circumstances.

The Constitutional Court of South Africa – is it of persuasive precedent?

[104] The 1st and 2nd respondents and the interested party urged this Court to recuse itself *en banc* and rely on the decisions of the Constitutional Court of South Africa in ***Judge President Mandlaka Yise John Hlophe v Premier of the Western Cape Province,*** CCT 41/2011, (***Hlophe***) which was cited with approval in ***Baaitse Elizabeth Nkabinde & Another v Judicial Service***

Commission & 3 Others, CCT 71/2016, (***Nkabinde***) and disqualify themselves *en banc*.

[105] In order to know the applicability of the said decisions it is important to consider the facts of the cases. We note that ***Nkabinde*** was decided summarily without a statement of the facts of the case by the Court hence, it is not suitable as persuasive precedent since it is not possible to tell whether it is *pari materia* to the present matter.

[106] In ***Hlophe*** the applicant sought leave to appeal to the Constitutional Court of South Africa against two decisions of the Supreme Court. In 2008 the Constitutional Court heard arguments in four matters relating to the prosecution of certain corruption charges. Before judgment was delivered, the applicant approached two Constitutional Court Judges in their chambers. Consequently, the Constitutional Court Justices on the bench, at the time, lodged a complaint with the Judicial Service Commission of South Africa (JSC SA), against the applicant. The applicant in turn lodged a complaint of judicial misconduct against the Justices.

[107] The JSC SA made a determination that the evidence before it did not justify a finding of gross misconduct on the part of the applicant or the Constitutional Court Justices. Two applications were made separately in the High Court, challenging that decision of the JSC SA. Appeals were made to the Supreme Court of Appeal and finally, leave was sought to appeal to the Constitutional Court.

[108] In declining to grant leave to appeal the Court held, at paragraph 46, that:

> ***"A balance needs to be struck between the Court's obligation to provide finality in this matter (as it would be intolerable to have a case pending indefinitely) and possible injustice to the applicant. These factors weigh heavily in determining the extent to which it is in the interests of justice to enter into the merits, and thus whether to grant leave to appeal."***

[109] Further, the Court held, at paragraph 23 as follows:

> ***"In addition, although the parties have consented to the conflicted Judges' sitting in the present matter, regard must still be had to the fact that they would ordinarily have to recuse themselves. For this reason, this Court should deny leave to appeal to preserve the fairness of its own process."***

[110] In ***Nkabinde***, the Constitutional Court merely issued an order dismissing an application for leave to appeal reiterating its earlier decision in ***Hlophe.*** There are a number of significant differences between the circumstances inHlophe and those we now find ourselves in the matter now before us.

Distinctions between *Hlophe* ***and the applications currently before the Supreme Court***

[111] It is worth of note that in in ***Hlophe*** the applicants had sought the leave of the Court to lodge an appeal before the Court. This significantly differs with the current applications before the Supreme Court since the applicants are before the

Court as of right as provided under Article 163(4)(a) of the Constitution and need not seek the leave of Court to appeal.

[112] It is also evident that in the matters before the Constitutional Court the Justices of the Court were directly involved in the matter since they had lodged the complaint against the applicant. Their complaint triggered the decision by the JSC which was the basis of the causes in the various Courts, culminating in the application before the Constitutional Court. In the current matter, the Judges of the Court, other than Hon. Justice Tunoi and Hon. Lady Justice Rawal, are not personally involved. The rest of the Judges have no direct interest in current the matter.

[113] In ***Hlophe*** the parties had recourse despite the denial of leave to appeal. They were to go back to the JSC for resolution of the matter. This is not an option available to the parties in the present matter – the Supreme Court is the final place of recourse for the parties in this matter hence an enhanced necessity to protect their constitutional right of appeal.

[114] The serious numerical challenge of the Supreme Court cannot be understated. Whereas the Constitutional Court of South Africa has eleven Justices and a quorum of eight, the Supreme Court of Kenya has only seven Judges and a quorum of five. In the event of recusal the Supreme Court judicial processes are more likely to be paralyzed more often as compared to those of the Constitutional Court which is expected to sit as at least eight Judges.

[115] In the event of a vacancy in the Constitutional Court, acting Judges may be appointed to ensure that the Court retains quorum. This is not an option available to the Supreme Court.

[116] There cannot be partial waiver. Once a Judge has disqualified themselves from hearing the matter at the pre-trial stage, they stand disqualified from hearing it during the trial itself. Unlike the pre-trial stage where a matter can be heard by a bench of on or two judges, the trial requires five Judges to constitute quorum. The constitution, unlike that of South Africa, does not envision a situation where Judges can be seconded from other Courts to fill the possible void that may emerge from the disqualification of a Supreme Court Judge, hence the principle of necessity. Such is our *jurisdictional conundrum*, activating this Court's *ratio* in ***Jasbir***.

The Supreme Court as Guardian of the Constitution

[117] The role of the Supreme Court of Kenya as the apex court of the land and the final arbiter in judicial determination must never be understated. In ***The Matter of the Attorney General,*** Advisory Opinion No. 2 of 2012, this court said:

> ***" We would state that the Supreme Court, as the custodian of integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enable to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution"***

[118] This court is the final bastion in the architectural design of our Constitution that protects and defends the rights of every citizen and enforces the obligations of State towards them. To decline to sit in a matter such as this, where a citizen of this country invokes the right to be heard; the right of appeal and access to justice in this court; would to my mind - be an abdication of duty and of the solemn oath taken up by each Judge of this court. The Supreme Court is the guardian of the Constitution and its intervention ought to be available to the citizens of this county.

[119] Mr. Omtatah suggests that because the Judges of this court have been depicted in caricatures in the press and the matter before us has been widely reported in certain negative slant in both mainstream and social media, that we ought to be aware of public perception and take this into account when we make a judicial decision. It is an established fact that the delivery of justice in an adversarial system such as ours is hardly ever popular. Popularity contests rightly belong to beauty pageants, socialites and politicians, and not to courts of law. Favour with the public is a political prerequisite not a judicial component. It matters not what the *perception* of the public is; what does matter is the quality of *justice given* to those who come before us. Perceptions may change overnight; but it is the defence of Justice that is engraved in our national values and fossilized in the sediments of legal history.

Conclusion:

[120] As we come to the final orders in this matter, I am of a different mind from the Chief Justice, my brothers Justices Mohammed Ibrahim, and Smokin Wanjala SCJJ as to the disposal of the conservatory orders given in this matter on the 27th May 2016. They propose that the inability to convene a quorate Court at this present time - due to recusal of some Judges - would mean that the

conservatory orders be vacated, as a consequence of convenience - as it is unclear as to *when,* (not if) there shall be a bench of this Court to hear the substantive matter and intended appeal.

[121] Those conservatory orders were issued by Njoki SCJ sitting as a one-judge bench under the provisions of Section 24 of the Supreme Court Act, and were made in the following terms:

> ***"ORDERS***
>
> ***[1] The Application is certified urgent and service of certificate of urgency is dispensed with at this instance.***
>
> ***[2] Pending interpartes hearing and determination of this application – a conservatory order is hereby issued directing that the decision of the High Court affirmed by the Court of Appeal today, the 27/5/2016 to the effect that the retirement age of judges appointed before 27/8/20101 is 70 years – be suspended.***
>
> ***[3] Pending the hearing interpartes a conservatory order is issued directing that the applicant will continue to discharge her constitutional, judicial and administrative duties.***
>
> ***[4] Pending the hearing interpartes of the application, a conservatory order is hereby issued prohibiting the respondents, the Chief Registrar of the Judiciary from advertising in any media, whatsoever, a vacancy in the office of the Deputy Chief Justice and Vice President of the Supreme Court of Kenya or to commence in any matter, whatsoever, the***

recruitment process of the applicant as a Judge of the Supreme Court.

[5] Conservatory orders issue directly upon the Respondents, the Chief Registrar of the Judiciary from issuing any retirement notices to the Applicant.

[6] All respondents be immediately served with the orders of the Court as issued.

[7] Interpartes hearing of this application shall be heard and argued before the Court on Friday 24th June 2016 at 10 am."

[122] I believe that it would not be proper to vacate the said orders of this Court within the confines of a Ruling on a preliminary objection. The correct and legal manner to vacate such orders would be at the *interpartes* hearing of the application. We have not yet reached that stage. Any finding to vacate the conservatory orders at this preliminary stage is premature and not within any legal procedure that I know of. *Ex parte* orders do not lapse: if they have to be lifted it is only after the primary litigants' are heard in an *interpartes* application as granted in the body of the Order. This has not been done.

[123] Failure to conduct the *interpartes* hearing would leave the applicant parties unheard on whether or not they ought to be granted a stay of the Judgment of the Court of Appeal, until their appeal is heard. The concern that lifting the stay order may have the effect of rendering the appeal nugatory will not have been addressed. It would indeed be ironic, if the stay were lifted at this preliminary stage - given that the *right to be heard* took centre stage in all of the

arguments in this matter - the outcome as a result, is that the parties most affected remain unheard.

ORDERS:

[124] I am inclined to make the following orders:

1. ***The Preliminary Objection is hereby dismissed.***
2. ***The Parties to proceed to be heard interpartes on the main application as a matter of course.***
3. ***Costs in the cause.***

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

.....

N. S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true

copy of the original

REGISTRAR, SUPREME COURT