REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 4 OF 2012

-BETWEEN-

1. JASBIR SINGH RAI
2. IQBAL SINGH RAI
3. DALJIT KAUR HANS } **.....PETITIONERS**
4. SARJIT KAUR RAI

-AND-

1. TARLOCHAN SINGH RAI, *ESTATE OF*
2. JASWANT SINGH RAI
3. SARBJIT SINGH RAI } **.....RESPONDENTS**
4. RAI PLYWOODS (KENYA) LIMITED
5. SATJIT SINGH & RAM SINGH, *ESTATE OF*

(An application for Review of the Judgment of the Court of Appeal, Civ. Appeal No. 63 of 2001 dated 30th September, 2002)

RULING

A. BACKGROUND

[1] The matter before the Court is a petition from Court of Appeal Civil Appeal No. 63 of 2001 at Nairobi, arising from contested High Court proceedings in Winding Up Cause No. 44 of 1999.

[2] The petitioners, being aggrieved by the decision of Ransley, J appealed to the Court of Appeal, where a three-judge Bench presided over by Justice A.B. Shah

(as he then was), dismissed the appeal under section 210 of the Companies Act (Cap. 486, Laws of Kenya). It is to be noted that at the time, the Court of Appeal was the final appellate Court. Subsequently, after judgment was delivered, certain facts came to light, indicating misconduct and/or misbehaviour on the part of the presiding Judge. Such facts indicated that there had been a collusive relationship between the Judge and one of the respondents.

[3] This revelation prompted the petitioners to lodge their grievance before the Integrity and Anti-Corruption Committee, resulting in Justice Shah's suspension, on 15th October, 2003 (*Gazette Notice* No. 7280 of 2003). The President further initiated an inquiry on the Judge's conduct. However, before the inquiry began, the Judge opted to retire. The said Court of Appeal judgment was the basis of the Judge's suspension, and of his decision to retire.

[4] Upon the promulgation of the Constitution of Kenya, 2010 and the enactment of the Supreme Court Act, 2011 (No. 7 of 2011), the petitioners moved the newly-established Supreme Court, seeking redress, by invoking the Supreme Court's 'special jurisdiction' under Section 14 of the Supreme Court Act, by way of petition.

[5] While the petition was pending, this Court delivered pertinent Ruling in another matter, ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & Two Others,*** Supreme Court Application No.

2 of 2011 (***Macharia Case***). The burden of that Ruling, in relation to the present case, was the declaration of *Section 14 of the Supreme Court Act to be unconstitutional,* insofar as it purported to give the Supreme Court a 'special jurisdiction'.

[6] Soon after the Ruling in the ***Macharia Case***, and as the petition herein was pending before the Supreme Court, the respondents raised a preliminary objection to the petitioners' case. They contended that the Court *lacked jurisdiction* to entertain the matter.

[7] Meanwhile, the petitioners lodged an application seeking the recusal of Tunoi, SCJ from sitting on the Bench hearing the matter. The application for recusal was heard first and dispensed with. The Court, in a Ruling of 6th February, 2013 dismissed the application for recusal on grounds, *inter alia*, of necessity.

[8] In response to the preliminary objection on jurisdiction, as lodged, the petitioners applied to the Court for a review of the ***Macharia*** Ruling, on the basis that the declaration of Section 14 of the Supreme Court Act, 2011 as unconstitutional was "wrong", and ought to be reversed. Consequently there were, technically, two applications before the Court: one by the respondents contesting jurisdiction, and the other by the petitioners, urging the Court to depart from the ***Macharia*** decision.

[9] The petitioners invoked the Supreme Court's jurisdiction under Section 14 of the Supreme Court Act, 2011 which clothed the Supreme Court with a 'special jurisdiction'. The respondents, by contrast, have sought to strike out the petition, on the basis of the ***Macharia*** decision, in which the Court thus held:

> ***"Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer 'special jurisdiction' upon the Supreme Court, contrary to the express terms of the Constitution".***

It was the perception of the applicants herein that the said Section 14 of the Supreme Court Act stood to their advantage, as it had thus provided:

> *"(1) To ensure that the ends of justice are met, the Supreme Court shall, within twelve months of the commencement of this Act, either on its own motion or on the application of any person, review the judgments and decisions of any judge –*
>
> *....*
>
> *(c) who resigns or opts to retire, whether before or after the commencement of this Act, in consequence of a complaint of misconduct or misbehaviour."*

[10] Meanwhile, the Law Society of Kenya applied to the Court to be admitted as *amicus curiae*, in the proceedings. LSK's position was that, whether the

declaration of Section 14 as being unconstitutional was proper or not, was a matter of constitutional significance, and, in line with its objectives under Section 4 of the Law Society Act (Cap. 18 Laws of Kenya), it had an obligation to assist the Court in determining the matter. The Court, on 13th June, 2013 allowed LSK's application and admitted it as *amicus curiae*, on terms that it confines its submissions to the validity of Section 14, and whether the Supreme Court could review its earlier decision.

B. LAW, PRINCIPLES, AND ISSUES OF MERIT: ESSENCE OF THE SUBMISSIONS

(a) Is the Supreme Court bound by its earlier Decisions?: The Petitioners' Case

[11] Learned counsel, Mr. Nowrojee for the petitioners, submitted that the Supreme Court is not bound by the ***Macharia*** decision. He urged that the Constitution anticipates that the Court may need to depart from its judgment, Article 163(7) stipulating that: "*all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.*"

[12] Counsel cited ***Dodhia v. National & Grindlays Bank Ltd*** [1970] EA 195, in which the former Court of Appeal for East Africa had thus observed [*per* Sir William Duffus, V.-P. at p. 207G]:

> ***"I entirely agree with my Lord President that this Court must, as the ultimate Court of Appeal, have a similar power to that***

formerly exercised by the Privy Council when it was the final Court of Appeal for Kenya. The duty of this Court in Kenya is to decide any case coming before it according to the laws of Kenya and this Court may be unable to do so if it is bound to follow a previous decision, which is clearly contrary to law and which this Court feels that it would be wrong to follow, and the Court must, therefore, as the ultimate Court of Appeal, be able to depart from a previous decision when it appears right to do so."

The Court, in that case, held that as the final Court of Appeal for East Africa, it would *normally* regard its previous decisions as binding, while remaining free in both civil and criminal cases to depart from such previous decisions when it was *right to do so*.

[13] Counsel further invoked the case, ***Kiriri Cotton Co. v. Ranchhodass Devani*** [1958] EA 239, in which the East African Court of Appeal stated that it was not bound to follow its own previous decision if such decision was given *per incuriam*. The Court in that case, remarked that the principle of *stare decisis* was subject to *certain qualifications*: the Court could choose to rely on either of its previous decisions, where two of its decisions are conflicting; the Court would not follow its previous decision if it was inconsistent with a decision of the Privy Council or of the House of Lords (which were higher Courts in the colonial

judicial hierarchy); and it was not bound to follow a decision given *per incuriam*.

[14] Counsel relied on a decision of the Court of Appeal in England, ***Morelle v. Wakeling*** [1955] 1 All E.R. 708, in proposing those circumstances in which a decision would have been given *per incuriam*, namely, where a decision is given in ignorance or forgetfulness of some inconsistent legislation or binding authority, consequently causing part of the reasoning, or some steps in arriving at the decision, to be wrong.

[15] Counsel urged that the ***Macharia*** decision was given *per incuriam*, insofar as the Court, in finding Section 14 of the Supreme Court Act, 2011 to be unconstitutional, *held that Article 163 of the Constitution provided for the jurisdiction of the Supreme Court exhaustively*. The Court had stated (at paragraph 69):

> ***"Article 163 of the Constitution provides for the jurisdiction of the Supreme Court in exhaustive terms, though leaving room for Parliament to prescribe further appellate jurisdiction***."

Counsel urged that this statement of law was wrong, because the jurisdiction of the Supreme Court is not stipulated in Article 163 *only,* but it is also found in other Articles in the Constitution: for instance, **Article 58(5)** which confers jurisdiction on the Supreme Court to determine the validity of a declaration of a *state of emergency*.

[16] Another example cited by counsel was **Article 168(8)** of the Constitution, which confers jurisdiction on the Supreme Court to hear an *appeal from a tribunal* that has recommended the removal of a Judge. Counsel submitted that it was *per incuriam* to state that Article 163 *exhaustively* provided for the jurisdiction of the Court, while Articles 58 and 168 *also* provide for the same. Counsel urged that, to *harmonize these three Articles* that provide for the jurisdiction of the Court, the Court ought to review the ***Macharia*** decision, for that decision wrongly attributes *exhaustiveness* to Article 163, on the question of *jurisdiction*.

[17] Counsel urged a further ground of *per incuriam* in the ***Macharia Case:*** the Court had failed to notice that *no determination on Section 14 of the Supreme Court Act was sought,* and that the matter before the Court had been instituted by *application* and not by *petition*. Counsel submitted that the ***Macharia Case*** was not instituted to seek relief under Section 14 of the Supreme Court Act, and that the Court proceeded on a misconception in arriving at its determination; and so its decision was *per incuriam*.

*(b) The Earlier Decision was **obiter dictum**, not binding: Petitioners' Further Contention*

[18] Counsel urged that the Court's findings with regard to Section 14 of the Supreme Court Act, 2011 were *obiter dicta*, in that they went "beyond the occasion and laid down what was unnecessary for the purpose at hand." Counsel

supported this argument by invoking the observations of the Court (paragraph 66 of the decision):

> ***"This holding would have been enough to dispose of the application save that there remains the question as to whether section 14 of the Supreme Court Act is unconstitutional."***

Mr. Nowrojee urged that what the Court was called upon to determine was whether or not to grant leave to appeal against the decision of the Court of Appeal in Civil Appeal No. 181 of 2004, and it was not necessary for the Court to delve into the issue of the *validity of Section 14 of the Supreme Court Act, 2011*. He differed with the observation of the Court, that the issue of the validity of Section 14 had been argued by the third respondent though "only tangentially," while the depositions of the other respondents had brought the issue "to the fore." Instead, he contended that the respondents' affidavits had not brought "to the fore" the said issue.

