REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. 11 of 2016

—BETWEEN—

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

—VERSUS—

1. JUDICIAL SERVICE COMMISSION.....
2. THE SECRETARY, JUDICIAL SERVICE COMMISSION..... } **RESPONDENTS**

—AND—

OKIYA OMTATAH OKOITI..... **INTERESTED PARTY**

—AND—

1. INTERNATIONAL COMMISSION OF JURISTS.....
2. KITUO CHA SHERIA.....
3. LAW SOCIETY OF KENYA..... } **AMICI CURIAE**

—AND—

CIVIL APPLICATION NO. 12 OF 2016

—BETWEEN—

1. JUSTICE PHILIP TUNOI.....
2. JUSTICE DAVID A. ONYANCHA..... } **APPLICANTS**

—VERSUS—

1. THE JUDICIAL SERVICE COMMISSION.....
2. THE JUDICIARY..... } **RESPONDENTS**

—AND—

LAW SOCIETY OF KENYA..... **AMICUS CURIAE**

(Being applications for issuance of conservatory Orders in respect of Judgment and Order of the Court of Appeal dated 27th May, 2016 (Hon. Justice GBM Kariuki, Hon.Justice Milton Asike Makhandia, Hon. Justice William Ouko, Hon.Justice Patrick O. Kiage, Hon. Justice Kathurima M'Inoti, Lady Justice Jamilla Mohamed, Hon. Justice Prof. Otieno-Odek)

RULING

A. BACKGROUND

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

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

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

> ***(a) The application is certified urgent and service of the certificate of urgency is dispensed with at this instance.***
>
> ***(b) Pending*** *inter partes* ***hearing and determination, a conservatory Order is hereby issued, directing that the decision of the High Court affirmed by the Court of Appeal, to the effect that the retirement age of Judges appointed before 27/8/2010 is 70 years, be suspended.***
>
> ***(c) Pending the hearing*** *inter partes,* ***a conservatory Order is issued directing that the applicant will continue to discharge her constitutional, judicial and administrative duties.***
>
> ***(d) Pending the hearing*** *inter partes* ***of the application, a conservatory Order is hereby issued prohibiting the respondents, the Chief Registrar of the Judiciary, from advertising in any media whatsoever, a vacancy in the Office of the Deputy Chief Justice and Vice President of the Supreme Court of Kenya, or to commence in any manner whatsoever the recruitment process of the applicant, as a Judge of the Supreme Court.***
>
> ***(e) Conservatory Orders issue directing the respondents, the Chief Registrar of the Judiciary from issuing any retirement notices to the applicant.***
>
> ***(f) All respondents be immediately served with the Order of the Court.***

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

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

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

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

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

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

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

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

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

"Granted the urgency under which the hearing of the application was sought, and the public interest in this

application, I hereby invoke my administrative powers as the Chief Justice and President of the Supreme Court, to fast track the hearing of the application. My directions are, therefore, as follows:

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

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

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

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

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

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

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

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

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

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

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

(c) The Notice of preliminary objection filed by counsel for the applicant Mr. Kiragu Kimani, dated 31st May, 2016 to be served upon all parties and will be heard by the five Judge Bench on 2nd June, 2016 at 10.00am.

(d) The Notice of Motion application dated 30th day of May, 2016 filed by Issa & Company Advocates to be served on all the parties and the same will be heard by the five Judge Bench on 2nd June, 2016 at 10.00am.

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

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

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

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

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

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

[13] At the commencement of the hearing of the substantive applications before Court, it was directed that all preliminary objections would be disposed off first before hearing the main applications on whether or not conservatory Orders issued *ex parte* should be confirmed, varied or dispensed with.

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

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

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

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

[18] It is through this background that parties made their respective submissions in Court. This Ruling consolidates all parties' case in both Applications No. 11 & 12 of 2016. Though I acknowledge that there was no consolidation of the two applications, a proper consideration and disposition of the issues raised in this case, justifies a determination in one breath.

