REPUBLIC OF KENYA

IN THE SUPREME COURT

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

CIVIL APPLICATION NO. 11 OF 2016

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

VERSUS

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

THE SECRETARY, JUDICIAL SERVICE

COMMISSION ..... 2ND RESPONDENT

OKIYA OMTATA OKOITI ..... 1ST INTERESTED PARTY

LAW SOCIETY OF KENYA ..... 2ND INTERESTED PARTY

INTERNATIONAL COMMISSION OF JURISTS (K) .....1ST AMICUS CURIAE

KITUO CHA SHERIA ..... 2ND AMICUS CURIAE

RULING OF MOHAMMED IBRAHIM, JUSTICE OF THE SUPREME COURT

I. INTRODUCTION

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

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

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

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

II. BACKGROUND

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

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

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

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

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

(iv) *Pending the inter-partes hearing and determination of this application, this Honorable Court be pleased to issue conservatory order directing that the applicant will continue to discharge her constitutional, judicial and administrative duties as a Supreme Court justice, the Vice President of the Supreme Court and the Deputy Chief justice of the Republic of Kenya.*

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

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

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

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

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

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

(xi) *Pending the hearing and determination of the intended appeal, this Honourable Court be pleased to issue conservatory order directing the respondents, the Chief Registrar of the Judiciary and the Judiciary, that judges appointed prior to the 27th of*

August 2010, are eligible to apply for appointment to the offices of Supreme Court Justices; Deputy Chief Justice and Chief Justice respectively, notwithstanding that they have attained the age of seventy (70) years.

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

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

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

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

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

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

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

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

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

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

(8) *It is so ordered.*

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

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

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

(3) *The Court be pleased to issue an order staying execution of the entire judgement of the Court of Appeal delivered on 27th May, 2016 in Civil Appeal No. 6 of 2016 pending the hearing and determination of the intended appeal. For avoidance of doubt, the 1st respondent be stopped and/or barred from retiring the applicant*

or taking any steps to retire the 1st applicant or moving to replace him as judge in the Supreme Court of Kenya including placing any advertisements in the Kenya Gazette or daily newspapers to replace him.

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

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

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

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

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

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

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

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

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

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

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

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

(7) *It is so ordered.*

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

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

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

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

(4) Granted the urgency under which the hearing of the application was sought, and the public interest in this application, I hereby

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. *THAT the application herein be certified urgent and heard ex-parte in the first instance.*
2. *That the Honourable Chief Justice and President of the Supreme Court give directions for the hearing of the application herein by a single judge*

or alternatively two judge bench or alternatively five- judge bench without delay.

3. *THAT this Honourable Court review and/or set aside and vacate the orders issued ex-parte by Hon. Justice Njoki Ndungu on 27th May, 2016 in the matter herein.*
4. *THAT this Honourable Court do hereby consider and strike out the Notice of Appeal filed in the applicant's Application herein and dated 27th May, 2016.*
5. *THAT this Honourable Court do issue any interim orders allowing the Court, however constituted under the doctrine of necessity, to deal with substantively and consider the applicant's application and determine the same prior to the anticipated retirement of the Chief Justice, while upholding the cardinal rules of natural justice.*
6. *THAt this Honourable Court do issue orders declining to take up the intended appeal by the applicant herein in exercise of its constitutional and inherent powers to prevent abuse of court process and to uphold constitutionalism and the rule of law.*
7. *THAT the respondents/applicants costs be provided for.*

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

> "TAKE NOTICE that the Interested Party will raise a preliminary point of law at the hearing of this application, to be determined in limine on the following grounds:
>
> 1. *THAT this Honourable Court has no jurisdiction to entertain the instant application or any other application or appeal filed in respect of the judgement and order of the Court of Appeal in Civil Appeal No. 1*

of 2016, delivered on the 27th day of May 2016, because all its judges have either supported or opposed the contention that judges appointed under the repealed Constitution should retire upon attaining the age of 70 years.

2. *THAT by dint of Article 50(1) of the Constitution, jurisdiction of a court can only be exercised where the court is impartial. Otherwise, a Court which is not impartial is stripped of jurisdiction. Further and in particular:*
    a. *A court cannot exercise jurisdiction where doing so violates the enjoyment of the absolute right to a fair trial;*
    b. *A court which is not impartial has no jurisdiction under the Constitution;*
    c. *Jurisdiction must be declined where a court is so conflicted that it cannot be impartial.*
    d. *All matters must be presided over or decided by judges whose detachment and neutrality is not as clearly compromised as is the case with the current judges of the Supreme Court on the subject matter of the retirement age of judges appointed under the repealed Constitution.*
3. *THAT pursuant to Articles 50(1), 73(1)(a)(iii) and 73(2)(b) of the Constitution, the disqualification of all current Supreme Court judges from entertaining any applications or appeals filed against the judgement and order of the Court of Appeal delivered on the 27th day of May 2016, in Civil Application No. 1 of 2016, is mandatory and cannot be waived as the learned judges have an obligation to avoid participating in this case where they have taken sides and the grounds for their disqualification are undeniably clear.*
4. *THAT the issue herein is outright disqualification of all Supreme Court judges and not voluntary recusal of the judges.*

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

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

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

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

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

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

1. *THAT this application be certified as urgent and be heard on priority basis and in priority to Civil Application No. 11 of 2016, on a date to be allocated by the Court.*
2. *THAT the Court does (sic) declare that conservatory orders awarded in Civil Application No. 11 of 2016 to be irregular, null and void ab initio.*
3. *THAT the Court be pleased to vacate, discharge or set aside the conservatory orders dated 27th May, 2016 and issued in Civil Application No. 11 of 2016.*
4. *THAT the Court be pleased to strike out Civil Application No. 11 of 2016.*
5. *THAT the Court do disqualify itself from entertaining any other appeals or applications arising from the decision of the Court of Appeal in Civil Appeal No. 1 of 2016, delivered in Nairobi on May 27th 2016.*
6. *THAT the Court be pleased to declare that because it is disqualified from entertaining this matter, the decision of the Court of Appeal in Civil Appeal No. 1 of 2016, delivered in Nairobi on May 27th 2016, stands as the final decision in the matter.*

7. *THAT such other or further orders as may be just be made to meet ends of justice and to safeguard and protect the authority and dignity of this Honourable Court.*
8. *THAT the 1st respondent (Hon. Lady Justice Kalpana Rawal) be condemned to costs.*

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

In Civil Application No. 11 of 2016

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

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

(3) The Notice of preliminary objection filed by counsel for the applicant dated 30th May, 2016 to be served upon all parties and will be heard by the five judge bench on 2nd, 2016 at 10.00a.m.

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

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

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

In Civil Application No 12 of 2016:

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

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

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

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

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

In Civil Application No. 13 of 2016

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

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

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

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

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

III. JURISDICTION DEMYSTIFIED

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

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

> ***"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration … a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion'."***

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

> **"Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The**

facts are deemed agreed, as they are *prima facie* presented in the pleadings on record."

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

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

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

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

"[88] <u>The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the *Constitution of Kenya, 2010* (Article 163), a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts, has been established.</u> The exclusive, dedicated role of the Supreme Court under the Constitution takes several forms: for example, it has "original jurisdiction to hear and determine disputes relating to the elections to the office of President" [Article 163(3)(a)]; it is required to hear and determine as of right, on appeal, "any case involving the interpretation or application of [the] Constitution"; it "may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government" [Article 163(6)].

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

express our understanding, that in the case before us, *it is not possible to detract from the Supreme Court's authority to hear and determine all the relevant questions." (Emphasis mine).*

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

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

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

"It is settled law that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity-dead- and of no

legal effect whatsoever. That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost."

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

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

1. **<u>It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another</u>, and**
2. **The subject matter of the case is within its jurisdiction, and no feature in the case which prevents the court from exercising its jurisdiction; and**
3. **The case comes before the court initiated by the (sic) due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction".**

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

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

A court is competent to entertain a case:

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

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

a) **<u>Jurisdiction is a matter of substantive law no litigant can confer jurisdiction on the court where the Constitution or statute or any provision of the common law says that the court does not have jurisdiction.</u>**
b) **Jurisdiction cannot be assumed in the interest of justice.**
c) **Nothing shall be intended to be outside the jurisdiction of the superior court but that which specifically appears to be so and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged.**
d) **Although courts have great powers yet their powers are not limited. Their jurisdiction is confined, limited and circumscribed by the statute creating it.**
e) **The court is not hungry for jurisdiction.**
f) **Judges have a duty to expound the jurisdiction of the court and not expand it as by so doing the court will be usurping the functions of the legislature.**
g) **A court cannot give itself jurisdiction by misconstruing a statute."**

[31] From the foregoing persuasive caselaw, it emerges that for a quorate court; the question of whether a court has the requisite number of judges who are

legally required to constitute a bench becomes a jurisdictional question. It is with this finding that I am satisfied that Mr. Omtatah's preliminary objection goes to the jurisdictional competency of this Court to hear the matter before us. I am of the view that it must be heard first before any other preliminary objection in *Civil Application No. 11 or 12*. Mr. Omtatah raises a fundamental issue and as a matter of good order it must be settled first for the Court to proceed having settled the question that indeed the quorate bench is fully constituted and hence competent.

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

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

[34] However, even this issue can only be delved into by a Court that is satisfied that it is competently constituted and has the jurisdiction to hear and determine that issue. This issue is a preliminary objection that comes in these proceedings as a preliminary issue and where there are issues of conflict of interest which seek

to remove or disqualify judges from hearing the matter, then it is my conviction that all reason and logic will require that the Court does not delve into any issue until the question of conflict is resolved. No issue for determination before a court exists in a vacuum. All issues arise in the cause of action before the Court and are heard and determined within the matter before the Court. One cannot isolate the preliminary issue against the administrative powers of the Chief Justice and determine them first then proceed to determine whether the Court has the jurisdiction or competence to determine the matter before it. A judge cannot be said to recuse himself from hearing some issues and then properly sit to hear others. Recusal and disqualification has always to be seen within the broader spectrum of the subject matter in court and not the narrow spectrum of a particular issue for determination among the various issues that are before the court for determination. Consequently, I have reflected and I must first deal with the preliminary objection raised by Mr. Omtatah as read together with *Civil Application No. 13 of 2016*.

IV. THE PRELIMINARY OBJECTION BY MR. OMTATAH

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

[36] The Court agreed with his submissions and ordered that *Application No. 13 of 2016* and the preliminary objection in *Civil Application No. 11 of 2016* be

served on the applicant in *Civil Application No. 12 of 2016*. Senior Counsel Mr. Pheroze appearing with Mr. Kiragu sought leave to take instructions from their client on how to respond to this. Having been served with the preliminary objection and taken instructions from their client, the following day, they were able to participate fully in the hearing of Mr. Omtatah's preliminary objection.

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

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

V. SUBMISSIONS

a) Mr. Omtatah's submissions

[39] In raising his preliminary objection, Mr. Omtatah submitted that this Court sits at the heart of the Kenyan enterprise and it should always be protected at all costs. He contended that a court is properly constituted where it is staffed by the

requisite judicial officers be they Judges or Magistrates and that as such there can be no courts where the judicial officers are non –existent. He averred that where the concerned judicial officers are perceived as being impartial then access to justice is in itself at stake.

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

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

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

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

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

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

[45] Mr. Omtatah urged the Court to depart from the doctrine of necessity as applied by this Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others petition no. 4 of 2012*** *[2013] eKLR* (***Rai*** case) arguing that that principle was an out dated principle, Mr. Omtatah added that the reading of Article 163(2) of the Constitution was of a discretionary nature and as such the wording of the Article countenances this Court to decline jurisdiction in some occasions.

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

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

[48] Citizen Mr. Omtatah submitted that there was a need to distinguish between the duty of a judge to sit and the responsibility to sit. He contended that Article 50(1) as read with Articles 159(2)(e),73 and 75 of the Constitution requires that a judge should not hear a case in which his or her impartiality and independence may be questioned. He urged that the doctrine of the duty to sit contradicts this concept by forcing judges to rule in situations where their impartiality is questioned. He argued that even though there exists a relationship between the doctrine of necessity and the duty to sit, the concepts are in fact distinct in that the rule of necessity states that judges must be able to hear and determine a matter even where it tangentially affects the bench because our system of governance demands that the courts be available to make decisions. However, the circumstances in the matter currently before the Court do not allow the application of the rule of necessity.

[49] That the duty to sit must be limited only to the connotation based on judicial courage and dedication and must never be extended to a situation where the facts of the case as presented suggest that impartiality is patently evident. That the doctrine of duty to sit is an outdated doctrine that is ultimately unhelpful to 21st century questions of disqualification of a judge. It was further

submitted that the parties' right to a judiciary above suspicion outweighs any misplaced notion that there is shame in stepping aside from cases in which judges' impartiality is raised.

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

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

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

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

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

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

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

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

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

[58] As to whether the right to appeal was sacrosanct, the learned Counsel made reference to Article 24 of the Constitution and submitted that certain rights under the Constitution are subject to limitation and as such even the right to appeal can be limited. The right to appeal is not among the rights in Article 25 of the Constitution that cannot be limited. Only four rights under the Constitution could not be limited and one amongst those rights was the right to fair trial.

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

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

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

[62] Replying to a question as to whether the Supreme Court in exercise of its constitutional mandate could have been restrained by ongoing proceedings in the High Court? Learned Counsel submitted that the Court ought not to have pronounced itself in the manner in which it did in the **Salat** case for the simple reason that there were live proceedings before the High Court whose jurisdiction had been invoked by members of the Supreme Court bench.

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

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

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

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

[66] Counsel submitted that judicial authority is derived from the people and as such public interest was central. Consequently, it was submitted that when an issue before the Court, public interest must constitute a legitimate matter for consideration. That it was in the public interest that the Republic of Kenya must have a fully constituted Supreme Court of Kenya with members who do not have a cloud or doubts hanging over their heads.

[67] Learned Counsel argued that as long as each of the seven members of the Court was a person of integrity and credibility, public interest would be served by having a fully constituted Court. He assailed the suggestion that the Learned

Judges, now intended appellants in the matter before the Court, could be able to sit in judgment in their own causes as patently absurd. According to learned Counsel Sections 23, 24 and 26 of the Supreme Court Act cannot be deemed to have amended Article 163(2) of the Constitution. It was submitted that the provisions of the Supreme Court Act that permit a single judge to sit and issue orders were not contemplated by Article 163(2) of the Constitution.

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

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

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

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

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

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

[71] Learned Counsel Mr. Kilukumi, opposed the preliminary objection on behalf of Hon. Lady Justice Rawal. He contended that it was in the public interest that the highest Court in the land pronounces itself on the matters before it. He argued that the preliminary objection was meant to urge the Court to abrogate its constitutional mandate to sit. He emphatically submitted that the Court ought to distinguish public interest from narrow private interest of those who wish to have a say on who succeeds the Chief justice upon his retirement.

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

[73] Counsel cited Section 3 of the Supreme Court Act in support of the proposition that the Supreme Court is the final judicial authority in Kenya and

must in the circumstance be afforded the opportunity to interpret and apply the Constitution. It was submitted that the applicant was entitled, just like all other Kenyans, to access to justice as provided under Article 48 of the Constitution.

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

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

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

referred back to the JSC unlike the present matter where this Court is the ultimate forum.

[77] In reference to the judgement in the ***Salat*** case in which it is contended that some members of this Court expressed themselves on the question before the Court**,** counsel submitted that at paragraph 102 of the High Court judgment in ***Kalpana H. Rawal versus Judicial Service Commission and 4 Others*** *Petition 386 of 2015*, it was evident that the High Court found that the Supreme Court in ***Salat*** case never determined the issue of the age of retirement age of judges and as such the **Salat case** cannot be taken to be evidence of bias.

g) 2nd Amicus, Kituo cha Sheria

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

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

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

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

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

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

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

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

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

[86] Learned Counsel Mr. Nowrojee faulted the preliminary Objection by stating that it has not met the principles well set in relation to Preliminary Objections in the case of ***Mukisa Biscuit Manufacturing Company versus West End***

Distributors Lld *[1969]E.A 696*. He submitted that the preliminary objection was not valid as what was contained in the preliminary objection are matters of a factual nature which have to be ascertained and that what had been contested was an exercise of judicial discretion contrary to the principles set in the ***Mukisa Biscuit*** case. He contended that indeed the objection was devoid of any point of law and was laden with facts, which could be considered and properly determined in another forum.

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

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

[89] Learned Counsel Mr. Kiragu, appearing together with Mr. Pheroze, submitted that a judge was like any other litigant and Kenya was not the first jurisdiction where judges had gone to Court to have their rights protected. Mr. Kiragu argued that substantial justice demands that the applicants are heard and procedural technicalities must not be upheld. He pointed out that the preliminary objection ought to demonstrate how the Court as currently constituted would breach the rights to a fair hearing. He urged that there was no basis at all in trying to distinguish between a first appeal and a second appeal.

[90] Learned Counsel Mr. Kiragu while distinguishing the ***Hlophe*** *case,* argued that in that case, a majority of the judges were litigants while in the current

scenario, only two of the judges of the Supreme Court are litigants. He took the view that every case must be decided on its own peculiar facts.

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

VI. ANAYSIS AND DETERMINATION

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

[93] Before delving into the determination of this matter, I would like to clarify an issue raised by learned Counsel Mr. Pheroze in opposing Mr. Omtatah's Preliminary Objection.The learned Senior Counsel submitted that as a matter of fact, Mr. Omtatah's Preliminary Objection was not a competent one. That it did not fall within the four corners of the law governing preliminary objections as stated in the ***Mukisa Biscuits*** case. In particular, he contended that it did not raise a pure point of law. He argued that apart from submitting that the Court lacks jurisdiction, which issue he contended that Mr. Omtatah proceeded to concede and urged the Court to decline to exercise that jurisdiction, all the other grounds were matters of fact which do not qualify to be raised by way of a preliminary objection.

[94] I agree with Senior Counsel on the jurisprudence in ***Mukisa Biscuits*** which I have already referred to in this ruling. However, I would like to reiterate that the matter before us took a peculiar trajectory, a fact that was repeatedly

stated by the Hon. Chief Justice in Court. More importantly, Mr. Omtatah's Notice of Motion application, *Civil Application No. 13 of 2016* was indeed collapsed into his Preliminary Objection and heard together. As a result, besides the points of law set out in the Preliminary Objection that Mr. Omtatah canvassed, there was also the *Civil Application No. 13 of 2016* which was supported by an affidavit. This was unusual combination but since the two raised the same issue in different ways, and since all counsel accepted to proceed on this basis, then Mr. Omtatah's Preliminary Objection together with the Notice of Motion application to disqualify allowed reference to evidence. I hasten to add that the Memorandum which Mr. Omtatah referred to is a matter in the public domain.

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

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

[97] In determining this matter, there is also need for a distinction to be made between disqualification of a judge which boarders on the likelihood of bias and recusal where a judge at the instance of a party or on his own volition, may decide to withdraw from participating or delving into a matter because of conflict of interest or bias. Further disqualification is mostly triggered by the parties; hence one seeks an express order of disqualification by making a formal application. Since I did not at the first instance raise the issue of recusal on my own, I must now deal with matter, the Preliminary Objection by Omtatah and *Civil*

Application No. 13 of 2016, on the basis that it is an application for disqualification at the instance of an application by one of the parties.

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

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

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

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

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

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

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

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

[105] Even where a judge finds that even after holding a particular position, he is still able to rise above that position and is willing to be persuaded, in such a case, a judge may wish to possibly persuade the parties that he wishes to hear the matter and he will be open-minded and objective. Where parties after being so informed agree, the judge may continue to sit. This happened in the case of ***National Bank of Kenya vs Anaj Ware Housing Corporation limited,*** *Petition No. 36 of 2014,* in which I had heard the matter as a High Court judge. When the matter finally reached the Supreme Court on appeal, I revealed to the parties that I had heard the matter in the High Court and invited the parties if they so wished that I opt out. However, I indicated that I was open to be convinced otherwise on merit since I had made my decision in the High Court by only applying the principles of *stare decisis*. Both parties before the Court submitted that they did not wish that I recuse myself, I heard the case and agreeing with my colleagues, we rendered a unanimous decision that reversed my holding in the High Court.

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

> *8. I aver that there is practically no way the Supreme Court can entertain the proceedings herein, or any other on the subject matter, given that all the seven judges of the Court are disqualified from entertaining the case because they have in one way or other publicly taken a position on the*

question of whether judges appointed under the repealed Constitution should retire at age 70 or 74 years.

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

Further and in particular:

a. *Chief Justice Dr. Willy and Hon. Justice Smokin Wanjala, being members of the 1st respondent which had decreed that the judges must retire upon attaining the age of 70 years, cannot preside in their own cause.*
b. *Hon. Lady Justice Kalpana Rawal and hon. justice Philip Tunoi are litigants who have challenged the decision to retire them at the age of 70 years, hence, they cannot preside in their own cause.*
c. *Hon. Justice Mohammed Ibrahim, Hon. Justice Ojwang, and Hon. Justice Njoki Ndungu were part of the bench which, in Supreme Court Petition No. 23 of 2014, expressed itself in support of Hon. Justice Philip Tunoi's and Hon. Lady Justice Kalpana Rawal's position that the retirement age of judges appointed under the old Constituion was 74 and not 70 years.*
d. *The Judicial Service Commission has made a finding of misconduct in the subject matter against Hon. Lady Justice Kalpana Rawal, Hon. Justice Philip Tunoi, Hon. Justice Mohammed Ibrahim, Hon. Justice Jackton Ojwang, and Hon. Justice Njoki Ndungu, and admonished them.*

[108] However, before the proceedings started, I pointed out to Mr. Omtatah that I was not a member of the bench in the ***Salat*** case. As a result, he applied to the Court for that part of paragraph 8 to be expunged from his Supporting

Affidavit, which application was acceded to. It is also my view that the matter pertaining to a letter written by Hon. Justice Ojwang, Lady Justice Njoki and myself, leading to a complaint by Mr. Apollo Mboya to the JSC 'strictly' did not deal with the question of retirement age. I will hesitate to say more on this as there are still pending live proceedings relating to the decision of JSC on the finding of misconduct that lead to admonishment of the said judges on the basis of that letter. Having said this, I agree with paragraph 8 of Mr. Omtatah's Supporting Affidavit that previously and in particular,even before Hon. Lady Justice Rawal and Hon. Justice Tunoi filed their matters in the High Court, I had given an opinion on the question whether judges appointed before the Constitution 2010 should retire at the age of 70 or 74.

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

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

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

…

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

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

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

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

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

(iii) The Judiciary do formally acknowledge and express on record, to which we be accorded access, our retirement age of

seventy-four (74) years, as applied when we were employed by the Kenya judiciary, and this be honoured and safeguarded.

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

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

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

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

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

[113] Notably, enough, at that time, there was no litigation between the parties and I did not consider at that time that it was even possible for any of us the judges to refer the matter to court. I verily believed that the matter will be mutually settled and even at one stage, when the matter became contentious, I was among the judges who proposed that the matter be referred to arbitration. With hindsight, I am now of the view that that memorandum ought not to have been written or that opinion given. At that time, I strongly believed that litigation was remote, if not impossible.

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

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

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

to one conclusion: *that public participation, public interest and the people has to come first* where a judge, more so a Supreme Court Justice, sits to hear and determine a matter.

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

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

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

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

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

[121] In an opinion I gave to the Chief Justice, which is my duty to disclose, and also shared with other judges of the Court, I opined that the number of judges of the Supreme Court is insufficient because it could lead to a crisis due to quorum deficits where a judge may be unwell or a vacancy has arisen. We cannot also rule out the possibility of other scenarios happening leading to the absence of a judge(s). In the said opinion of 30th May, 2012, I stated:

> ***"... It is, therefore, of great significance and realization that a Bench of seven (7) Supreme Court Judges is not***

appropriate and may in fact be a great danger in the future and could lead to a Constitutional crisis if the Court lacks quorum.

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

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

[123] Mr. Omtatah submitted that when the judges of the Constitutional Court of South Africa found that they were conflicted and that as a result it was not able for the Court to constitute a bench, they refused to grant leave to appeal. He urged that we should be persuaded to therefore, where we find that we are conflicted and cannot constitute a bench to hear this matter, let the Court of Appeal decision stand. The applicants invoked the Doctrine of Necessity and

sought to distinguish the ***Hlophe*** *case*. Mr. Kilukumi argued that in the ***Hlophe*** case, the matter was being taken back to the Judicial Service Commission, hence not closed unlike in the case before us where this is the final stage.

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

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

[126] As a judge of the Supreme Court, I have considered and I firmly believe that I should be guided by my oath of office. My fidelity to the law of the land is first to the Constitution which enshrines the sovereignty of the people. It is my solemn belief that the right thing for me to do therefore, which I hereby do is to invoke my oath of office thus:

> **"I <u>Mohammed K. Ibrahim</u>, a judge of the Supreme Court, do swear in the name of the Almighty God to diligently serve the people and the Republic of**

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

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

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

[129] I hereby order that a certified copy of this ruling be placed in *Civil Application No. 13 of 2016* to constitute as part of the said record. I would

propose that costs of this preliminary objection as heard together with *Civil Application No. 13 of 2016* to be costs in the cause.

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

.....

MOHAMMED IBRAHIM

JUSTICE OF THE SUPREME COURT

I certify that this is a true
Copy of the original

REGISTRAR
SUPREME COURT OF KENYA