[19] Counsel invoked the legal-redress maxim, *ubi jus ibi remedium*: "there is no right without a remedy." He urged that the petitioners should not be *left without a remedy,* submitting that the petitioners had a right to *fair hearing* before an impartial and independent Court: and this, at the time of the incident, was true under Section 77 of the 1969 Constitution (now repealed) – just as it is today, under Article 50 of the Constitution of 2010. This right, counsel urged, was

grossly violated at the hearing and determination before the Court of Appeal – yet the petitioners had no remedy by way of an overturning judicial order. Counsel urged that *the Constitution* proffered Section 14 of the Supreme Court Act, 2011 as the basis of redress which, however, the ***Macharia*** decision had denied. Counsel submitted that the scope of a party's rights under Article 25 of the Constitution cannot be limited despite *any other* provisions, including that relating to *the Supreme Court's jurisdiction under Article 163(3).* Learned counsel urged that, by the ***Macharia*** decision, the Court had overlooked the terms of Article 22(1) of the Constitution which thus read:

> ***"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."***

Counsel also urged that the ***Macharia*** decision stood in departure from the *right to a fair trial* as provided for in Article 25 of the Constitution.

[20] Learned counsel submitted that the Court, bearing in mind the fundamental-rights provisions of the Constitution, has an obligation to resort to its *inherent powers*, to ensure that the ends of justice are met. For this proposition counsel relied on the Indian Supreme Court decision, ***Manohar Lal Chopra v. Bahadur Rao Raja Seth Hiralal*** (1962) S.C. 527, and on the following passage:

"The inherent power has not been conferred on the court, it is a power inherent in the Court by virtue of its duty to do justice between the parties before it."

He urged that the Court was under obligation to exercise its inherent power in arriving at its decision in the ***Macharia Case;*** and that it was not the *legislative intention* to leave unredressed the tainted judgments of the past. Counsel submitted that the Court had improperly perceived its inherent powers as being limited to operational situations, and administrative matters. By no means, in the circumstances, it was urged, had Article 163 constrained the legislative initiative in the enactment of Section 14 of the Supreme Court Act.

(c) Retired Judge's Decision should not Remain Standing: The Position of the amicus curiae

[21] Learned counsel, Mr. Gichuhi urged the Court to depart from the decision in the ***Macharia Case.*** He urged that the ***Macharia*** decision was bad, and that a bad judgment cannot be allowed to stand, where the Judge who made it was removed. Counsel submitted that the Sixth Schedule to the Constitution (Section 23) provides for a *vetting process* for Judges and Magistrates, and Article 10 gives the guiding principles to be applied during the vetting. Counsel submitted that Article 10(2)(b) (which includes in the declared "national values and principles of governance," human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized)

was not considered in the ***Macharia Case***. The *amicus curiae* cited the Vetting of Judges and Magistrates Act 2012 (No. 2 of 2012), particularly Section 18, in support of his submission that Judges had an obligation to evince fairness and impartiality.

[22] Mr. Gichuhi urged the position of the *amicus curiae* as resting on the foundations of Articles 159(1) [which declares that "Judicial authority is derived from the people"] and 259 [which declares the manner of interpretation of the Constitution: for instance, a manner that "promotes its purposes, values and principles"; that "advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights"] of the Constitution. Counsel invoked the provision of the Constitution (Article 25 (c)) to support the argument that the *right to a fair trial* cannot be limited; and he relied on Article 48 which provides that: "The State shall ensure access to justice for all persons…" Counsel urged that the provision in question, Section 14 of the Supreme Court Act, 2011 had been intended for ensuring *access to justice* in cases where a fair hearing was denied, in the previous political dispensation.

[23] Counsel submitted that evidence of lack of impartiality on the part of a Judge raises a *constitutional question*, namely, denial of the right to a fair hearing: and that, on this account, this Court should depart from the earlier decision in the ***Macharia Case.***

(d) Is it tenable in Law for the Supreme Court to depart from its earlier Decision?: The Case of the Second and Third Respondents

[24] Learned Senior Counsel, Mr. Oraro urged the Court not to depart from the decision in the ***Macharia Case.*** It was counsel's submission that, this being the final Court, it is bound by its decision and, under Article 163 of the Constitution, it is not given a free hand to depart from its previous decisions; it may only do so where there are *compelling reasons*.

[25] Learned counsel urged that his client's position was, in fact, the one supported by some of the authorities relied on by the petitioner: ***Dodhia v. National & Grindlays Bank Ltd*** [1970] E.A. 195; ***Kiriri Cotton Co. v. Ranchhodass Devani*** [1958] E.A. 239; ***Young v. Bristol Aeroplane Co. Ltd*** [1944] 2 All E.R. 293 (CA), [1946] A.C. 163 (HL). That position is consistent with the Court of Appeal decision in England which was supported on appeal to the House of Lords – as rendered by Lord Greene, MR [1944] 2 All ER 293 at p.300:

> ***"On a careful examination of the whole matter we have come to the conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are [as may be summarized]: (i) the court is entitled, and bound to decide which of two conflicting decisions***

of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly, overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The court is not bound to refuse to follow a decision of its own if it is satisfied that the decision was given *per incuriam."*

[26] From the foregoing set of precedents, Mr. Oraro submitted that, while it was the case that the Supreme Court *could* depart from its previous decision, it may do so only for substantial cause, and in exceptional circumstances. Applying that principle to the facts of the moment, learned counsel urged that, irrespective of whether the Supreme Court was inclined to take a strict or liberal stand, regarding the doctrine of *stare decisis*, no ground had been established in this case, to warrant a departure from the ***Macharia*** decision.

(e) The Constitutionality of Section 14 of the Supreme Court Act: The Case of the Second and Third Respondents

[27] On the constitutionality of Section 14 of the Supreme Court Act, it was learned counsel's submission that Parliament was not granted power by the Constitution to make any law granting the Supreme Court original jurisdiction as envisaged by Section 14. He submitted that the power of Parliament to enact legislation in respect of the Supreme Court was for the following purpose:

(i) to confer appellate jurisdiction from any other court or tribunal; and
(ii) to make further provisions for the operation of the Supreme Court.

Counsel submitted that Section 14, by purporting to confer upon the Supreme Court 'special jurisdiction' entailed a contravention of the Constitution. To buttress this point, counsel cited the Canadian Case, ***R v. Demers*** (2005) 1 LRC 763, in which the Supreme Court considered the issue of division of powers (page 275):

"14. We will first examine the issue as to whether the impugned provision falls within Parliament's criminal law power under S.91(27) of the Constitution Act 1867, or whether as the appellant contends, it is ***ultra vires.***

15. Whenever an issue of division of powers arises, the first step in the analysis is to characterize the 'pith and substance' of the impugned legislation. In order to determine the pith and substance of any legislative provision, it is necessary to examine that provision in its overall legislative context."

It was counsel's submission that the legislative power of Parliament was as specified in the long title to the relevant enactment; in the case of the Supreme Court Act:

"to make further provision with respect to the operation of the Supreme Court pursuant to Article 163(9) of the Constitution and for connected purposes."

Counsel also relied on the High Court of Trinidad and Tobago case, ***Trinidad & Tobago Civil Rights Association & Another v. Attorney-General*** [2006] 3 LRC, where the Court, alluding to the doctrine of separation of legislative, executive and judicial powers, observed:

> ***"...it is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government."***

It was counsel's submission that Parliament cannot grant jurisdiction to the Supreme Court as it purported to do in Section 14 of the Supreme Court Act.

[28] On retrospective application of Section 14 aforesaid, it was counsel's submission that, as a general rule, all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are *prima facie* prospective; and any retrospective effect can only be given by express words, or necessary implication, if that appears to be the intention of the Legislature. Such prospective application, it was urged, is anchored on the acknowledgement that the rights of parties accrue at the time of occurrence of the event.

[29] It was counsel's submission that, by Section 14, Parliament had enacted a statute which not only creates "special jurisdiction", but extends it to apply to a

period prior to the promulgation of the new Constitution, by using the words "before or after the commencement of this Act." Sections 14(1)(a) and 14(1)(c), thereby purport to create a special jurisdiction applying well before the Constitution came into force, and before the Supreme Court was established; and this operates to affect rights which accrued before the Constitution was promulgated.

[30] Learned counsel contested the petitioners' contention that the Court's statement in the ***Macharia Case,*** regarding Article 163 of the Constitution, by any means rendered that decision *per incuriam*. On the contrary, counsel urged, both Article 58 (regarding a state of emergency) and Article 168(8) (regarding appeal from the decision of a Judge removed) confer a jurisdiction that is anchored in *the Constitution itself* – rather than a jurisdiction emanating from Section 14 of the Supreme Court Act, 2011.

[31] Mr. Oraro submitted that in the ***Macharia Case,*** the issue of the constitutionality of Section 14 of the Supreme Court Act was by no means a marginal one. Mr. Macharia, in that case, had sought leave to appeal; and Section 14 of the Act required that the Court be moved by petition; and both sides in the contest had elaborately canvassed this question.

[32] Learned counsel went further to urge that a question as to the validity of legislation, inherently, could not be regarded as *obiter dictum* where it bears

relevance in a cause. For, by virtue of Article 2(1) of the Constitution, a duty is placed on "all persons and all State organs" to ensure that the Constitution is given effect. And, as Kenya has evolved from a regime of parliamentary supremacy to that of the supremacy of the Constitution, the Court's voice in the interpretation of statute law is an ultimate premise.

[33] Learned counsel adverted to the broad principle invoked by the petitioners: that there can be no right without a remedy (*ubi jus ibi remedium*). Whereas the principle is valid, Mr. Oraro submitted, its application in a matter such as the instant one, was dependent on the Court, in the first place, being possessed of *jurisdiction* – a principle well exemplified in case law: ***Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited*** [1989] KLR 1.

[34] On the question whether or not under Articles 25 and 50 of the Constitution the "right to a fair hearing" can be limited, learned counsel urged that this was beside the point, on the facts of the instant matter, as the Court must in the first place be a valid bearer of *jurisdiction*. Counsel urged that although Section 3 of the Supreme Court Act, 2011 entrusts certain roles to the Court, such as to "assert the supremacy of the Constitution and the sovereignty of the people of Kenya", this presupposed, for any given question, that the Court had been duly vested with *jurisdiction* – and the said Section 3 itself was not designed to create jurisdiction. Thus, Section 14 of the Act was the clear example of non-conformity

with the Constitution, though the remainder of the Statute, on the facts of the instant matter, had occasioned no inconsistency with the terms of Article 163(9).

[35] To the petitioners' contention that it was incumbent on the Supreme Court to deploy *inherent powers* to ensure that their grievance found just redress, Mr. Oraro submitted that inherent powers were girded with limitations: they are for *ensuring that ends of justice are met* – but not for conferring jurisdiction, where it is not granted.

[36] Learned counsel submitted that the petitioners' case against the ***Macharia*** decision amounts to a quest for alternative meanings and perspectives to the concept of "fair trial": but in principle, the mere existence of alternative meanings is not a proper ground for the Court to depart from its earlier decision. He submitted that this Court should not depart from its decision in the ***Macharia Case.***

[37] And consequently, counsel urged, that as Section 14 of the Supreme Court Act had been declared unconstitutional, the petitioners cannot ground their case upon it. Besides, counsel submitted, the Court though having the power to depart form its previous decision, it had not been shown that there were any substantial or exceptional circumstances warranting such departure. Counsel, thus, prayed for a dismissal of the petition.

C. ANALYSIS

(a) Preamble

[38] The ultimate questions for determination in this matter fall in a limited set, namely: (i) whether the Supreme Court can depart from its earlier decision? (ii) If yes, in what circumstances is such a departure tenable? (iii) On the facts and determination of the ***Macharia Case***, does it call for departure? (iv) Does the ***Macharia Case,*** on the merits, meet the baseline of principles for a departure?

(b) Can the Supreme Court depart from its previous Decision?

[39] It is perhaps too late in the day to pose this question which has been repeatedly addressed by scholars and jurists in the past, and the answer to which is now clear enough. The following passage in Benjamin Cardozo's ***The Nature of the Judicial Process*** (New Haven: Yale University Press, 1921) [p. 149] illuminates today's reality:

> ***"In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay***

one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

[40] This is a clear perception of the doctrine of precedent in the functioning of the superior Courts in the common law tradition. The message is simply this. As a matter of consistent practice, the decisions of the higher Courts are to be maintained as precedent; and the foundation laid by such Courts is in principle, to be sustained. This, of course, leaves an opening for the special circumstances which may occasionally dictate a departure from previous decisions.

[41] Whether or not the apex Court will adhere to its precedent, or depart therefrom, is dependent on that Court's perception of the claims of justice and equity, or of the fundamental constitutional or related principles coming to bear upon the issues raised.

[42] The immediate pragmatic purpose of such an orientation of the judicial process, is to ensure *predictability, certainty, uniformity* and *stability* in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations.

[43] In principle therefore, it follows that this Court, an apex Court, can indeed depart from its previous decision, for good cause, and after taking into account legal considerations of significant weight.

[44] Such a latitude for departure from precedent exists not only in principle, and from well-recorded common law experience, but also by virtue of the express provision of the Constitution. Article 163(7) of the Constitution of Kenya 2010 thus stipulates:

> ***"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."***

[45] Such a position in the law is supported also by comparative judicial experience. In ***The Bengal Immunity Company Limited v. The State of Bihar and Others*** [1954] INSC 120, the Indian Supreme Court thus held:

> ***"There is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public. Article 141 which lays down that the law declared by this Court shall be binding on all Courts within the territory of India quite obviously refers to Courts other than this Court. The corresponding provision of the Government of India Act,***

1935 also makes it clear that the Courts contemplated are the Subordinate Courts."

[46] There are other grounds of substance which show that the Supreme Court of Kenya *may* depart from its previous decisions of precedent-value. In this regard, the purpose and intent flows from two complementary Articles. Article 159 which declares that the judicial authority is derived from the people, further states that: "the purpose and principles of this Constitution shall be protected and promoted"; and Article 259 (1) thus stipulates:

"This Constitution shall be interpreted in a manner that…permits the development of the law."

The inference is to be drawn that the Supreme Court, if it is to "develop the law", has to have the liberty to depart from previous decisions such as may stand as a constraint to the growth of the law.

[47] Such an inference equally flows from Section 3 of the Supreme Court Act, 2011 which thus provides:

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

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

(b) provide authoritative and impartial interpretation of the Constitution;

(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth....”

[48] Such are functions both extensive and dynamic, as must needs be reposed only in a fully mandated Court, able to consider the merits of each question coming up before it, and to chart uninhibited courses of growth in the law.

[49] It is right, therefore, that in the submissions before this Court, none of the counsel urged that it was not possible to depart from our previous decision. Counsel, as we understood it, no more than underlined the need for fidelity to the principle of *stare decisis*, while urging that only in the most exceptional circumstances, should there be a departure from this principle.

[50] For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision was an *obiter dictum* (side-remark), or was given *per incuriam* (through inattention to vital, applicable instruments or authority). A statement *obiter dictum* is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the

final decision of the case. And a decision *per incuriam* is mistaken, as it is not founded on the valid and governing pillars of law.

[51] Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at *per incuriam*, merely because it is thought to be contrary to *some broad principle*, or to be out of step with some broad trend in the judicial process; the test of *per incuriam* is a strict one – the relevant decision having not taken into account some *specific* applicable *instrument, rule* or *authority*. This position is illustrated by the English House of Lords judgment in ***Cassell & Company Limited v. Broome*** [1972] 2 WLR 645, in which the Court of Appeal's perception of ***Rookes v. Barnard*** [1964] AC 1129 as being *per incuriam* was the subject. The relevant passage (per Lord Reid) reads:

> ***"I am driven to the conclusion that when the Court of Appeal described the decision in*** *Rookes v. Barnard* ***as decided*** *per incuriam,* ***or "unworkable," they really only meant that they did not agree with it....***
>
> ***"When this House undertakes a careful review of the law it is not to be described as acting*** *per incuriam* **or** *ultra vires* ***if it identifies and expounds principles not previously apparent to the counsel who addressed it or to the judges and text-book***

writers whose divergent or confusing expressions led to the necessity for the investigation."

[52] The House of Lords, in ***R v. Kansal*** [2001] UKHL 62, had to decide on an application to review its previous decision, and overturn the holding in ***R v. Lambert*** [2002] 1 LRC 584. In the ***Lambert Case*** it had been held by a majority that Section 22 (4) of the Human Rights Act, 1998 as read alongside Section 7(6), made a distinction between criminal trials and appeals, and did not permit a defendant in proceedings lodged by a public authority to rely on "Convention rights" after 2nd October, 2000 in cases in which trial had taken place before that date but appeal was lodged after. Although a number of the Law Lords were of the opinion that the decision in ***Lambert*** was wrong, a majority of four to one declined to overturn it.

[53] It is apparent there were *policy* and *practical considerations* for the majority decision in the ***Kansal Case***. This emerges from the following statement by Lord Slynn:

"As Lord Steyn has written in his speech we are dealing 'only with a transitional provision on which the House has very recently given a clear-cut decision' and I do not think it right because there is one change in the composition of the Appellate Committee, and despite the skilled arguments on behalf of the intervenors, for the House to depart from the decision in ***Lambert.***"

[54] Such a pragmatic perception in the ***Kansal Case*** clearly emerges from the opinion of another Judge, Lord Lloyd of Berwick:

> *"I confess that from the start of the hearing in the present appeal, I have had grave doubts whether the majority decision in* ***Lambert*** *could be supported. Had I been a party to the hearing in* ***Lambert****, I would have found myself in the embarrassing position of not agreeing with anyone, even though three different views were expressed. I should not have been able to agree with the majority."*

But Lord Lloyd of Berwick saw no cause for the House of Lords to overturn the ***Lambert*** decision. Apart from making suggestions on how such a disturbed state of the law could have been addressed, Lord Lloyd of Berwick thus remarked:

> *"Justice [to the parties] requires that the present appeal be reheard, and the conflict finally resolved. But it seems that a rehearing before a panel of seven Law Lords cannot be arranged in time. So the conflict remains unresolved, and the only question is whether, as a panel of five, we should depart from the decision in* ***Lambert****. I am quite clear that we should not."*

[55] The ***Kansal Case*** gives a singular example on the considerations that attend the reversal of the decision of an ultimate Court. It is clear that the House of Lords (now the Supreme Court), one of the historic exemplars as apex Courts,

was in that case, of the opinion that the rectification of a judicial error of judgment was *not* an imperative, irrespective of all juridical or policy considerations. Lord Steyn, who held the opinion that the majority's position in the ***Lambert*** decision was mistaken, nonetheless remarked:

> ***"It does not, however, follow that we must now depart from that decision."***

[56] A similar situation had arisen earlier, in ***R v. Knuller*** (***Publishing, Printing and Promotions) Ltd*** [1973] A.C. 435, in which the House of Lords had stated (per Lord Reid, at p. 455):

> ***"It was decided by this House in Shaw v. Director of Public Prosecutions [1962] A.C. 220 that conspiracy to corrupt public morals is a crime known to the law of England...***
>
> ***"I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that***

there is some very good reason before we so act….I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."

[57] Certainty in the law is a principle that has guided England's apex Court for a long time. Thus in ***Fitzleet Estates v. Cherry*** [1971] 1 WLR 1345, Lord Wilberforce thus remarked (at p. 1349):

"Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected…. [D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."

[58] Examples from the United States show a like mode of treatment of the decisions of the apex Court. In ***Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey*** 505 U.S. 833 (1992), the Supreme Court declined to overturn its previous decision in ***Roe v. Wade*** 410 U.S. 113 (1973): on the ground that the factual underpinnings of the earlier decision had not

changed. The Supreme Court used the occasion to lay out the factors to be considered, where it is called upon to overturn its past decision:

> *(i) whether the precedent set has become impracticable or intolerable;*
>
> *(ii) whether overturning the precedent would occasion hardship, or inequities to those who had already relied on the authority of the precedent;*
>
> *(iii) whether, since the setting of the precedent, related principles have evolved to such an extent that it is fair to conclude that the society's conditions and expectations have taken new dimensions;*
>
> *(iv) whether the facts have significantly changed, or are currently viewed so differently, that the design of the precedent has become irrelevant, or unjustifiable.*

[59] The foregoing principles thus emerge from the opinion, in ***Planned Parenthood***, rendered by Justice O'Connor:

> *"**So in this case we may inquire whether** Roe's **central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule in question; whether the law's growth in the intervening years has left** Roe's **central rule a***

doctrinal anachronism discounted by society; and whether *Roe's* ***premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed."***

[60] The emerging lesson is that the decisions of Kenya's Supreme Court, which ought always to be arrived at only after the most conscientious and detailed consideration, will stand as the binding reference-point in the norms governing the judicial process. Such a position is vital for the maintenance of the certainty, predictability, and jurisprudential standards that sustain the principles of the Constitution, and the rights and duties flowing from the legal set-up, and which provide sanctity for the legitimate actions of the people.

[61] As times, values, perceptions, and yardsticks of legitimacy and right, keep evolving, however, the Supreme Court retains a competence and discretion, when properly moved, and on weighty grounds, to reconsider its precedents, and to vary them as may be appropriate.

[62] Subject to that broad principle, certain directions may, on this occasion, be laid down:

(i) where there are conflicting past decisions of the Court, it ***may*** *opt to sustain and to apply one of them;*

*(ii) the Court **may** disregard a previous decision if it is shown that such decision was given **per incuriam;***

(iii) a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion;

(iv) the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness.

*(c) **Macharia and Another v. Kenya Commercial Bank Limited and Two Others: Applying the Principles***

[63] The ***Macharia*** case, before the Supreme Court, was an application for:

"...leave to appeal to this Honourable Court against the Judgments of the Court of Appeal at Nairobi in Civil Appeal No. 181 of 2004...delivered on 31st July 2008 and the Decree therein."

[64] That application for leave had several grounds:

(i) that a "matter of great public importance" was involved in the intended appeal;

(ii) that a substantial miscarriage of justice may occur unless the appeal is heard;

(iii) that the intended appeal was arguable;

(iv) that the intended appeal raised major constitutional issues pertaining to the limits of the Government's power in regulating Kenya's market

economy;

(v) that the intended appeal raised the issue as to whether the investor in Kenya has any protection against arbitrary and capricious exercise of pubic power in enterprises in which the Government is a shareholder, as is the case of the respondents.

[65] The applicant in the instant matter is aggrieved by the fact that the Supreme Court, in determining the ***Macharia*** matter which was brought "under Rule 21 of the Supreme Court Rules, Article 163 of the Constitution and Sections 14 to 16 of the Supreme Court Act", made a determination on the status of the said Section 14, in relation to the superior status of the Constitution.

[66] The respondent in the ***Macharia Case*** contested that application, among other things, for being founded on ***Section 14 of the Supreme Court Act, 2011*** which was said to be in conflict with the law of *jurisdiction* as stated in **Article 163** of the Constitution. Such a contest is manifested in the affidavit evidence, with the averment of a deponent (David Kiprop Malakwen) that:

"There is [a] compelling argument that this Section [14] is unconstitutional as it is not anchored in Article 163 of the Constitution."

[67] Apart from the status of Section 14 of the Supreme Court Act featuring in the depositions, it was also the subject of submissions, especially by counsel for the third respondent.

[68] Such canvassing of Section 14 of the Supreme Court Act, and more particularly, the fact that it touched on *jurisdiction* (defined in ***Black's Law Dictionary,*** 8th ed. (2004) as *"[a] court's power to decide a case or issue a decree"* (p.867)), *required* that the Court consider the *constitutionality of that Section*; and the outcome, in these circumstances, would stand as a declaration of status *in rem*. This is clear from the following passage in the ***Macharia*** Ruling (para.68):

> ***"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents ...that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution."***

[69] The Supreme Court, while considering the question of jurisdiction, inevitably took a position on the *status of Section 14 of the Supreme Court Act*, as follows [paras. 70 and 71]:

> ***"The Act contemplated by Article 163(9) is operational in nature....Such an Act was never intended to create and confer jurisdiction upon the Supreme Court beyond the limits set by the Constitution....***
>
> ***"Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer 'special jurisdiction' upon the Supreme Court, contrary to the express terms of the Constitution. Although we have a perception of the good intentions that could have moved Parliament as it provided for the 'extra' jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article 163(4) of the Constitution, or under Section 23 of the Sixth Schedule on 'Transitional Provisions'."***

[70] Inquiry about jurisdiction is always a preliminary issue that the Court is to entertain at the barest of indications. And in the ***Macharia Case*** all the indications were there, leading the Court to advert to the link between Section 14 of the Supreme Court Act, 2011 and the question of jurisdiction. A decision arising in such circumstances, we believe, is not to be regarded as *obiter dictum,* as learned counsel, Mr. Nowrojee had suggested. It follows, therefore, that the

challenge to the ***Macharia Case*** founded on the *obiter dictum* concept, is not for sustaining.

[71] The decision is still much less of an *obiter dictum*, in view of the provision of the Supreme Court Act, that the Supreme Court functions as *"a court of final judicial authority"* asserting *"the supremacy of the Constitution and the sovereignty of the people of Kenya*" (Section 3(a)). By this provision, the Supreme Court is empowered to evolve such essential laws and principles, as enable it to render all required interpretations to the Constitution – a task which is to be discharged in the context of matters litigious as well as non-litigious (such, for instance, as the rendering of ***Advisory Opinions*** by virtue of Article 163(6) of the Constitution). And in the ***Macharia Case*** it was in all respects proper, and *not* a "side issue", for the Court to make a finding on the *relationship between the Constitution and Section 14 of the Supreme Court Act*.

[72] The Supreme Court's decision on the issue of the constitutionality of Section 14 of the Supreme Court Act, therefore, ***is*** to be considered an element in the *ratio decidendi* in the ***Macharia Case,*** rather than an *obiter dictum*. The rational basis of this position comes not only from the core mandate of the Court, as regards the integrity of the Constitution, but furthermore, from the principle that this is the *apex Court*, with a clear mandate to establish *broad-based precedent*, going even beyond the strict terms of the limited grievance raised by

the parties. The reasoning for this is well elaborated by Professor Goodman in his learned work, ***How Judges Decide Cases: Reading, Writing and Analysing Judgments,*** 2nd Ind. Repr. (2009) [p.143]:

> *"A rule of thumb is the more superior the court, the wider can be the ratio. This represents that part of the function of the higher courts which is to give practical guidance to judges at first instance."*

D. CONCLUSION

[73] From the design of the application herein and from its detailed mode of prosecution, it has emerged, in our perception, that the essence of the case is that the ***Macharia Case*** was wrongly decided, and the decision should be reversed. The nub of the applicant's case is that this Court came to its decision *per incuriam*, in declaring Section 14 of the Supreme Court Act, 2011 to be unconstitutional. We do not find this contention to rest on any grounds of cogency. A decision *per incuriam* is one rendered in ignorance of a constitutional or statutory prescription, or of a binding precedent: but if a decision be such, this, by and of itself, does not, perforce, render it "inappropriate", or "mistaken", or "wrong" – for the decision could still rest upon its own special merits, and be in every respect sustainable as a matter of principle.

[74] The *per incuriam* contention is made on the ground that this Court had let fall the words: "Article 163 of the Constitution provided for the jurisdiction of the

Supreme Court *exhaustively"* – and that this was "wrong", because, as an instance, the Court's jurisdiction is *also* to be found provided for elsewhere: for instance, in Article 58(5) which relates to declaration of a *state of emergency*.

[75] It is entirely logical that learned counsel, Mr. Nowrojee did not contend that such other jurisdiction regarding *state of emergency* could avail his client, in *this* case. It leads to the inference that counsel had viewed out of context the Court's use of the word "exhaustively"; and, by no means, does this help to buttress the applicant's case. In any event, that the Court was mindful of the position that its jurisdiction also rested on Articles other than 163, is clear from its statement that [para. 73 of the Ruling]:

> ***"The Constitution also confers jurisdiction upon the Supreme Court to hear and determine an appeal from a judge who has been recommended for removal*** *under Article 168(8)."*

[76] Learned counsel, thus, invokes provisions of the Constitution of the most limited relevance to the question of the constitutionality or otherwise, of Section 14 of the Supreme Court Act. There is no validity, in our opinion, to the contest to the Court's declaration nullifying Section 14 of the Supreme Court Act; and the *per incuriam* argument is, with respect, distinctly inapposite.

[77] The remarkable element in the conduct of the applicant's case, has been the sustained invocation of general principles declared in the Constitution; but no

self-evident instances of interpretive fault, or of erroneous application of law, was laid before the Court. Learned counsel invoked his client's constitutional entitlement to a fair trial, which the ***Macharia*** precedent would deny; but he barely took into account the prior jurisdictional question which, alone, must determine whether even a genuine grievance is to be entertained. The Court had been obliged to pronounce upon Section 14 of the Supreme Court Act, as part of the initial resolution of the jurisdictional question. If it may be thought that any error was entailed in the Court's perception of jurisdiction, such an apprehension by itself, would not justify the reversal of the ***Macharia*** Ruling, a decision which, as we must take judicial notice, will have established itself as a mark of certainty and predictability in the law, and on the basis of which numbers of people will have figured out their rights and expectations. In these circumstances, in our view, public policy will not stand on the side of reversal of precedent.

E. ORDERS

[78] ***Accordingly, we disallow the application.***

[79] ***The costs shall be in the cause***.

THE CONCURRING OPINION OF MUTUNGA, CJ & PRESIDENT

[80] I concur with the decision of the majority in this matter. I write separately, however, to expand on four issues that I deem useful in this matter.

A. WAS THE DECISION IN THE MACHARIA CASE CORRECT?

[81] In the ***Macharia Case***, this Court held that Section 14 of the ***Supreme Court Act*** was unconstitutional. In the case before us, the constitutionality of Section 14 was, indeed, the essence of the application and the resulting arguments before the Court. I suggest that going forward it will be good practice for this Court to take every opportunity a matter affords it to pronounce on the interpretation of a constitutional issue that is argued either substantively or tangentially by the parties before it.

[82] In addition to the reasons already articulated by this Court, I am convinced that Section 14 of the ***Supreme Court Act*** is unconstitutional on two additional grounds: one, it is discriminatory, contrary to Articles 10(1)(b), 10(2)(b), and 27 of the Constitution; and two, it violates private property rights contrary to Article 40 of the Constitution.

Article 27 calls for equal protection under the law:

> ***"27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law."***

Additionally, the Constitution binds Parliament in the enacting of law not to pass discriminatory laws:

> *"10. (1) The national values and principles of governance in this Article* ***bind all State organs****, State officers, public officers and*

all persons ***whenever any of them****–*

(a) applies or interprets this Constitution;

(b) ***enacts****, applies or interprets any law; or*

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include–

(a) …;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, ***non-discrimination*** *and protection of the marginalised;*

(c) …; and

(d) …"

[83] Article 10 of the Constitution requires Parliament to be non-discriminatory when it enacts laws. Parliament violated Article 10 when it enacted Section 14 of the ***Supreme Court Act*** because it limited the remedy of a new trial only to those who could prove that the judge in their case had been removed, retired or resigned on the basis of their complaints. The right to a fair trial, however, applies to everyone, not just those who were denied the right because of the misconduct of judges who then voluntarily or involuntarily left the bench. It also applies to those litigants whose rights were violated even though their respective judges had been found suitable by the ***Judges and Magistrates Vetting Board,*** or who did not have to be vetted under the Act. If the right to a fair trial belongs to everyone, the remedy must also belong to everyone. Therefore, based on the provisions of Article 10 that promote and protect the principle of non-

discrimination and the equal protection afforded by Article 27, I find no basis for this discrimination and I would have declared Section 14 unconstitutional.

[84] Additionally, there are **crystallized** property rights arising out of the judgments that vest such rights on the successful party. This flows from Article 260 and Article 40 of the Constitution. Article 260 on the Interpretation of the Constitution defines "property" to include the physical asset itself but also the *vested* or *contingent* right:

> *" **260. "property" includes any vested or contingent right** to, or interest in or arising from—*
>
> *(a) land, or permanent fixtures on, or improvements to, land;*
>
> *(b) goods or personal property;*
>
> *(c) intellectual property; or*
>
> ***(d) money, choses in action or negotiable instruments..."***

[85] Article 40(2) deals with the protection of the right to property, and states that no law can be passed that arbitrarily takes away property rights:

> ***"40. (2) Parliament shall not enact a law that permits the State or any person —***
>
> ***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).”

[86] Therefore, Parliament, in enacting Section 14 of the ***Supreme Court Act*** failed to appreciate that in taking away crystallized rights of citizens, it was violating their protection under Article 40 of the Constitution. Section 14 does not provide any criteria for the taking away of property rights properly vested after a judgment. It only provides for the re-opening of a case in which a complaint was filed against a judge leading to his/her removal, without an effective enquiry into how this affects the property rights already vested. Section 14 also does not address how “just compensation to the person” with such vested rights shall be paid to them and by whom. It is also my view that the crystallized and vested property rights in the ***Macharia Case*** constituted *money* under Article 260 of the Constitution.

[87] Thus, invoking the provisions of Article 40 of the Constitution, the Supreme Court still could have found section 14 of the ***Supreme Court Act*** unconstitutional.

B. INTERPRETATION OF THE CONSTITUTION

[88] As I have stated hereinabove, it should be good practice for the Supreme Court to take every opportunity presented to it to pronounce itself on new nuggets of our jurisprudence, through interpretation of the Constitution. This is

clearly laid out in Paragraph 72 of this Ruling, where we state that as the *apex Court*, we have a clear mandate to establish *broad-based precedent*, going even beyond the strict terms of the limited grievance raised by the parties. In this matter both learned Senior Counsel Nowrojee and Oraro, and learned counsel Gachui, engaged the Supreme Court on the interpretation of the Constitution. The specific aspects are covered comprehensively in the majority decision. My commentary is simply in deference to some of the issues counsel raised, that need comment.

[89] In Paragraph 8 of my dissenting Advisory Opinion in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion of the Supreme Court*** **(Reference No 2 of 2012)**, I endorsed the approach to the interpretation set out in the Constitution itself, and in the provisions of the ***Supreme Court Act.*** There is no doubt that the Constitution is a radical document, that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism, and 50 years of independence. In their wisdom, the Kenyan people decreed that past to reflect a *status quo* that was unacceptable and unsustainable, through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate

authority to the people of Kenya which they delegate to institutions that must serve them, and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights, giving the whole gamut of human rights the power to radically mitigate the *status quo* and signal the creation of a human-rights State in Kenya; mitigating the *status quo* in land that has been the country's Achilles heel in its economic and democratic development. These instances, among others, reflect the will and deep commitment of Kenyans, reflected in fundamental and radical changes, through the implementation of the Constitution.

[90] It is also the will of the Kenyan people that they rely on the Judiciary to protect and develop the Constitution. Article 159 of the Constitution deals with the principles governing the exercise of judicial power, identifying the source of that power in the people of Kenya. The constitutional provisions on the Judiciary (its independence, its integrity, its intellectual leadership and the distinction of its judges and its resources) make this abundantly clear. Therefore, the early years of the decisions of the Courts, and in particular those of the Supreme Court, will be seminal and critical for the future development and impact of the Constitution.

[91] Although I had categorized the jurisprudence envisaged by the Constitution as robust (rich), patriotic, indigenous and progressive (all these attributes derived

from the Constitution itself, and from Section 3 of the ***Supreme Court Act***), perceptions of this decolonizing jurisprudence can be summed up as ***Social Justice Jurisprudence***, or ***Jurisprudence of Social Justice***. Such jurisprudence in all our Courts, and in particular at the Supreme Court, as the apex court in the Republic of Kenya, will ensure that the fundamental and core pillars of our progressive Constitution shall be permanent, irreversible, irrevocable and indestructible – as should also be our democracy.

[92] I would like to add more bases of constitutional interpretation (not covered in my dissenting Advisory Opinion) - some informed by arguments of counsel, and others that I have since reflected upon.

[93] The principle of the supremacy of the Constitution declared in Article 2, particularly sub-article 4, which defines in extremely broad terms laws and acts that may be questioned for compatibility with the Constitution, expresses the intent that all provisions of the Constitution are justiciable.

[94] The Supreme Court of India in ***D. S. Nakara v. Union of India*** [1983] SCR (2) 165 invoked the word "socialist" in the preamble to the Constitution, among other articles, in striking down a government-liberalized pension scheme as discriminatory. The Supreme Court interpreted the state directive on socialism to encompass various attributes – the creation of a welfare state in India being one of them. And in Kenya, in interpreting the Constitution, the aspirations captured in two preambular paragraphs are relevant:

> **"COMMITTED to nurturing and protecting the well-being of the individual, the family, the communities and the nation;** and
>
> **"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law..."**

[95] Article 20(4) requires Courts and other relevant authorities, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights. Senior Counsel Nowrojee emphasized the provisions of Article 25, as pivotal and fundamental injunctions in the interpretation of the Constitution. That Article lists the fundamental rights and freedoms that may not be limited:

> ***"25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –***
>
> ***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***
>
> ***(b) freedom from slavery or servitude;***
>
> ***(c) the right to a fair trial; and***
>
> ***(d) the right to an order of*** *habeas corpus".*

[96] In my opinion, Articles 22 and 23 give the Courts a special, and wide responsibility for the enforcement of the Bill of Rights. Article 24 requires the

Courts to determine whether the limitations on rights and freedoms are valid. More generally, the Courts have to interpret the scope of numerous rights and freedoms under Chapter 4 of the Constitution.

[97] Article 191 deals with conflicts of laws of the national legislature and the county legislature, on matters falling within Schedule 4 to the Constitution, and sets out a complex procedure for determining the primacy of the national legislation on matters otherwise falling to the counties. Article 191(5) directs the Court on the exercise of its powers under Article 191: ***"in considering an apparent conflict between legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids a conflict to an alternative interpretation that results in conflict."***

[98] Under Article 259(3), there is a general interpretative principle, **"the doctrine of interpretation that the law is always speaking …",** with four specific rules, to guide the Kenyan courts towards relevant interpretation, by interrogating principles of common-law rootage and the international jurisprudence founded upon it.

C. *STARE DECISIS*: WHEN SHOULD A SUPERIOR COURT DEPART FROM ITS EARLIER DECISION?

[99] In this matter, we were asked to depart from our decision in the ***Macharia Case***. Article 163(7) of the Constitution provides that *"All courts,*

other than the Supreme Court, are bound by the decisions of the Supreme Court." We have cited, distinguished, and applied decisions from the Commonwealth (Kenya, India, the United Kingdom, Trinidad and Tobago, Canada) and the United States, in arriving at the answer to the question of when the Supreme Court may depart from its earlier decision.

[100] In the development and growth of our jurisprudence, Commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the U.S. yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country. A negative side of the mechanistic approach to precedent, is that it tends to produce a mind-set: "If we have not done it before, why should we do it now?" The Constitution does not countenance such a pre-determined approach. All the cases cited in this matter were subjected to an inquiry into their respective contexts. We sought to find out whether they are still good law, or have been overturned. We did all this because our progressive needs, under the Constitution, are different; and there is the need to bear in mind that our Constitution remains always, as our brother Judge Ojwang has emphasized, a *transformative charter of good governance*.

[101] While our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably enriched, as decreed by the ***Supreme Court Act.***

[102] The historical, economic, social, cultural and political bases of the principle of *stare decisis* are well articulated in the decisions cited. The justifications for this doctrine are recognised as: stability, predictability, consistency, reliability, integrity, coherence, and flexibility. Occasions for departing from earlier decisions are also justified by those cases. What does not come out clearly in those decisions, is the basis of the persistent *tension* between adherence to precedent on the one hand, and development of the law, on the other: the two are both required, because societies are not static in their growth. Indeed, such growth is dynamic, and it is dialectic in nature.

[103] The basic justification for adherence to precedent is the need to have stability of economic and social development, in any society; while flexibility in precedent (which takes the form of distinguishing cases; not allowing them because the socio-economic, cultural and political contexts have radically changed; and recognising that fidelity to the rule of law can be harmed by decisions that reflect gross injustice, etc) mitigates the unwanted disruptions of developments that those who rule societies do not want to see. Such flexibility is also a basis for necessary reforms that the law can bring about. Finding a *balance*

to the tension I have mentioned has, in the experience of courts in various jurisdictions, been categorized as judicial restraint, innovation, invention, creativity, or activism. In our case, the Constitution provides this balance in Article 163(7), and by underlining transformation through mitigation of the *status quo*. Given early age of the Constitution, the Supreme Court may find it wise to strike the *balance and flexibility* through the approach to interpretation suggested in this concurring opinion.

D. RIGHT WITHOUT REMEDY

[104] I do not know how many cases in our judicial system will go down in the annals of history as a reflection of gross injustice, meted out in the very temple of justice. It is perhaps easy to understand, in the constitution-making, why Kenyans clamoured for the Judiciary to be closed down, all judges and magistrates sent home and asked to re-apply for their positions. To the minds of many, that was the only way to clean up the judiciary, separate the wheat from the chaff, and rebuild a new judiciary that would reflect the values to be set out in the Constitution. This matter before us also reflects the impunity of the judiciary, and the unacceptable face of the jurisprudence of technicalities – technicalities that had become the handmaiden of gross injustice. It is apposite to recall the unfortunate details of this injustice, that will be forever remain a glaring stain on our justice system.

[105] Senior Counsel Nowrojee summoned his renowned brilliant faculties to confront the position that, in the temple of justice there can be a right without a remedy. The injustice in this case stemmed from a three-judge bench of the Court of Appeal, that was presided over by a judge who wrote the majority decision and who stood accused of being significantly a party to the case. The decision of the Court so constituted was, therefore, indelibly tainted. One uncontroverted fact is that the said judge of appeal resigned under a cloud of injustice, occasioned by these allegations.

[106] On bringing these allegations to the Court of Appeal and asking for a review of the decision, the Court refused to pay regard to these facts, and dismissed the review application, stating that it had no jurisdiction. Justice Omolo, writing for the majority, relied on the old maxim that there ought to and must be an end to litigation, and stated:

> ***"Yes, a party may be able to show that a decision is wrong either in law or upon some clear reason. But for the interest of peace, in the interest of certainty and security, such a party might [be] and is often told: Even if all that you say is correct, yet the decision has been made and you must learn to live with it."***

That Court stated that it did not need to concern itself with the underlying dispute in the appeal, the conditions under which the appeal was dismissed, or the affidavits that outlined the misconduct of both the presiding judge and the

respondents' lawyer, because the respondents had filed a notice of preliminary objection as to jurisdiction and points of law. The Court simply said it had no jurisdiction under the Constitution or the ***Appellate Jurisdiction Act,*** to review the case.

[107] Mr Nowrojee comes to the Supreme Court and asks us the following questions: Can the Kenyan Constitution countenance an injustice without redress? Does the Constitution grant a right that, upon its violation and breach, there is no remedy? Is there an injustice that the Supreme Court is unable to redress? Senior Counsel Oraro is right in his response to the third question. In his view the question is whether the Supreme Court has jurisdiction to redress ***all*** injustices brought to its attention.

[108] The Constitution has redressed the jurisprudence of technicalities. It obligates the Judiciary under Article 159, to administer justice without undue regard to procedural technicalities. Senior Counsel Nowrojee contends that this Court is the right forum for dealing with the injustices he has narrated. He quotes renowned Indian jurist Nani Palkhivala in asserting:

> ***"There is no injustice that the Supreme Court is powerless to redress."***

This quote is found in an affidavit filed by Mr Palkhivala in a matter before the Southern District Court of New York, in which Justice John F. Keenan dismissed the filing of the suit by the Union of India in the United States. He held that

there was a competent legal system in India that could arbitrate upon the dispute arising from a gas leak in Bhopal, India leading to the deaths of thousands. He held that the U.S. Court was an inappropriate forum because the material facts and all parties involved were substantially situated in India. On appeal, the U.S. Second Circuit of the Court of Appeal upheld the decision by Justice Keenan (***Union of India v. Union Carbide*** 809 F.2d 195). The said affidavit is also reproduced in the book entitled ***Courtroom Genius*** by Soli J Sorabjee and Arvind P Datar, (LexisNexis Butterworths Wadhwa, Nagpur 2012).

[109] Mr. Palkhivala's quote, however, has to be put in the context of the relevant provisions of the Indian Constitution. These are Articles 32 and 136 (1) of the Indian Constitution, reproduced below:

"PART III
FUNDAMENTAL RIGHTS

Right to Constitutional Remedies

32. Remedies for enforcement of rights conferred by this Part –

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred under this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

"PART V
THE UNION
CHAPTER IV. - THE UNION JUDICIARY

136. Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

[110] Article 32 cited above merits special note. It gives the Supreme Court of India power to redress all violations of fundamental rights by issuing writs. It is, therefore, true that in the *Indian* context, the Supreme Court has all power to redress injustices – where injustices mean the violations of fundamental rights. This is not a power arrogated by the Indian Supreme Court, but one donated by the Constitution. Our Constitution does not have similar provisions; and therefore, the Kenyan Supreme Court does not have a similar jurisdiction. In my view, this lack of jurisdiction settles and answers Mr. Nowrojee's third question.

I now turn to his two other questions.

As stated above, the Supreme Court of India has the *power to redress all violations of fundamental rights*. The *High Court of Kenya* has similar jurisdiction. This jurisdiction has been donated to the High Court under Articles 23 and 165(3)(b) of the Constitution:

> ***"23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."***

[111] Therefore, while accepting Senior Counsel Nowrojee's contentions that there have been injustices in this case, the *choice of forum* is in question. The Kenyan Constitution has given the High Court the *exclusive jurisdiction* to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the Constitution). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in ***Protus Buliba Shikuku v R,*** **Constitutional Reference No. 3 of 2011,** [2012] eKLR.

[112] The ***Shikuku Case*** fell within the criminal justice system; it involved a claim of violation of the petitioner's fundamental rights by the Court of Appeal, in a final appeal. The trial Court failed to impose against the petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction,

the learned judges, relying on Articles 20, 22, 23 and 165 of the Constitution, rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated with approval the dicta of Shield J, interpreting the provisions of the 1963 Constitution in ***Marete v. Attorney General*** [1987] KLR 690:

> ***"The contravention by the State of any of the protective provisions of the Constitution is prohibited and the High Court is empowered to award redress to any person who has suffered such a contravention."***

[113] Thus, in answer to Mr. Nowrojee's first two questions posed to the Supreme Court, my answer is this: ***There is no injustice that the Constitution of Kenya is powerless to redress.***

THE CONCURRING OPINION OF RAWAL, DCJ & VICE-PRESIDENT

[114] I have keenly perused the majority ruling of the Court and I do concur with the rendition of facts and relevant laws meticulously considered therein. I am in agreement with the conclusion of the majority Court that:

> ***"Such canvassing of Section 14 of the Supreme Court Act, and more particularly, the fact that it touched on jurisdiction … required the Court to consider the constitutionality of that Section; and the outcome, in the circumstances, would stand as***

a declaration of status in rem."

[115] I also concur that the Court, while considering the question of jurisdiction, looked into the relevant provisions of ***Article 163 and Section 23 of the Sixth Schedule of the Constitution of Kenya, 2010,*** and arrived at the only conclusion that it could – an affirmation that ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & Two Others,*** Supreme Court Application No. 2 of 2011 (***Macharia Case***), was rightly decided, and was correct in its finding on the unconstitutionality of Section 14 of the Supreme Court Act, 2011, insofar as it purported to give the Supreme Court a 'special jurisdiction'.

[116] That being said, I am of the view that it is important to enter into the realm of the history of ***Article 163 and Section 23 of the Sixth Schedule of the Constitution,*** to bring home the cogent reasons behind this Ruling. In common-law countries, before interpreting a constitutional or statutory provision, it is legitimate to consider the history of its enactment, and the evil it was intended to remedy, or the mischief it was intended to address, and then ascertain whether the remedy provided therein is legitimate or appropriate.

[117] It has been commonly perceived, in the past, that before the promulgation of this Constitution, the Judiciary was viewed by the general public as having impugned its core function of giving expeditious, transparent, fair and

substantial justice, and this, essentially, culminated in a failure to uphold the rule of law. This widespread perception translated into a form of public demand for Government to take appropriate institutional measures to redress the unsavoury aspects of our judicial history. In response, the Government set up the ***Integrity and Anti-corruption Committee of the Judiciary in Kenya, 2003*** to implement a strategy of "radical surgery" of the Judiciary. This led to the suspension, and in many cases, subsequent resignation, of several Judges and Magistrates, due to findings of judicial corruption, misconduct or misbehaviour.

[118] In order to further correct and transcend the past deficiencies, and to restore public confidence in the Judiciary, provisions relating to judicial transformation consequently featured, quite prominently, in the text of the new Constitution. Among these was the enactment of Section 23 of the Sixth Schedule of the Constitution, which reads as follows:

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

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

Section 24 of the Sixth Schedule went on to provide, thus:

"24. (1) The Chief Justice in office immediately before the effective date shall, within six months after the effective date, vacate office and may choose either —

(a) to retire from the judiciary; or

(b) subject to the process of vetting under section 23, to continue to serve on the Court of Appeal.

(2) A new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act, and after consultation with the Prime Minister and with the approval of the National Assembly.

(3) Subsection (2) also applies if there are further vacancies in the office of Chief Justice before the first general elections under this Constitution."

[119] I have detailed out these provisions to show the seriousness with which the people of Kenya perceived past problems in the Judiciary, and to portray their

concerted efforts, *via* the Constitution, to restore the credibility, integrity and independence of the Judiciary.

[120] Other central tenets to the new constitutional dispensation's commitment to restore public confidence in the judicial system include: re-affirming the sovereignty of the Kenyan people, and declaring that judicial authority derives from them; and that, Courts are required to exercise such judicial authority in a manner that ensures that justice is done to all, irrespective of status; that justice is not delayed; and that justice is administered without undue regard to procedural technicalities (Article 159); the guarantee of judicial independence (Article 160); and the establishment of an apex Supreme Court (Articles 162 and 163), to provide fresh leadership to a Judiciary that would be guided by the values and principles set out in Article 10.

[121] After the establishment of the Supreme Court, Parliament enacted the Supreme Court Act, 2011, in accordance with Article 163(9) of the Constitution; the Act included the contentious Section 14, titled "Special Jurisdiction". The Court takes cognizance of Parliament's intention to enact Section 14 of the said Act, from the relevant *Hansard,* which carries the following passage:

> ***"Some of those judgments have led to*** *[the]* ***removal of some judges and magistrates, yet the ramifications of the same continue to exert untold suffering on quite a number of Kenyans. Hence I encourage Honourable***

Members to carefully study Clause 14, and if they deem it fit, allow it to exist. In conferring this special jurisdiction on the Supreme Court, we are remedying the wrongs that may have been perpetrated on the Kenyan people in the previous dispensation."

[122] This short venture into the history of the Constitution, as well as of Section 14 of the Supreme Court Act, is simply meant to illustrate that the people of Kenya not only expected to get a clean Judiciary on the dawn of the Constitution, 2010, but also sought an avenue through which past injustices, inflicted upon the people by corrupt judicial officers, would be addressed. That expectation was, in part, actualised by the enactment of Section 23 of Sixth Schedule ("Transitional Provisions"). The result thereof was the **Vetting of Judges and Magistrates Act, 2011,** which came into force on 22nd March, 2011, and under which the Judges and Magistrate's Vetting Board was established.

[123] The facts of the instant case, though not strictly falling within the province of the said Act, definitely sit in *tandem* with its purpose and intention.

[124] Further, Section 3 of the Supreme Court Act has provided the apex Court with guiding principles for the interpretation of the Constitution. I cite them below:

i. ***assert the supremacy of the Constitution and the will of Kenyans;***

ii. ***provide authoritative and impartial interpretation of the Constitution;***

iii. ***develop rich jurisprudence that respects Kenya's history and facilitates its social, economic and political growth;***

iv. ***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;***

v. ***improve access to justice;***

vi. ***provide for the administration of the Supreme Court and related matters.***

It is noteworthy that these principles of interpretation of the Constitution were well embedded in our jurisprudence even before the advent of the present Constitution.

[125] In the case of ***Crispus Karanja Njogu v. Attorney General (H.C Criminal Application No. 39 of 2000)***, a three Judge bench of the High Court held the view that:

"Constitutional provisions must be read to give effect to the values and aspirations of the people. The court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document."

[126] Similarly in the case of ***Rev. Dr. Timothy Njoya & 6 Others v. The Attorney General & 4 Others (2004),*** KLR 232 the Court held:

"The Constitution is not an Act of Parliament and is not to be interpreted as one. It is the Supreme Law of the land; it is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposively or teleologically to give effect to those values and principles. ...Those to my mind are the values and principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution."

[127] My purpose in invoking the above, is to point out that the apex Court, in all matters before it, needs to be sensitive to the *expectations and the aspirations of the people*. I think that Parliament's enactment of Section 14 of the Supreme

Court Act had laudable intentions, which resonated with the will and sentiments of ordinary citizens. Indeed, the Court aptly observed in the ***Macharia Case*** as follows:

> ***"Although we have a perception of the good intentions that could have moved Parliament as it provided for the 'extra' jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article 163(4) of the Constitution, or under Section 23 of the Sixth Schedule on 'Transitional Provisions'."***

[128] In my opinion, the conclusion arrived at in the ***Macharia Case*** is correct, in that Section 14 of the Supreme Court Act is *unconstitutional,* insofar as it purported to give the Supreme Court a 'special jurisdiction'. Still, I am convinced that this Court, as an iconic court in the land, should have approached the issue of the constitutionality, or lack thereof, of Section 14 of the Supreme Court Act, in the ***Macharia Case***, in a more comprehensive manner, and strived to explain its background and context extensively, or even painstakingly, so that the people of Kenya, and the litigants (present or prospective), could fully grasp the reasons behind its refusal to exercise jurisdiction as purportedly provided under Section 14 of the Supreme Court Act. The promise of justice embedded in Section 14, was undoubtedly an issue close to the hearts of the Kenyan people; and this, thus,

provided an opportunity for the Supreme Court to seek the parties' participation by way of detailed submissions, as a basis for full justice on the issue. This would especially have been advisable, in view of the well established *presumption*, *of the constitutionality of a statute*, and of its provisions.

[129] By doing so, the Court would not only have manifested due regard for the sovereign power of the people, which has only been delegated to the Courts, (Article 159 of the Constitution), but would also have lived up to its mandate, as the apex Court, to develop robust, indigenous, transparent and accountable jurisprudence for posterity, based on the principles set out in Section 3 of the Supreme Court Act, and the readily-identifiable tenets of judicial independence, natural justice, and international best practice.

[130] While remarking the foregoing considerations, I would like it to be clear that the Supreme Court, being in the exalted position of an apex Court, has the right, nay, the obligation, to develop jurisprudence touching on issues of general public interest, as well as those that touch on the interpretation of the Constitution. This right cannot be curtailed by anyone.

[131] I am aware that my views, as expressed herein, have had the benefit of hindsight; but this Court should not hesitate, in the interest of developing an indigenous jurisprudence, to pave further paths that will advance the rule of law. This could easily be accomplished by taking certain minimal actions, that fall

within our constitutional and legislative mandate, such as *asking Parliament* to take comprehensive steps to address the void left after this Court struck out Section 14 of the Supreme Court Act in the ***Macharia Case***. After all, Articles 25 and 48 of the Constitution require the State to ensure the right to a fair trial, and access to justice for all.

THE DISSENTING OPINION OF IBRAHIM, SCJ.

[132] I have read the majority decision in totality, and agree that the decisions of the Supreme Court, which ought always to be arrived at only after the most conscientious and detailed consideration, will stand as the binding reference-point in the norms governing the judicial process. Indeed, such a position is vital for the maintenance of the certainty, predictability, and jurisprudential standards that sustain the principles of the Constitution, and the rights and duties flowing from the legal set-up, which provide sanctity for the legitimate actions of the people.

[133] I agree with the majority of the Court that the Supreme Court do retain a competence and discretion, when properly moved, and on weighty grounds, to reconsider its precedents, and to vary them as may be appropriate. The Court has already laid down principles to guide it when so moved. I am agreeable to these principles and I will fully adopt them.

[134] I would, however, add that these principles should not be deemed to be exhaustive. The process of development of jurisprudence will occasionally give birth to novel principles that, after a conscientious and detailed consideration, may be adopted by this Court when moved to depart from its precedent. I would draw from the jurisprudence of the Indian Supreme Court in ***The Bengal Immunity Case,*** where the Court quoted from Australian jurisprudence as set out in the ***Tramways Case [*1939] A.C. 215, 245** [*per* Griffith, C.J. at p. 58]:

> ***"In my opinion, it is impossible to maintain an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and … only when the previous decision is manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow …"*** [emphasis supplied]

[135] The Supreme Court of India departed from its previous decision in ***The Bengal Case,*** and added thus:

> ***"In considering the applicability of the principles laid down in the decisions hereinbefore mentioned….an erroneous interpretation of the Constitution may quite conceivably be perpetuated or may at any rate remain unrectified for a considerable time to the great detriment of the public well-being. The considerations adverted to in the decisions of the Supreme Court of America quoted***

above are, therefore, apposite and apply in full force in determining whether a previous decision of this Court should or should not be disregarded or overruled."

[136] Therefore, the Court should, in addition, take into account the following principles, when considering whether to depart from its precedents:

i) A decision that is manifestly wrong on the face of it will occasion a departure by the Court. What is manifestly wrong will depend on a conscientious determination by the Court, and will vary from case to case.

ii) Whether a decision is erroneous, and severely affects the lives of people, and impacts negatively on the general welfare of the public.

iii) Upon consideration of such elements, the Court will be ready and willing to depart from an erroneous decision, where the decision is a recent one and the decision has not as yet created property rights around which individuals' interests have vested.

[137] The majority have ruled that the ***Macharia Case*** does not pass the test for departure as set out above. However, with tremendous respect to their decision, I would have allowed a departure from the ***Macharia Case,*** on the basis of the principles just proposed.

[138] It is true that the issue of jurisdiction was fundamental in the determination of the ***Macharia Case***. To my mind, a question of jurisdiction when raised, occasionally by way of a preliminary objection, does not necessarily

address the issue of the constitutionality of a piece of legislation. It may be questioning the applicability of that law to the issues forming the subject-matter under consideration.

[139] My brothers and sisters have rightfully asserted that jurisdiction is everything, and without it a Court cannot make a single step. This position was well captured in the ***Lillian S Case*** (above), which was referred to by counsel for the respondents. In the ***Lillian S Case***, the issue for determination was whether the High Court was properly seized of admiralty jurisdiction under Sections 20 and 21 of the Supreme Court Act, 1981 [UK]. The Court of Appeal held that the High Court had no jurisdiction, as the matter that forming the subject of the issues before the Court did not fall under the threshold set by Sections 20 and 21 of the Act.

[140] Consequently, the issue of jurisdiction in the ***Macharia Case*** was framed not on the question of the constitutionality of Section 14 of the Supreme Court Act, but on whether the case as presented by the Applicant had met the threshold set by Section 14 of the Act: that a judge had been removed, retired or resigned; secondly, whether the procedural requirement of moving the Court by way of petition, provided for by the rules, had been followed; and if not, whether that was fatal to the application before the Court. These are the issues that formed the crux of the application which the Court addressed and determined.

[141] With tremendous respect to my brothers and sisters, I am not convinced that the issue of the constitutionality of Section 14 ever formed part of the jurisdictional challenge, and the Court should not have delved into it. The Court rightly recognised this position when it declared (at paragraph 66) that:

> ***"This holding would have been enough to dispose of the application save that there remains the question as to whether section 14 of the Supreme Court Act is unconstitutional."***

It is my conviction that the Court should have stopped at that point.

[142] Again the Court acknowledges that the constitutionality of Section 14 was not expressly pleaded or sufficiently canvassed, when it stated that:

> ***"(67) <u>Although counsel for the third Respondent urged the issue of the constitutionality of section 14 only tangentially,</u> <u>the deposition</u> on behalf of the first and second respondents brings the issue to the fore**..."* [emphasis supplied].

[143] The use of the term "tangentially" in the Ruling correctly captures the position that the issue of constitutionality or otherwise of Section 14, was not directly an issue for determination by the Court. This point has further dimensions that merit focussed attention, as follows.

[144] *Firstly:* in the ***Concise Oxford English Dictionary***, 12th Edition, the word "tangential" is defined as:

> "***. . . 1. Relating to or along a tangent.***
> ***2. Having only a slight connection or relevance peripheral,***
> ***3. Diverging from a course***
> ***Derivatives tangentially adv."***

[145] *Secondly*, the adverb "tangentially" is derived from the noun "tangent", and the adjective "tangential". These are not terms of art, but a normal part of general grammar in English. Of the word "tangent", ***The Free Online Dictionary*** states:

> "*Making contact at a single point or along a line, touching but not intersecting; irrelevant.*"

The Oxford Advanced Learners' Dictionary, International Student's Edition (New 8th ed.) gives an elaborate definition (p. 1525):

> "*Tangent* (***n***) (Geometry) – *a straight line that touches the outside of a curve but does not cross it.*
>
> "*Tangential* (***adj.***) – ***having only a slight or indirect connection with something: a tangential argument***" [emphasis supplied].

[146] Applying the foregoing principle to the instant matter, suffice it to say that the Court, in the ***Macharia Case***, was satisfied that the issue of the unconstitutionality of Section 14 of the Supreme Court Act had been dealt with

merely in passing – and it did not fundamentally intersect with the parties' main arguments.

[147] There is no record of any pleading that addresses the issue of the unconstitutionality of Section 14. The only time the word 'unconstitutional' appears in the pleadings is in the affidavit of one David Kiprop Malakwen, Company Secretary to the first respondent, in which he depones at paragraph 10 thus:

> ***"THAT with respect to Section 14 of the Supreme Court Act, 2001, I am advised by the said Advocate, which advice I verily believe to the true, <u>that this provision has no application to the matters before this Honorable tribunal.</u> There is a compelling argument that this section is unconstitutional as it is not anchored on Article 163 of the Constitution. Even assuming it passes constitutional muster and relief is sought under it, it assists the Applicants*** *[not],* ***as it does not come within its ambit as all the three judges who decided the Appeal are still serving, thus none of the three circumstances set out in Section 14(1) (a) which would trigger the operation of the so called Special jurisdiction obtains"*** [emphasis supplied].

[148] It is my belief that this statement is categorical, that the witness is opposing the applicability of Section 14 to the application herein. As to the constitutionality of Section 14, the deponent depones that it is his advocate who holds the opinion that Section 14 is unconstitutional. There are no reasons, or further submissions

given, on the constitutionality or otherwise of Section 14. The source the advocate alludes to, so as to form the opinion which he gives to the deponent, is clearly in another forum not privy to this subject-matter.

[149] Suffice it to say that the respondents' opposition on jurisdiction, was on the basis that Section 14 did not apply, and not that section 14 was unconstitutional. There is no single prayer, or relief sought, for the declaration of Section 14 of the Supreme Court Act as unconstitutional.

[150] Consequently, I agree with the petitioners in the ***Jasbir Case,*** that in holding Section 14 to be unconstitutional, the Supreme Court acted ***suo motu.*** This was unnecessary, as it was never prayed for.

[151] The declaration of a law as being unconstitutional is a weighty matter, that has a bearing on the doctrine of *separation of powers*. It amounts to holding that the legislature in exercise of its legislative mandate, as bestowed upon it by the Constitution, acted *ultra vires*. A Court being moved to undertake such a declaration must proceed with utmost caution and care. Such caution does not in any way bear the stigma of timidity on the part of the Court; but it evidences *fidelity to the doctrine of the separation of powers*.

[152] The Court must be clear, that what is being sought is a declaration of a particular provision of the law as unconstitutional; and all interested parties must

be given ample notice and time to make submissions on the question of constitutionality, or otherwise. It is my humble view that the Attorney-General, as the chief legal adviser of the Government, ought to be given an opportunity to be heard. He advises the Government on the various Bills which the executive arm originates, some of which once enacted as Acts, may form the subject of a declaration of unconstitutionality.

[153] It is my opinion that the Supreme Court, or even the High Court, ought not to decide upon the constitutionality or unconstitutionality of a statutory provision, without the involvement of the Attorney-General as a respondent or as ***amicus curiae***. The constitutionality of legislative provisions ought not to be determined as between *private parties* alone: because statutory laws belong to, and affect the people of Kenya and the State; it is not a private matter, but rather, it is of a *public nature*, and it affects the *public interest*.

[154] In this case, the Law Society of Kenya, as the umbrella body of the Bar, whose members are in constant interaction with the law, may also be given an opportunity to be heard on a provision of the law that is sought to be declared unconstitutional, in particular in a case which dealt with the removal of judges, as a result of alleged misconduct.

[155] It matters not that such bodies may not be parties to the matter in Court. The onus rests on the Court, when faced with such a question, to inform such

parties as it considers key stake-holders, of such a challenge. I acknowledge that Kenya operates an adversarial system, and the Court as an impartial umpire ought not to descend into the arena of conflict. However, a matter touching on the constitutionality of a provision of the law, is not a matter of conflict as *between parties*. It transcends the parties, and becomes a matter of general concern, that binds all persons as signified by Article 3 of the Constitution, thus:

> **"3(1) Every person has an obligation to respect, uphold and defend this Constitution"**.

[156] It is worth noting that the ***Macharia Case*** was a *private dispute*: between S.K. Macharia and Kenya Commercial Bank. The onus of enacting laws rests with Parliament. I strongly hold that a Court of law should be hesitant to declare legislation unconstitutional in a private matter, where Parliament is not a party. Where such an application is made, the Court should move to invite all stakeholders on board. As earlier stated, this enhances fidelity to the doctrine of separation of powers, and contributes to respect for all constitutional organs, and for their mandates. This way, the principle of checks and balances will be seen to be truly operational, within the constitutional framework, in the terms of Article 2 of the Constitution.

[157] The broad perspective that this Court, as an apex Court, ought to take when dealing with issues touching on the constitutionality or otherwise of a law, is well

captured in the concurring opinion of Lady Justice Rawal, DCJ. The learned Judge thus remarks:

> ***"...this Court as an iconic Court in the land, should have approached the issue of the constitutionality, or lack thereof, of Section 14 of the Supreme Court Act, in the*** *Macharia Case*, ***in a more comprehensive manner and strived to explain its background and context extensively, or even painstakingly, so that the people of Kenya, and the litigants (present or prospective), could fully grasp the reasons behind its refusal to exercise jurisdiction as purportedly provided under Section 14 of the Supreme Court Act. The promise of justice embedded in Section 14, was undoubtedly an issue close to the hearts of the Kenyan people; and this, thus, provided an opportunity for the Supreme Court to seek the parties' participation by way of detailed submissions, as a basis for full justice on the issue. This would especially have been advisable, in view of the well-established presumption, of the constitutionality of a statute, and of its provisions"*** (emphases supplied).

[158] This very principle was well articulated by the apex Court of Tanzania, the Court of Appeal, in an election petition where the constitutionality of Section 111(2) of the Elections Act was under consideration, in ***Ndyanabo v.***

Attorney-General (Civil Appeal No. 64 of 2001 [2002] TZCA 2 (14 February 2002) @ www.saflii.org. The Court, in that case, gave directions on the interpretation of the Constitution, as follows:

> ***"Thirdly, until the contrary is proved, a legislation is presumed to be constitutional*** *(emphasis mine).* ***It is a sound principle of constitutional construction as will make it operative and not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction.*** [emphasis supplied].

[159] The Constitution of Kenya is emphatic on the disregard of procedural technicalities. It provides:

> **"159 (2) (d) justice shall be administered without undue regard to procedural technicalities."**

However, an issue touching on a procedure challenging the constitutionality of statutory law is not a matter of procedural technicality. It is a matter of

procedural substance. The procedure towards the declaration of Section 14 of the Supreme Court Act to be unconstitutional is a substantive procedure, that goes to the core of the constitutionality of a legislative activity. I would hold that the declaration of Section 14 as being unconstitutional, lacked the procedural substantive requirement, and it ought not to be left to stand as a precedent.

[160] It is pertinent to emphasize that the declaration of Section 14 as being unconstitutional was made when the current matter was pending before the Court. In my view, this premature declaration in proceedings which did not call for such a determination, prejudiced litigants who were properly before the Court, given, now with clear hindsight, that the *prima facie* threshold requirement under Section 14 *had been attained* – as the particular judge at the centre of this case retired as a consequence of the allegations made against him. The petitioners herein stand to suffer, by being denied the right to a fair hearing on the basis of a decision of the Court which was made while they had properly moved the Court – yet it was made in a matter that had not correctly invoked Section 14 of the Supreme Court.

[161] Consequently, I would have allowed the application to depart from the ***Macharia Case***, where it declares Section 14 unconstitutional, and would have admitted this petition to hearing, on the principle that the declaration is *manifestly wrong*, as it was based on an apparent erroneous procedure.

[162] As the majority is of a contrary opinion, theirs must be the decision of the Court.

DATED and **DELIVERED at NAIROBI** this 20th day of August 2013.

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

.....
N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA