REPUBLIC OF KENYA

IN THE SUPREME COURT

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

CIVIL APPLICATION NO. 11 OF 2016

BETWEEN

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

AND

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

1. OKIYA OMTATAH OKIOTI..... INTERESTED PARTY

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

AND

CIVIL APPLICATION NO. 12 OF 2016

BETWEEN

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

AND

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

THE LAW SOCIETY OF KENYA……3RD AMICUS CURIAE

RULING OF MUTUNGA CJ & PRESIDENT OF THE SUPREME COURT

A. BACKGROUND

[1] My learned colleagues in their respective rulings have already addressed the background in this matter and I will not repeat it. There were three preliminary objections raised: two were filed by the applicants in Civil Application No. 11 of 2016 and Civil Application No. 12 of 2016 and another was filed by Mr. Okiya Omtatah Okioti (Mr. Omtatah), the interested party. All the applicants in Application Nos. 11 and 12 of 2016 responded to Mr Omtatah's preliminary objection. For purposes of clarity and for neatness, I will first jointly deal with the preliminary objections raised by the applicants in Civil Applications No. 11 of 2016 and Civil Application No. 12 of 2016 and Mr. Okiya Omtatah's preliminary objection separately. My opinion in the preliminary objections and the consequent orders will logically follow from this format.

B. PRELIMINARY OBJECTIONS IN CIVIL APPLICATIONS NO. 11 OF 2016 AND CIVIL AAPLICATIONS NO. 12 OF 2016

I. INTRODUCTION

[2] In my view, the issues raised in the two preliminary objections lodged by the applicants in Civil Application No. 11 of 2016 and Civil Application No. 12 of 2016 against the directions of the Chief Justice dated 30th May 2016, as argued by the parties, are based on two main grounds: first, that the Chief Justice acted without jurisdiction under the Supreme Court Act or Rules; and second, that the directions were in breach of the Constitution, especially the principle of decisional independence of a judge encapsulated in Article 160(1). Counsel Dr. Khaminwa supported the arguments by the applicants while the respondents opposed them.

II. ANALYSIS

[3] Answering these questions invariably calls for a reappraisal of the twin roles a Chief Justice plays as the head of a State organ and as a judicial officer within the terms of the Constitution and relevant laws.

[4] Article 161(2)(a) of the Constitution establishes the Office of the Chief Justice and states that he or she shall be the head of the Judiciary. Underlying this is a recognition in Article 161(1) that the Judiciary is an organ of the state and an

institution comprised of courts, judges, magistrates, Kadhis as judicial officers and staff, all under the charge, control, management and leadership of one specific person, the Chief Justice.

[5] Regarding her or his specific and defined roles as the person in whom the Constitution reposes organizational leadership of the Judiciary, the Judicial Service Act No.1 of 2011 (Judicial Service Act) gives effect to Article 161(2)(a) of the Constitution by delineating and defining these roles in Section 5. It reads:

> ***"5. Functions of the Chief Justice and the Deputy Chief Justice***
>
> ***(1) The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government.***
>
> ***(2) Despite the generality of subsection (1), the Chief Justice shall—***
>
> ***(a) assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the Principal Judge of the High Court and the Chief Registrar of the Judiciary;***
>
> ***(b) give an annual report to the nation on the state of the Judiciary and the administration of justice; and cause the report to be published in the Gazette, and a copy thereof sent, under the hand of the Chief Justice, to each of the two***

Clerks of the two Houses of Parliament for it to be placed before the respective Houses for debate and adoption;

(c) exercise general direction and control over the Judiciary."

[6] ***This power highlighted in Section 5(2) (c), namely to exercise general control and direction over the Judiciary,*** *is still broad and wide*. It is broad because it is a generalized power stated without any specific textual limitation on scope or breadth. The expansive terms of this provision must not however be construed to mean that the Chief Justice is an imperial monarch, enjoying unfettered and limitless scope of authority as the head of the Judiciary. It is clear from the architecture and content of the Constitution Kenyans desired the monarchical and feudalist powers of the Chief Justice democratized and decentralized. The creation of heads of superior courts who would seek mandate from their colleagues and who would become an integral part of the leadership in the judiciary, and act as checks and balance of the Office of the Chief Justice, was based on the history of monarchical Chief Justice of the past. The Constitution also removed administrative and accounting powers from the Chief Justice and judges by creating a constitutional office of the Chief Registrar of the Judiciary. The Chief Justice would exercise oversight roles, but the constitutional design was geared to promote the values of the Constitution.

[7] Therefore, that cannot be the intention of the provision in Section 5(2) (c) of the Judicial Service Act. In this era of transformative constitutionalism demanding various values such as accountability no statutory provision can possess such purport. As the Constitution amplifies in Article 1(1) - *all sovereign power is derived from the people*, and is sanctioned and constrained by the Constitution.

[8] I say so because, as my colleagues and I on this bench have pointed out in previous decisions of this Court, the 2010 Constitution has reconceptualised and reconfigured governance and specified certain constitutional dictates to be observed in the discharge of public authority. In ***Communications Commission of Kenya & Pothers v Royal Media Services and Others*** Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014 ***(CCK)*** at paragraph 368 we said that:

> ***"The Constitution itself has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution. <u>The new Kenyan state is commanded by the Constitution to promote and</u>***

protect values and principles under Article 10 and media independence and freedom." (Emphasis added.)

[9] In the earlier Advisory Opinion case ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion No. 2 of 2012 (In Re Gender),*** I pointed out that Article 10 demands that whenever a public or state officer applies or interprets the Constitution; enacts; applies or interprets any law; or makes or implements public policy decision, national values and principles of good governance should be the first point of call. It was a maiden call that this Court would later unanimously endorse in ***CCK***. Since then, a binding edict of law has been that Article 10 is a peremptory constitutional injunction, applies and binds any interpreter, enforcer, executioner, implementer or legislator of any public authority or discretion at all times when such power is sought to be exercised. At paragraph 364 and 365, the Court stated:

"This appeal has also highlighted, for analysis, some of the cardinal values in our Constitution, particularly those of equity, integrity, non-discrimination, participation of the people, patriotism, inclusiveness, and sustainable development as they relate to media independence and freedom. The deconstruction and demystification of these

values and their alignment to the vision of the Constitution is important. Such analysis will clarify the constitutional and legal obligations of the state, government, state organs, commercial and political interests, national and international, implicated in media freedom and independence.

...

Under Article 10 of the Constitution national values and principles of governance bind all State organs, State officers, public officers, and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions."

[10] On this account, and in accordance with the edict in Article 10 of the Constitution, the Chief Justice's powers under Article 161(2)(a) as defined further in Section 5 of the Judicial Service Act can be exercised or invoked to instill good governance, promote integrity, equity, inclusiveness, participation of the people, advance transparency and secure accountability of the Judiciary. Without exception or exemption, Article 10 binds all judicial officers to abide by its provisions.

[11] Applying this principle to this case, Section 5 of the Judicial Service Act must therefore be construed to mean that for institutional effectiveness and efficiency, the Chief Justice enjoys wide and expansive leverage in the direction and control of the Judiciary, its functions, management, officers and other agencies, except that in conducting such functions the prescriptions of Article 10 constraints the reach and scope of her or his powers. Additionally, the powers which he or she can exercise direction or control must be in line with the entire Constitution or can be declared invalid under Article 2(4) of the Constitution.

[12] But the conclusion above cannot be arrived at absent the sad history of intrusive conduct of some of the past Chief Justices who steamrolled or countermanded the work of other judges in a systematic weakening and erosion of judicial independence. Counsel for the applicants gave presentations on the various instances in which some of the previous Chief Justices wrongfully exercised and exceeded their powers, more so in collecting files from other judges and ensuring that the cases were decided in a particular manner. This was indeed a sad reminder of the past Judiciary in which the powers of the Chief Justice were contrary to the rule of law and in effect, hindered access to justice and the right to a fair hearing. It is this past history that the 2010 Constitution has decreed it must be reversed.

[13] The promulgation of the Constitution in 2010 introduces new roles for the Chief Justice while at the same time creates room for other general directions and functions to be performed by the Chief Justice as per statute. The same Constitution also introduces the idea of *non-legal phenomena or considerations* in interpreting the Constitution and these considerations must offer the Chief Justice guidance, when exercising her or his roles. These considerations was first brought to light in his Court's decision in ***In the Matter of the Interim Independent Electoral Commission*** Constitutional Application No. 2 of 2011; [2011] eKLR at paragraph 86, which states:

> ***"The rules of constitutional interpretation do not favour formalistic or positivistic approach (Article 20(4) and 259(1). The Constitution has incorporated non legal considerations which we must take into account in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human rights based and social justice oriented state and society. The values and principles articulated in the preamble, in article 10 in chapter 6 and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence for Kenya. Article 159(1)***

states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the court".

[14] When account is taken of the powers and roles of the Chief Justice conferred by the Judicial Service Act, the broad sense of the powers in Section 5 must be seen to be limited when seen through the lens of some of the non-legal considerations listed in Article 10 of the Constitution such as equity, inclusiveness, transparency and accountability. Unlike the past, the Constitution admits no unregulated or arbitrary power, discretion or authority.

[15] I wish to reiterate that the authoritarian history of our country, in certain cases manifested in the capricious and judicial fiat of some Chief Justices and judges, vividly pointed out by counsel, are not lost on me. It is a regrettable history which the Chief Justice in the current constitutional dispensation cannot desire or seek to re-enact. For to act outside the powers conferred by constitutional imprimatur or by law is to undermine and subvert the very Constitution, its values, ideals and impede the new ethos and culture to which it seeks to reengineer the Kenyan society.

[16] By recalling the words of a South African scholar Etiene Mureinik, writing in the post-apartheid moment, (in a journal article ***'A Bridge to Where?***

Introducing the Interim Bill of Rights,' 10 SAJHR 31, 32 (1994)), I state that ours is a new era of constitutional "justification" in which the exercise of all public power is constrained by the Constitution, its values and principles. In the decision of ***In Re Gender***, our expression of the Constitution's commitment, in relation to values and principles gives more clarity on this issue. There, a majority of the bench stated:

> ***"A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions."***

[17] The national values I am referring to include integrity, accountability, and the rule of law, transparency and good governance. By their aid, one can speak truth to the intransigent authoritarianism by which a complicit judicial system or

its imperial head would unapologetically obtain convictions against dissident voices of indignation against the state or meddle in the judicial province of other judges. The ethos of integrity, accountability, the rule of law, transparency and good governance are the imperatives of now, while impunity and imperium are schemes of yesteryears which cannot be proliferated in this era of constitutional accountability.

[18] My reflections above relate to the powers of the Chief Justice in relation to the Judiciary as a whole. I have paid much emphasis to show that although today the powers of a Chief Justice are still not concisely defined in the Constitution, giving an impression of overbreadth, the constitutional value of accountability provides a counterbalance. I now move to discuss the role and powers of the Chief Justice in relation to the Supreme Court of Kenya. It is this aspect of the Chief Justice's powers that I find most relevant in the context of this case. Before I do let me express my surprise at one aspect that no counsel addressed in arguments on the powers of the Chief Justice. This is the aspect of the monarchical powers of a judge or any other judicial officer. It cannot be argued that while the Constitution clipped and changed the monarchical powers of the Chief Justice those of other judges were left intact. Judicial officers are bound the Constitutional values, too. I say this because there was a loud silence on the exercise of judicial power by a single judge, called decisional independence, which was monarchical in terms of

denying respondents due process, fair hearing, with the urgency that the applicants were accorded justice.

[19] The second role and function of the Chief Justice draws from Article 163(1)(a) of the Constitution. The Chief Justice is the President of the Court. In the Constitution, the Supreme Court Act and the Judicial Service Act there is no definition of what a President of the Supreme Court is, neither has any such role been spelt out. Should that mean, as suggested by Mr. Kilukumi, that the Chief Justice as the President of the Supreme Court has no role at all to play in the case management and organization of the Court aside from being a judge of the Court and the presiding judge? The answer is no. Indeed, with performance management contracting in the judiciary, the daily court returns register, conferencing, and responding to complaints against judges, these administrative powers to reinforce constitutional prescriptions must be exercised. Will the Chief Justice not ask a judge who has delayed a ruling in any court to fast track it and deliver it in the interests of justice? Are the constitutional values not against judicial laziness?

[20] The powers of the Chief Justice in relation to the Supreme Court are to be found in the Rules of the Court. In Part two of the Supreme Court Rules, 2012 as amended by the Supreme Court (Amendment) Rules, 2016 with the title "Administration of the Court" one thing is clear. Falling within the administrative aspect of the Court are four aspects: (i) the role of the Chief Justice in Rule 4; (ii)

the role of the Registrar in Rule 4A; (iii) the working hours of the Registry in Rule 5 and; (iv) the language of the Court in Rule 6.

[21] As a function falling within the Chief Justice's administrative province, Rule 4 lists that which she or he can do:

> ***"4. (1) The Chief Justice shall co-ordinate the activities of the Court, including—***
> ***(a) constituting a Bench to hear and determine any matter filed before the Court;***
> ***(b) determining the sittings of the Court and the matters to be disposed of at such sittings; and***
> ***(c) determining the vacations of the Court.***

[22] The Rules make it clear that the Chief Justice, as the President of the Supreme Court, is vested with defined administrative powers. These powers relate to constituting a bench to hear and dispose of a matter in the Court's roll, determining sittings of the Court and the matters to be disposed of at such sittings and vacations of the Court.

[23] It was contended by Counsels for the applicants that the directions of the Chief Justice of 30th May, 2016 were made without jurisdiction; the directions

amounted to a variation of judicial orders of *Njoki SCJ*; and that the Chief Justice has no power or authority to vary the orders of any single judge of the Supreme Court. Mr Nowrojee further argued that the Chief Justice issued directions without specifying the source of his powers, in the Constitution or the law. It was the applicants' case that no administrative power can override a judicial power of a single judge. The sum of all these submissions was that the Chief Justice's directions are inconsistent with the decisional independence of a judge safeguarded by the Constitution.

[24] Let me first dispose of the question whether the Chief Justice acted without jurisdiction in giving the directions now challenged. I quote paragraph 4 and 5 of the directions I gave:

> ***"[4] Granted the urgency under which the hearing of the application was sought, and the public interest in this application, I hereby invoke my administrative powers as the Chief Justice and the President of the Supreme Court to fast track the hearing of the application.***
>
> ***[5] My directions are, therefore, as follows: 1) The Registrar of the Supreme Court serves the parties to appear for the hearing of this application inter-partes before a 5-Judge Bench of the Supreme Court on Thursday,***

June 02, 2016 at 10 am. 2) The Registrar also serves the parties with notices to appear for directions on the said hearing tomorrow, May, 31 2016 at 10 am before Wanjala and Njoki SCJJ."

[25] Paragraph 4 of the directions clearly states the source of the Chief Justice's powers to give directions. The Chief Justice relied on his administrative powers provided in the Rules. Rule 4 specifies those administrative powers exercisable by the Chief Justice. Clearly and contrary to Counsels' contention, the Chief Justice's decision was properly anchored in law and the directions as given, had a lawful basis, in Rule 4 of Supreme Court Rules, 2012.

[26] Featuring on the directions as given were three aspects. First, it fixed the *hearing date in a matter* that was lodged in the Registry under a certificate urgency. Second, the Chief Justice *determined a five-judge bench to consider the application at an inter partes hearing*. Third, for purposes of the hearing, *parties were directed to appear before a two-judge bench for necessary directions* on the matter. The Chief Justice did not take the file from Judge Njoki. The Chief Justice did not alter her orders except the one that related to the date of hearing which he had the legal power to do. The Chief Justice in observing the provisions of Article 163(2) of the Constitution directed that a bench of five judges of the Supreme Court hear the matter.

[27] As the President of the Supreme Court, the law confers on the Chief Justice the powers to give those necessary directions. The power to determine or allocate hearing dates, select matters to be heard on priority and to determine the quorum of the Court to hear and dispose of such matters is sourced in Rule 4 of the Supreme Court Rules.

[28] But an important point was raised, in my view by Mr. Nowrojee. His submission was that the power of the Chief Justice to determine sittings of the Court does not include the power to decide a hearing date. This again takes us back to the question of what constitutional approach a court should accord the interpretation of a statutory provision, where the word sought to be interpreted has not been defined in the statute.

[29] In search of that proper approach, we need, by way of inquiry to give context to this case. That entails a duty on us to have regard to the nature of the cause of action at hand and probe what constitutional issues or rights that may be implicated on a conspectus of the facts before the Court.

[30] One cannot entertain any doubt that the power of the Chief Justice to determine sittings of the Court and the manner of exercise of that power, will in all cases implicate or have an effect on a party's right to appeal and the right to have

the dispute determined expeditiously. Because the exercise of that power has an implication on the rights of a party, there is a duty on this Court, by dint of Article 20(3)(b), to interpret that provision in a way that most favours the enjoyment of that right. Article 20(3)(b) provides:

> ***"(3) In applying a provision of the Bill of Rights, a court shall-***
> ***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and***
> ***(b)adopt the interpretation that most favours the enforcement of a right or fundamental freedom."***

[31] This rule of interpretation that any law, including statutory law which affects rights must be interpreted to comport with the spirit, purport and objects of rights in the Bill of Rights also appears in Article 20(4)(b) of the Constitution. In my dissent in ***Nicholas Arap Kiptoo Salat v Independent Electoral and Boundaries Commission and Others*** Supreme Court Petition No. 23 of 2014; [2015] eKLR, I stated that:

> ***"As I read these provisions they mean that if any existing rule of common law does not adequately comply with the Bill of Rights, the court has the obligation to develop the***

rule so that it does comply. Additionally, the court has the obligation to interpret statute in a way that also complies with the Bill of Rights."

[32] In South Africa, a similar provision is to be found in Section 39(2) of the Constitution, and which the Court has interpreted in ***Fraser v ABSA Bank Limited [***2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at paragraph 43 that:

"When interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution. This Court has made clear that section 39(2) fashions a mandatory constitutional canon of statutory interpretation."

[33] In ***Makate v Vodacom (Pty) Ltd*** [2016] ZACC 13, at paragraphs 88 and 90 Jafta J made further illumination to the principle espoused in ***Fraser*** o*n* the duty imposed by Section 39(2):

"It is apparent from Fraser that section 39(2) introduced to our law a new rule in terms of which statutes must be construed. It also appears from the same statement that

this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.

...

It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2), irrespective of whether the parties had asked for it or not. This is so because the operation of section 39(2) does not depend on the wishes of litigants. The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. That duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights."

[34] Therefore, in construing a provision in the Rules which accord the power to determine sittings of the Court, a broad interpretation that most favours the right to appeal and expeditious dispensation of disputes at the Supreme Court must be preferred. The power to determine sitting of the Court must therefore include the power to decide the place, date and time of the sitting and quorum of the Court. On the contrary, adopting an interpretation that does not assign that power to a specific person or authority creates an administrative void which may affect the hearing and adjudication of appeals before the Supreme Court.

[35] A narrow and restrictive interpretation was suggested by Mr Nowrojee, namely that sittings, as understood in Rule 7C of the Amended Rules means the three terms or sessions in a year when the Court is working. I decline to endorse this approach because it is one that curtails the assigned powers and takes away the important role of institutional leadership which the Constitution vests in the Chief Justice. If adopted, it would mean that the administrative functions in the Court, especially as regards the day and time of hearing matters shall remain in limbo until parties appear before Judges of the Court to seek directions on hearing dates. One cannot think of any potential cause of delay in the administration of justice than this.

[36] Having found that the Chief Justice properly exercised powers conferred on him by the Rules of the Court, I do not find merit in the submissions that the

directions amounted to a variation of judicial orders of *Njoki SCJ*, neither is the suggestion that the Chief Justice has no power or authority to vary the orders of any single judge of the Supreme Court on matters of fast tracking dates of hearing in the interests of justice, tenable.

[37] Let me set out the facts giving rise to this case in demonstrating my point. On 27th May 2016, immediately the Court of Appeal handed down its judgment, by way of a certificate of urgency, a notice of motion application was swiftly filed before this Court. The application was brought before a single judge, who heard the matter *ex parte*, in chambers and gave orders staying the decision of the Court of Appeal.

[38] On the same day, the single judge proceeded to certify the matter as urgent, issue conservatory orders and also gave directions that the matter be heard *inter-partes* on 24th of June, 2016.

[39] Section 24 of the Act empowers a single judge to make any interlocutory orders and give any directions other than an order or direction which determines the proceedings or disposes of the questions in issue. This provision of the Act has yet to be interpreted by this Court. In my view, the interpretation and application of Section 24 of the Act read together with Rule 4, as I have signalled above must be brought within the ambit of Articles 10 and 20 of the Constitution and must

accord with the canons of interpretation established in other decisions of this Court.

[40] It is common cause that the question of the retirement age of judges is a dispute of greatest public interest- the parties in this case have termed it as an "exceptional" or "unique" case before the Court. The issue transcends the parties involved and the public expects that a speedy resolution of the dispute be attained.

[41] It was therefore imperative that the Court or any single judge seized of the matter allow a ventilation of the issues in an open and transparent environment, with representation of all parties. Article 10 of the Constitution which enjoins all public and judicial officers to adhere to transparency, accountability, equity, inclusiveness, integrity was binding on the single judge when exercising powers conferred by Section 24. If *ex-parte* orders are issued in any matter, it is common practice that the Court sets down the matter for *inter-partes* hearing as soon as possible to allow for the other party to be heard. Equity dictates this. Likewise, Article 159(2) places a duty on courts, while exercising judicial authority, to uphold the principles of justice shall be done to all irrespective of status, justice shall not be delayed and the purpose and principles of the Constitution shall be protected and promoted. In future this court must decide whether a single judge of this court can give orders *ex-parte* without subverting the constitutional values I have repeated in this ruling.

[42] To have heard the matter in chambers, at the exclusion of other parties and to allocate a hearing date several weeks after the Court would have been incapacitated by a quorum deficit runs afoul not only the right to a fair trial but is also an unapologetic abuse of judicial discretion in Section 24 contrary to Article 10 and 20 of the Constitution.

[43] Caution must be sounded to all judges of this Court that discretionary powers under Section 24 are not absolute in a similar way that the powers of the Chief Justice under any law are not without limitations. All judges of this Court must appreciate that Section 24 is neither a blank cheque giving room for a relapse into the old jurisprudence of technicalities n0r is it an invitation to non-adherence of constitutional values and principles of governance.

[44] The justice of this case thus demanded that as the head of the Court I had to intervene in the matter. I was prompted by the glaring injustice and blatant violation of the Constitution with which the ex-parte orders were granted. The Chief Justice invoked his administrative powers as the President of the Supreme Court to secure the right of the respondents to be heard to and the right to have a dispute expeditiously determined before a full bench of this court.

[45] These directions did not alter or vary the orders of *Njoki SCJ*. As I stated in the directions, the extreme urgency with which the matter was brought before the Court necessitated and justified a prompt and urgent hearing in a forum where all parties are present. Furthermore, judicial notice has to be taken of this issue as one involving immense and agitated public interest.

[46] In any case, I find it quite duplicitous for the applicants, who are Judges of an apex Court to challenge an order fast-tracking the hearing of their case when in the first place they moved the Court with a prayer that their application deserves to be treated with priority and sought to have the matter certified as urgent. *Why then would it be against the interests of justice if the matter, which has been certified as urgent is moved to be heard at an earlier date and allows all the parties to argue their case?* I must admit that this aspect of the preliminary objection baffled me. As Counsel Kilukumi eloquently stated the applicants moved to this Court for justice with lightning speed. In urging that the other parties be heard in the same fashion and not be relegated to the speed of an old turtle in their search for justice what prejudice can possibly been caused by bringing the hearing forward?

[47] The Court's attention was drawn to the High Court decision in ***Philip K. Tunoi & 2 Others v Judicial Service Commission & Another*** [2015] eKLR

where Mwongo, PJ, Korir, Meoli, Ongudi and Kariuki JJ observed at paragraph 70:

> ***"From the foregoing it is explicit, and we so determine, that substantive directions are to be issued by the court actually seized of the matter, and not any other person or authority. Directions, when issued, form part of the judicial exercise or the road map in the overall conduct of a matter. In our view, the situation is fraught with danger where the Chief Justice issues directions as to the hearing date or the date when the court ought to render judgment, because this ceases to be an administrative function and can be construed as bordering on interfering in the judicial conduct, or road map of a matter. In any case, the court seized of the matter is obliged in law to dispose of all matters in an expeditious manner."***

[48] Two aspects distinguish that case from this present matter. One, the decision is a High Court decision which is persuasive and does not bind this Court. Two, the powers of the Chief Justice under challenge in that case relate to the scope of Article 165(4) which confers on him authority to empanel a bench of uneven numbers in the High Court when a substantial constitutional question is raised in

an action. The directions in that case concerned a case in another court whereas in the present case the directions concern a case in a court headed by the Chief Justice.

[49] In this case, we are dealing with express powers of the Chief Justice donated by the Rules of the Court. Because the sets of facts in this case are at variance with the High Court decision above, its *ratio decidendi* is inapplicable.

[50] It was also contended that the directions of the Chief Justice amount to improper conduct against a judge of the Supreme Court in violation of decisional independence of a Judge. Having found that the directions of the Chief Justice were properly originated and predicated in law and the Constitution, I find no reason to venture into the question whether there was interference with the decisional independence of a judge.

[51] Mr. Muite also raised the point that the avenue adopted to challenge the exercise of administrative powers was not a proper one. I tend to agree with this proposition because it is clear in our law that where a party is aggrieved by an administrative decision, the proper forum is the High Court where judicial review orders may be sought against that administrative decision. It does not lie to a party to object by raising a preliminary point to the hearing of an appeal or application on grounds that an administrative decision taken in the matter was not proper.

[46] I therefore decline to uphold and consequently disallow the two preliminary objections by the applicants both applications.

B. THE PRELIMINARY OBJECTION RAISED BY THE INERESTED PARTY, MR. OKIYA OMTATA

I. THE PARTIES' CASES

[1] Mr. Okoiti Omtatah raised a Preliminary Objection dated 31st May 2016 together with a Notice of Motion (in Application No. 13 of 2016) of even date against Application No. 11 of 2016. He relied on the arguments in the said Preliminary Objection, Notice of Motion, and the Replying Affidavit dated 6th June 2016 and written submissions of even date to support the said Preliminary Objection. The main argument gleaned from all the pleadings is that this Court lacks the necessary jurisdiction to entertain all the applications filed before this Court. The basis of his argument is that Article 50(1) as read with Article 25(c) of the Constitution places an absolute bar to the exercise of jurisdiction by a judge who is neither impartial nor independent. He urged that Articles 50(1), 73(1)(a)(iii) and 73(2)(b) of the Constitution demand a mandatory and outright disqualification of judges in the case of conflict of interest. In such circumstances, he submitted, recusal is an option. He posited that litigants are entitled to the constitutional guarantee of a fair trial by an impartial and independent court. Further, that the courts must guard against even the appearance of bias.

[2] Mr. Omtatah submitted that under the Constitution, a court means judges and that there can be no court without judges. The import of his argument is such that, if judges are removed from the bench on the basis of lack of impartiality and independence, the court is stripped off its jurisdiction and cannot entertain such a matter. Thus, Articles 50(1) and 25(c) place an absolute bar to the court's exercise of jurisdiction where a judge is not impartial and independent.

[3] He provided the following brief facts as the basis of his argument that, the bench as currently constituted, may not be impartial and independent as required by Article 50(1) of the Constitution. He pointed out that *Wanjala SCJ* and I, are members of the Judicial Service Commission (JSC) which has publicly announced that judges appointed under the repealed Constitution should retire at the age of 70 years as stipulated in the 2010 Constitution. In that regard, he argued that by virtue of our membership on the JSC, we have participated in its decision since there is no evidence whatsoever to show that we recused ourselves from arriving at that decision. On that basis, he said that we are automatically disqualified from adjudicating this matter.

[4] He further stated that the remarks made by *Ojwang SCJ and Njoki SCJ,* in ***Nicholas Arap Kiptoo Salat v IEBC and Others [2015] eKLR*** (***Salat***), regarding the pertinent issues "display a deep-seated antagonism to the view that judges appointed under the old Constitution should retire at [the age of] 70 years".

This, he argued, will cause a reasonable person to harbor doubts about the impartiality of the constituted bench. On that basis, he advanced the argument that the two should be automatically disqualified from adjudicating this matter. He went to great lengths to cite several foreign case law in support of his submissions. He also reiterated that the applicants had direct interest in the matters and could not sit to hear them.

[5] Lastly, he stated that the interaction between the judges on the bench and the applicants raises a perception of bias. He pointed out that, on the facts of this case, there is incontrovertible evidence that raises the risk of actual bias.

[6] It is his argument that there is no duty to sit on the part of judges and that, only the responsibility to sit where the court is independent and impartial exists. On the strength of this argument he urged this Court to depart from its earlier decision in ***Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others*** [2013] eKLR (***Jasbir***) because it creates a duty to sit even where the independence and impartiality of the judges of the Court is in question by invoking the doctrine of necessity. Mr. Omtatah submitted that the doctrine of necessity is not applicable in this case since it can only be invoked to avoid injustice, for a good cause and with due regard to the principles in Article 10 of the Constitution. He further urged this Court to adopt the approach followed by the South African Constitutional Court in ***Hlophe v Premier of the Western Cape Province,***

Hlophe v Freedom Under Law and Other [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC) (***Hlope***) where the Court declined to grant leave to appeal to adjudicate the merits of the application on the basis that the bench was conflicted and recusal would result in a quorum deficit.

[7] He also stated that this case raises "moral" issues and that ancient doctrine that justice should not only be done, but be seen to be done should prevail. He pointed out that the litigants are members of this Court, who had a close interaction with members of this bench and that this raises a perception of bias. He urged this Court to adopt the approach in ***Hlophe*** and decline to adjudicate this case because of conflict leaving the decision of the Court of Appeal as the final judgment.

[8] As regards the conservatory orders, he urged this Court to vacate and declare them null and void as they were improperly and unconstitutionally granted in contravention of Article 163(2) of the Constitution, Rules 31(1) and 31(2) of the Supreme Court Rules, 2012. He further attacked the validity of the conservatory orders on the ground that there application was irregular as there was no Notice of Appeal, judgment of the Court of Appeal and the Registrar's signature when the appeal was filed and conservatory orders granted. This therefore meant that it had not been sanctioned by the Registrar in terms of Rule 4(b) and Article 83(b) of the Constitution.

[9] Counsel for the 1st and 2nd respondents in Application No. 11 of 2016, Mr. Charles Kanjama supported Mr. Omtatah's Preliminary Objection and associated himself with the submissions outlined above. He added that the right to appeal is exercisable where the court is impartial as demanded by Article 50(1). Senior Counsel for the 1st and 2nd respondents in Application No. 12 of 2016 also supported Mr Omtatah's Preliminary Objection. He stated that judicial authority as espoused in Article 159 of the Constitution is vested in the people of Kenya and should therefore be seen to be done in their eyes. He, like Mr. Omtatah, urged the Court to adopt the approach in ***Hlophe*** by declining to decide the issues, leaving the decision of the Court of Appeal as the final judgment. Counsel for the 1st *Amicus Curiae*, International Commission of Jurists (ICJ), Mr Nyaundi supported Mr. Omtatah's Preliminary Objection and urged the court to decline deciding the matters for the same reasons stated above.

[10] Counsel for both applicants in Applications Nos. 11 and 12 of 2016, opposed Mr. Omtatah's Preliminary Objection. So did Dr. Khaminwa for the Kituo cha Sheria, amicus curiae before both withdrew from the proceedings. Mr. Kilukumi, counsel for the applicant in Application No. 11 of 2016 argued that this Court cannot be invited to abdicate its mandate. He emphasized that his client is entitled to the right to appeal and that the Court of Appeal decision cannot be allowed to stand unchallenged as it was vitiated with bias. He distinguished the case of

Hlophe from the present in that, there the case was to be referred back to the Judicial Service Commission for consideration, which is not the case here. He stated that the doctrine of necessity dictates that the court should sit and render justice to the parties. He urged the Court to invoke the doctrine of necessity just like in ***Jasbir***.

[11] Mr. Pheroze Norwojee, Senior Counsel in Application No. 12 of 2016 strongly opposed the Mr. Omtatah's Preliminary Objection. He filed Grounds of Opposition dated 8th May 2016 opposing the Notice of Motion in Application No. 13 of 2016. These grounds of opposition apply mutatis mutandis to the Preliminary Objection raised by Mr. Omtatah for the reason that Application No. 13 of 2016 and the Preliminary Objection were merged because of the similarity of the arguments raised therein.

[12] He argued that Mr. Omtatah is urging the Court to abdicate its constitutional mandate and that the Preliminary Objection is merely an attempt to dispose of the matters before court summarily and through a procedure unknown to law. He further stated that the right to access a court of final instance ought not to be denied to an applicant in any circumstances where the Court is mandated to hear the case. Counsel submitted that, in view of the nature of the constitutional issues raised in this case, it is necessary for this Court to provide an authoritative pronouncement on the constitutional question raised in the intended appeal. He

submitted that Mr. Omtatah has not provided any legal basis whatsoever, why the judgment of the Court of Appeal should be a final decision on the constitutional question raised in the intended appeal.

[13] In addition to the above, he relied heavily on ***Mukisa Biscuit Co. v West End Distributors Ltd*** 1969 EA 696 (***Mukisa Biscuit Co.***) to support his submission that Mr. Omtatah's "Preliminary Objection" is not a preliminary objection in the true sense of the word because it fails to satisfy the test set out in that case. In that case, Law JA pointed out that in order for a point to qualify as a Preliminary Objection it must consists of the following:

> ***(a) It must raise a pleaded point of law or one arising from the pleadings by implication.***
>
> ***(b) It must be such that, if argued successfully, would dispose of the suit (and he gave examples of jurisdiction and limitation of time).***

[14] In a concurring judgment, Sir Charles Newbold P added that:

> ***(a) It must be a pure point of law argued on the assumption that the facts pleaded are correct (undisputed).***

(b) That it cannot be raised where facts has to be ascertained; and

(c) It cannot be raised where what is being sought is a subject of a court's discretion.

[15] Applying the above test, the applicant argued that this Court has jurisdiction and that jurisdiction is the only ground which could have placed this Preliminary Objection under the ***Mukisa Biscuit Co.*** test. Counsel further submitted that declining jurisdiction on the basis of lack of impartiality involves the ascertainment of facts and an exercise of discretion and that a ground which requires the court to exercise its discretion removes the Preliminary Objection from the test set out in ***Mukisa Biscuit***. He said that no application for disqualification of the judges was made and that, in any event, a statement for recusal or disqualification is not a Preliminary Objection. Further, that the question whether the judges' independence and impartiality is compromised is a point to be ascertained from the facts not of law. Lastly, that there is no right that is more important than the other. In the end, he urged the Court to dismiss the Preliminary Objection.

II. ANALYSIS

[16] The issues involved herein are of cardinal and public importance, touching on the integrity of the apex court and its ability to discharge its constitutional

mandate independently and impartially. The fate of the integrity of this Court as an institution and its ability to maintain public confidence in the administration of justice will therefore depend on how we handle these issues. I have looked at the respective parties' submissions (both written and oral) and affidavits and the overriding issue is whether the issues raised in Mr. Omtatah's Preliminary Objection are meritorious. His Preliminary Objection is a broader one in the sense that it questions this Court's suitability to deal with all the applications filed in this Court. What becomes of it determines the fate of all other applications.

[17] As stated elsewhere above, Mr. Omtatah's argument is that this Court lacks the necessary jurisdiction to entertain any of the applications in this regard. In clear terms, he stated categorically that this Court should not touch any of these applications. His argument is that, before this Court can exercise its jurisdiction, it must be impartial and independent as required by Article 50(1) of the Constitution. In other words, judicial independence and impartiality are preconditions of this Court's exercise of jurisdiction. Without these two, the court is stripped off its jurisdiction by virtue of Article 50(1) of the Constitution. This argument is based on the premise that judges of the Supreme Court are the "court" and once disqualified, there would be no court. He argued that the bench as constituted is not independent and impartial for the reasons set out elsewhere above.

[18] The upshot of Mr. Kilukumi's and Mr. Noworojee's arguments is that lack of impartiality should not paralyze this Court from exercising its mandate. Mr. Nowrojee further argued that lack of impartiality does not take away this Court's jurisdiction and that since the Preliminary Objection is not based on jurisdiction, it fails the test out in ***Musika Biscuit Co***.

[19] It is therefore necessary to start off with the question of jurisdiction. The Supreme Court is created through Article 163(1) of the Constitution and its jurisdiction is donated by Article 163(3) and (4). Article 163(3) provides that the Supreme Court shall have:

> ***"(a) [E]xclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President arising under Article 140 and;***
> ***(b) Subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from-***
> ***(i) The Court of Appeal and;***
> ***(ii) Any other court or tribunal as prescribed by national legislation."***

[20] Article 163(4) provides as follows:

"Appeals shall lie from the Court of Appeal to the Supreme Court –

(a) As of right in any case involving the interpretation or application of this Constitution; and

(b) In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

Additionally, Section 3 of the Supreme Court Act No. 7 of 2011 (Supreme Court Act) provides that:

"3. 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;

(d) enable important constitutional and other legal matters, including matters relating to the transition from

the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;

(e) improve access to justice; and

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

[21] From the above provisions, it is quite clear this Court is an institution created by the Constitution and that its jurisdiction is donated by the Constitution and the Supreme Court Act. In ***Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others Sup. Ct. Civil Appeal (Application)*** No. 2 of 2011 we affirmed this as follows (paragraph 72)-

"A court's jurisdiction flows from either the Constitution or legislation or both. As such a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction that goes beyond that which is conferred upon it by law." (See also ***In Re the Matter of the Interim in the Independent Electoral Commission*** Sup. Ct. Application No. 2 of 2011.)

[22] Indeed, in ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*** **[2014] eKLR** this Court held that at paragraphs 37 and 49 that-

> ***"[O]rdinarily, in our view, a question regarding the interpretation or application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it... As the apex Court, we must always be ready to settle legal uncertainties whenever they are presented before us. But in so doing, we must protect the Constitution as a whole."***

[23] The judges of the Supreme Court are therefore separate from the Court as an institution. Neither is its jurisdiction attached to the judges. It therefore follows that, whether a judge or judges are disqualified from sitting does not take away the constitutionally bestowed jurisdiction of the Court for the simple reason that jurisdiction is attached to the Court as an institution not just the judges.

[24] Mr. Omtatah's argument suggests that the jurisdictional provisions should be read subject to Article 50 (1) (impartiality and independence requirement) and 25(c) (the right to a fair trial shall not be limited). The constitutional provisions

reproduced above are silent on that proposition. To uphold Mr. Omtatah's proposition would be to limit the jurisdiction of this Court by the art of interpretation through inference. The question in the preliminary objection is clearly about the interpretation of the Constitution – whether the applicant Supreme Court judges right to an appeal can be limited by the fact that there is no impartial bench under Article 50(1) of the Constitution. Essentially, he is dissuading this Court from exercising its jurisdiction because the bench's impartiality is questioned and this will inevitably limit the party's rights to a fair trial. This question invokes the jurisdiction of this Court.

[25] In view of the above exposition, I agree with Mr. Pheroze that the recusal or disqualification of judges does not divest this Court of its constitutionally donated jurisdiction. This line of reasoning defeats Mr. Omtatah's argument that this Court should not have touched the earlier application and should not even "touch" the present preliminary objections. It would not make sense for Mr. Omtatah to urge us not to "touch" the applications yet he has filed the present Preliminary Objection for this Court to make a determination on whether it should disqualify itself and not proceed to hear any further application. In the ordinary adversarial adjudication process, the Court needs to first convene before a dispute is heard. If a contrary proposition is adopted, this Court would not be in a position to determine the core question, whether the bench, as constituted, is suited to deal with the issues raised in the applications.

[26] What then becomes of Mr. Omtatah's Preliminary Objection? Although the Preliminary Objection is raised under the label and style of "jurisdiction", it is clear from the arguments raised in his Notice of Motion, written submissions and Replying Affidavit that it is in fact not based on the lack of jurisdiction. It is based on the disqualification of the judges on the bench on the ground that their independence and impartiality is compromised. The preliminary objection raises issues of constitutional interpretation which this Court must address. It is on this basis that he argued that all the members of the bench must disqualify themselves and that if they do, there would be no "court" to decide the applications. Mr. Nowrojee has contended that the procedure employed by Mr. Omtatah is unheard of in law and that the court cannot be divested of its mandate summarily by means of a purported Preliminary Objection. This, he submitted, is because the Preliminary Objection fails to satisfy the test laid in ***Mukisa Biscuit Co***. It is therefore apposite to look into this argument.

[27] I have already set out the test enunciated in ***Mukisa Buscuit Co.*** above and I need not do so here. But before I begin, it is necessary to make some observations. When adopting cases decided in the pre-2010 constitutional dispensation, sight should not be lost of the fact that they should be viewed and understood through the constitutional lens. In other words, they should be infused and baptized with the spirit, letter, and overall vision of the Constitution. An

approach that pays homage to the principles of equity, fairness, integrity, inclusiveness, transparency, accountability, as enunciated in Article 10, should be preferred over a pure legalistic one. In ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** [2014] eKLR**,** this court when interpreting the well-known and widely used case on jurisdiction ***Owners of the Motor Vessel "Lillian S' v. Caltex Oil*** **(Kenya) Ltd** [1989] KLR 1, reiterated in paragraphs 88 and 89 that**-**

> ***" [88] The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the Constitution of Kenya, 2010 (Article 163), a Supreme Court, with ultimate constitutional responsibility, and bearing binding authority in questions of law, over all other Courts, has been established."***
>
> ***[89] Such are new functions that were not in contemplation at the time of the decision of the "Lillian S" case. The Supreme Court is, besides, not in the more constrained position in which the Court of Appeal had been, at the time of "Lillian S".***

It is for this reason that in ***In Matter of the Interim Independent Electoral Commission*** – Constitutional Application No2 of 2011; [2011] eKLR, we also stated that "[t]he rules of constitutional interpretation do not favour a formalistic or positivistic approach (Articles 20(4) and 259(1)".

[28] I have already stated that Mr. Omtatah's Preliminary Objection is not anchored on jurisdiction although it is labelled as such. Does that disqualify it as a Preliminary Objection? Mr. Pheroze says yes. It is important to note that although Preliminary Objections are, more often than not, based on lack of jurisdiction, it is not the only ground. It is for that reason that, Law JA in ***Mukisa Biscuit Co.*** gave jurisdiction and limitation of time only as examples of the grounds of raising a Preliminary Objection. The list should not therefore be regarded as closed. Depending on the facts and circumstances of a particular case, they may be other grounds for raising a Preliminary Objection. The instant case is a good example. It is a case that has arisen in the post 2010 Constitutional era and the unique and exceptional facts, which all parties have attested to, will require this Court to interpret ***Mukisa Biscuit Co.***, in light of the provisions of the Constitution.

[29] On the main issue whether this Court has jurisdiction to determine further applications or the Court should disqualify itself, Mr. Omtatah's argument that the

judges' impartiality and independence is compromised such that they should be disqualified from adjudicating on the matter. The question is whether such a ground passes the test laid in ***Mukisa Biscuit Co.*** and when answering that, due regard should be had to the spirit and letter of the Constitution; the principles set out in Article 10; the need to safeguard the integrity of the Court as an institution and the need to engender public confidence in the administration of justice.

[30] Whether a judge should be disqualified from sitting may be a question of law depending on the facts and circumstances of a particular case and is not always an issue that falls within the discretion of the court as argued by Mr Nowrojee. I am guided by the observations of Lord Browne – Wilkinson in ***Ex parte Pinochet Ugarte (No 2)***, where he stated that the fundamental principle that a man may not be a judge in his own cause has two similar but not identical implications. The first is that if a judge is in fact a party to the proceedings or has a financial or proprietary interest in the outcome, he is a judge in his own cause. In these circumstances, the mere fact that he is a party to the proceedings or has a financial interest in the proceedings automatically disqualifies him from sitting without any factual investigation.

[31] The second is where a judge is not a party to the proceedings and does not have a financial or proprietary interest in the outcome, but his conduct or behavior may give rise to the suspicion that he may not be impartial, such as by an

association with the parties in *lis*. This second category is not the principle in the strict sense and does not invite automatic disqualification. The ***Pinochet*** case was cited with approval by this Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*** [2013] eKLR (***Jasbir***). The test set out there is therefore applicable in this case provided it arrives at an outcome that accords with the dictates of the Constitution. *Do Mr. Omtatah's allegations of bias fall under the category which calls for disqualification without the need to investigate any facts?* Only when the answer is in the affirmative can the ground of bias bring his Preliminary Objection under ***Mukisa Biscuit Co.*** test. I say so because the test requires only questions of law, which do not require an exercise of discretion by the court and the ascertainment of which do not require factual investigation.

[31] It is indisputable that the facts relied on by Mr. Omtatah need not be investigated. They are not disputed. **They are hard, clear and recorded**. *Wanjala SCJ* and I sit in the Judicial Service Commission (JSC), a party in these proceedings, which made a decision that judges should retire at the age of 70 years. This is a fact which, even this Court may take judicial notice. We have participated in that decision of a corporate body, the JSC. Now, can we sit on a bench where the JSC is seeking an order declaring that judges should retire at the age of 70 without raising a perception of bias or partiality? I think not.

[32] The position of my other colleagues is also similar. *Ojwang SCJ* and *Njoki SCJ* (with *Rawal DCJ* and *Tunoi SCJ* included) expressed their views in relation to the question before us now in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** [2015] eKLR at paragraph 76 where they stated thus:

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

[33] Mr. Omtatah relied on the above passage to assert that to allow the said judges to sit on this matter may raise a perception of bias. Counsel for the applicants contended that those are not findings. I am not convinced. The above paragraph is very clear on which position the judges have taken on the matter. To this end, it is clear that Mr. Omtatah's Preliminary Objection raises issues of law touching on the impartiality and independence of members of this Court based on hard facts which require no investigation.

[34] It is important to state that a check list approach to the test in ***Mukisa Biscuit Co.***, as suggested by Mr. Noworojee is not consonant with the spirit and letter of the Constitution. The issues raised in Mr. Omtatah's Preliminary Objection are not insignificant. Nor are they narrowly limited to the rights of the applicants. They speak to the integrity of this Court as an institution and the urgent need to engender public confidence on this Court's ability to dispense with justice equitably, fairly and with due regard to the spirit and letter of the Constitution. Whatever outcome that will arise from this Court as presently constituted, will raise serious questions about the impartiality and independence of its members. This Court's mandate is not only to adjudicate on matters brought before it, but dispensing with justice impartially and independently, with due regard to the principles enunciated in Article 10 of the Constitution.

[35] The pursuit of justice demands that judges act independently and impartially. Where lack of impartiality may raise perceptions of bias, such that members of the public may think justice has not been rendered, it is only fair and equitable that the court declines to adjudicate such matters. In the circumstances of this case, where the litigants are members of this Court, appearing before their colleagues, and where other members of the bench are members of the 1st respondent, it is only fair and equitable that the Court declines to adjudicate the issues to safeguard the integrity of the institution and to foster public confidence in the administration of justice.

[36] *Whose perception must the Court look at in order to determine that the judges must disqualify themselves?* Several counsel have come before this Court and stated that the test as derived from several cases in foreign jurisdictions persuade the Court to examine what the "reasonable woman or man" would perceive if the bench proceeded to determine the matter. It is critical to emphasize that comparative foreign cases are of persuasive value and pursuant to Article 2(4) of the Constitution that stipulates that *"any law …that is inconsistent with the Constitution shall be void to the extent of its inconsistency."* Article 1(1) of the Constitution provides that *"all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution."* Article 159(1) of the Constitution states that judicial power is derived from the people. Therefore in this particular matter, when determining whose perception the Supreme Court

should bear in mind, what the people/public perceive of the Court is critical. Who are the "people" as contemplated in the Constitution? Counsel seemed to agree that the people mean ***Wanjiku,*** the ordinary Kenyan. We were told to imagine that Kenyan in some bus or ***matatu.*** The reality is that the ordinary Kenyan normally walks. We must, therefore, imagine the people of Kenya to reflect what the Preamble of the Constitution calls ***our ethnic, cultural and religious diversity.*** We could also add class because of the glaring inequalities in our society. Conceptualizing the people is complex and courts problematize and interrogate the concept. Judges will invariably differ on their conception of the people. The critical question is what Kenyan people of different regions, religions, gender, generation, race, class, clan, and ethnicity would perceive as justice in this matter. In this particular exceptional case, the "people" will look at the general outlook of the Court: the two applicants in the matter where their colleagues have to determine the matter; two other judges who are members of the respondents; and two others who have voiced opinions on the issue in a previous case. It is for the judge to imagine what their perceptions would be and decide.

[37] Will this Court's integrity be upheld if it proceeds to determine the other applications in light of all these factors? I have time and again pronounced myself on the prominence of the national values and principles of governance enshrined in Article 10 of the Constitution. One key principle is integrity. Integrity is usually connoted to individual integrity but it does not stop there. Article 73(1)(a)(iv) of

the Constitution recognizes integrity of office or rather institutional integrity. It reads as follows:

> ***" 73. (1) Authority assigned to a State officer—***
>
> ***(a) is a public trust to be exercised in a manner that—***
>
> ***(iv) promotes public confidence in the integrity of the Office"***

The members of this bench are therefore called upon to promote the public trust in the integrity of the office (in this instance the Supreme Court) and if the public perception calls for this Court to disqualify itself, each member of the Bench must analyze that perception and determine what to do.

[38] However, the applicants strongly submit that they have a right to access justice under Article 48 of the Constitution and this means they also have a right to appeal to this Court. Additionally, it will only be fair to the parties to exercise this right which should not be limited by Article 50(1). On the other hand, the interested party has submitted that the right to access justice under Article 48 of the Constitution does not mean the right to access the Courts. Justice must not be connoted to merely mean courts. Also, the 1st and 2nd respondents urged us to rely on the ***Hlope*** decision that held that since the applicants therein had already exercised their right to appeal they would be no injustice if they were not granted leave to appeal.

[39] I wish to restate that the applicants have a right to a second appeal. The ***Hlope*** decision cannot be applicable in relation to the set of facts before this Court. In that matter, the facts are highly distinguishable from this case especially in relation to the applicants having justice through an appeal. Article 163(4)(a) of the Constitution allows for parties to access the Supreme Court in relation to second appeals. Making a finding that the applicants should not access this Court because they have already exercised a right of appeal at the Court of Appeal will be an action that can be invalidated by Article 2(4) of the Constitution. However, although parties have a right of second appeal, the question of whether this Court must ultimately exercise is jurisdiction to determine the appeal, should be answered on a case-by-case basis.

[40] What then does the concept of justice entail? The Constitution recognizes in Article 10(2)(b) and 19(2) that social justice is a national value and principle and must be promoted in order to promote the rights in the Bill of Rights. Article 159(2) also places a duty on courts and tribunals exercising judicial authority to uphold the following principles:

> ***"(2) In exercising judicial authority, the courts and tribunals shall***
>
> ***be guided by the following principles—***

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted."

[41] The applicants strongly argued that it would be unfair to lock them out of this Court and in effect that would be unjust. However, it would also curtail justice if this Court proceeds and determines the matter and in the long run the ultimate decision-making process is questioned or perceived to have been pre-determined by an impartial bench and in the long run not only hinder the fairness of both parties before this Court but fail to preserve the fairness of the Supreme Court's processes and in turn, be contrary to the constitutional precepts of justice which courts are required to bear in when exercising their judicial authority.

[42] Mr. Kilukumi urged this Court to invoke the doctrine of necessity like we did in ***Jasbir*** despite the arguments on perception of bias raised by Mr. Omtatah. In

fact, Mr. Omtatah urged us to depart from that case since it creates a duty to sit even where there is a risk of partiality on the part of judges. On the other hand, Mr. Kilukumi fortified his position by arguing that the doctrine of necessity is crucial to avoid paralyzing the court from performing its constitutional mandate. The arguments therefore raise the question: how can a court strike a delicate balance between invocation of the doctrine of necessity on the one hand and the need to dispel perceptions of bias in the administration of justice on the other?

[43] First, it is important to distinguish the case of ***Jasbir*** from the present case. In that case no basis whatsoever was provided for the recusal of the judge except for the mere fact that he once recused himself in the same case before the Court of Appeal. In this case, Mr. Omtatah has provided uncontroverted facts to substantiate his claims for disqualification on the basis of perceived bias. These two cases are distinguishable. It cannot therefore be argued that, merely because the doctrine of necessity was invoked in ***Jasbir***, the same should be done in this case. Each case must be dealt with on its own facts. It is for that reason that in ***Jasbir***, we stated that "the circumstances calling for recusal, for a judge, are by no means cast in stone". For these reasons, I find no reason to blindly follow the approach adopted in ***Jasbir***.

[44] Does the perception of bias in this case such that it calls for the judges to recuse themselves? In ***Jasbir*** we stated the test as follows:

"Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.

[45] In the circumstances of this case, does perception of fairness and moral convictions permit us to hear this case given the uncontroverted facts provided by Mr. Omtatah? I think not. The perception of bias that arises from the facts stated above is very clear and in that regard I associate myself with the words of Lord Hutton as endorsed by Ibrahim SCJ in his concurring opinion in ***Jasbir*** that:

"[P]ublic confidence in the administration of justice required that the judge implicated disqualifies himself, it was irrelevant that that there was in fact no bias on the part of the judge, and there is no question of investigating whether there was any likelihood of bias or any reasonable suspicion of bias on the fact of that particular case."

[46] The quote above responds aptly to the circumstances of this case. As stated by Ibrahim SCJ in ***Jasbir***, "this Court has to address its mind to the question as to whether a reasonable and fair-minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible". *If the answer is in the affirmative, disqualification will be inevitable*." I cannot imagine the people as I have conceptualized them having a different perception other than we would not be seen to be free from perception of bias.

[47] Can the doctrine of necessity be invoked to save the judges from recusing themselves despite what is said above? Mr. Kilukumi says yes and he referred us to a long list of authorities to back this argument. I turn to consider this argument. In his concurring opinion in ***Jasbir***, *Ibrahim SCJ* stated that the doctrine of necessity can only be invoked thus:

> ***"In the circumstances in which all the members of the only tribunal competent to determine a matter are subject to disqualification, they may be allowed to sit and determine the matter . . . to avoid a miscarriage of justice. This common law principle will however, only apply in very exceptional circumstances which are required to be very clear."***

[48] From the above, it is clear that the main object of invoking the doctrine of necessity is to "avoid a miscarriage of justice" and it applies where members of the *only* forum to determine the matter are disqualified. It is this reasoning that gleans on the reasoning of the South African Constitutional Court in ***Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other [ZACC] 4; 2012; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567*** when it stated that:

> ***"In determining the extent to which we should consider the merits, regard must be had to whether substantial injustice will be done to the applicant should this Court refuse to grant leave to appeal."***

[49] The learned authors, De Smith, Woolf and Jowell in Judicial Review of Administrative Action (5th ed. 1995) at page 544 make it clear that the doctrine of necessity applies to prevent a failure of justice. Furthermore, in the Australian High Court in ***Laws v. Australian Broadcasting Tribunal*** at page 454 the Court stated that:

> ***"[The doctrine] will not apply in circumstances where its application would involve positive and substantial***

injustice since it cannot be presumed that the policy of either the legislature or the law is that the rule of necessity should represent an instrument of such injustice. Secondly, when the rule applies, it applies only to the extent that necessity justifies.

These two limitations make it clear that the doctrine should not be applied mechanically. To do so would gravelly undermine the guarantee of an impartial and independent tribunal. . .”

[50] It is clear from the foregoing that the invocation of the doctrine of necessity is aimed at avoiding a miscarriage of justice. Furthermore, that its invocation does not turn a blind eye to the guarantee of judicial impartiality and independence. I did not hear the applicants to be arguing that an injustice has been occasioned and am I suggesting that it has not. They seem to be arguing that the doctrine compels this court to sit because the applicants have a right of appeal to this Court. The authorities referred to above make it clear that the doctrine must be invoked only to the extent necessary to avoid a miscarriage of justice. Impartiality and judicial independence are essential elements of trusted administration of justice in a constitutional democracy founded in the rule of law. They should be jealously safeguarded to foster public confidence in the administration of justice. The

invocation of this doctrine must be done sparingly, to the extent that necessity invites us to do so and with due regard to the spirit and letter of the Constitution.

[51] For the above reasons, I am of the view that the Preliminary Objection should be upheld and that this Court should decline to entertain any of the applications on their merits. It was urged that we declare the decision of the Court of Appeal as final. In my view, the majority of the Bench are declining jurisdiction and are recusing themselves to hear the applications and the intended appeal, so the decision of the Court of Appeal stands, but I would not say it is final. The applicants have the right to appeal to a Supreme Court differently constituted. I do not believe we are holding that because of recusal, the Supreme Court has no jurisdiction to hear the appeal in future.

[52] My Orders would be as follows:

- **The Preliminary Objections in Petition 11 and 12 are hereby disallowed;**
- **Mr. Omtata's preliminary objection on this court lacking jurisdiction ab initio to hear the preliminary objections including his, is hereby disallowed;**
- **Because of the perceived conflict on interest in the constitution of the bench hearing the matter this court should decline jurisdiction to hear the applicants application, the application by the respondents, and the intended appeal;**
- **For avoidance of doubt, and on the basis of prior orders herein the orders granted by Njoki SCJ must be vacated and hereby vacated.**

- **Costs shall be in the cause.**