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

(i) Applicant's submissions

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

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

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

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

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

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

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

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

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

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

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

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

[28] Counsel also referred to the case of ***Re Colina v. Ex Parte Torney*** (1999) HCA 57, where the High Court of Australia stressed on the independence of Judges particularly the fact that a Chief Justice has no capacity to direct or even influence Judges of the Court in the discharge of their adjudicative powers and responsibilities. Other relevant cases referred to include ***Phillip K. Tunoi & 2 Others v. Judicial Service Commission & Another,*** High Court Petition No. 244 of 2014; [2015] eKLR; ***Donna Oliverez v. Mark Oliverez***, Court of Appeal of the State of California No. FL024506; R v Lippe [1991] 2 SCR

114 and ***Canada (Minister of Citizenship and Immigration) v. Tobiass*** [1997] 3 SCR 391.

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

(ii) 3rd Amicus Curiae Submissions

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

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

(iii) 1st & 2nd Respondents' Submissions

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

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

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

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

[35] It was counsel's argument that, the Chief Justice has the power to prioritise the hearing dates of any matter. In line with that, he relied upon Article 161(2) (a) of the Constitution which refers to the Chief Justice as the head of Judiciary. Article 161(1) on the other hand, defines the Judiciary as consisting of the Judges of the superior Courts, Magistrates, other judicial officers and staff. Further, Section 5(2) (c) of the Judicial Service Act delineates the functions of the Chief

Justice as *inter alia* to exercise general direction and control over the Judiciary. Thus the Judiciary in this case, should be read to mean the Judges of the superior Court. Accordingly, counsel submitted that part of that general directions includes bringing forward the date of a hearing.

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

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

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

[39] Counsel also advanced the argument that under Section 21 of the Supreme Court Act, the ultimate powers to make any Order rests with the Court. He submitted that a Court is properly constituted if it is composed of 5 Judges. It was Counsel's submission that the Chief Justice took into consideration the governing principles found under Article 10, 159 and 259 of the Constitution. Counsel concluded by underscoring that the applicant had failed to distinguish between the powers of the Chief Justice as the head of Judiciary and as the President of the Supreme Court. Additionally, counsel sought to distinguish some of the authorities cited by the applicant and urged the Court to find that they did not apply in the present circumstances.

(iv) Interested Party Submissions

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

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

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

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

[43] The Preliminary Objection raised by the 1st applicant in Civil Application No. 12 of 2016, is contextually analogous to the applicant's Notice of Preliminary Objection in Civil Application No. 11 of 2016. Both applications question the Chief Justice's purported authority in issuing the directives of 30th May, 2016. Thus, it is only new issues argued on Civil Application No. 12 of 2016 are highlighted in this part of the Ruling.

(i) 1st Applicant's submissions

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

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

> ***"[S]ubstantive directions are to be issued by the Court actually seized of the matter, and not any other 'person' or 'authority'. Directions when issued, form part of the judicial exercise or the road map in the overall conduct of a matter. ...the situation is fraught with danger where the Chief Justice issues directions as to the hearing date or the date when the Court ought to render Judgment, because this ceases to be an administrative function and can be construed as bordering on interfering in the judicial conduct, or road map, of a matter. In***

any case, the Court seized of the matter, is obliged in law to dispose of all matters in an expeditious manner."

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

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

[48] Mr. Kiragu Kimani, appearing also for the 1st applicant, informed the Court that the Orders given by the single Judge are all part of a judicial decision and one cannot purport to separate between the conservatory part and the part indicating the hearing date. He submitted that the exercise of the Chief Justice's general power cannot be used to review an Order given by a judicial officer. The only available avenue for any person dissatisfied with such a decision would be to move the Court for constitution of a 5 Judge Bench to hear the matter.

(ii) 3rd Amicus Curiae Submissions

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

(iii) 1st & 2nd Respondents' Submissions

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

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

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

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

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

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

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

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

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

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

- *(a) A Court cannot exercise jurisdiction where doing so violates the enjoyment of the absolute right to a fair trial;*
- *(b) a Court which is not impartial has no jurisdiction under the Constitution;*
- *(c) jurisdiction must be declined where a Court is so conflicted that it cannot be impartial;*
- *(d) all matters must be presided over or decided by Judges whose detachment and neutrality is not clearly compromised as is the case with the current Judges of the Supreme Court on the subject matter of the retirement of Judges appointed under the repealed Constitution.*

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

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

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

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

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

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

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

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

(i) Interested Party's Submissions

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

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

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

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

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

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

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

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

dated principle. He added that the reading of Article 163(2) was of a discretionary nature and as such the wording of the Article countenances this Court to decline jurisdiction in some occasions.

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

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

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

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

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

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

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

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

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

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

[74] In rejoinder, Mr. Omtatah submitted that Article 2(4) of the Constitution provides that even doctrines of law that are in conflict with the Constitution are null and void. Accordingly, the doctrine of necessity was one such doctrine. He reiterated that Article 48 of the Constitution was about access to justice and not access to Courts. Mr.Omtatah also took the view that the test for impartiality happens outside the proceedings and not necessarily in the course of proceedings.

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

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

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

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

[78] On the question as to whether the right to appeal was sacrosanct, learned counsel made reference to Article 24 of the Constitution and further took the view that certain rights even under the Constitution are subject to limitation and as such even the right to appeal can be limited.

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

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

[81] His further submissions was that the test in determining bias was that of the perceived appearance of bias but that being the case in the instant matter, it was not a matter of oblique conflict but rather direct conflict which was

precipitated by a decision co-authored by members of the currently constituted Bench and as such the circumstances that gave rise to the decision in ***Nicholas Kiptoo arap Salat v. Independent Electoral and Boundaries Commission and 7 Others*** Petition No. 23 of 2014, [The **Nick Salat** case], began with Memorandum drafted by some members of this Bench and indeed a reasonable person would be able to surmise that there is an intimate connection.

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

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

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

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

[85] Senior Counsel Mr. Muite adopted fully the submissions of Learned Counsel Mr. Kanjama and proceeded to submit that indeed there was no doubt

that this Court has the jurisdiction but that the Court was simply being urged to decline to take up jurisdiction.

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

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

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

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

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

being conflicted since sitting members were intimately connected to the proceedings now before Court.

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

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

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

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

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

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

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

[95] It was counsel's contention that distinguishing fair hearing from fair trial was a distinction without merit. He submitted that the applicant's case both at the High Court and the Court of Appeal was that the right to fair administrative action had been infringed and as such this Court must be given an opportunity to give an ultimate interpretation.

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

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

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

[99] Mr. Kilukumi also submitted that the doctrine of necessity was applicable to prevent a failure of justice or frustration of statutory provisions. He reiterated that if the Court fails to hear and determine the substantive application, the same would be frustrated. It was further submitted that the necessity to hear the matters placed before the Supreme Court arises from the Constitution. Counsel was emphatic that failure to apply the doctrine of necessity would have the effect of denying litigants a right to be heard. He cited the case of ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others*** petition no. 4 of 2012 [2013] eKLR, and the Indian case of ***Tata Cellular v. Union of India*** 1996 AIR 11,1994 SCC (6)651, which endorses the doctrine of necessity.

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

[101] In reference to the Judgment in the **Nick Salat** case, counsel submitted that at paragraph 102 of the Judgment in ***Kalpana H. Rawal v. Judicial***

Service Commission and 4 Others High Court Petition 386 of 2015, it was evident that the High Court decision never determined the age of retirement age of Judges and as such the **Nick Salat** case cannot be taken to be evidence of bias.

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

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

[103] It was Mr. Nowrojee's further contention that indeed the application was devoid of any point of law and was laden with facts, which could only be considered and properly determined in another forum.

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

[105] It was also learned counsel's contention that the public interest claimed by Mr. Omtatah in the matter had been claimed without any basis at all. Furthermore, learned counsel stated that a person exercising a right of appeal

could not be barred from exercising that right whether the appeal is a first appeal or a second appeal.

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

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

[108] Mr. Kiragu also distinguished the case of ***Hlophe v. Premier of the Western Cape Province and Another*** 2012(6) SA 13 (CC). He stated that in that case a majority of the Judges were litigants while in the current scenario only two are litigants. He took the view that every case must be decided on its own peculiar facts.

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

E. ISSUES FOR DETERMINATION

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

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

[112] It was counsel's further submission that the Chief Justice could not interfere with a judicial decision by any Judge of the Supreme Court. Mr. Nowrojee in particular urged this Court to be guided by the history of this country where past Chief Justices had interfered in the decisional independence of Judges by calling for files to the detriment of justice. Mr. Kilukumi on the other hand submitted that only a five-Judge Bench of this Court could vary the Order of a single Judge of the Court. This submission, was supported by Mr. Kiragu, counsel for the applicants in application number 12 of 2016.

[113] Senior Counsel Mr. Ahmednassir, in opposing the submission, argued that the very Orders by the duty Judge on which the preliminary objection was anchored were themselves illegal as they had not been based on an existing

appeal before the Court. Counsel submitted that an irregular or illegal Order cannot be the basis for a preliminary objection such as the one raised by the applicant. Every proceeding which is founded on a nullity, is also a nullity, counsel concluded.

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

[115] Mr. Kanjama submitted that the Chief Justice had acted in accordance with the administrative powers vested in him by the Constitution, the Judicial Service Act and the Supreme Court Act. Counsel contended that the Chief Justice had in fact struck the right balance between independence of the judiciary and administrative efficiency. It was his submission that in the scheme of the practice of the Supreme Court, only the Chief Justice, the Deputy Chief Justice and the Registrar can exercise administrative powers. In counsel's view, if the Chief Justice were to be stripped of administrative powers necessary for case management and general direction of business, the Supreme Court would descend into chaos. The preliminary objection in counsel's view, had failed to make a critical distinction between judicial and administrative functions of the Chief Justice. In furtherance to Mr. Kanjama's contention, Mr. Omtata submitted that the CJ had acted to preserve the integrity of the Court and had simply interfered with the administrative directions of the duty Judge and not the judicial function.

[116] Senior counsel Mr. Muite supported the submissions of Messrs. Ahmednassir and Kanjama. It was his argument that the administrative powers of the Chief Justice are well provided for in the Constitution, the Judicial Service

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

F. ANALYSIS

[117] It is important to establish the proper context within which the current controversy has arisen. In direct contention are the powers of a single Judge sitting to determine an *ex parte application* and the administrative powers of the Chief Justice to manage the Judiciary of which he is head and the Supreme Court of which he is President. The position of Chief Justice in this regard is one that defies exact categorization. In one instant, the Chief Justice is a Judge like any other, who is called upon daily to discharge judicial functions in the company of fellow Judges of the Supreme Court. He has to adjudicate disputes and render decisions in accordance with the Constitution and the law.

[118] In another instant, the Chief Justice oversees the daily operations of the judiciary in general and the Supreme Court in particular. Regarding the Supreme Court, the Chief Justice must ensure that the calendar of the Court in

terms of Court sittings, vacations, hearings and disposal of cases is observed and implemented efficiently and effectively. On occasion, the Chief Justice will be called upon to make administrative decisions as dictated by the exigencies of the Court's business. The administrative powers of the Chief Justice in his dual capacity as head of the Judiciary and President of the Supreme Court are donated by the Constitution, the Judicial Service Act, the Supreme Court Act and the Supreme Court Rules.

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

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

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

> ***"Without prejudice to the provisions of sub-rule (1) or sub-rule (2), a single Judge of the Court may hear applications and make Orders with regard to—***
>
> ***(i) change of representation;***
> ***(ii) admission of consent;***
> ***(iii) consolidation of matters;***
> ***(iv) Dismissal of a matter for want of prosecution;***
> ***(v) correction of errors on the face of the record;***
> ***(vi) withdrawal of documents;***
> ***(vii) review of the decision of the registrar;***

(viii) leave to file additional documents;

(ix) admission of documents for filing in the Registry; or

(x) substitution of service."

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

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

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

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

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

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

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

> ***"...the Chief Justice shall exercise general direction and control of the Judiciary"***

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

> ***"the Chief Justice shall coordinate the activities of the Court, including:***
>
> ***(a) Constituting a Bench to hear and determine any matter filed before the Court;***
>
> ***(b) determining the sittings of the Court and the matters to be disposed of at such sittings; and***

(c) determining the vacations of the Court."

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

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

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

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

[124] The facts leading to the preliminary objection are not in dispute. What is in dispute is whether the action by the Chief Justice of bringing the matter

forward for an *inter partes* hearing on 2nd June, 2016 as opposed to 24th June, 2016 violated the Constitution or the law. In doing so, the Chief Justice invoked his administrative powers under the Constitution or the law. It was strongly submitted that the Chief Justice has no administrative powers under the Constitution or the law as would permit him to vary a hearing date fixed by a Judge of the Court.

[125] It is clear to me that the Constitution, the Judicial Service Act, and the Supreme Court Act and the Rules thereunder, vest the Chief Justice with general powers of control and direction over the judiciary and the Supreme Court. What does being the head of the judiciary actually mean? What about being the President of the Supreme Court? It must mean having powers, duties and responsibilities of an administrative nature whose exercise is to ensure the efficient and effective administration of justice. That is what the judiciary is established and actually exists for. An important caveat is that the exercise of administrative powers by the Chief Justice or any other Judge or judicial officer should not interfere with the decisional independence or adjudicative function of another Judge. I would also add that the use of administrative powers should not be actuated by the intention to subvert the ends of justice. In fact, the administrative powers vested in the Chief Justice, must be exercised in such a manner as to guarantee the independence of the judiciary. In Mr. Kilukumi's list of authorities, there is to be found a scholarly article entitled *"The Administrative Authority of Chief Judicial Officers in Australia"* authored by **Kathy Mack'and Sharyn Roach Anleu** in which the writers cite with approval the following paragraph:

> "**Generally, one cannot deny the need for administrative supervision over Judges to promote efficiency of judicial administration. Therefore, Judges must submit to administrative guidance by other Judges who are in charge of the**

administrative management of the court. ***Such administrative guidance must be directed to matters of case management and court administration but should not refer to the exercise of the judicial function itself, i.e. the procedural and substantive decision making aspect of adjudication"*** (see authority number 1 in the applicants list of authorities at page 7 of the bundle of authorities)

[126] I agree with senior counsel Nowrojee when he cautions against the dangers of forgetting history in reference to the actions of past Chief Justices. I am alive to this dark era in our country when the judiciary lent its imprimatur to the oppressive actions of the State. Fortunately, the Constitution of 2010 is designed in such a manner as to make it near impossible for a State or public officer to use the authority conferred on him or her in a whimsical manner. What are we to make of Article 10 of the Constitution which decrees that any state officer who interprets and applies the Constitution is bound by a gamut of national values and principles of governance including the rule of law, inclusiveness, human rights, good governance, integrity, transparency and accountability?

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

applicants. The duty Judge also issued a direction setting the matter down for hearing on the 24th of June, 2016.

[128] Now, it is a matter of common knowledge that the Chief Justice had declared his intention to retire as head of the judiciary and President of the Supreme Court on 16th of June, 2016. In the circumstances, if the date of 24th June set down for hearing by the duty Judge stood, it would bring into play a number of scenarios. The first of these scenarios is that come 24th June, there would be no quorum of five Judges to hear the matter substantively. The Deputy Chief Justice, and Mr. Justice Tunoi, being parties and applicants in the matter would be expected to steer clear of the Bench, leave alone constituting one. The Judgment of the Court of Appeal would remain suspended, the respondents would remain hamstrung by the conservatory Orders, and the applicants would remain in office until they attained the age of 74 since no five-Judge Bench could ever be raised to pronounce itself on the matter.

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

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

[131] Where would these scenarios leave the Supreme Court? The apex Court in the land would have been dealt a fatal blow to its legitimacy. The Court would

become the subject matter of ruthless ridicule. The other Judges of the Court would have been thrown into the ignominy of the incomprehensible. This story is the stuff of things that make Oscar winning Hollywood movies. The damage done to the Court, the Judges of this Court, and by extension the entire judiciary would justifiably claim frontline coverage in the world's media, and provide comic relief to overworked students of law in established law schools and faculties.

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

> ***"Granted the urgency under which the hearing of the application was sought, and the public interest in this application, I hereby invoke my administrative powers as the Chief Justice and the President of the Supreme Court to fast track the hearing of the application.***
>
> ***My directions are therefore, as follows: 1) The Registrar of the Supreme Court serves the parties to appear for the hearing of this application*** *inter-partes* ***(sic) before a 5-Judge Bench of the Supreme Court on Thursday, June 02, 2016 at 10 am. 2) The Registrar also serves the parties with notices to appear for directions on the said hearing tomorrow, May 31, 2016 at 10 am before Wanjala and Njoki SCJJ."***

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

the two-Judge bench, the respondents filed another Notice of Motion No. 12 seeking the same Orders as in application No. 11.

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

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

Justice so as to bring the hearing of his application forward during the pendency of these proceedings?

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

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

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

[138] This Section grants a single Judge of the Supreme Court considerable discretionary latitude. Yet, however far-reaching the discretion, it must be exercised judiciously and cautiously. The discretion cannot be exercised without regard to the circumstances surrounding each case. Mr. Nowrojee submitted that the Chief Justice cannot be said to have absolute discretion in exercising his administrative powers. Neither can a single Judge of this Court exercise absolute

discretion in issuing interlocutory directions. Such directions, especially when they concern matters administration, such as fixing a hearing date for a five-Judge Bench, cannot be issued without reference to the Chief Justice and consultation with the other Judges of the Supreme Court.

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

> ***"the Supreme Court shall be properly constituted*** *for the purposes of its proceedings* ***if its composed of five Judges."***

[140] Strictly speaking therefore, in the light of Article 163(2) of the Constitution, a single Judge sitting before the empaneling of a five-Judge Bench cannot constitute the Supreme Court. A single Judge issues *ex parte Orders* not in his or her capacity as the Supreme Court, but as an agent of the yet to be empaneled Bench of the Court. This explains why such orders must be very temporary in nature and only last up to and until a five-Judge Bench is constituted by the Chief Justice. An *ex parte direction* that fixes a hearing date usurps the administrative powers of the Chief Justice, the consultative privilege vested in other Supreme Court Judges and the powers of the Registrar of the Court.

[141] In view of the foregoing reasons, ***I hereby dismiss the two Preliminary Objections in applications number 11 and 12 of 2016. The costs shall abide the cause.***

G. THE PRELIMINARY OBJECTION BY Mr. OMTATA – THE INTERSTED PARTY

[142] My dismissal of the two Preliminary Objections in applications number 11 and 12 of 2016 ought to pave the way for me to be part of the Bench that should dispose of the pending applications together with the main application for conservatory orders by the applicants. But alas! another hurdle has been placed in my way by Mr. Omtata who has participated in this matter as an interested party, all the way from the High Court. This hurdle is a formidable one. I have set out in my account the nature of Mr. Omtata's objection, and his submissions in support of the same.

[143] Mr. Omtata contends that this Court lacks jurisdiction to entertain any application arising from and touching upon this dispute in view of the fact that all the seven of us are conflicted in one way or another. The applicants who are themselves Judges of this Court cannot be expected to sit in Judgment over their own cause. The Chief Justice and Justice Smokin Wanjala are members of the Judicial Service Commission which is a party to this dispute. Justices Ibrahim and Ojwang are said to have written a memo in which they expressed an opinion as to what is the retirement age for Judges. Lady Justice Njoki is said to have filed a case in the High Court against the Judicial Service Commission. In the circumstances, Mr. Omtata submits that this Court ought to disqualify itself from entertaining this matter. In the alternative Mr. Omtata submits that each individual Judge should recuse him or herself from this case on grounds of the personal conflict of interest.

[144] The interested party prays that once it becomes evident that this Court cannot determine this dispute due to the resultant lack of quorum, the Judgment of the Court of Appeal should become final. In support of his submissions, Mr. Omtata has cited many authorities ranging from the Constitution to case law. The interested party has received support for his preliminary objection from the

respondents, the first *amicus curiae*, and the second *amicus curiae*. Again, I shall not revisit the arguments and submissions in support. The applicants oppose this preliminary objection. I have equally documented their reasons for opposition.

[145] Mr. Nowrojee opposed this preliminary objection on the ground that it does not satisfy the criteria set in the ***Mukisa Biscuits Case.*** For the same reasons I rejected this line of reasoning by Mr. Ahmednassir in relation to the two other preliminary objections, I shall proceed to determine Mr. Omtata's objection on the merits.

[146] The interested party's application is such that it must be determined first before this Court can proceed to entertain the substantive application for conservatory Orders. In this regard, this application contains one element of a preliminary objection, i.e., it has the potential of disposing of the case, at least for now, were it to succeed.

[147] Mr. Omtata placed heavy reliance on Article 50 (1) of the Constitution in urging the Court to disqualify itself for lack of jurisdiction. This Article provides that:

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

[148] In the applicant's view, Article 50(1) envisages only an independent and impartial tribunal. Any Court, or Tribunal that is not independent, is automatically disqualified for want of jurisdiction. I must at the outset declare that the right to a fair and public hearing before an independent Court or other competent tribunal lies at the heart of a functional judiciary. But in jurisdictional terms, one must read the Constitution as a whole. In this regard, I agree with

Messrs. Kilukumi and Kiragu and senior counsel Nowrojee that it is to Article 163 (4) of the Constitution that one must turn to ascertain whether this Court has jurisdiction to entertain this matter. I would further confirm that in terms of this Article, this Court is indeed clothed with the subject matter of jurisdiction to entertain the intended appeal.

[149] The real question that this Court has to grapple with is whether it should exercise jurisdiction or decline to exercise jurisdiction should any of its members recuse him/herself from determining the dispute on grounds of conflict of interest. It would not be the first time that this Court has found that it has jurisdiction but for stated reasons declined to exercise such jurisdiction. In ***Re the Matter of the Interim Independent Electoral Commission*** (2011) eKLR, this Court held that it had jurisdiction to issue an advisory opinion but declined to exercise its jurisdiction on the basis of stated reasons.

[150] To dismiss Mr. Omtata's application at this stage on the basis of the ***Mukisa Biscuits case***, would deny me the opportunity to address calls for my recusal.

H. ISSUES FOR DETERMINATION

[151] The only issue for determination is *whether this Court should decline to exercise its jurisdiction on grounds that all or certain members of this Bench are conflicted*. Put differently, the issue for determination is whether *I, Justice Smokin Wanjala, being a member of this Bench should recuse myself from determining this dispute because I sit on the Judicial Service Commission, which is a party to this case.*

[152] In the course of submissions by counsel for all the parties in support of this application, I was urged to recuse myself from sitting on this Bench on

grounds that, being a member of the Judicial Service Commission, which is a party to this suit, had generated a perception in the eyes of the public that I would not be impartial. Mr. Omtata even attached a popular and widely read cartoon strip published by one of the mainstream media wherein I was portrayed as having made up my mind. I had not come across the said cartoon strip until, it was waved in front my face in open Court by the interested party.

[153] At first, Mr. Omtata's cartoon waving motions stirred in me feelings of amusement as I promptly joined those in Court in mirthful outbursts of laughter. But my laughter was short-lived, as it almost immediately, turned into a terrified smile, and later faded into an agonized grimace. In a matter of seconds, I had been ravaged by a complex and excruciating array of emotions. Here I was, faced with a very serious dispute in which two senior members of the Court in which I sit, were seeking justice, by way of intended appeal, in the very same Court. Yet, the people of Kenya, on whose behalf, I exercise judicial authority in the highest Court in the land had formed the opinion that I could do no justice, that I was not free from bias. Even the third *amicus curiae*, the Law Society of Kenya, through Messrs. Anzala and Masika rose to caution me against sitting on this Bench to determine the dispute.

[154] In answer to all those who have urged me to recuse myself because of being a member of the Judicial Service Commission, I would hold that membership in the JSC does not automatically disqualify a Judge from adjudicating a dispute to which the former (JSC) is a party. Membership in the Commission is a constitutional imperative. Indeed, this would not be the first case, to which the Commission is a party, and in which I have participated as a member of a five-Judge Bench.

[155] But there may arise a situation where a Judge, who is a member of the Judicial Service Commission, becomes so intimately involved in the process leading to an impugned decision, that no amount of judicial ingenuity can

extricate him/her from either real or perceived bias. I am afraid to declare that, this indeed, is my situation in this case. During the deliberations at the Commission, regarding the question whether Judges should retire at the age of 70 or 74, not only did I vote in support of the resolution requiring Judges to retire at the age of 70, I did also proffer extensive legal opinion to justify such a position. Similarly, long before this question became a subject matter of judicial adjudication, I had expressed a similar opinion during informal discussions with the other Judges of this Court including the applicants herein.

[156] While I am capable of being persuaded to change my opinion in open Court, by learned submissions of counsel; it is clear to me that it is not possible to surmount the perception of bias in this case, which has gripped the public psyche. All counsel for the respondents submitted that if the Court were to down its tools on grounds of recusal by individual Judges of this Bench, it would shut out the applicants from accessing justice in the apex Court. Counsel urged us to invoke the doctrine of necessity so as to prevent the injustice that would be visited upon the applicants. While I am not without sympathy for this cause, I am also acutely aware that refusal to recuse myself has the potential of inflicting far-reaching damage to the credibility of the Supreme Court. Sometimes, not even the doctrine of necessity can override the overwhelming demands of natural justice. I do not even think that, this Court's reasoning in the ***Jasbir Rai*** case established a principle that the doctrine of necessity would apply in all cases before this Court in which a Judge is called upon to recuse him/herself from the matter at hand.

[157] The effect of my recusal will no doubt affect the capacity of this Court to raise a quorum. The effect of the inability of the Supreme Court to entertain the intended appeal is that the decision of the Court of Appeal, to the effect that all Judges must retire upon attaining the age of 70 stands, until it is affirmed or reversed by a properly constituted Bench of the Supreme Court. By the same

token, the *ex parte Orders* issued on the 27th of May, 2016 must lapse with this recusal because the Bench on whose behalf the Orders were issued is no longer in existence. The said Orders cannot exist in futility.

[158] On the basis of the foregoing reasons, I hereby ***allow the application by Mr. Omtata and recuse myself from any further participation in this dispute as a Judge of the Supreme Court of Kenya.***

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

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA