Judicial Service Commission & another v Rawal (Civil Application 308 of 2015) [2016] KECA 831 (KLR) (29 January 2016) (Ruling)

Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal [2015] eKLR

Neutral citation: [2016] KECA 831 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 308 OF 2015

GBM KARIUKI, W OUKO, PO KIAGE, J MOHAMMED & JO ODEK, JJA

JANUARY 29, 2016

BETWEEN

JUDICIAL SERVICE COMMISSION ..... 1ST APPLICANT

THE SECRETARY, JUDICIAL SERVICE COMMISSION ..... 2ND APPLICANT

AND

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

(Being an application by the applicants premised on rule 84 of the Court of Appeal Rules seeking to strike out the respondent's notice of appeal against the Judgment/ decree of the High Court of Kenya, Nairobi (Mwongo PJ, Korir, Ongundi, Meoli & Kariuki JJ.) delivered on 11th day of December 2015 in PETITION NO.386 OF 2015)

Article 164(3)(a) of the Constitution confers simultaneously jurisdiction and the right of appeal to the Court of Appeal

The respondent filed an appeal in the Court of Appeal against the decision of the High Court that held that her retirement age as a judge was 70 years. The court held that article 164(3)(a) of the Constitution conferred simultaneously jurisdiction and the right of appeal to the Court of Appeal.

Reported by Teddy Musiga

Constitutional Law *– fundamental rights and freedoms – right to fair trial – right to appeal decisions of the High Court touching on fundamental rights and freedoms to the Court of Appeal - whether an intending appellant had a right of appeal to the Court of Appeal in matters involving fundamental rights and freedoms in the absence of a statute conferring that right – Constitution of Kenya, 2010, article 164(3) (b), Appellate Jurisdiction Act, section 3(1).*

Jurisdiction *– appellate jurisdiction of the Court of Appeal – right of appeal to the Court of Appeal - whether an intending appellant had a right of appeal to the Court of Appeal in matters involving fundamental rights*

and freedoms in the absence of a statute conferring that right – Constitution of Kenya, 2010, article 164(3) (b), Appellate Jurisdiction Act, section 3(1).

***Statutes** – interpretation of statutes – what was the effect of section 3(1) of the Appellate Jurisdiction Act (that provided that there was no right of appeal unless provided by statute) in light of article 164(3) of the Constitution that gave the right of appeal to the Court of Appeal? – Appellate Jurisdiction Act, section 3(1).*

Brief facts

The respondent (Lady Justice Kalpana Rawal) filed an appeal in the Court of Appeal against the decision of the High Court that held that the respondent's retirement age as a judge was 70 years. However, the applicants (Judicial Service Commission) filed a notice of motion seeking to strike out the appeal on the ground that the respondent had no right of appeal to the Court of Appeal from the decision of the High Court. The respondents also filed an application seeking an injunction to stop the Judiciary from retiring her pending the hearing of the intended appeal, alternatively that the court should issue conservatory orders prohibiting the Judiciary from unconstitutionally retiring her pending the hearing and determination of the intended appeal and also for the court to issue a prohibitory injunction preventing the Judiciary from advertising or otherwise commencing the recruitment process for the replacement of the Deputy Chief Justice pending the hearing and determination of the appeal.

Issues

i. Whether an intending appellant had a right of appeal to the Court of Appeal in matters involving fundamental rights and freedoms in the absence of a statute conferring that right.
ii. Whether there was an automatic right of appeal given by the Constitution under article 164(3) to the Court of Appeal.
iii. Whether article 164(3) of the Constitution of Kenya, 2010 conferred both the right to appeal to the Court of Appeal and the jurisdiction of the Court of Appeal to hear appeals from the High Court.
iv. What was the effect of section 3(1) of the Appellate Jurisdiction Act (that provided that there was no right of appeal unless provided by statute) in light of article 164(3) of the Constitution that gave the right of appeal to the Court of Appeal?
v. What was the proper interpretation of article 164(3) of the Constitution of Kenya, 2010?
vi. Whether there was a difference between jurisdiction to interpret and apply the Constitution and jurisdiction to enforce the Bill of Rights.

Held

Per G B M Kariuki, JA

1. There could be no controversy that article 164(3) of the Constitution of Kenya, 2010 made a complete shift from the erstwhile law by directly giving jurisdiction to the Court of Appeal instead of leaving it to Parliament. *Anarita Karimi Njeru's case* was decided in the context of the law obtaining then. It was not an authority in the instant case.

2. It was apparent that section 3(1) of the Appellate Jurisdiction Act purported to give the Court of Appeal jurisdiction although the jurisdiction of the Court of Appeal was conferred directly by article 164(3) of the Constitution of Kenya, 2010. To that extent, section 3(1) of the Appellate Jurisdiction Act was superfluous.

3. Section 3(1) of the Appellate Jurisdiction Act was restrictive in its conferment of jurisdiction and the right of appeal to the Court of Appeal in that it conferred jurisdiction to hear appeals from the High Court, in cases in which an appeal lay to the Court of Appeal under any law. In effort, therefore, the jurisdiction and right of appeal to the Court of Appeal was to hear and determine appeals in which there existed a statute giving an appellant the right of appeal to come to the Court of Appeal. Such a statute for instance included the Criminal Procedure Code (Cap 75), Civil Procedure Act (Cap 21). In contrast, the jurisdiction conferred by article 164(3) removed the restriction. It widened the jurisdiction to hear appeals.

4. It seemed the 2010 Constitution deliberately removed from Parliament the task of conferring jurisdiction and the right of appeal as was the position before. It was ostensible that article 164(3) of the Constitution

of Kenya, 2010 deliberately eschewed the erstwhile restriction imposed by the words, "in cases in which an appeal lay to the Court of Appeal under any law" appearing in section 3(1) of the Appellate Jurisdiction Act. By virtue of article 2(1) of the Constitution, section 3(1) of the Appellate Jurisdiction Act was overridden by article 164(3) to the extent of its restrictiveness and superfluity.

5. Where the Constitution was exhaustive in its provisions on jurisdiction, the court had to confine itself to the constitutional limits and it was not open to the court to expand its jurisdiction through judicial craft or innovation.

6. It was patent that, the Bill of Rights was the fabric of the society which bound the organs of the government and all persons. The rights conferred by the Bill of Rights ought to be enjoyed by all. Where breach or a violation occurred or was threatened, the Constitution in article 22 conferred on every person the right to institute proceedings in court to seek redress. Only the High Court had original jurisdiction and was therefore the trial court in which cases on the Bill of Rights were commenced. The Court of Appeal only had appellate jurisdiction under article 164(3). It had no original jurisdiction.

7. Under article 164(3) (a), the Court of Appeal was mandated to make decisions on appeal involving the interpretation or application of the Constitution which were appealable to the Supreme Court as of right. Therefore, that lent itself to the inevitable conclusion that the right of appeal was conferred by the Constitution and could be subsumed in article 164(3).

8. The hearing and determination of constitutional matters whose decisions by the Court of Appeal on appeal would be appealable to the Supreme Court by didn't of article 163(4)(a) and (b) would take place in the High Court as the trial court pursuant to the power vested in it by article 165(3) (b) and (d). Those constitutional provisions showed that the Constitution had mandated the Court of Appeal and expected it to hear appeals from decisions of the High Court on the interpretation and application of the Constitution as well as on decisions made by the High Court under article 165(3) (b) on determination of the question whether a fundamental right or fundamental freedom on the Bill of Rights had been denied, violated, infringed or threatened; and on interpretation and application of the Constitution under article 165 (3) (d).

9. When interpreting article 164(3) of the Constitution, one had to therefore have regard to the provisions and framework of the Constitution. It was plain to see that the Constitution intended to confer the right of appeal. Without the right of appeal, the High Court would be a final court on the Bill of Rights and that would deny litigants' access to the Court of Appeal and to the Supreme Court. That was not what the Constitution intended.

10. Article 10(1) and (2) of the Constitution of Kenya, 2010 bound judicial officers, state officer and public officers to national values and principles of governance while discharging their duties if they were called upon to apply or interpret the Constitution. Those constitutional requirements showed that the right of appeal had to exist to challenge in the Court of Appeal decisions of the High Court as they appertained to the determination of the question whether a right or a fundamental freedom in the Bill of Rights had been breached, violated, infringed or threatened or any question with respect to the interpretation and application of the Constitution.

11. The Constitution gave the Court of Appeal jurisdiction directly and kept Parliament out of the matter and therefore omitted in article 164(3) (a) any question that the jurisdiction of the Court of Appeal in appeals from the High Court had to be prescribed by an Act of Parliament. To suggest that the right of appeal in respect of decisions of the High Court had to be or ought to be given in a statute was perilously close to suggesting that the Constitution could not confer simultaneously jurisdiction and the right of appeal.

12. A constitutional interpretation to the effect that the right of appeal was not subsumed in article 164(3) or that the article merely gave the Court of Appeal jurisdiction to hear appeals without more, was not in harmony with the provisions of the Constitution and canons of interpretation could not support it. A proposition that one could be inferring the right of appeal by an interpretation of the Constitution that posited that the right of appeal to the Court of Appeal was subsumed in article 164(3) could not hold good.

13. Article 159(2) I of the Constitution of Kenya, 2010 provided that the court had a duty to ensure that the purpose and principles of the Constitution were not undermined or rendered meaningless and that the court had to help in the development and realization of the purpose and principles of the Constitution. Thus, the court was expected to determine appeals from decisions of the High Court on interpretation and application of the Constitution (article 163(4)(a)) and on a question whether a right or fundamental freedom on the Bill of Rights had been violated, infringed or threatened (article 165(3) (b).

14. To posit or postulate that an interpretation of the Constitution that resulted in a conclusion that a right of appeal was given or was subsumed in under article 164(3) was wrong because it amounted to making an inference in the face of plethora of authorities from the Court of Appeal stating that there could be no appeal unless the right of appeal had been expressly donated by statute failed to appreciate the wording and the framework and effect of the constitutional provisions which showed that the court was duty bound, not only to promote and protect the purpose and principles of the Constitution as mandated by article 159(3) of the Constitution but also that the court was under a constitutional duty to promote and protect the Bill of Rights to ensure that the appeals envisaged by the Constitution from the High Court to the Court of Appeal and from the Court of Appeal to the Supreme Court became a reality.

15. Failure to construe the right of appeal as subsumed in article 164(3) of the Constitution would result in an absurdity and would render the Bill of rights an empty promise. The people of Kenya could not give themselves something that would amount to nothingness. They gave themselves a right of appeal from the High Court to the Court of Appeal and from the Court of Appeal to the Supreme Court on the Bill of Rights and interpretation of the Constitution.

16. It could also be argued that discerning the right of appeal as subsumed in article 164(3) amounted to turning the court into legislators. Although article 164(3) did not mention the word right of appeal, the Constitution clearly showed that the right of appeal was clearly intended; it also showed that the right of appeal was subsumed in article 164(3) as that was clearly in the scheme and framework of the Constitution an any other construction would produce an absurd result.

17. It seemed that the drafters of the Constitution after clearly showing that appeals would be filed in the Court of Appeal from the decisions of the High Court saw no need to state in article 164(3) that there was a right of appeal. Perhaps that was a mishap but not a fatal one. It being clear that the Constitution intended to confer the right of appeal in article 164(3) and as the failure to expressly mention the words, “right of appeal” in the article was merely a faultiness of expression, the court had to read the obviously donated right of appeal as being incorporated in the enforcement of jurisdiction under article 163(3).

18. In construing article 164(3) as conferring jurisdiction and right of appeal, one was giving an intelligible interpretation to the Constitution and avoiding a construction that could result into absurdity and meaninglessness to the Bill of Rights. It was clear that interpreting the Constitution in a manner that promoted and protected the Bill of Rights did not amount to a journey of discovery by the court, nor was it usurpation of power. Rather it was discharging the court’s mandate under the Constitution by interpreting it in a way that promoted and protected the Bill of Rights by ensuring that appeals envisaged by the Constitution from the High Court to the Court of Appeal were actualised.

Per W Ouko, JA

19. Article 164(3) of the Constitution of Kenya, 2010 empowered the Court of Appeal to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. That was a departure from section 64(1) of the former Constitution at least with regards to appeals from the High Court, where the court’s jurisdiction depended on conferment by an Act of Parliament.

20. Whereas section 64 of the former Constitution only conferred jurisdiction to the court in relation to appeals from the High Court, “as could be conferred by law”; article 164(3) (a) of the Constitution made no such reference to any law because the Constitution was the supreme law of the land, the mother of all laws. Any

law that was inconsistent with it became void. But the Constitution or a statute could impose limitations to a court's jurisdiction or prescribed further jurisdiction.

21. Article 164(3) (a) did not provide for appeal from all and sundry decisions of the High Court. That right of appeal to the Court of Appeal could also be conferred or restricted by statute in specific circumstances, so long as that conferment or restriction was consistent by the Constitution.

22. The Court of Appeal was established and its jurisdiction expressly conferred by the Constitution; that that jurisdiction was not a thoroughfare between it and the High Court for each and every decision of the High Court; that the requirement for a separate legislation to confer jurisdiction in addition to that already conferred by article 164(3)(a) was no longer necessary, that requirement having been based on section 64(1) of the former Constitution; and that reasonable regulation and limitation in appeals to the Court of Appeal was permitted.

23. The right of appeal could either be conferred by the Constitution or by statute. Where a right of appeal was not established there could be no jurisdiction. In other words, the right to appeal (or the law granting leave to appeal) had to first be established before jurisdiction could be invoked.

24. Section 84 of the former Constitution before its amendment simply stipulated that a person could apply for redress to the High Court if he alleged violation of fundamental rights and freedoms. The Constitution was silent on what would happen to a party aggrieved by the decision of the High Court. That gap had ruinous effect on parties who were genuinely discontented with the decision of the High Court. Such frustration over the state of the law later led to the introduction, a few years later, of sub section (7) to section 84 which provided that a person aggrieved by the determination of the High Court under that section could appeal to the Court of Appeal as of right.

25. The legislative intendment was to subject determination of human rights violations and the interpretation of the Constitution to further interrogation by the Court of Appeal.

26. The rules of constitutional construction had to be employed so as to ascertain if indeed the determination of the High Court in the matter, the subject of the intended appeal was final. In construing the Constitution, one had to pay attention to the words used in the enactment, rather than the context in which they were used, giving words their plain and ordinary meaning, or one looked at the context and apparent purpose of the provision being interpreted in order to achieve the objective and the interpretation that best advanced the purpose of the enactment, the plain meaning of the words used notwithstanding.

27. Whatever the approach a judge adopted in interpreting any provision of the Constitution, judicial restraint had to be exercised and the intention of the framers of the Constitution had to be borne in mind. To achieve that, relevant provisions had to be read together and not disjointly. Where the construction involved the Bill of Rights, it was necessary that it be given a generous and purposive interpretation that would advance those rights, looking at the Constitution as a whole.

28. The finality in judicial determination of fundamental issues in the society could only come from the highest court of the land, the Supreme Court. That indeed was why both articles 164(3)(b) and article 163(3)(b) and (4)(a) provided incontrovertible right of appeal to the Court of Appeal from the interpretative and application jurisdiction of the High Court.

29. Article 164(1) and (3)(a) established the Court of Appeal and donated its power to hear appeals from the High Court. On the other hand, the Supreme Court was conferred by article 163(b)(i) with appellate jurisdiction to hear and determine appeals from the Court of Appeal.

30. The Constitution itself envisioned that an appeal from the Court of Appeal would come through to the Supreme Court challenging the former's determination of a question of interpretation and application of the Constitution, that question in turn having come from a similar determination by the High Court. Because of the importance of the interpretation and application of the Constitution and issues of human rights and freedoms, that second appeal from the Court of Appeal to the Supreme Court was of right.

31. No provision of the Constitution barred or limited appeals arising from the decisions of the High Court determining the question of violation of a right or a fundamental freedom or any question respecting the

interpretation of the Constitution under article 165(3)(b) of the Constitution of Kenya, 2010. To hold that there was no right of appeal because it was not provided for expressly would have been against article 259 of the Constitution which enjoined the court to interpret the principles that advanced the rule of law, the human rights and fundamental freedoms that permitted the development of the law and contributed to good governance. It was highly unlikely that having seen the substantial injustice occasioned by section 84 of the former Constitution and having brought a solution by amending it to provide for a right of appeal as of right, that it was the intention of the framers to take the right of appeal away under the Constitution of Kenya, 2010 which was considered to be the most progressive and transformative in the region.

32. The absence of an explicit provision conferring in the Court of Appeal jurisdiction to hear appeals from the High Court on the Bill of Rights or on the interpretation of the Constitution was not an accidental omission. It was not an omission at all. The Constitution having expressly vested in the court under article 164 the general appellate jurisdiction to hear appeals from the High Court and having explained how appeals relating the interpretation and application of the Constitution were to be appealed from the Court of Appeal to the Supreme Court under article 163, that *per se* was sufficient conferment of appellate jurisdiction.

33. There was no legal void. It would have been a serious travesty of justice and an absurdity if it was to be held that in the hierarchical scheme of the courts, from the Magistrates' Courts to the Supreme Court, that only the Court of Appeal would have no say in the interpretation and application of the Constitution on matters to do with the Bill of Rights and yet the Supreme Court was expected, indeed enjoined jurisdiction to hear appeals from the Court of Appeal by dint of article 164(3) (a) as of right.

P O Kiage, JA

34. The Constitution of Kenya, 2010 moved human rights and fundamental freedoms from the shadowy, peripheral fringes of questionable utility to the very centre and core of state obligation and national life. The Bill of Rights was not just an essential value constitutionally recognised as a national aspiration alongside equality, freedom, democracy, social justice and the rule of law.

35. It was also one of the national values and principles of governance upon which the Republic was declared to be founded by article 4 of the Constitution. It alongside the others in article 10(2) was binding on all state organs, state officers, public officers and all persons whenever any of them applied or interpreted the Constitution; enacted, applied or interpreted any law; or made or implemented public policy decisions. Its pride of place in the new Kenya was beyond disputation given its express justiciability aided and strengthened in no small measure by the removal of historical strictures including *locus standi*.

36. Other than curtailing the justiciability of Bill of Rights claims at the High Court, the constitutional-statutory framework prior to 2010 contained a further handicap, namely their appellability to the Court of Appeal. The former Constitution at section 176(1) provided that the predecessor to the Court of Appeal – the Court of Appeal of Eastern Africa, was to have such jurisdiction in relation to appeals from the Supreme Court (as the High Court was then called) as could have been conferred by law. Excluded from such jurisdiction by dint of section 176(3) were any question as to the interpretation of the Constitution and any question as to the contravention of any of the provisions of sections 14 to 27 [the Bill of Rights provisions] of the Constitution.

37. That section 176(3) of the former Constitution was repealed by the Constitution of Kenya (Amendment) Act, 1965. That repeal meant that it was then open to Parliament, by virtue of section 176(1) to confer jurisdiction on the former Court of Appeal for Eastern Africa in regard to interpretation of the Constitution and enforcement of fundamental rights and freedoms. It did not do so.

38. The effect of that repeal was that from being appellable as of right (that had been provided by section 180 of the former Constitution), final decrees in those constitutional areas could only be repealed at the Court of Appeal if Parliament by enactment, conferred such right. It did not do so and that was to remain the case until 1992 when section 84(7) of the Constitution was introduced by providing for Bill of Rights appeals to the Court of Appeal as of right.

39. When Parliament established the Court of Appeal for Kenya in 1977 by substituting section 64 of the former Constitution, it conferred jurisdiction on it, not in the Constitution itself but outside of it, in a statute, namely the Appellate Jurisdiction Act, 1977 at section 3(1). The earlier section 180 repealed by the 1965 Act, was never restored to the Constitution. Section 3(1) of the Appellate Jurisdiction Act reflected the notion that appeals to the Court of Appeal had to be conferred by statute.

40. There were two forms of conferment of appellate jurisdiction. The first form was exemplified by the English Court of Appeal established by the Supreme Court of Judicature Act, 1873. The same form was adopted by India where the Supreme Court's appellate jurisdiction followed that of the Court of Appeal of England.

41. A complete and careful reading of *Anarita Karimi Njeru's case* revealed a very thoughtful approach by the court which took the trouble to not only trace the legislative position of various jurisdictions but also placed them in proper historical context. It had to be noted that when dealing with the second form of jurisdictional conferment which obtained in various countries including Kenya, the issue under discussion was, always, the statutes establishing the respective Courts of Appeal which all left jurisdictional conferment to yet other Acts of Parliament such as the Appellate Jurisdiction Act.

42. In none of the jurisdictions which adopted the second form of conferment was the jurisdiction of the Appellate Court conferred by the countries' constitutions. Statute and most definitely the Constitutions of those countries did not confer jurisdiction. That occurred only in the first form of conferment, which present in England and India, with the latter hoisting it to a constitutional level. England of course did not have a written Constitution, which ought to inform any engagement with decisions which pointed to the need for statutory conferment of the right of appeal with no mention of the Constitution.

43. A failure to appreciate that salient difference in the mode of conferment was productive of much of the confusion and disputation that surrounded the instant issue. What could be discerned from a majority of judicial pronouncements that had been quoted and applied the, "there was no right of appeal without express statutory conferment" mantra was that they had paid scant attention to the context and had thereby fallen into the trap of quoting extracts of judgments out of context.

44. The jurisdiction of the Court of Appeal under the Constitution of Kenya, 2010, flowed from the Constitution itself and that jurisdiction had in fact been expanded and not constricted. The Constitution of Kenya, 2010 provided a general right of appeal, so that previous decisions such as *Anarita Karimi Njeru case* had to be understood in, and confined to, the context of the legislative framework of the time of their decision

45. Both the jurisdiction and the right of appeal from the High Court to the Court of Appeal were founded, in the first instance in the Constitution of Kenya, 2010. The jurisdiction invested on the Court of Appeal was not qualified by words such as, "where the appeal arose". It provided both the right of approach from the High Court and the power to hear those who had so approached. The constitutional right of appeal could only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself.

46. The wording of article 164(3) of the Constitution admitted to no other interpretation. It would have been inimical to the general tenor of the Constitution and the centrality of the Bill of Rights were the instant court or any other to pronounce itself that in matters to do with the interpretation or application of the Constitution and the enforcement of fundamental rights and freedoms, that the Court of Appeal had no role to play. There was neither rhyme nor reason; neither doctrine nor policy that could justify such a conclusion.

Per J Mohammed, JA

47. The Constitution of Kenya, 2010 was a progressive Constitution at whose heart was the Bill of Rights. The intention of the drafters of the 2010 Constitution was to place the issue of the recognition, promotion and protection of human rights at center stage.

48. A holistic and purposive reading of the intention of the drafters of the Constitution was that it was intended that the Constitution was to grant a party before it the right to have a case touching on the fundamental rights and freedoms concluded to its logical end, which would invariably include a right of appeal if desired. Limiting

the right to appeal would have been unconstitutional as it would have denied a party the right which was part of the right to a fair hearing conferred by article 50.

49. Under the repealed Constitution, the High Court on occasion sat as the constitutional court, and despite there being a Court of Appeal, its decisions sitting as a constitutional court were final. However, during the Constitutional Review process, Kenyans expressed displeasure with the situation in the repealed Constitution where there was no provision for appeal on matters when presented to the High Court. It was seen as a denial of the right of appeal of the aggrieved party. Consequently, in the 2010 Constitution, a decision of the High Court on a constitutional matter could be appealed to the Court of Appeal.

50. The Constitution had to be read to give effect to articles 19, 20 (application of the Bill of Rights), 25 (right to fair trial) and 48 (access to justice, in the instant case appellate justice). In doing so, a party had a right to appeal to the Court of Appeal in a matter involving alleged violations of fundamental rights and freedoms. The Constitution contemplated a right of appeal as of right in matters touching on fundamental rights and freedoms. The right of appeal to the Court of Appeal on matters touching on fundamental rights and freedoms did not derive from any particular statute but from the Constitution itself.

51. Section 3(1) of the Appellate Jurisdiction Act provided that the Court of Appeal had jurisdiction to hear and determine appeals in which an appeal lay under law. The Constitution was the supreme law of the Republic and granted a right of appeal. Accordingly, an intended appellant had a right of appeal to the Court of Appeal which right was conferred by the Appellate Jurisdiction Act in conformity with the Constitution.

52. Article 163(4) (a) of the Constitution provided that appeals lay from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution. In the absence of the right of appeal from the High Court to the Court of Appeal on cases involving the interpretation or application of the Constitution, article 163(4) would have been rendered inoperative in view of the fact that article 163(3) granted the Supreme Court appellate jurisdiction to hear and hear and determine appeals from the Court of Appeal.

53. The Constitution therefore contemplated that there was a right of appeal on matters touching on fundamental rights and freedoms to the Court of Appeal and finally to the apex court, the Supreme Court. To interpret otherwise would render article 163(4) superfluous and would defeat the right to a fair hearing which could not be limited.

54. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, (the *Mutunga Rules*) were drafted in compliance with the applicable constitutional requirement. Rule 32 provided that, an appeal or second appeal could not operate as a stay of execution or proceedings under a decree or order appealed. The *Mutunga Rules* though subsidiary legislation envisioned a scenario where an aggrieved person had a right to appeal and made provision for it.

55. Kenya was a signatory to many international human rights instruments that promoted and protected fundamental rights and freedoms including the African Charter on Human and Peoples Rights. Articles 1 and 7 thereof provided for a right of appeal in the African Charter in matters involving fundamental rights and freedoms.

Per Otieno-Odek, JA

56. Article 22(1) of the Constitution provided that every person had the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or was threatened. The exercise of that right could only be limited as provided for under article 24 of the Constitution which expressly stated that a right or a fundamental freedom in the Bill of Rights could not be limited except by law. Article 24(2)(b) stipulated that a legislation limiting a right or a fundamental freedom could not be construed as limiting the right or fundamental freedom unless the provision was clear and specific about the right or freedom to be limited and the nature and extent of the limitation and could not limit the right or fundamental freedom so far as to derogate from its core or essential content.

57. Section 19(a) of the Supreme Court Act echoed article 163(4)(a) of the Constitution that the Supreme Court could hear and determine appeals from the Court of Appeal only to the extent that a written law provided for the bringing of such an appeal to the Supreme Court. It was manifest from article 163(4)(a) of the Constitution that the Supreme Court had appellate jurisdiction to hear appeals only if a written law provided for such an appeal. In that regard, an appeal as of right was an appeal that did not require permission of the trial court or appellate court as a prerequisite to taking the appeal. Conversely, the right of appeal was a right to appeal conferred by the Constitution or statute.

58. The application of article 163(4)(a) of the Constitution as read with sections 3(b) and (d) of the Supreme Court Act aptly showed that questions of interpretation and application of the Constitution and issues related to transition from the former to the present constitutional dispensation were appealable as of right to the Supreme Court.

59. Guided by the *dicta* that the chain of courts in the constitutional set up running up to the Court of Appeal had the competence to interpret the Constitution and that an appeal to the Supreme Court had to originate from a Court of Appeal case, therefore except where the Supreme Court had original, advisory or direct appeals with leave under section 17 of the Supreme Court Act or appellate jurisdiction under article 168(8) of the Constitution or any other law; a condition precedent to the Supreme Court's exercise of its appellate jurisdiction was existence of a judgment, order or ruling by the Court of Appeal.

60. The Supreme Court's appellate jurisdiction under article 163(4) (a) was unqualified and unrestricted. The applicant submitted that in the absence of a right of appeal to the Court of Appeal in relation to the Bill of Rights, it followed that likewise the Supreme Court had no jurisdiction to hear and entertain appeals on the Bill of Rights.

61. Within the prescription in section 17 of the Supreme Court Act, Kenya's legal system did not recognize somersaulting or overlapping or sidestepping the hierarchy of the court system. In the superior court structure, litigation had to commence at the High Court with an appeal to the Court of Appeal and then to the Supreme Court each within their jurisdiction. Unless expressly provided for in the 2010 Constitution, access to superior courts in Kenya was linear, vertical and hierarchical; there was no side stepping, overlapping and by-passing or a circumvention approach of access to any of the superior courts. Access to justice had to follow the vertical hierarchical structure of the judicial system which was an obligatory and peremptory procedure in litigation.

62. Accepting the applicant's submission that a judgment of the High Court was final on matters relating to the Bill of Rights would have been tantamount to judicial limitation and or amendment to article 163(4)(a) of the Constitution which conferred appellate jurisdiction, "as of right" to the Supreme Court in interpretation and application of the Constitution. All constitutional articles were justiciable and amenable to interpretation by the Court of Appeal and the Supreme Court for a specific determination whether an article(s) had been correctly interpreted and applied by the High Court in accordance with the Constitution. There was no any express constitutional provision excluding some constitutional articles from justiciability and interpretation before the Court of Appeal and the Supreme Court.

63. Rule 32 of the *Mutunga Rules* envisaged a right of appeal on matters relating to the protection and enforcement of rights and fundamental freedoms. That rule did not state that leave to appeal was required. All rules in the *Mutunga Rules* took effect on the same day and there was no provision in the Rules suspending the application and implementation of rule 32 allegedly until such time as a right of appeal could be conferred.

64. To interpret articles 165(3) (b) and 164(3) of the Constitution in order to strip the Court of Appeal the right to hear appeals and determine if the High Court correctly interpreted and applied any article in the Bill of Rights could not be to promote and fulfill the rights and fundamental freedoms as required by article 21 of the Constitution. It would have meant that the Court of Appeal had no role to play in protecting the rights and fundamental freedoms of Kenyans. The rights and fundamental freedoms of an individual were the quintessence of human rights, dignity, liberty, livelihood and life.

65. The Constitution of Kenya, 2010 did not establish a ceremonial Court of Appeal in so far as the enforcement of the Bill of Rights was concerned. By conferring appeal as of right to the Supreme Court on matters of interpretation and application of the Constitution, the 2010 Constitution *ipso jure* conferred as of right jurisdiction to the Court of Appeal on matters relating to interpretation and application of the Constitution.

66. In reading the Constitution holistically, whereas article 165(3) (b) vested upon the High Court original jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened; taken into context, article 165(3)(b) did not restrict or oust jurisdiction of the Court of Appeal to hear appeals on interpretation and application of the articles on enforcement of the Bill of Rights or violation of fundamental rights and freedoms of the individual.

67. Contextually, as article 165(3) did not expressly oust the appellate jurisdiction of the Court of Appeal in relation to the Bill of Rights and because article 163(4)(a) expressly conferred the option to appeal as of right to the Supreme Court, and since rule 32(1) of the *Mutunga's Rules* expressly envisaged an appeal and second appeal in matters relating to protection of rights and freedoms. The express right of appeal to the Supreme Court on matters of interpretation and application of Constitution *ipso jure* denoted appeals as of right to the Court of Appeal on matters of interpretation and application of the Constitution.

68. Subject to articles 24 and 25 of the Constitution, all articles in the Bill of Rights were justiciable and amenable to appellate interpretation without any limitation before all the Superior Courts of Kenya.

69. Given the historical context in which the 1997 constitutional amendment was made to introduce section 84(7) in the former Constitution, the principle in the case of *Anarita Karimi Njeru case* that there was no right of appeal in Bill of Rights litigation was dead and buried in 1997. The 1997 constitutional amendment overturned, set aside or impliedly repealed the principle in *Anarita Karimi Njeru case* as law in Kenya. *Anarita Karimi Njeru case* was decided under the old constitutional dispensation that was grounded in totalitarian values where fundamental rights and freedoms did not belong to the individual but were granted by the State.

70. Under section 20 of the Interpretation and General Provisions Act, unless expressly stated, repeal of a law that repealed an earlier law did not revive the earlier law. The repeal of the former Constitution by the 2010 Constitution did not revive the principle in *Anarita Karimi Njeru case* to the effect that there was no right of appeal in Bill of Rights litigation.

71. The repealed Constitution had a clear distinction between jurisdiction to interpret and apply the Constitution and jurisdiction to enforce the Bill of Rights. Both the High Court and the Court of Appeal had the general jurisdiction to interpret and apply the Constitution as part and parcel of the day to day judicial work. However, under the repealed Constitution, as regards the Bill of Rights, a separate and distinct procedural and substantive jurisdiction was vested upon the High Court whose decision was final with no right of appeal to the Court of Appeal. Case law from the old legal order affirmed the distinction with the *dicta* that the Court of Appeal had no appellate jurisdiction on matters relating to enforcement of the Bill of Rights.

72. The spirit of the 2010 Constitution did not support the notion that courts in Kenya had to restrict and limit rights and fundamental freedoms by curtailing the appellate process. Any limitation of rights and fundamental freedoms had to meet the criteria in article 24 of the Constitution. The Bill of Rights could not be interpreted as bi-directional giving rights and fundamental freedoms with one hand and taking away with the other. The Bill of Rights was linear, unidirectional and there were a few express articles in the Constitution that permitted limitation of enforcement of rights and fundamental freedoms.

73. The Constitution of Kenya, 2010 maintained the distinction between jurisdiction to interpret and apply the Constitution and jurisdiction to enforce the Bill of Rights. It maintained the distinction because article 23(1) as read with article 165(3)(b) specifically provided for the High Court as the court of original jurisdiction to deal with redress, violation or infringement of the Bill of Rights. In addition, special procedure grounded on article 22(3) of the Constitution had been provided for under the *Mutunga Rules* for the enforcement of the Bill of Rights.

74. Section 9(5) of the Fair Administrative Action Act was the express statutory provision that granted and conferred a right of appeal to the Court of Appeal in relation to the enforcement of the Bill of Rights. By referring a person aggrieved by an administrative action to the court with original jurisdiction to enforce the Bill of Rights, the Fair Administrative Action Act was applicable to rights and fundamental freedoms.

75. Section 9(1) of the Fair Administrative Actions Act required that a person who was aggrieved by an administrative action could apply to the High Court which was the court with original jurisdiction under article 23(1) of the Constitution following the procedure provided for in article 22(3) of the Constitution as implemented by the *Mutunga Rules*. Section 9(1) of the Fair Administrative Actions Act was in tandem and consonance with articles 22(3); 23(1) and articles 165(3) (b) of the Constitution that vested upon the High Court original jurisdiction to redress violation and infringement of the Bill of Rights.

76. Under the *Mutunga Rules*, an aggrieved person could file a petition before the High Court and a judgment could be delivered. It was not in dispute that the respondent in the instant case filed the instant petition before the trial court pursuant to the *Mutunga Rules*. The petition in paragraph 13 thereof explicitly stated *inter alia* that it was grounded on article 47(1) and (2) of the 2010 Constitution as well as articles 10, 19(2), 20(1), (2) and (3); *inter alia.*

77. The jurisdiction of the High Court to review administrative actions that included enforcement articles in the Bill of Rights was anchored in the Constitution. The review provisions and the right to appeal in section 9(5) of the Fair Administrative Action Act had its underpinning in article 47(3)(a) of the Constitution that *inter alia* provided that Parliament could enact legislation to provide for administrative action by a court.

78. There was an express provision in section 9(5) of the Fair Administrative Action Act which had a constitutional underpinning in article 47(3)(a) of the Constitution that conferred a right of appeal to the Court of Appeal on matters relating to the enforcement of the Bill of Rights. Section 9(5) conferred the right of appeal to the Court of Appeal from decisions of the High Court sitting as a judicial review court procedurally empowered *vide* section 9 of the Act and conferred original Bill of Rights enforcement jurisdiction pursuant to articles 22(3); 23(1) and 165(3)(b) of the Constitution.

79. With appellate jurisdiction of the Court of Appeal expressly conferred *vide* section 9(5) of the Fair Administrative Action Act, there was internal coherence, certainty and predictability in the decisions made by the Court of Appeal in post 2010 Constitution as regards the requirement for an express constitutional or statutory right of appeal. It was for that reason that the post 2010 decisions of the Court of Appeal cited by the applicant remained good law.

80. Section 9(5) of the Fair Administrative Action Act was the ladder, the missing rung, the stepping stone to the Court of Appeal and ultimately the Supreme Court in relation to the enforcement of the Bill of Rights.

81. The *Anarita Karimi Njeru* case law principle that a person who alleged violation of his/ her constitutional right and fundamental freedom had to specifically plead and cite the article violated had been subsumed and codified in the *Mutunga Rules* as Rule 10(c). It followed that the requirement for pleading that a specific article had been violated was also grounded in the *Mutunga Rules* and the requirement was not premised on the *Anarita Karimi Njeru* case. Enforcement of the Bill of Rights in Kenya was a subject of Fair Administrative Action Act. Based on that, there was an express statutory right of appeal to the Court of Appeal on matters relating to the Bill of Rights.

Application dismissed. No orders as to costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

RULING OF G.B.M. KARIUKI, J.A.

1. The decision we are called upon to make has caused me anxiety not least because the issue whether or not which confers jurisdiction on this Court also confers the right of appeal has far reaching implications on the enforcement of the Bill of Rights. One school of thought suggests that we shall open a flood gate for appeals if we find that there is a right of appeal; on the other hand, the other school of thought suggests that if we find that Article 164 (3) merely confers jurisdiction on this court to hear appeals but does not confer a right of appeal, that interpretation will be too restrictive and will be bound to defeat the objectives of the Constitution on fundamental individual rights in the Bill of Rights and will deprive litigants of the right to access this court and thus impede access to justice. The decisions made by this court ought not only to provide legal luminosity and develop jurisprudence but also keep in tandem with contemporary aspirations of Kenyans. If there is no right appeal under Article 164(3), the respondent's appeal shall be rendered incompetent and the notice of appeal shall be struck out.

2. The facts relating to the application giving rise to this ruling are not complicated. The matter raised by the applicants in their notice of motion dated 23rd December 2015 is a jurisdictional issue. We appreciated the need to delve into it at once and to make a determination in line with the timeless words of Nyarangi JA in the Owners of MV Lillian "S" V. Caltex Oil Kenya Ltd [1989] KLR 1 at pg 14

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

3. We are required to determine whether a right of appeal is conferred by the Constitution for without it we cannot proceed to determine the application by notice of motion dated 17th December 2015 made by Hon. Lady Justice Kalpana Rawal (the respondent) seeking –

> "an order of injunction to stop and/or prohibit the Judicial Service Commission or any organ of the judiciary from retiring her (the applicant) on the attainment by her of the age of seventy (70) years, pending the lodgment hearing and determination of her intended appeal."

4. When the said notice of motion came up for hearing on 28th December 2015, it did not proceed to hearing, in part because objection was taken on the constitution of the Bench then sitting to hear it, and in part because Judicial Service Commission (JSC) and the Secretary of JSC, the 1st and 2nd applicants had filed on 23rd December 2015 the notice of motion which is the subject of this ruling in which they contended that the respondent lacks the right to appeal against the High Court judgment dated 11th December 2015.

5. The gravamen of the appellant's complaint which led to her filing the petition in the High Court in which the impugned judgment was delivered on 11th December 2015 is that the 1st applicant resolved to retire her upon her attainment of the age of 70 years in January 2016.

6. The respondent was also aggrieved by the fact that the 2nd applicant acting on a resolution of the 1st applicant moved to advertise a vacancy in the office of the Deputy Chief Justice and Vice President of the Supreme Court of Kenya.

7. The respondent contended in her petition to the High Court that her fundamental rights and freedoms guaranteed by the Bill of Rights had been infringed and she sought interpretation of various constitutional provisions relating to Judges appointed to serve in the judiciary prior to the enactment of the 2010 Constitution.

8. The High Court in its judgment delivered on 11th December 2015 held that the retirement age of a Judge serving on the date of promulgation of the 2010 Constitution is seventy (70) years and consequently dismissed the respondent's prayers seeking, inter alia, a declaration that the respondent be at liberty to continue serving until the attainment of 74 years. The High Court also found that notice upon the petitioner in the Judiciary was at liberty to issue retirement notice upon the petitioner in accordance with the applicable law.

9. The notice of appeal lodged in this court on 14th December 2015 by the respondent manifested her intention to appeal against the decision of the High Court of Kenya made by the Hon. R. Mwongo, Hon. W. Korir, Hon. H. Ongundi, Hon C. Meoli and Hon. C. Kariuki JJ delivered at Nairobi on 11th December 2015 in the respondent's Petition No.386 of 2015 against the applicants, the interested party and the amicus curiae, who were named in the petition as the 1st respondent, 2nd respondent, interested party, 1st Amicus Curiae and 2nd Amicus Curiae respectively.

   The notice of appeal stated that the respondent –

   > "intends to appeal to the Court of Appeal against part of the decision that held that the Petitioner is supposed to retire at the age of seventy (70) years."

10. The notice of motion dated 23rd December 2015 came up for hearing before us on 12th January 2016. Learned Senior Counsel Mr. Ahmednasir Abdullahi appeared with learned counsel Mr. Kanjama for the 1st and 2nd applicants and learned Senior Counsel Mr. George Oraro appeared with learned counsel Messrs Waweru Gatonye and Kioko Kilukumi for the respondent. The interested party, Mr. Okiya Omtata Okoiti, appeared in person. The 1st and 2nd Amicus Curiae were represented by learned counsel Mr. Ken Nyaundi and learned counsel Dr. John Khaminwa, respectively.

11. The Notice of Appeal was filed on the respondent's behalf by the firm of Kilukumi & Company advocates who appeared in the petition in the High Court.

12. The respondent was appointed as a Judge of the High Court on 2nd June 2000 under Section 61(2) of the repealed Constitution. On 19th December 2011, she was appointed a Judge of the Court of Appeal and in May 2013 she was appointed to the office of Deputy Chief Justice (DCJ) and the Vice–President of the Supreme Court of Kenya.

13. Article 167 of the 2010 Constitution provides that "a Judge shall retire from office on attaining the age of Seventy (70) years" but may elect to retire at anytime after attaining the age of sixty five (65) years.

14. The Kenya Constitution 2010 was promulgated on 27th August 2010.

15. Under Article 260 of the Constitution, the date on which the Constitution came into force is defined as "the effective date" and by dint of Article 263, the Constitution came into force on its promulgation by the President on 27th August 2010 or on the expiry of a period of fourteen days from the date of the

publication in the Gazette of the final result of the referendum ratifying the Constitution, whichever was earlier.

16. By dint of Article 261 (1) of the 2010 Constitution, Parliament was required to enact legislation required by the Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

17. It is Article 264 of the Constitution that repealed the Constitution in force immediately before the effective date subject to the Sixth Schedule.

18. Under the repealed Constitution, the retirement age of judges of the High Court and the Court of Appeal was seventy four (74) years.

19. When the respondent was still serving as a Judge of the High Court in the year 2011, the 1st applicant resolved in its meeting of 18th April 2011 that the period of service of all the Judges who were in office on the effective date of the Constitution was saved under Section 31 (1) of the Sixth Schedule to the Constitution and that they shall therefore retain their retirement age of seventy four (74) years.

20. Subsequently, the 2nd applicant authored a memorandum dated 27th March 2014 which was addressed to the respondent conveying the 1st applicant's decision that in the latter's meeting of 24th March 2014, the retirement age for all Hon Judges is Seventy (70) years. This is what sparked off the respondent's petition to the High Court in which the respondent sought, inter alia, –

    (a) A declaration that the petitioner is at liberty and all the other judges appointed under the Repealed Constitution are at liberty by dint of Section 31(1) of the Sixth Schedule to the Constitution of Kenya, 2010 to serve in the Judiciary until the attainment of the age of seventy four (74) years in accordance with the provisions of Section 62(1) of the Repealed Constitution as read together with Section9 of the Judicature Act, which continue to be operative by reason of express constitutional provisions.

    (b) A declaration that the petitioner and all the other Judges appointed under the Repealed Constitution are entitled to continue to hear and determine disputes and preside over all other judicial proceedings and carry out all other judicial duties and functions until the attainment of seventy four (74) years.

    (c) A declaration that the 1st respondent has no constitutional and or statutory role in the allocation of judicial duties to individual Judges and cannot therefore purport to direct which Judges will preside or sit in judicial proceedings.

    (d) A declaration that it is an imprudent and irresponsible usage of public funds in contravention of Article 201 (d) of the Constitution to pay judges who are not allocated judicial duties and functions.

    (e) An order of certiorari calling into this Hon. Court for the purposes of quashing forthwith the retirement notice issued by the respondents dated 1st September, 2015 communicating the 1st respondent's decision to unconstitutionally retire the Petitioner upon reaching the age of seventy (70) years.

    (f) An order of certiorari calling into this Hon. Court for the purposes of quashing forthwith the respondents' decision to advertise, notify the public and announce a vacancy in the office of the Deputy Chief Justice and Vice-President of the Supreme Court of Kenya published in the Standard Newspaper on Sunday of 6th September, 2015.

    (g) The respondents to bear the costs of this petition in any event.

(h) Such further orders as this honourable court may deem just and expedient.

21. The High Court dismissed prayers (a) (b) and (d) of the Petition and granted prayers (c) (e) and (f) in the Petition.

22. The High Court in its finding on retirement age of 70 years expressed itself as follows –

> " 412. We conclude therefore that the provisions applicable for the transition of judges serving before the effective date are Sections 31(2) and thereafter 23 of the Sixth Schedule. Section 31(2) states inter alia that the transited officers "so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution."
>
> 413. the import of the emphasized words in Section 31(2) with regard to the petitioner is this: that Article 167(1) assumed a retrospective colour that in a sense blotted out all vestiges of her tenure under the former constitution. Under this provision there can be no dispute that the retirement age of Judges in office on the effective date is seventy years. Once the transition is effected, Section 31(2) is spent and Article 167(1) continues to apply prospectively.
>
> 414. in this regard Section 31(2) is a true sunset clause as far as Judges are concerned. On the effective date, it transited Judges in office into the new dispensation. This transition and fresh start was symbolized by the taking of the oath provided for in Section 13. Their next hurdle was vetting under Section 23, despite Section 31(2), which more or less confirmed for successful judges that they would continue in service under the new Constitution. Such is the scheme of things as we understand it.
>
> 415. considering the nature of transitional clauses, we do not believe that it was the intention of the framers of the Constitution to have those provisions remain in force until the last serving judge attained seventy four years. It would have been more rational in such a case to have an express provision in the body of the Constitution saving the former retirement age, or excluding the serving judges from application of Article 167(1)."

23. The Sixth Schedule to the 2010 Constitution contains transitional and consequential provisions. Section 31(1) of the Sixth Schedule provides

> " 31.
>
> (1) Unless this Schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person.
>
> (2) Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution.

32. The law applicable to pensions in respect of holders of constitutional offices under the former Constitution shall be either the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to the person."

24. It was in Section 9 of the Judicature Act that Parliament provided the retirement age of Judges as 74 years under the repealed Constitution.

25. The applicants contend that the respondent is not entitled to come to this Court on appeal from the 11th December 2015 decision of the High Court because Article 164 (3) of the Constitution does not vest in her a right of appeal. This Court is established by Article 164(1) which states –

" 164 There is established the Court of Appeal which –

(1) (a) Shall consist of the number of judges, being not fewer than twelve, as may be prescribed by an Act of Parliament; and

(b) Shall be organized and administered in the manner prescribed by an Act of Parliament."

26. Article 164(3) of the Constitution confers on this Court jurisdiction to hear appeals. Does it also confer a right of appeal? That is the crux of the matter. Article 164 (3) states –

" The Court of Appeal has jurisdiction to hear appeals from –

(a) The High Court; and

(b) Any other court or tribunal as prescribed by an Act of Parliament

27. Learned Senior Counsel Mr. George Oraro informed the Court that the appellant had lodged an appeal in this court against the 11th December 2015 decision of the High Court in which the High Court found and held that the respondent's retirement age as a Judge is 70 years. That appeal was lodged pursuant to the Notice of Appeal dated 14th December 2015 which the applicants' notice of motion now seeks to have struck out on the ground that the respondent has no right of appeal to this Court from the decision of the High Court. We heard submissions of counsel for the parties and also of the interested party in the notice of motion dated 23rd December 2015.

28. Learned Senior Counsel Mr. Abdullahi leading learned counsel Mr. Kanjama for the applicants robustly and eloquently pointed out that the applicant's notice of motion to strike out the notice of appeal took precedence in hearing over the respondent's notice of motion dated 17th December 2015 in which the respondent seeks, in prayers 3, 4, 5 and 6 the following orders –

" (3) this Hon. Court be pleased to issue an order of injunction halting, stopping and or prohibiting the Respondents or any organ of the Judiciary from retiring the Applicant on 15th January, 2016 on the attainment of seventy (70) years, pending the lodgment, hearing and determination of the intended appeal.

(4) alternatively, this Hon. Court be pleased to issue a conservatory order prohibiting the respondents or any organ of the Judiciary from unconstitutionally retiring the Applicant on the attainment of the age of seventy (70) years on 15th January 2016, pending the lodgment, hearing and determination of the intended appeal.

(5) this Hon. Court be pleased to issue a temporary injunction prohibiting the respondents or any other organ of the Judiciary from advertising, or otherwise commencing in any manner whatsoever the recruitment process for the replacement of the Applicant as a Supreme Court Justice, the Deputy Chief Justice and the Vice President of the Supreme Court of Kenya, pending the lodgment, hearing and determination of the intended appeal.

(6) the costs of and incidental to this application abide the result of the intended appeal."

29. As all the learned counsel and the interested party were in agreement that the applicants' said motion raised a fundamental issue and as we were intent on hearing the jurisdictional issue first in line with the principle in M. V. Lillian's (supra), we proceeded to hear the applicants' said notice of motion first. If we find that the appellant does not have a right of appeal to challenge the 11th December 2015 High Court decision, the respondent's motion seeking injunction and conservatory orders shall become a non-starter and shall be dead in the water and the notice of appeal filed by her shall be liable to be struck out. On the other hand, if we find that the respondent has a right of appeal, the appellant shall be entitled to be heard on her aforementioned notice of motion and on her appeal.

30. Mr. Abdullahi drew our attention to Rule 84 of this Court's Rules on the basis of which the applicants seek to strike out the respondent's notice of appeal.

Rule 84 stipulates –

" 84 A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."

31. Mr. Abdullahi submitted that this Court has no original jurisdiction; that it has only appellate jurisdiction; that the appellant has no business coming to this court; that her notice of appeal should be struck out; that Article 164(3) of the Constitution does not provide a right of appeal to the appellant; that it merely confers jurisdiction on the Court of Appeal to hear appeals from the High Court; that the conferment of jurisdiction on the Court of Appeal does not vest in the respondent a right of appeal; that while Section 84 (7) of the repealed Constitution gave automatic right of appeal, the 2010 Constitution does not; that it is incumbent on the appellant to show the statute which allows her to appeal to this court; that case-law from this Court shows that there is no right of appeal save for that which is conferred by statute; that there is no right of appeal subsumed in Article 164(3) of the 2010 Constitution; that an appellant must point out the precise provision of a statute on the basis of which he/she claims to be entitled to appeal to this Court.

32. Mr. Abdullahi took us through the case-law before and after the promulgation of the 2010 Constitution to show the history relating to the right of appeal to this Court. In summary, he submitted that unless the respondent can show the statutory provision giving her the right to appeal to this court, she is doomed and her notice of appeal was liable to be struck out. He contended that there is no such provision.

33. Referring to the decision in Kakuta Maima Hamisi V Peris Pesi Tobiko & 2 Others [2013] eKLR, Mr. Abdullahi contended that although under Article 164(3) this Court has "jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament", unless an appeal lies to this Court it cannot entertain the purported appeal. As Article 164(3) merely confers jurisdiction on this court to hear appeals as aforesaid, contended senior counsel, it behoved the respondent to show under what law her right of appeal is donated. In Kakuta Maima's case, he said, this Court emphatically stated that -"unless such appeal donating law can be found, no appeal can lie."

34. My perusal of the Kakuta Maima's case (supra) shows that it related to an election petition and an interlocutory appeal was preferred against a ruling and order made with regard to limited scrutiny. The interlocutory appeal sought to have reversed the decision made by the election court not at the end of the hearing of the election petition in which final pronouncement is normally made on the petition itself, but rather on only an aspect of adjudicative process before the Court, albeit an important one at that, but before the final judgment and decree. The court (Kiage JA) observed –

> " the law on electoral dispute resolution as currently formulated was meant to facilitate a speedy and seamless process of adjudication of the petitions prosper, hence the exclusion of disruptive distractions such as interlocutory appeals that serve only to unnecessarily prolong the process with the attendant peril of piercing the statutory timelines. We are unable to see the utility of a truction of the adjudicative process."

Then this court (Kiage JA) determined the interlocutory appeal by stating as follows -

> " having accepted the proposition of this court in The M.V. Lillian "S" that "a question of jurisdiction once raised by a party or by the court on its own motion must be decided forthwith...", we decided without hesitation that the Court of Appeal has no jurisdiction to entertain, hear or determine appeals from interlocutory rulings and orders of the High Court as an Election Court."

> " Being of that mind, we cannot venture into any consideration of this ill-fated appeal on its merits for to do so would be to embark on a meaningless misadventure the net result of which would be a nullity and a barren nothing for want of jurisdiction."

35. The Court then proceeded to strike out the appeal as incompetent.

36. The Kakuta Maimai case is distinguishable from the instant case not least because it related to an election dispute which is governed by a special legal regime, to wit, Election Act and the Elections (Parliamentary and County Elections) Petition Rules 2013 which govern and constitute the framework for electoral dispute resolution and whose Rule 35 does not lend itself to an interpretation that a party has a right of appeal against an interlocutory order or ruling made by an Election Court. The Court was alive to the rationale behind the rule when it cited the case of Ferdinard Ndungu Waititu V. Independent Electoral and Boundaries Commission (IEBC) and 8 Others (Civil Application No. 137 of 2013 (unreported)) in which this Court stated with regard to limitation to the right of appeal in interlocutory matters in an Election Petition.

> " we think the limitation to the right of appeal was deliberate, realizing that in the course of hearing of an election petition a number of interlocutory applications that occasion interlocutory rulings do arise and if any party aggrieved by such decisions were to be allowed to appeal or seek stay of proceedings pending appeal, it would be difficult, nay, impossible,

to conclude an election petition before the High Court within the stipulated period of six months."

37. It goes without saying that the ratio decidendi in the Katuka Maimai's case is not an authority in support of the proposition that Article 164(3) does not give a right of appeal to the respondent for the simple reason that the case did not deal with the Article 164(3) and its decision was predicated on the election law and rules.

38. The next authority cited to us by senior counsel Mr. Abdullahi was Republic V. Shem Angungo & 5 Others (Criminal Appeal 168 of 1987 at Kisumu).

He in particular referred to the judgment of Apaloo JA, as he then was, and discerned the principles that emerged from it. First, that an appeal is the creature of statute. Secondly, that there is no appeal from one tribunal to another tribunal unless some statute gives the right to it. Thirdly, that a right of appeal cannot be implied.

39. In Shem Angungo's case, the court referred to the cases of Anarita Njeru V. Rep. Criminal Application No.4 of 1979; Munene V. Rep [1978] (No.2) KLR 105; Nealon V. Rep [1950] Vol. 17 EACA 120; Sydney Ralph V. Republic; Mudavadi V. Republic.

40. The court examined in depth the question of the right of appeal. It held that this Court has no jurisdiction to entertain an appeal from the High Court unless a right of appeal is conferred on it by statute, and further that, this Court has no general supervisory jurisdiction over the High Court. The court also held that the appeal (in the Shem Angunga case) was statutorily barred. The Court (Apallo JA) was in agreement with the decision in Anarita Karimi Njeru's case that this court has no jurisdiction to supervise and control the decisions of the High Court by Prerogative remedies. In its words –

> " The only method known to me in criminal jurisprudence by which a party aggrieved may be relieved of the infirmities of a judgment or order of the High Court is the process of appeal. And as I said, ad nauseam, such right can only be granted by statute..."

41. The facts in the Shem Angungo case show that it related to a private prosecution instituted by an applicant against the respondents for trespass and of willfully causing damage to property.

42. Shem Angungo's case was decided in 1988 on the principle in Ralf V. Rep. [1960] E.A. 310 with which it was said to be on all fours. Raph V. Rep. held that refusal by the High Court to extend time to appeal was not appealable and the amendment (of S.361) by introduction of subsection 8(b) was otiose.

43. It was the contention of the learned Senior Counsel Mr. Abdullahi that the case of Anarita Karimi Njeru V. R. Criminal Appeal No.4 of 1979 correctly stated the legal principles as regards the right of appeal. Quoting Anarita's case, he said that –

> " it is well established, that there is no right of appeal apart from statute, either it is expressly granted by statutory authority, or it is not. There is no right of appeal by mere implication or by inference."

44. Referring to the respondent's notice of appeal, Senior Counsel Mr. Abdullahi contended that no statutory provision had been invoked as conferring on the respondent the right to come to this court on appeal.

45. Shem Angungo's case (supra) related to the provisions of the Criminal Procedure Code. The learned Judge of the High Court found that the complainant in the private prosecution had had enough time to prosecute his application and as the matter had been pending since 1979, there should be an end

to it. Accordingly he dismissed the application after finding that there was no good cause for granting enlargement of time and declined to do so in the exercise of his discretion. One of the main grounds on which it was said the Judge's decision was irregular and void was that the proceedings before the Judge contravened the rules of natural justice and were bad on that account and that although Section 361(8)(b) denied that appeal, it was said the supervisory jurisdiction of the court could be invoked to take an appeal. The decision can clearly be distinguished because Section 361(8)(b) clearly denied the right of appeal.

46. Learned Senior Counsel Mr. Abdullahi referred us to the decision in Equity Bank Ltd V. West Link MBO Limited (Civil Application No.78 of 2011 – UR 53/2011) delivered on 31st May 2013. The issues in the case were whether this Court has jurisdiction to grant the orders under Rule 5(2)(b) of the Rules of this Court and whether Section 3(1) and (2) of the Appellate Jurisdiction Act is unconstitutional. And further, whether this court has inherent power to grant interim orders pending the determination of an appeal. Its relevance was on the issue of jurisdiction to grant orders under Rule 5(2)(b) although the Constitution only conferred jurisdiction to hear appeals without more. In his judgment, M'Inoti JA, with respect, correctly, in my view, stated that -

> " the power to hear and determine conservatory applications is an incidental or collateral power that is supposed to support and actualize the primary purpose of the Court."

47. In her judgment, Sichale JA, succinctly stated –

> "...my view is that such an application is pegged to an appeal that has been filed. It is not independent. Indeed the Court of Appeal cannot entertain such application unless an appeal had been filed. To this extent, I am in agreement with the learned counsel for the applicant that the basis of an application for stay is the appeal from the High Court..."

48. Although the 2010 Constitution only gives the Court of Appeal jurisdiction in Article 164(3) to hear appeals, nevertheless Section 5(1) of the Appellate Jurisdiction Act makes rules to address and deal with the Court's powers incidental to the hearing and determination of appeals from the High Court. In his judgment, M'Inoti JA, with respect, correctly stated with regard to the Court of Appeal's powers under rule 5(2)(b) thus -

> "...those powers were never meant to exist independently of the jurisdiction of the Court to hear appeals. In fact and in practice, they do not. The respondent is quite right that overtime the Court of Appeal has described the power it exercises under Rule 5(2)(b) as "original jurisdiction". The description is what has brought confusion on the true nature of the powers of order 5(2)(b) taken on face value, it creates the false impression that the Court of Appeal has an original jurisdiction like the original jurisdiction of the High Court and that that jurisdiction exists and is exercisable independent of the jurisdiction conferred on the Court by the Constitution to hear appeals. The fact of the matter is that the Court of Appeal cannot assume or exercise jurisdiction in an application under rule 5(2)(b) unless a competent notice of appeal has been filed. Filing of a notice of appeal from the decision of the High Court is a condition precedent before the powers under rule 5(2)(b) can be invoked."

49. One does not have far to seek to see that although the Constitution has not spelt out incidental powers of the Court to give effect to the mandate to hear and determine appeals, the court has jurisdiction to deal with matters incidental to the hearing and determination of the appeals as there is legislation in place (to wit rule 5(2)(b)) to confer such incidental powers on the Court.

50. The decision in Nyutu Agrovet Limited (Civil Application No.61 of 2012) on which learned counsel Mr. Abdullahi also submitted, concerned the Arbitration Act. Briefly, the facts of the case were that the arbitrator in the case awarded Nyutu Shs.526,720,658.50 as damages on account the tort of negligence on the part of Airtel. The High Court (Kimondo J) set aside the arbitral award. Nyutu appealed to this court against the setting aside of the award. Airtel did not think that an appeal should lie, and so filed a motion dated 3rd May 2014 seeking to strike out the record of appeal. The matter for determination was whether an appeal lay from the High Court to the Court of Appeal following a decision made under Section 35 of the Arbitration Act.

51. It is patent that Nyutu Agrovet (supra) was decided on its own peculiar circumstances and was not a decision on the general interpretation of Article 164(3) of the Constitution as regards conferment of the right of appeal.

52. In his submissions before us in reply to Senior Counsel Abdullahi, learned Senior Counsel Mr. George Oraro told us that there was no cause for celebration of Anarita's decision because for a long time, section 84 of the repealed Constitution did not give a right of appeal and this court did not have power to enforce fundamental rights and that after Anarita's decision it became necessary to confer the right of appeal under Section 84(7) of the repealed constitution which read -

> "a person aggrieved by the determination of the High Court under this Section may appeal to the Court of Appeal as of right."

53. Today, said Senior Counsel Mr. George Oraro, jurisdiction is conferred by the constitution to hear appeals from the High Court. Mr. Oraro emphasized that Article 164 (3) does not state that this court's jurisdiction to hear appeals from the High Court is qualified by the words –

> "as may be prescribed by statute" as is the case with regard to jurisdiction (under Article 164(3)(b) to hear appeals from any other court or tribunal as prescribed by an Act of Parliament."

54. It was Mr. Oraro's submission that the argument that there is no right of appeal under Article 164(3)(a) would render Article 164(3)(a) worthless if the right was subject to the existence of statute to confer that right.

55. Mr. Oraro pointed out that the respondent's right of appeal was contained in the jurisdiction of the court to hear appeals and his client's petition whose determination by the High Court is now the subject of the appeal to this court was both on interpretation of the Constitution and also enforcement of fundamental rights. It was his submission that this court is enjoined to uphold the Constitution and the Rule of law and is bound by the Supreme Court decisions by dint of Article 163(7) of the Constitution. Further, it was Mr. Oraro's submission that the Nyutu case has no application. He drew the court's attention to paragraph 54 in the judgment of Equity Bank Ltd V. West Link MBO Ltd [2013] eKLR wherein learned Senior Counsel Mr. Abdullahi who appeared in the case is reported to have taken the position that Article 164 (3) of the Constitution provides an automatic right of appeal from all decisions of the High Court and any other court or tribunal as prescribed by an Act of Parliament and the fact that the right of appeal is now absolute and any decision of the High Court is appealable to this Court.

56. Mr. Oraro contended that there was no basis for the application or the preliminary objection by the two applicants. He urged us to dismiss the application as lacking in merit.

57. On his part, the interested party, Mr. Okiya Omtata Okoiti, supported the stance taken by learned Senior Counsel Mr. George Oraro and urged us to dismiss the applicants' notice of motion. He wondered how the Supreme Court will deal with interpretation and application of the Constitution and enforcement of the fundamental rights if the Court of Appeal does not have the right to deal with the appeals from the High Court. He referred us to Article 25(c) relating to the right to a fair trial and contended that -

> "law has to give effect to rights and the court has a duty to ensure that the law is developed to confirm rights."

He opined that the court had a duty to protect the Bill of Rights and urged us to dismiss the applicants' notice of motion.

58. On behalf of the 1st amicus curiae, learned counsel Mr. Ken Nyaundi associated himself with the submissions of Senior Counsel Mr. Ahmednasir Abdullahi. He emphasized that determination of the question whether Article 164(3) confers a right of appeal is very important. In his view, it does not. The right of Appeal must be donated by statute, he contended. It was submission that the Constitution does not give a right of appeal in Article 164(3) nor does any statute. He pointed out that Parliament had not enacted law to confer a right of appeal. Kenya, he said, is where it was in the days of the repealed constitution.

59. The 2nd Amicus Curiae was represented by Dr. John Khaminwa who urged us to dismiss the notice of motion by the applicants and the objection thereof. He associated himself with the submissions of Senior Counsel Mr. George Oraro and of the interested party, Mr. Okiya Omtata Okoiti. In his view, by dint of Article 2(5) of the Constitution, the general rules of international law form part of the law of Kenya and as they all recognize the right of appeal which the applicants contend does not exist under Article 164(3), the Court should find that there is a right of appeal and dismiss the application. He referred the Court to the decisions in Karuhanga V. Attorney General [2014] 3 EA 218 and Singh V. Attorney General [2014] 2 EA 319.

In the Karuhanga case (supra), the Constitutional Court of Uganda in a majority decision shot down the re-appointment of retired Chief Justice (Odoki) as Chief Justice after his retirement upon making a finding that Article 42 of the Ugandan Constitution explicitly refers to Justices of the Supreme Court, the Court of Appeal and Judges of the High Court as posts which can be held in an acting capacity after an individual has vacated office as a result of the mandatory age limit. The Court held that "had the framers of the Constitution contemplated that a retired Chief Justice could be re-appointed in an acting capacity, the provision would have, as it did with the other posts, explicitly said so." Further, and what is of relevance to this ruling, the Court held that –

> "reading Article 143 in isolation of Article 144 would go against a cardinal rule of constitutional interpretation that the constitution must be looked at as a whole, the entire constitution must be read as an integral whole and no one particular provision should destroy the other but each should sustain the other."

60. The Singh V. Attorney General case (supra) concerned a complaint for removal of a Judge from the Bench and did not bear on the issues in this case.

61. Counsel for the applicants and the respondents and the Amicus Curiae as well as the interested party in the motion dated 23rd December 2015 addressed a momentous issue relating to the question whether there is a right of appeal to this court from decisions of the High Court on the Bill of Rights under the Constitution.

62. In Samuel Kamau Macharia & Another V. KCB Ltd & 2 Others (Application No.2 of 2011) the Supreme Court whose decisions bind this and all other courts held that jurisdiction cannot be inferred. It must be conferred by the Constitution or other law. Said the Court –

> " 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 in his submission 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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. 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. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

63. In Adegbenro V. Akintola [1963] AC 614 the House of Lords (Lord Raddcliffe) stated in relation to the study of decisions on the interpretation of the constitutions of other countries –

> " ...it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other constitutions which are not explicitly incorporated in the formulas that have been chosen as the frame of this Constitution."

64. In the Karuhanga case (supra) the constitutional court of Uganda appreciated that a constitution has to be interpreted as a whole and its provisions ought to sustain one another.

65. More than any other authority, the decision in Anarita Karimi Njeru delved into the historical development of the jurisdiction of this court and the right of appeal. Anarita's case shows –

> " ...that establishment and jurisdiction of this court, and its predecessors, has remained, in effect, unaltered from 1902 until the present (i.e. May 1979) with the result that we can safely rely on authorities contained in our law reports going back to that date, all of which are authority for interpreting strictly the enactments conferring jurisdiction on this court and its predecessors."

66. Anarita's case went to great length to trace the history relating to the conferment of jurisdiction on this court and its predecessors and to state the law as regards the right of appeal. It noted that the Court and other Appeal Courts in the East African region were originally established during the colonial times. This court was established without jurisdiction to obviate the need of setting out in the Order in Council every law in each territory where there was to be no appeal. The court succinctly put it thus in the judgment –

> " the reason why the Court of Appeal was established without jurisdiction, it being left to the individual territories to confer jurisdiction, is obvious. Had the jurisdiction been conferred

as in the first form (that is, to hear appeals from any judgment or order of the High Court), it would have been necessary to set out in the Oder in Council every law in each territory where there was to be no appeal to the Court of Appeal; and, should it be considered desirable in any territory to exclude appeal to the Court of Appeal in any future law, that would have to be done by Order in Council for, had the territory attempted to do this, it would have been ultra vires the Order in Council."

67. When the Treaty for East African Co-operation came to an end after the collapse of the East African Community, the 1963 Constitution was amended in Section 64 by Act 13 of 1977 which established the Court of Appeal and mandated Parliament to confer jurisdiction on it.

68. In Anarita Karimi Njeru's case, the court noted that this court's jurisdiction, originally, emanated from England and the judicial systems of the countries whose authorities the court considered all followed the English system. The court opined –

> " the conferment of jurisdiction on a Court of Appeal takes one or two forms. The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court. Here, where the Court of Appeal is to be deprived of jurisdiction that is done specifically in a particular enactment. The second is where the legislature establishes a Court of Appeal expressly without jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one or two forms; either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court, or by conferring jurisdiction on the Court of Appeal in particular enactments, as considered appropriate."

69. The post-independence constitution continued to retain the model in which this court was established and its jurisdiction was conferred by statute. The 1963 Constitution stated in Section 64(1) –

> " there shall be a Court of Appeal which shall be a Superior Court of Record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.

The Appellate Jurisdiction Act (Cap 9) in its Section 3(1) conferred the jurisdiction thus -

> " 3(1) the Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law."

Subsections 2 and 3 of Section 3 of the Appellate Jurisdiction Act provided –

> " (2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."
>
> (3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."

70. In 2010, the new Constitution established this Court under Article 164 (1) and conferred on it directly under Article 164(3) jurisdiction as stated in paragraph 26 above. A little digression will show that prior to the promulgation of the 2010 Constitution, this court was discordant in interpreting its jurisdiction to hear interlocutory appeals from the High Court especially in election matters. Sample this. In 1981, this court held in Karanja V. Magugu (Civil Appeal No.30 of 1991) that as the law stood then, it had no jurisdiction to hear appeals from final decisions of the Election Court. However, it held that it could entertain and hear appeals on interlocutory matters. At that time, Section 45(5) of the Constitution read –

> " the determination by the High Court of any question under this Section shall not be subject to appeal."

71. The Court of Appeal followed the case of Mudavadi V. Kibisu [1970] EA 585 in which it had held that the Court of Appeal had jurisdiction to entertain an appeal from an interlocutory order of the High Court sitting as an Election Court which did not determine the validity of the election.

72. In 1984, Section 44(5) of the Constitution was amended to provide that –

> " the determination by the High Court of any question under this section shall not be subject to appeal."

73. When the Matiba V. Moi (Civil Application No.241 of 1993) came up for hearing this court declined to find that it had no jurisdiction to hear an interlocutory appeal although all the loopholes for interlocutory appeals had been sealed by the1984 amendment. Instead, it did self-help, and in a manner of speaking appeared to say that what Parliament had not given, the Judges could take for themselves provided it was not expressly prohibited by statute. In doing this, the Court overlooked the observation made in Karanja V. Magugu (supra) that the preclusion of a right of appeal in two respects under section 44(5) of the Constitution cannot be construed as equivalent to express conferment of a right of appeal in all other respects. The court inferred power. It failed to appreciate that at the time, it had to trace its power to statute. In Munene V. Republic (2) [1978] KLR 105, which was overruled by Anarita Karimi Njeru V. The Republic (2), Madan and Law JJA accepted that –

> " it is well established that there is no right of appeal apart from statute, either it is expressly granted by statutory authority, or it is not. There is no right of appeal by mere implication or by inference. There is also no right of appeal, save to the extent hereinafter stated, when it is expressly prohibited in the instance of statutes which enact that on appeal to the court the decision of the High Court shall be final and shall not be subject to further appeal."

74. In Munene V. the Republic, the court, after correctly making this observation went further to hold that –

> " there was a right of appeal from the High Court where the matter was of pure law."

This court held in Anarita Karimi Njeru (2) (supra), that the term "law" as used in Section 64(1) of the repealed Constitution and section 3(1) of the Appellate Jurisdiction Act is restricted to mean statute or acts of Parliament of Kenya.

75. In 1987, this court in the case of Commissioner of Lands V. M. J. Samuel [Civil Appeal No.109 of 1978] observed that –

> " It is clear therefore that before the court of appeal can enter upon the hearing of an appeal there must be some law which statutorily provides for a right of appeal. Though there have been differences of opinion how that law conferring jurisdiction should manifest itself, even in Munene V. Republic it was accepted that there is no right of appeal apart from statute, there is no right of appeal by mere implication or by inference. That was the answer given to the submission that there could be a right of appeal under Section 3 of the Appellate Jurisdiction Act, Cap 9, because it was not expressly prohibited."

76. There can be no controversy today that Article 164(3) of the Constitution made complete shift from the erstwhile law by giving directly jurisdiction to this Court instead of leaving it to Parliament. Anarita's case was decided in the context of the law obtaining then. It is not an authority in this case on the vexed question which is the subject of determination in this ruling namely whether there is a right of appeal given by the Constitution and if so, whether ith is subsumed in Article 164(3).

77. Section 7 of the Sixth Schedule to the 2010 Constitution requires all law in force before the effective date to continue in force and to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

78. By virtue of Article 2(4), any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.

79. It is apparent that S.3 (1) of the Appellate Jurisdiction Act purports to give this Court jurisdiction although the jurisdiction of this court is conferred directly by Article 164(3) of the Constitution. To that extent, Section 3(1) is superfluous. In relation to the repealed constitution, Section 3(1) was restrictive in its conferment of the jurisdiction and right of appeal to this court in that it conferred jurisdiction to hear appeals from the High Court "in cases in which an appeal lies to this court under any law." In effort, therefore, the jurisdiction of this court was to her and determine appeals in which there existed statute giving an appellant the right of appeal to come to this court. Such statute would for instance include the Criminal Procedure Code Cap 75 and the Civil Procedure Act, Cap 21. In contrast, the jurisdiction conferred by Article 164(3) removed the restriction. It widened the jurisdiction to hear appeals.

    After establishing this court, Article 164 (3) gave it jurisdiction directly to hear appeals from (a) the High Court and (b) any other Court or tribunal as prescribed by an Act of Parliament. In effect, therefore, the Constitution changed the erstwhile restrictive law that obtained prior to the promulgation of the 2010 Constitution when the only appeals that this court could handle from the High Court were those "in cases in which an appeal would lie to the Court of Appeal under any law" which meant that an appellant had to show the statute giving the right of appeal. It seems the 2010 Constitution deliberately removed from Parliament the task of conferring jurisdiction and the right of appeal as was the position before. It is ostensible that

    Article 164(3) deliberately eschewed the erstwhile restriction imposed by the words "in cases in which an appeal lies to the Court of Appeal under any law" appearing in Section 3(1) of the Appellate Jurisdiction Act. Today, by virtue of Section 2(1) of the Constitution, Section 3(1) of the Appellate Jurisdiction Act is overridden by Article 164(3) to the extent of its restrictiveness and superfluity. The only issue is whether the right of appeal is now subsumed in article 164(3). I hold the view that it is for the following reasons.

80. First in seeking to establish whether the right of appeal is conferred by Article 164(3) of the Constitution which also confers jurisdiction to this court to hear appeals from, inter alia, the High Court, one must read the Constitution as a whole. In Samuel Kamau Macharia & Another V. KCB Ltd and 2 Others [Application No.2 of 2011] the Supreme Court of Kenya whose decisions are binding on all other courts by dint of Article 163(7) of the Constitution gave the following exposition as regards interpretation of the Constitution –

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. 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. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

The ratio decidendi emerging from the Interim Independent Electoral Commission, Constitutional Application No.2 of 2011 [2011] eKLR is clearly that where the Constitution is exhaustive in its provisions on jurisdiction, the court must confine itself to the constitutional limits and it is not open to the court to expand its jurisdiction "through judicial craft or innovation."

81. A look at the Bill of Rights in Chapter Four of the Constitution (Articles 19 to 59) shows a number of fundamentals. First, it is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies (see Article 19); secondly, it applies to all law and binds all state organs and all persons (see Article 20(1)); thirdly, it is a fundamental duty of the State and every State organ to observe, respect, protect and fulfill the rights and fundamental freedoms in the Bills of Rights (Article 21(1); fourthly, 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, (Article 22(1)).

82. It is patent that, the Bill of Rights is the fabric of our society which binds the organs of the government and all persons. The rights conferred by the Bill of Rights ought to be enjoyed by all. Where breach or a violation occurs or is threatened, the Constitution (in Article 22)) confers on every person the right to institute proceedings in court to seek redress.

83. Of the three Superior Courts established by the Constitution (i.e. the Supreme Court, the Court of Appeal and the High Court) it is the High Court that has original jurisdiction and which therefore is the trial court in which cases on the Bill of Rights are commenced. This Court has only appellate jurisdiction under Article 164(3). It has no original jurisdiction. The Supreme Court too is an appellate court and has no original jurisdiction except in relation to the hearing and determination of the election to the office of the President arising under Article 140 and the giving of advisories under Article 163(6).

84. But under Article 163(4)(a), it is plain to see that this court is mandated to make decisions on appeal involving the interpretation or application of the Constitution which are appealable to the Supreme Court as of right. Should this not lend itself to the inevitable conclusion that the right of appeal is conferred by the Constitution and may be subsumed in Article 164(3).

85. The hearing and determination of constitutional matters whose decisions by this court on appeal would be appealable to the Supreme Court by dint of Article 163(4)(a) & (b) would take place in the High Court as the trial court pursuant to the power vested in it by Article 165(3)(b) & (d).

86. These constitutional provisions show that the Constitution has mandated this Court and expects it to hear appeals from decisions of the High Court on the interpretation and application of the Constitution as well as on decisions made by the High Court under Article 165(3)(b) on determination of the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated infringed or threatened; and on interpretation and application of the constitution under (Article 165 (3)(d)).

87. When interpreting Article 164(3) of the Constitution, one must therefore have regard to the provisions and framework of the Constitution. It is plain to see that the constitution intended to confer the right of appeal. Without the right of appeal the High Court would be a final court on the Bill of Rights and this would deny litigants access to this court and to the Supreme Court. This is not what the Constitution intended.

88. I observe that Under Article 10(1) of the Constitution, judicial officers qua State officers or qua public officers are bound by National Values and principles of governance "whenever any of them (a) applies or interprets the Constitution or (b) enacts applies or interprets any law or (c) makes or implements public policy decisions." Judicial officers are bound by the Constitution to ensure that while discharging their duties, if they are called upon to apply or to interpret the Constitution or to interpret any law, they must apply national values and principles enshrined in Article 10(2) which include the rule of law, human dignity, human rights and good governance. These constitutional requirements show that the right of appeal should exist to challenge in this court decisions of the High Court as they appertain to determination of the question whether a right or fundamental freedom in the Bill of Rights has been breached, violated, infringed or threatened or any question respecting the interpretation and application of the Constitution.

89. The Constitution gave this court jurisdiction directly and kept Parliament out of the matter and therefore deliberately omitted in Article 164 (3)(a) any mention that the jurisdiction of this court to hear appeals from the High Court would be as prescribed by an Act of Parliament. To suggest that the right of appeal in respect of decisions of the High Court should be or ought to be given in a statute is perilously close to suggesting that the Constitution cannot confer simultaneously jurisdiction and the right of appeal. I know of no rule of construction that forbids simultaneous conferment of both jurisdiction and the right of appeal.

90. The Constitution is comprehensive and is not worded in general terms so as to leave it open to future elaboration to meet changing conditions. Human beings being what they are, it seems the drafters of the Constitution did not risk or gamble with the interpretation that might possibly be made and therefore went full throttle in an attempt to detail every aspect of its application thereby running the risk of its partaking the prolixity of a legal code. But they omitted the words "right of appeal" after giving the court mandate to hear appeals from the High Court on the Bill of Rights. We are enjoined to interpret the Constitution in a manner that gives effect to the intention that was intended.

91. A constitution to the effect that the right of appeal is not subsumed in Article 164(3) or that the Article merely gives this court jurisdiction to hear appeals without more, is not in harmony with the provisions of the constitution and cannons of interpretation do not support it.

92. A proposition that one would be inferring the right of appeal by an interpretation of the Constitution that posits that the right of appeal to this court is subsumed in Article 164(3) cannot hold good.

93. Under Article 159, this court is vested with judicial authority by the people of Kenya. It is required to exercise its judicial authority guided by the principles in Article 159(2)(a)to (e) which (in Article 159(2) (e)) require that the purpose and principles of the Constitution shall be protected and promoted.

In applying a provision of the Bill of Rights, a court is required under Article 20(3)(a) & (b) to develop the law to the extent that it does give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Further, in interpreting the Bill of Rights, a court, tribunal or other authority is enjoined to promote the values that underlie an open and democratic society based, inter alia, on human dignity, and the spirit, purport and objects of the Bill of Rights.

94. The word "protect" as a verb is defined in Oxford Advanced Learners Dictionary in (1) as meaning "to make sure that somebody or something is not harmed, injured or damaged etc." In relation to the purpose and principles of the Constitution under Article 159(2)(e), it simply means that the court has a duty to ensure that the purpose and principles of the Constitution are not undermined or rendered meaningless and that the court will help in the development and realization of the purpose and principles of the Constitution.

95. It is clear from these Constitutional provisions that the court is expected to determine appeals from decisions of the High Court on interpretation and application of the Constitution (see Article 163(4)(a)) and on a question whether a right or fundamental freedom on the Bill of Rights has been denied, violated, infringed or threatened (see Article 165 (3)(b)). Further as aforestated decisions of this court on the constitution may be tested in the Supreme Court.

96. To posit or postulate that an interpretation of the Constitution that results in a conclusion that a right of appeal is given or is subsumed in under Article 164(3) is wrong because it amounts to making an inference in the face of a plethora of authorities from this Court stating there can be no appeal unless the right of appeal has been expressly donated by statute fails to appreciate the wording and the framework and effect of the constitutional provisions which show that the court is duty bound, not only to promote and protect the purpose and principles of the Constitution as mandated by Article 159(3)(e) but also that the court is under a constitutional duty to promote and protect the Bill of Rights and to ensure that appeals envisaged by the Constitution from the High Court to this court and from this court to the Supreme Court become a reality. If this were not so, why would the Constitution provide that this court which has no original jurisdiction would make decisions on the constitution including on the Bill of Rights which may be appealed to the Supreme Court? As expressed by Viscount Simon, L.C. in Nokes V. Doncaster Amalgamated Collieries 4[1940] 3 All ER at pg 554, in dealing with legislation –

> " if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

97. The duty cast on the Court in our Constitution to ensure workability and operationalization of the Constitution echoes the words of Lord Dunedin in Murray V. Inland Revenue Commrs. 3 [1918] AC at pg 553 that –

> " it is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a Judge to declare a statute unworkable."

98. Having regard to the decisions and sentiments expressed by the Supreme Court of Kenya, the aforesaid words could not be more apt. Moreover, one of the canons of construction of statutes which holds true also of Constitutions namely, ut res magis valeat quam pereat, advocates a construction that will give validity rather than invalidity.

99. Failure to construe the right of appeal as subsumed in Article 164(3) would result in absurdity and render the Bill of Rights empty promise. The people of Kenya could not give themselves something that would amount to nothingness. They gave themselves a right of appeal from the High Court to this court and from this court to the Supreme Court on the Bill of Rights and on interpretation and application of the Constitution.

100. It may also be argued that discerning the right of appeal as subsumed in Article 164(3) amounts to turning the Court into legislators. Although Article 164(3) does not mention the word right of appeal, the Constitution clearly shows that the right of appeal was clearly intended; it also shows that the right of appeal is subsumed in Article 164(3) as this is clearly in the scheme and framework of the Constitution and any other construction would produce an absurd result. It seems to me that the drafters of the Constitution after clearly showing that appeals would be filed in this Court from decisions of the High Court as aforesaid, saw no need to state in Article 164(3) that there was a right of appeal. Perhaps that was a mishap, albeit not a fatal one. It being clear that the Constitution intended to confer the right of appeal in Article 164(3), and as the failure to expressly mention the words "right of appeal" in the Article was merely "a faultiness of expression," the court should read the obviously donated right of appeal as being incorporated in the conferment of jurisdiction in Article 163 (3). In construing Article 164(3) as conferring both jurisdiction and right of appeal, one is giving an intelligible interpretation to the Constitution and avoiding a construction that will result in absurdity and meaninglessness to the Bill of Rights. As Lord Parker CJ said in 1959 "it is not really a question of adding anything to the section, for it is quite clear what the intention was, and the omission of certain words that you would expect to find there is nothing more than a faultiness of expression," see page 357 of Regina V. Qakes [1959] 2 QB 350. It is clear that interpreting the Constitution in a manner that promotes and protects the Bill of Rights does not amount to a journey of discovery by the court, nor is it usurpation of power. Rather, it is discharging the court's mandate under the Constitution by interpreting it in a way that promotes and protects the Bill of Rights by ensuring that appeals envisaged by the Constitution from the High Court to this court are actualised.

101. In my view, Judges ought to be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant to work for all. It is for these reasons that I have come to the conclusion that the right of appeal is subsumed in Article 164(3) which also confers jurisdiction to this Court to hear appeals from decisions of the High Court on the Bill of Rights. Accordingly, I do not find merit in the notice of motion dated 23rd December 2015.

102. As my learned brother and sister Judges Ouko, Kiage, Mohammed and Odek JJA are also in agreement, the notice of motion dated 23rd December 2015 is dismissed with no order as to costs.

103. I am indebted, as are my brother and sister Judges, to the learned Senior Counsel appearing for the applicants and the learned Senior Counsel for the respondent and their respective learned assistants for their illuminating submissions and the authorities they cited.

104. In the result the hearing of the respondent's notice of motion dated 17th December 2015 and the appeal (which we understand from the respondent's counsel has now been filed) shall be fast-tracked.

RULING OF OUKO, J.A

1. On 14th September 2015 the respondent, Hon. (Lady) Justice Kalpana H. Rawal, the Deputy Chief Justice of the Republic of Kenya and the Vice-President of the Supreme Court, pursuant to Articles 165(3) (b) & (d), & 167(1), among other provisions of the Constitution of Kenya, 2010, and section

31 of the Sixth Schedule to the Constitution petitioned the High Court, in Petition No. 386 of 2015 alleging that the 1st applicant, (the Judicial Service Commission) had acted arbitrarily, illegally and unconstitutionally by its decision to retire her upon attaining the age of 70 years instead of 74 years as provided for in the Constitution, and by going ahead to advertise for suitable candidates to fill that office. The question raised for determination in the petition, which is relevant to the matter before us, was whether by issuing to the respondent a retirement notice of 1st September, 2015 directing her to retire with effect from 16th January 2016, the 1st applicant was in breach of the former's constitutional rights.

2. The learned Judges (Mwongo, Korir, Ong'udi, Meoli & Kariuki, JJ) found, inter alia, that although the respondent was a serving judge on the effective date, she was nonetheless expected to retire upon attaining the age of 70 years in accordance with the Constitution. Aggrieved by this part of the decision, the respondent has evinced her intention, by filing a notice of appeal, to challenge it on appeal to this Court. In the meantime she has taken out a motion on notice under Rule 5(2) (b) of the Court of Appeal Rules to restrain, by a temporary order of injunction, the applicants or any organ of the Judiciary from retiring her on 15th January 2016 (now past) when she would turn 70 years, or from commencing the recruitment process for her replacement until the intended appeal is lodged, heard and determined.

3. The applicants in opposition to the application filed both a replying affidavit and a notice of preliminary objection. Subsequently they took out the instant notice of motion. The motion and the notice of preliminary objection raise a single identical issue; whether this Court has jurisdiction to entertain the intended appeal in view of the provisions of Articles 164 (3) (a) and 165(3), (b) and (d) of the Constitution. The motion, brought pursuant to Rule 84 of the Court of Appeal Rules seeks the striking out of the notice of appeal for the sole reason that the respondent lacks the right of appeal to this Court against the High Court decision.

4. By the nature of the latter application it became imperative that it be heard first instead of the one for injunction. By Rule 84 of the rules of this the Court, an application to strike out the notice of appeal, or the appeal itself may be brought at anytime, either before or after the institution of the appeal, on the grounds that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. The applicants have argued that no appeal lies to this Court from the decision of the High Court in the exercise of its jurisdiction under the Bill of Rights or its jurisdiction on any question respecting the interpretation of the Constitution under Article 165(3) (b) and (d).

5. Mr. Ahmednasir, learned senior counsel appearing with Mr. Kanjama for the applicants has invited us to find that, like the pre-1997 section 84 of the former Constitution, the present Article 165(3) of the Constitution of Kenya, 2010 does not provide for the right of appeal from determinations of the High Court arising from actions founded on the Bill of Rights or on the interpretation of the Constitution; that with respect to section 84 aforesaid the void was filled in 1997 by the introduction of sub-section (7) to section 84 by the Constitution of Kenya (amendment) Act, 1997, (Act No. 9 of 1997) which commenced on the 7th November 1997 specifically providing, as of right, for appeals arising from the determinations of the High Court under of Chapter V- Protection of Fundamental Rights and Freedoms of the Individual; that with that single amendment a historical problem was resolved. Learned senior counsel, however thinks that the current Constitution has reversed this monumental gain and reverted the country to the pre-1997 provision with the result that today the determination by the High Court under the Bill of Rights or on the interpretation of the Constitution is final; and that, in any case under section 3 of the Appellate Jurisdiction Act, appeals to this court can only be pursuant to some written law. So that despite Article 164(3) (a) of the Constitution a party intending

to appeal in those circumstances to this Court must cite the law authorizing the appeal; and further, that any leave to appeal granted without authority of the law does not create a right of appeal.

6. To support these submissions counsel relied on a long line of case law, tracing the evolution of the law in this area from 1963 to this day. I shall be referring to those authorities later on.

7. Mr. Nyaundi, learned counsel for the International Commission of Jurists (ICJ), appearing as amicus curiae agreed with those submissions, adding that while the Court lacks jurisdiction, the respondent on the other hand lacks the right to appeal; that the lacuna in the law is either deliberate or inadvertent.

8. But that is the present status of the law that must be applied, he concluded.

9. Mr. Oraro, learned senior counsel, assisted by Messrs Gatonye, Kilukumi, Abbas and Okoth, in opposing the application submitted that under the Constitution today it is no longer necessary for a litigant to show under what legislation the right of appeal emanates; that by Article 164(3)(a) appeals from the High Court automatically lie to this Court without any qualification, save where the right is expressly limited or restricted by the Constitution itself or statute; that in contrast, appeals to the High Court and to the Supreme Court are circumscribed by the Constitution under Articles 165(3) (e) and 163(4) (b), respectively and so are appeals from courts with status of the High Court created by Article 162 (2), which appeals depend on the donation of the right of appeal, by an Act of Parliament. Counsel further submitted that since there is an automatic right of appeal from this Court under Article 163(4) (a) to the Supreme Court on matters of interpretation and application of the Constitution, there can be no dispute that this Court has jurisdiction to entertain the intended appeal. Likewise counsel has urged us to find that it was as a result of the previous historical circumstances limiting the right of appeal among other reasons that led to the promulgation of the Constitution in 2010; and that today the decision of this Court in Anarita Karimi Njeru Vs. R [1976-80] 1KLR 1283 is no longer law of general application. In his view, the distinction drawn by various decisions between "the right of appeal" and "jurisdiction" is one without a difference because once there is jurisdiction the right of appeal follows with the converse also being true. Counsel supported these arguments with a bundle of authority which I have similarly taken into consideration.

10. Mr. Omtata, acting in person as an interested party agreed with these submissions and sought to know the purpose for which the Supreme Court was created if not to hear all appeals from the Court of Appeal. He submitted that there would be a miscarriage of justice if the decision of a single judge of the High Court were to be final; that if the law does not give effect to the rights and fundamental freedoms, it is the duty of the court to interpret it in a manner that would give it effect; and that the absence of legislation cannot be cited as a tool for limiting rights and fundamental freedoms. Citing Article 2 on the supremacy of the Constitution, Mr.Omtata argued that since the Constitution does not place any restrictions on the jurisdiction of this Court other than that provided for under Article 164(3) (b), any law purporting to limit that jurisdiction would be inconsistent with the Constitution and void to that extent.

11. Dr. Khaminwa, senior learned counsel representing Kituo Cha Sheria, the 2nd amicus curiae highlighted written submissions filed prior to the hearing of this application. Those submissions focused more on the merits of the motion for an injunction and the intended appeal. Regarding the application before us, counsel warned that to allow this application the Constitution would be destroyed and the country would revert to the old order; that the importance of the Bill of Rights cannot be gainsaid as the Constitution devotes a whole 31 Articles to the Bill of Rights; and that the right to a fair hearing is intended to extend to appeals.

12. Mr. Kanjama, in his wrapping-up response urged us to bear in mind the principles of good governance as an approach to constitutional interpretation and application in order to achieve predictability in

the decision-making process; that departing from settled judicial decisions will only result in anarchy in the courts.

13. Arising from the aforegoing submissions the question remains; does the Court of Appeal have jurisdiction to entertain appeals from the decisions of the High Court arising from the Bill of Rights and the interpretation of the Constitution?. The question may be put differently thus; does the respondent have the right to challenge, on appeal, the decision of the High Court on such matters to this Court?.

14. In Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank Limited & 2 Others, Application No. 2 of 2011, the Supreme Court extensively explained as follows how a court's jurisdiction is conferred;

> "(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 .... 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. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.
>
> (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 in terms of Article 163(3) (b) (ii)...."

15. These principles were recognized as early as in 1979 in the time-honoured Anarita case (supra). The Court in that case considered the question of "jurisdiction" of the court and "the right of appeal" in a manner giving the impression the two were indistinguishable. The Court stated that;

> "It is well established that there is no right of appeal apart from statute; either it is expressly granted by statutory authority, or it is not. There is no right of appeal by mere implication or by inference .... The conferment of jurisdiction on a Court of Appeal takes one of two forms. The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court.
>
> Here, where the Court of Appeal is to be deprived of jurisdiction that is done specifically in a particular enactment. The second is where the legislature establishes a Court of Appeal expressly without jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one of two forms; either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court; or by conferring jurisdiction on the Court of Appeal in particular enactments as considered appropriate." (Emphasis mine)

16. At the time this case was decided Munene Vs. Republic (No. 2) [1978] KLR 105 was generating some controversy. In that case the Court described its jurisdiction in a tendentious manner, insisting that;

> " We will not usurp jurisdiction. We will interpret liberally the extent of our jurisdiction .... There is right of appeal from the High Court in this Court because it is a matter of pure law whether there was unreasonable delay on the part of the appellant in presenting his appeal to the High Court."

17. Two new concepts were being developed here from the Court's understanding of its jurisdiction, namely, that the Court would be guided by pure law; and that it would interpret liberally the extent of its jurisdiction, expressing the ratio decidendi that the Court had a general supervisory power over the judicial process and would entertain appeals from all decisions of the High Court. The Court by that edict assumed jurisdiction which was outside that conferred by statute and which indeed had been expressly excluded. That decision was criticized in Anarita where the learned Judges asserting that;

> " With respect, to do so (assuming jurisdiction not conferred), appears to us to do violence to the principles accepted by the court, that there is no right of appeal apart from statute ... a long line of authorities, following the well-established rule that there is no right of appeal apart from statute, was cast aside as having been decided on a strict interpretation of statutes defining the court's jurisdiction."

18. The Court then concluded that;

> " We are satisfied that the principles of pure law have no application in the determination of the jurisdiction of this Court, and we have grave doubt that such law has any application in a court of law. Further, we are satisfied that there is no substance in the proposition that this Court may interpret liberally the extent of its jurisdiction. With respect, we are of the view that the decision in Munene's case is bad law and should not be followed."

19. Prior to the decision in the Munene case (supra) the Court had consistently held in terms of section 64(1) of the independence Constitution, that it had "such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law." Section 3(1) of the Appellate Jurisdiction Act, using more or less the same language restates that position.

20. In Mudavadi Vs. Kibisu [1970] EA 585, decided slightly before Munene, for example, this Court's prececessor (Sir William Duffus, P.) reaffirmed the law as it had been applied by the Court and its predecessors for over fifty years before the decision in Munene. He said;

> " We were referred to various English authorities but with respect those authorities are not of much assistance as the question of our jurisdiction depends solely on the interpretation of the relevant section of the Constitution and of the Laws of Kenya and these in our view clearly define our jurisdiction to hear this appeal.... It is well established that there is no right of appeal apart from statute; either it is expressly granted by statute or not. There is no right of appeal by mere implication or by inference."

21. It will be recalled that these are the very words that would subsequently be used by the Judges in Anarita. The historical context of these decisions must not be lost sight of. At the time the Court of Appeal was created by section 64 of the former Constitution its jurisdiction and powers in relation to appeals from the High Court were to be conferred by law, which meant that a specific Act of Parliament

or other statutes, as opposed to the Constitution, would contain the powers of the Court. But this, in my view has changed.

22. Fast forward to 2010, a journey that began with two failed attempts in 1997 though the Inter-Party Parliamentary Group (IPPG) bringing some token reforms, one of which relates to section 84 which I shall be referring to, and the 2003 endeavour though the Constitution of Kenya Review Commission (CKRC) that partly culminated in the referendum of 2005 and ultimately the rejection at the vote of the draft Constitution.

23. The Final Report of the Committee of Experts on Constitutional Review (CoE), 11th October 2010 is a synopsis of what informed the provisions in Chapter Ten – the Judiciary Chapter of the Constitution. The report observed at paragraphs 6.4.4. & 7.5.4 that;

> "Submissions to the CoE on the Judiciary were virtually unanimous on one point: the Judiciary must be reformed. The CoE received a number of submissions on how this should be done .....
>
> ....Serious allegations were made against the Judiciary, including inefficiency, incompetence and corruption. Furthermore the need for judicial reform was identified as one of the long term issues causing conflict in Agenda Four of the Kenya National Dialogue and Reconciliation in February 2008."

24. This part of history helps to understand the journey leading to the enactment of Article 164(3) (a) and the thinking behind the whole architecture of the Constitution.

25. Like all institutional reforms that have a constitutional dimension, judicial reforms inaugurated by the Constitution of Kenya, 2010 introduced structural and functional changes to the Judiciary. Critical to this application is the establishment of new hierarchy of court system either with the jurisdiction constitutionally conferred or to be conferred by legislation. By Article 164(3), the Constitution, for instance, empowers the Court of Appeal to hear appeals from;

> "(a) the High Court; and
>
> (b) any other court or tribunal as prescribed by an Act of Parliament ...."

26. This is a departure from section 64(1) of the former Constitution at least with regard to appeals from the High Court, where the Court's jurisdiction depended on conferment by an Act of Parliament. The Article has, since the passage of the Constitution, been the subject of numerous judicial pronouncements by this Court. The decisions include, Equity Bank Limited Vs. West Link Mbo Limited Civil Application No. 78 of 2011, Kakuta Maimai Hamisi Vs. Peris Pesi Tobiko & 3 Others, Civil Appeal No. 154 of 2013 and Nyutu Agrovet Limited Vs. Airtel Networks Limited Civil Appeal (Application) No. 61 of 2012. The decisions are unanimous on the Court's jurisdiction under the current dispensation and follows the broad path defined by the Supreme Court in Samuel Kamau Macharia case (supra) with which I fully and respectfully agree, that where the Constitution exhaustively provides for the jurisdiction of a court, the court must operate within the constitutional limits; and that if a Court is to be deprived of its jurisdiction so conferred that can only be done by a specific law. Whereas section 64 aforesaid only conferred jurisdiction to the Court in relation to appeals from the High Court "as may be conferred on it by law", Article 164 (3) (a) makes no such reference to any law because the Constitution is the supreme law of the Republic, the mother of all laws. Any law that is inconsistent with it becomes void. But the Constitution or a statute can impose limitations to a court's jurisdiction or prescribe further jurisdiction.

27. In Equity Bank (supra) Mr. Ahmednasir, S.C. is recorded as having submitted, relying on Republic Vs. El Mann [1969] EA 357, that Article 164(3) (a) provides an unlimited access to the Court of Appeal with regards to appeals (only) from the High Court; that any other matter not being an appeal, for instance an application under Rule 5(2)(b) of the Court of Appeal Rules have no place in the Court; that that jurisdiction is unlimited and cannot be restricted by statute hence sections 3(1) and 3(2) of the Appellate Jurisdiction Act would be contrary to the Constitution for purporting to, respectively limit and redefine the Court's jurisdiction. Although the latter issue was not directly before it, the Court, drew the following distinction; whereas Article 164(3)(a) gives jurisdiction to the Court to hear appeals from the High Court, section 3(1) of the Appellate Jurisdiction Act restricts such appeal "to cases in which an appeal lies to the Court of Appeal under any law," meaning that Article 164(3)(a) notwithstanding, a right of appeal has, in turn to be conferred by a statute.

28. While Githinji, J.A was cautious in his approach, having noted that the issue was not necessary for the determination of the preliminary objection raised before them and declined the invitation to declare sections 3(1) & 3(2) inconsistent with the Constitution, the other learned Judges were more bold.

29. For instance Musinga J.A expressed the view that even with the provision of Article 164, the Court of Appeal will still exercise or be limited in its exercise of jurisdiction in accordance with the relevant statutes; that it was not the intention of the drafters of the Constitution to open wide the doors of the Court to all manner of decisions from the High Court. For these reasons the learned Judge found that the two sections are not inconsistent with the Constitution. Kiage, J.A, for his part found that the right to appeal from the High Court to this Court flows directly from the Constitution itself. Relying on Anarita the learned Judge stated that the Court of Appeal has jurisdiction to hear all appeals from the High Court (unless expressly excluded), but will hear appeals from other courts and tribunals if so prescribed by statute. He too shared the conviction that despite Article 164(3)(a) not every decisions of the High Court is appealable and by way of illustration cited sections 66, 67,72 and 75 of the Civil Procedure Act and section 379 of the Criminal Procedure Code as limitations to the right of appeal. Similarly M'Inoti, J.A expressed the opinion that the Constitution of Kenya, 2010 has broadened the jurisdiction of the Court by declaring the general jurisdiction to entertain appeals from decisions of the High Court; that the Article, as far as appeals from the High Court are concerned, makes it unnecessary for a party to first identify specific legislation which confers jurisdiction; and that arguments in Anarita under section 84 of the former Constitution of Kenya, [1969] before the introduction of subsection (7) are no longer tenable. He clarified however that this finding was not to suggest that Article 146(3) (a) allows all and sundry decisions of the High Court to be appealed to this Court; that a holistic and purposive interpretation, of the Constitution permits limitation by statute of what is appealable so long as the limitation satisfies Article 24 of the Constitution.

30. I reiterate that these views were obiter dicta as observed by Githinji, J.A.

31. They however, being the first views on this issue, set stage for subsequent consideration by this Court of its appellate jurisdiction. The question was directly raised in Kakuta Maimai case (supra) in which the court's jurisdiction to entertain appeals arising from interlocutory decisions of the High Court sitting as an election court was considered. Relying on Ferdinand Ndungu Waititu Vs. Independent Electoral & Boundaries Commission & 8 Others, Civil Application No. 137 of 2013, the Court held that, pursuant to Rule 35 of the Elections Petition Rules, 2013, appeals to this Court from the High Court in election matters lie only from judgments and decrees and not orders from interlocutory

applications; and that the formulation of Rule 35 limiting the right of appeal to this Court is neither an aberration nor accidental. The Court said;

> " It fits perfectly within the conceptual, doctrinal and philosophical framework that informs the correct electoral adjudication laws. There is method and deliberation behind the rule and we cannot see how an interpretation of it can be embraced and espoused that would allow interlocutory appeals without doing violence to, breaching and uprooting the strict constitutional and statutory timelines adverted to above.
>
> ....We respectfully think it is founded on a demonstrable misconception that all matters of grievance are appealable from the High Court to this Court. This is not the case, of course. It is trite that no right of appeal exists absent an express donation by the Constitution, or by statute ....Unless an appeal lies to his Court it is bereft of jurisdiction to entertain any purported appeal.
>
> It behoves an intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie."

32. In Nyutu the Court held that no appeal lies to this Court from the decision of the High Court under section 35 of the Arbitration Act.

33. See also Twaher Abdulkarim Mohamed Vs. Mwathethe Adamson Kadenge & 2 Others Civil Appeal No. 45 of 2015 where the court also found that by Article 87(i) of the Constitution and section 75(1A) and (4) of the Elections Act, no second appeal lies to this Court from the decision of the High Court in its appellate jurisdiction in electoral matters from the Magistrate's Court.

34. Clearly there is a general concensus from the cases so far decided under the current Constitution and from clear reading of the Constitution that Article 164(3) (a) does not provide for appeal from all and sundry decisions of the High Court; that the right of appeals to this Court can also be conferred or restricted by statute in specific circumstances, so long as that conferment or restriction is consistent with the Constitution.

35. Based on the law and the decisions of this Court I hold the view that this Court is established and its jurisdiction expressly conferred by the Constitution; that that jurisdiction is not a thoroughfare between it and the High Court for each and every decision of the High Court; that the requirement for a separate legislation to confer jurisdiction in addition to that already conferred by Article 164(3) (a) is no longer necessary, that requirement having been based on section 64 (1) of the 1963 Constitution; and that reasonable regulation and limitation in appeals to this Court is permitted. I am also in agreement that the right of appeal can either be conferred by the Constitution or by statute; that where a right of appeal is not established there can be no jurisdiction. In other words the right to appeal (or the law granting leave to appeal), must, first be established before jurisdiction can be invoked.

36. It is with that in mind that I turn to consider the main and final part of this ruling, regarding the right of appeal to this Court from decisions of the High Court under the Bill of Rights or on the interpretation of the Constitution.

37. Section 84 of the former Constitution before its amendment simply stipulated that a person may apply for redress to the High Court if he alleges violation of fundamental rights and freedoms. The Constitution was silent on what would happen to a party aggrieved by the decision of the High Court. The gap had ruinous effect on parties who were genuinely discontented with the decision of

the High Court. Expressing a sense of helplessness, Masime, J.A in Republic v Shem Angungo & 5 others, Criminal Appeal No.168 of 1987, lamented that;

> " I am apprehensive that in situations referred to in his judgment (Platt, J.A) this legislative removal of jurisdiction is bound to lead to injustice when this Court is prevented from correcting decisions that are null and void for failure to accord hearing to litigants as happened in the present case. Yet that situation can only be rectified by appropriate legislation. Before that is done however, I consider that the party affected may usefully advert to the general principle that ex parte orders are always open to revision."

38. Such was the frustration over the state of the law leading to the introduction, a few years later, of sub-section (7) to section 84. It read;

> " (7) A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal as of right."

39. The debate in Parliament preceding the amendment as captured by the Hansard of 15th October, 1997 is instructive.

> " The Attorney-General (Mr.Wako): Mr. Temporary Speaker Sir, the last one is important. Chapter Five deals with the protection of fundamental rights and freedoms of the individual. In the whole of that chapter, when it came to the issue of interpreting the violations of human rights and the Constitution as a whole, the law was that the highest court that could handle that was the High Court of Kenya. As of now, the highest Court in this country is not the High Court of Kenya but the Court of Appeal. I think this came about because during the days of the East African Community, the highest Court within Kenya was the High Court. Therefore it was thought that matters of interpreting the Constitution of Kenya and human rights violations which are protected under chapter five of our Constitution were matters which must be confined within the sovereignty and the territorial limits of Kenya. Therefore the High Court was to interpret those matters and that those matters should not be subjected to the Court of Appeal which covers the entire East Africa. So, it may have served a purpose at that time. But, then when the community collapsed and we no longer had the East African Court of Appeal, we did not amend this particular section. So Clause 10 is now amending section 84 of the Constitution to state as follows;
>
> > " A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal as of right."
>
> As of right, a person is entitled to appeal on those grave matters to the highest Court of the land - the Court of Appeal. By passing this Bill, we shall be enhancing the protection of the fundamental rights of Kenyans in as much as they will now have another avenue of appeal should they feels that their rights have been violated.
>
> They will now be able to appeal to the highest Court of this land."

460. It is clear, from this extract that the legislative intendment was to subject determination of human rights violations and the interpretation of the Constitution to further interrogation by the top Court.

41. In order to answer the question posed earlier, the rules of Constitutional construction must be employed so as to ascertain if indeed the determination of the High Court in the matter, the subject

of the intended appeal is final. To borrow the words of Professor Gordon Wood regarding American Constitution;

> " What, in the final analysis gave meaning to the Americans' conception of the Constitution was not its fundamentality or its creation by the people, but rather its implementation in the ordinary courts of law"

See: The Creation of The American Republic, 1776-1787 New York and London-1969.

42. I am guided by Article 259 in construing the provisions under consideration.

The Article provides;

> " 259
>
> (1) This Constitution shall be interpreted in a manner that;
>
> (a) promotes its purpose, value and principles;
>
> (2) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> (3) permits the development of the law; and
>
> (4) contribute to good governance."

43. In construing the Constitution and bearing in mind the foregoing, one must either pay attention to the words used in an enactment, rather than the context in which they are used, giving the words their plain and ordinary meaning, (See El Mann (supra)), or one looks at the context and the apparent purpose of the provision being interpreted in order to achieve the objective and the interpretation that best advances the purpose of the enactment, the plain meaning of the words used notwithstanding. See Philip Torney Vs. Ireland & the A. G. [1985] 1 I.R 289 cited with approval in Equity Bank. Whatever the approach a judge adopts in interpreting any provision of the Constitution, judicial restrain must be exercised and the intention of the framers of the Constitution must be borne in mind. To achieve this, relevant provisions must be read together and not disjointly. Where the construction involves the Bill of Rights, it is necessary that it be given a generous and purposive interpretation that would advance those rights, looking at the Constitution as a whole. See Lyomoki & Others Vs. Attorney General [2005] EA. 127.

44. Bearing in mind the supremacy of the Constitution under Article 2, Article 50 on fair hearing, right to access to justice under Article 48, the exercise of judicial authority contained in Article 159 and the provisions of Article 163(3) (b) and 4(a) on the jurisdiction of the Supreme Court, and since judicial power resides in the authority to give meaning and life to the Constitution through interpretation and application, it is my firm belief that the finality in judicial determination of fundamental issues in the society can only come from the highest court of the land, the Supreme Court. That indeed is why I find that both Articles 164(3(b) and 163(3) (b) and 4 (a) provide incontrovertible right of appeal to this Court from the interpretative and application jurisdiction of the High Court.

45. Article 164 (1) and (3) (a) establishes the Court of Appeal and donates to it power to hear appeals from the High Court. On the other hand the Supreme Court is conferred by Article 163(3) (b) (i) with appellate jurisdiction to hear and determine appeals from the Court of Appeal in the following words;

> " (4) An appeal to the Supreme Court from the Court of Appeal shall lie;

(a) as of right in any case involving the interpretation or application of this Constitution." (My emphasis)

46. The Constitution itself envisions that an appeal from the Court of Appeal will come through to the Supreme Court challenging the former's determination of a question of interpretation and application of the Constitution, that question having in turn come from a similar determination by the High Court. Because of the importance of the question of interpretation and application of the Constitution and the issues of human rights and freedoms this second appeal from the Court of Appeal to the Supreme Court is as of right. Article 163 (4) (a) was not intended to be a moribund and redundant provision in the Constitution, particularly recalling the reasons that led to the introduction of sub-section (7) to section 84 of the former Constitution. No provision of the Constitution bars or limits appeals arising from the decision of the High Court determining the question of violation of a right or fundamental freedom or on any question respecting the interpretation of the Constitution under Article 165 (3) (b) and (d). To hold that there is no right of appeal because it is not provided for expressly would be against Article 259 which enjoins the Court to interprete the provisions of the Constitution in a manner that promotes its purpose, values and principles; that advances the rule of law, the human rights and fundamental freedoms, that permits the development of the law and contributes to good governance. It is highly unlikely that, having seen the substantial injustice occasioned by section 84 of the former Constitution and having brought a solution by amending it to provide for a right of appeal as of right, that it was the intention of the framers to take that right of appeal away by the current Constitution, which is considered to be the most progressive and transformative in the region.

47. There are several cases that have traveled this course to show that it could never have been the intention of the people of Kenya to roll back the gain introduced by sub-section (7) of section 84. See Lawrence Nduttu & 6000 Others Vs. Kenya Breweries Ltd & Another, S.C. Petition No. 3 of 2012, Samuel Kamau Macharia, (supra) and Peter Oduor Ngoge Vs. Ole Kaparo, Petition No. 2 of 2012, among others.

48. In Hassan Joho & Another Vs. Suleiman Said Shahbal & 3 Others, S.C. Petition No. 10 of 2013, the Supreme Court, citing a passage from Erad Suppliers & General Contractors Ltd Vs. National Cereals & Produce Board Petition No. 5 of 2012, delivered itself as follows;

> " ...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in superior court of first instance, is to be resolved at that forum in the first place before an appeal can be entertained."

49. The Court want to state that;

> " (40). The instant appeal involves a cardinal issue of law. The issue for determination in the High Court and the Court of Appeal was one of interpretation of the Constitution and an Act of Parliament
>
> .....
>
> (42) It is clear, as we have established, that the issue for determination in the application before the High Court was the constitutionality of section 76 (1) (a) of the Elections Act, and the applicants invited the High Court to exercise its jurisdiction as conferred by Article 165(3) (d) (i), to interpret the Constitution and determine the validity of the provisions of the Election Act.

The High Court exercised this jurisdiction and rendered a decision which was then appealed to the Court of Appeal and ultimately to this Court."

50. The Supreme Court had no doubt whatsoever that such a critical question affecting the citizen must be ventilated through the hierarchy of courts up to the last court.

51. The following passage from Nduttu was reproduced in Richard Tongi Vs. Chris Bichange & 2 Others Petition No. 17 of 2014;

> " The appeal must originate from a Court of Appeal case where issues of contestation revolve around the interpretation or application of the Constitution, which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation; where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under Article 163(4) (a)."

52. Finally to stress the point that there is a right of a second appeal from this Court to the Supreme Court, and therefore there must equally be a right of appeal from the High Court, I quote the Supreme Court in the case of Gatirau Peter Munya & Another Vs. Independent Electoral and Boundaries Commission & 2 Others, Application No. 5 of 2014;

> " Article 163(4) (a) must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court .... Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application .... The appeal must originate from a Court of Appeal case where issues of contestation revolve around the interpretation or application of the constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that such a party must be faulting the Court of Appeal on the basis of such interpretation ....
>
> (70) These two cases, in our view, adequately clarify the frontiers of the appellate regime of the Supreme Court embodied in Article 163(4) (a) of the Constitution."

53. I reiterate that the absence of an explicit provision conferring in the Court of Appeal jurisdiction to hear appeals from the High Court on the Bill of Rights or on the interpretation of the Constitution, was not an accidental omission. It was not an omission at all. The Constitution having expressly vested in the Court under Article 164 the general appellate jurisdiction to hear appeals from the High Court and having explained how appeals relating to the interpretation and application of the Constitution are to be appealed from this Court to the Supreme Court under Article 163, that per se is sufficient conferment of appellate jurisdiction. There is no legal void. It would be a serious travesty of justice and an absurdity if it was to be held that in the hierarchical scheme of the courts, from the magistrate's court to the Supreme Court, only the Court of Appeal would have no say in the interpretation and application of the constitution and on matters to do with the Bill of Rights, and yet the Supreme Court is expected, indeed enjoined to hear appeals from the Court of Appeal by dint of Article 164(3) (a) (as of right).

54. For these reasons I would accordingly dismiss the notice of motion dated 23rd December, 2015 for lack of merit and make no orders as to costs in view of the importance of the point raised to the general public.

RULING OF KIAGE, J.A

A. preliminary

1. By a motion dated 23rd December 2015, expressed as brought under various constitutional and statutory provisions including Rule 84 of the Court of Appeal Rules 2010, the Judicial Service Commission (JSC) prays, in the main, that the notice of appeal lodged by the Respondent, Hon. Lady Justice Kalpana Rawal against the above-captioned decision, be struck out. The grounds proffered for that plea, which appear on the face of the motion, include that;

   (c) Article 164(3) of the Constitution of Kenya 2010 provides that the Court of Appeal has jurisdiction to hear appeals from the High Court and any other Court or tribunal as prescribed by an Act of Parliament.

   As per the Constitution of Kenya 2010 and the existing law, The Respondent does not have a right of appeal as this is a constitutional matter on rights and freedoms which has to be prescribed by the law."(My emphasis).

2. The application is supported by the affidavit of Winifrida Mokaya, the JSC's Registrar, sworn on the said 23rd December 2015.

3. Ms. Mokaya swears that the impugned notice of appeal was against a decision of a 5-Judge bench of the High Court which dismissed the respondent's petition challenging the requirement that she retire from her position as Deputy Chief Justice upon attainment of the age of seventy (70) years. She swore at paragraph 5 and 6 thus;

   > "That the Respondent chose to question the applicability of the provisions of the Constitution of Kenya 2010 to her, on the ground of violation of her fundamental rights and freedoms, and filed a Constitutional Petition in the High Court, namely Petition No. 386 of 2015... The judgment of the High Court was a final judgment and the Respondent herein does not have a right to appeal against that finding to this Honourable Court..."

4. At the hearing of the application, Mr. Ahmednassir Abdullahi, learned Senior Counsel, appeared with Mr. Charles Kanjama for the JSC; while learned Senior Counsel Mr. George Oraro appeared with MessrsWaweruGatonye, KiokoKilukumi, Abas Ismail and David Okoth, for the Respondent. Learned Counsel Mr. Ken Nyaundi and Dr. John Khaminwa, respectively, appeared for the International Commission of Jurists (ICJ), Kenya Chapter, and Kituo Cha Sheria who are amici curiae.

   Mr. OkiyaOmtatahOkaiti is an interested party.

B. submissions In Support

5. Characterizing the JSC's application as one that raises a fundamental issue calling for this Court's determination, Mr. Abdullahi submitted that the respondent had no right of appeal to this Court and therefore the notice of appeal she filed is bad in law, calling for striking out. While the Constitution is clear about the High Court's jurisdiction to entertain and determine petitions to enforce the Bill of Rights, asserted Senior Counsel, it was silent on what options were open to a litigant who was aggrieved by the High Court's such determination, as it did not provide for an appeal therefrom. In this regard, he argued, the 2010 Constitution is akin to the Independence (1963) Constitution which also made no provision for appeal. Such provision was only introduced by amendment to Section 84 of

that Constitution, introducing Sub-Section (7), which provided for appeals from determinations on enforcement of the Bill of Rights. As the current Constitution did not incorporate such a provision, Mr. Abdullahi contended, the conclusion is inescapable that there is no right of appeal.

6. Citing this Court's decision in Republic –vs- Shem Angungo & 5 Others CR.APP. NO. 168 OF 1987 (KISUMU), Mr. Abdullahi urged that there can be no right of appeal unless it be specifically provided for, as it cannot be implied, and that without statutory conferment, the right cannot lie. He submitted that the ladder to the next level by way of appeal must be statutorily provided and that in the absence of such statute, there is an implicit exclusion of the right of appeal in the matters concerned.

7. Senior counsel next referred to the oft-cited decision of Anarita karimi Njeru –vs- Republic [1979] eKLR (Anarita) and emphasized this Court's holding that a right of appeal could only be based on statute law and not the common law, thereby overruling the majority decision in the earlier case of Munene –vs- The Republic (NO.2) [1978] KLR 105, (Munene) which had, by resorting to the concept of "pure law? and a liberal interpretation of the Court's jurisdiction, entertained an appeal on the Bill of Rights. He laid great emphasis on and urged us to be guided by the Court's conclusion in the penultimate paragraph of its judgment;

> " As we have seen, Parliament established a Court of Appeal for Kenya by substituting section 64 of the Constitution, and conferred on it jurisdiction by section 3(1) of the Appellate Jurisdiction Act 1977. Nowhere was the jurisdiction conferred by section 180 of the Constitution of 1963 (and repealed by the Act of 1965) restored, with the inescapable conclusion that this Court has no jurisdiction to hear appeals from the decisions of the High Court exercising its jurisdiction under section 84 of the Constitution of 1969".

8. The last of the pre-2010 decisions of this Court that counsel cited was Rafiki Enterprises Limited –vs- Kingsway Tyres & automart Ltd [1996] eKLR and in particular the passage where the Court treated as axiomatic the requirement that a right of appeal exists only by express statutory donation, never otherwise;

> " And of course it is now trite that a right of appeal must expressly be given by law and such a right cannot even be implied or inferred. In the High Court, if a situation arises which is not covered by any provisions of the Civil Procedure Act or the rules made thereunder, one can always invoke the inherent jurisdiction created by section 3A of the Civil Procedure Act. In the Court of Appeal, that is not possible because the Court's jurisdiction is limited to hearing appeals from the High Court and the right of appeal must be given by some law".

9. Turning to the post-2010 jurisprudence, Mr. Abdullahi posited that this Court has consistently held that the right of appeal to it must be provided by statute. He cited in aid the case of Kakuta Maimai hamisi –vs- Peris Pesi Tobiko & 2 Others [2013] eKLR (Kakuta) where we held that;

> " It is trite that no right of appeal exists absent an express donation by the Constitution, or by statute or by other law... unless an appeal lies to this Court, it is bereft of jurisdiction to entertain any purported appeal. It behooves any intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie".

10. Counsel then made expansive submissions on this Court's decision of Nyutu Agrovet Limited –vs- Airtel Networks Limited [2015] eKLR, (Nyutu) which he termed as critically important as it was the first time a five-Judge bench of this Court was empanelled to give a definitive pronouncement on Article 164(3) of the Constitution. He opined that the said provision provides for the jurisdiction

of this Court but does not concern itself with the right of appeal, a distinction that was thus captured by Mwera J.A;

> "I do not agree that Article 164(3) of the Constitution, Section 3(1) of the Appellate Jurisdiction Act and even Section 75 of the Civil Procedure Act, giving this Court jurisdiction to hear appeals from the High Court, should be read to mean that these provisions of law also confer the right of appeal on the litigants. The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this Court. To me, even if jurisdiction and the right of appeal may be referred to side by side or in the same breath, the two terms do not mean one and the same thing. It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law then that court has no business to entertain the matter (see Owners of the Motor Vessels "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1. This Court has jurisdiction to hear any matters coming on appeal from the High Court and any other court or tribunal prescribed by law. But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not show that leave has been granted to lodge the appeal before us. However, be it appreciated that such leave does not constitute the right to appeal. The right must precede leave".

11. Mr. Abdullahi also drew our attention to the Judgment of W. Karanja J.A who rejected the notion that the Right of Appeal could be inferred to exist where it has not been expressly denied, and agreed with the sentiments of Omolo J.A in Kenya Shell Ltd –vs- Kobil petroleum Limited, civil Appeal NO. 57 OF 2006 (unreported) who had stated;

> " I agree with Onyango Otieno J.A that the right of appeal to this Court can only be conferred by Statute and cannot be inferred. That is now old hat".

12. Musinga J.A?s sentiments in the same case were also brought to our attention. The learned Judge of Appeal categorically rejected the contention made by the appellant therein that given the jurisdiction donated by Article 164 (3) of the Constitution, any provision in a statute that purports to curtail that jurisdiction is unconstitutional, in these terms;

> " 32. With great respect, I do not agree. Whereas the above cited Article of the Constitution generally gives the Court of Appeal jurisdiction to hear appeals from the High Court, that per se does not accord a party to arbitral proceedings a right of appeal save as provided for under the arbitration agreement and/or the Act. Article 164 of the Constitution does not confer an automatic right of appeal in respect of each and every decision of the High Court. This Court so held in Equity Bank Ltd –vs- West Link mbo Ltd(supra). There is a clear distinction between the general jurisdiction of the Court to hear appeals from the High Court as conferred to it by the Constitution and a right of appeal which is vested on a litigant by statute and that right is not absolute, it may be ousted or circumscribed by statute".

13. Quoting from the judgment of M'Inoti J.A, Senior Counsel asserted that jurisdiction and right of appeal cannot be used interchangeably and this Court can only proceed with an appeal where there is a fusion of the two. The learned Judge of Appeal's reasoning, which we were urged to adopt, was that;

> " Article 164(3) does not contemplate appeals to this Court from all decisions of the High Court and that a right of appeal, as distinct from the jurisdiction of this Court which is conferred by Article 164(3), must be conferred by statute...
>
> I think the answer to the respondent's argument lies in the distinction that the appellant seeks to draw between „jurisdiction? and „right of appeal.? Although the respondent dismissed the distinction as a distinction without a difference, I am convinced that there is a lot of merit in the differentiation. Because jurisdiction and right of appeal must coincide for a party to be heard on appeal in this Court, there has been a tendency to use the two terms as though they are interchangeable. Article 164(3) confers jurisdiction on this Court to hear appeals where there is a right of appeal. The conferment of jurisdiction on the Court by Article 164(3) to hear and determine appeals from the High Court cannot be understood to create the right of appeal to this Court from all decisions of the High court. The right of appeal as distinct from jurisdiction must be expressly conferred by the Constitution or by Statute".

14. Coming to the close of his submissions, Mr. Abdullahi contended that for the time being, there exists no statute that provides for a right of appeal to this Court from Bill of Rights litigation, and in view of that "missing link", the respondent has no right of appeal and her notice of appeal is for striking out.

15. Mr. Nyaundi for the ICJ-K, associated himself with the submissions made by Mr. Abdullahi. He readily conceded that a questioning of the right of appeal from Chapter 4 of the Constitution, the Bill of Rights Chapter, is a precedent-setting matter of great public importance, then proceeded to assert in terms, that there is neither a right of appeal to, nor jurisdiction vested in this Court to entertain such appeals, of which the Respondent's is one. He contended that we are in the same position, devoid of jurisdiction in Bill of Rights matters, as we were before the amendment to the retired Constitution introduced Section 84(7).He submitted that there is a vacuum in the law, brought about by a failure of constitutional or statutory provisions for a right of appeal from the „special jurisdiction? that the High Court exercises under Section 165(3) (b), which is different from its civil or criminal jurisdiction, the appeals wherefrom are provided for under the Civil Procedure Act and the Criminal Procedure Code, respectively.

16. Mr. Nyaundi contended further that the leave given by the High Court is all in vain as it is not founded on any statutory provision and is inescapable of conferring or donating a right of appeal. Nor can the principles for exercising judicial authority confer such right. He concluded by expressing sympathy for the respondent but quickly adding that neither sympathy, nor a keen awareness of the ramifications of the upholding of his submissions, would suffice to create a right of appeal for the respondent who has come to the end of the road, with no further remedy. He thus implored us to down our tools.

C. Submissions In Opposition

17. Opposing the motion, Mr, Oraro started on a poignant note, stating that the historical circumstances of the Anarita decision of this Court were very sad because Section 164 of the old Constitution established this Court but without jurisdiction, which had to be conferred on it by statute. For that reason, the Court remained weak, at some point lacking even the power to enforce its own orders. The

amendment that introduced section 84(7) of that Constitution was a response, and an intended cure, to the situation that obtained in Anarita, opined Senior Counsel.

18. Mr. Oraro asserted that under the current Constitution, jurisdiction on this Court is not conferred by a statute, as previously, but by the Constitution itself. He contended that the Court's jurisdiction is of express constitutional conferment, and referred to Section 164(3) (a) which provides that;

> " The Court of Appeal has jurisdiction to hear appeals from –
>
> (a) the High Court;
>
> (b) and any other court or tribunal as prescribed by an Act of Parliament".

19. Senior Counsel then directed our attention to the appellate jurisdiction of the Supreme Court provided for by Article 163 (4) in these terms;

> " 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.
>
> (b) n any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved..."

20. Mr. Oraro argued that in so far as the Supreme Court does have jurisdiction to hear appeals which lie from this Court as of right in cases involving interpretation or application of the Constitution, that can only be because this Court would have dealt with them legitimately within the context of its appellate jurisdiction. He supported that contention with a reference to the Supreme Court's Advisory Opinion in Re The Matter Of the Interim Independent Electoral Commission [2011] eKLR, in which the apex Court delivered itself thus;

> " [43] Quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court. And while the Advisory-Opinion jurisdiction is exclusively entrusted to the Supreme Court, the Constitution does not provide that this Court while rendering an opinion, may not interpret the Constitution. Indeed, interpretation of the Constitution stands to be conducted, for different purposes and at different stages, by a vast array of constitutional organs; so, for instance, the State Law Office in advising Government Ministries, is entitled to interpret the Constitution as may be necessary; and the several independent Commissions under the Constitution are similarly entitled to interpret the Constitution as part of the performance of their respective mandates. The Supreme Court too, for the purpose of rendering an Advisory Opinion, may take its position as guided by its own interpretation of the Constitution. Only where litigation takes place entailing issues of constitutional interpretation must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution

by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages". (My emphasis)

21. That decision, Mr. Oraro reminded us, is binding on this and all other courts by dint of Article 163(7) of the Constitution.

22. Commenting on Section 3 of the Appellate Jurisdiction Act that provides that this Court "shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law", Senior Counsel submitted that we are in duty bound to construe that provision in a manner that brings it into conformity with the Constitution which contemplates a general appellate jurisdiction over decisions of the High Court. Pursuing that line of argument further, Mr. Oraro urged us to hold that this Court's decision in Nyutu (Supra) must be accorded a limited, as opposed to a general application, as it was not pronouncing on rights of appeal generally but only within the narrow strictures of Section 35 of the Arbitration Act.

23. Turning to Equity Bank Limited Vs. West Link Mbo limited[2013] eKLR, (Equity Bank) Mr. Oraro submitted that this Court was right to hold that it had jurisdiction to entertain and grant applications for interim relief under Rule 5(2) (b) which had been challenged. He cited a particular passage in my judgment therein where I rejected the argument that this Court's jurisdiction had been constricted under the new Constitution;

> "It would seem to me that in applying the foregoing reasoning to the Constitution, the Court of Appeal does have jurisdiction to hear all appeals from the High Court (unless expressly excluded) but will only hear such appeals from other courts and tribunals as will be specified in the legislation contemplated in Article 164(3) (b).
>
> So understood, it follows that it is inaccurate and way off the mark to state that the Constitution has curtailed, cut back or cut to size the jurisdiction of this Court. To the contrary it seems to have expanded it, but definitely within appellate context."

24. Senior Counsel returned to Anarita and urged us to appreciate that it was decided in a different environment altogether, and therefore remains relevant only for situations where appeals are by statutory conferment, which no longer obtains in Kenya. He supported himself with these sentiments of M'Inoti J.A;

> "In my opinion, the effect of Article 164(3) is, as far as appeals from the High Court are concerned, to make it henceforth unnecessary for a party to first identify specific legislation which confers jurisdiction on the Court of Appeal before the Court can assume jurisdiction. Arguments such as that advanced in AnaritaKarimiNjeru that there was no right of appeal from decisions of the High Court under section 84 of the Constitution of Kenya 1969, as it then stood (before introduction of section 84(7) in 1992 to expressly provide for a right of appeal) are no longer tenable".(My emphasis)

25. Mr. Oraro completed his submissions by asserting that under the current constitutional dispensation one has to justify any exclusion of the right of appeal and, such justification being absent, the objection on the basis of an alleged lack of the right of appeal, and the motion which is predicated on it, ought to be dismissed. He contended that the distinction between "jurisdiction" and "right of appeal" is a distinction without a difference, and asserted that the motion is misguided because the respondent's petition filed before the High Court sought both the enforcement of her rights and the interpretation of the Constitution, both of which are appealable before this Court.

26. Mr. Omtatah declared upfront his support for the position taken by the Respondent regarding only the competence of the appeal. He argued that the right to appeal is part of the right to a fair trial as errors could be made by the High Court and this would require correction by this Court. He asserted that the Court is enjoined under Article 20(3) of the Constitution to develop the law so as to give effect to a right and urged us to do so to give effect to the respondent's right to a fair trial. He contended that any case law that tended to derogate from that right, by virtue of Article 20(4) is null and void. He added that absence of legislation expressly donating a right of appeal could not be invoked to limit the said right. He asserted that one has direct access from the High Court to this Court which has obligation to hear appeals and therefore no further bridge is required, contrary to what was contended by the Applicant.

27. Dr. Khaminwa was equally in support for the position taken by his fellow Senior Mr. Oraro. He categorized his other senior colleague Mr. Abdullahi's submissions as bold but lacking merit and belonging to the old order, to uphold which, he warned, "would be to destroy the new Constitution, 41 Articles of which are devoted to human rights".

28. He asserted that fair hearing involves appeals as recognized by various international law instruments. He did not however cite specific provisions of those instruments. He concluded that Bill of Rights issues are matters of general importance that call for pronouncement by this Court. He urged us to dismiss the motion.

D. The Reply

29. Responding to those submissions, Mr. Abdullahi agreed that this is a matter of great importance. He urged us to pay due regard to the doctrine of stare decisis, which assures certainty on the basis of which parties can be assured of sound legal advice by their advocates on the state of the law. He extolled Anarita as good law, asserting that it is beyond argument that a right of appeal must be donated by statute, a position this Court has upheld consistently. He reiterated that Article 164(3) of the Constitution does not donate a right of appeal but only sets out this Court's appellate jurisdiction, the two being totally different.

30. Counsel contended that the Constitution limits institutions, including this Court, and that in interpreting the Constitution in a manner that advances its purposes as commanded by Article 259, we ought to hold that no right of appeal has been donated. It is this Court's appellate jurisdiction that is unlimited under the new Constitution but not the right of appeal to it, he argued. Responding to the sentiments of Musinga and M'Inoti JJ.A in the Equity Bank case relied on by Mr. Oraro, Mr. Abdullahi stated that they were „wrong? but opined that M'Inoti J.A did correct himself and settle the issue in Nyutu when he stated that "a right of appeal, as distinct from jurisdiction, must be conferred by statute". Only statute can confer a right of appeal and not the broader principles of constitutionalism urged by Mr. Oraro, counsel stated, noting that the particular issue was never put to the people of Kenya in a referendum and therefore the Constitution as is, must be taken to reflect the wishes of the people.

31. Mr. Kanjama took it up from Mr. Abdullahi and emphasized that predictability is a component of good governance which is an approach to interpreting the Constitution. On the issue at hand, he submitted, three clear and authoritative pronouncements of this Court post-promulgation in Kakuka Maimai,nyutu and joseph Mohere Aoko –vs-civicon Limited [2015] eKLR had all approved, upheld and applied Anarita to the effect that the right of appeal requires statutory conferment. Mr. Kanjama urged that it would not be possible for this Court to now depart from that settled path without causing anarchy. This would be an untenable situation considering that many appeals have already been shut

out of this Court on the basis of that package of interpretation, and it is important that the Court must not be seen to be either fluid and flexible or firm and rigid depending on who the parties are. He therefore urged us to allow the application and strike out the notice of motion as no right of appeal exists.

E. Analysis And Determination

32. There is unanimity that what we are called upon to decide in this motion is a question of grave and monumental importance. The JSC is asking us to find and hold that the long-awaited 2010 Constitution, hailed and celebrated for its democratizing ethos as a charter of liberty and which, at Article 259 commands us to interpret it in a manner that "(a) Promotes its purpose, values and principles,(b) Advances the rule of law, and the human rights and fundamental freedoms of the Bill of Rights,(c) Contributes to good governance" does not envision or contemplate, let alone permit, a right of appeal to this Court, in Bill of Rights litigation.

33. That the human rights and fundamental freedoms project has, for the larger part of Kenya's independent history, been viewed with State suspicion as a troubling inconvenience is nowhere more clear than in the manner in which justiciability and appellability of the Bill of Rights was treated in the governing constitutional text and interpreted by the courts over time. I need only state, to illustrate, that even though the old Constitution at Section 84(6) gave the Chief Justice discretion to make rules governing the practice and procedure of the High Court in relation to the jurisdiction and powers conferred by Section 84 for the enforcement and protection of fundamental rights and freedoms, successive Chief Justices defaulted in the matter for four decades until Chunga CJ, to his credit, did so during his brief tenure. That long-standing default and omission was in turn cited by a Judiciary, not then famous for being enamored with the Bill of Rights, to rule that in the absence of the contemplated rules, Kenyans had not right of access to the High Court for enforcement of fundamental rights and freedoms which then became effectively non-justiciable. That much is in the public domain and tells the story of decades-long Bill of Rights antipathy in officialdom. See, for instance, Stanley D. Rose, „The Rule of Law and Lawyers in Kenya?, The Journal of Modern African Studies, 30, 3 [1992] pp. 421-442 who refers to discussions on the „destruction of the Constitution by the courts" in various articles published in issues of the The Nairobi Law Monthly eg. A. Vasquez, "Is the Bill of Rights Enforceable After July 4, 1989?", in ibid. 20 p.8; Kathurima M?Inoti, „The Reluctant Guard: the High Court and the Decline of Constitutional remedies in Kenya?, in ibid. 34, 1991, pp. 17-26 and Wachira Maina, „Justice Dugdale and the Bill of Rights?, in ibid. 34, 1991, pp. 27-36.

34. It is no surprise that as part of re-engineering and re-calibrating the Kenyan State, the People of Kenya gifted themselves a Constitution in 2010 that moved human rights and fundamental freedoms from the shadowy, peripheral fringes of questionable utility to the very centre and core of State obligation and national life. The Bill of Rights is not just an essential value constitutionally recognized as a national aspiration alongside equality, freedom, democracy, social justice and the rule of law (see the Preamble to the Constitution). It is also one of the national values and principles of governance upon which this republic is declared to be founded by Article 4. It, alongside the others in Article 10 (2), is binding on 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. (Article 10(1)). Its pride of place in the new Kenya is beyond disputation given its express justiciability in the 2010 Constitution aided and strengthened in no small measure by the removal of historical strictures including locus standi. See Part 1 of Chapter 4 (General Provisions Relating to the Bill of Rights), Article 19 to 25.

35. Other than curtailing the justiciability of Bill of Rights claims, at the High Court, the constitutional-statutory framework prior to 2010 contained a further handicap, namely their appellability to this Court. The 1963 Constitution at Section 176(1)provided that the predecessor of this Court, the Court of Appeal for Eastern Africa, was to have such jurisdiction in relation to appeals from the Supreme Court (as the High Court was then called) as might be conferred by law. Excluded from such jurisdiction by dint of Section 176(3) were;

> " (a) any question as to the interpretation of the Constitution.
>
> (b) any question as to the contravention of any of the provisions of sections 14 to 27 (inclusive) [the Bill of Rights provisions] of this Constitution".

36. The above provision was repealed by the Constitution of Kenya (Amendment) Act, 1965which deemed the Kenya Independence Order in Council 1963 to be the Constitution of the Republic of Kenya, coming into effect on 12th December 1964. That repeal meant that it was now open to Parliament, by virtue of Section 176(1), to confer jurisdiction on the former Court of Appeal for Eastern Africa in regard to interpretation of the Constitution and the enforcement of fundamental rights and freedoms. It did not do so.

37. What is more, whereas the 1963 Constitution provided, at Section 180, that if a Court of Appeal of Kenya were to be established, appeals would lie to it as of right from final decisions of the Supreme Court (High Court) in those two key areas, the 1965 amendment repealed the said section. The effect of that repeal was that from being appellable as of right, final decrees in those constitutional areas could only be appealed to this Court if Parliament, by enactment, conferred such right. It did not do so and this was to remain the case until 1992 when Section 84(7) of the Constitution was introduced providing for Bill of Rights appeals to this Court as of right.

38. When Parliament established the Court of Appeal for Kenya in 1977 by substituting Section 64 of the Constitution, it conferred jurisdiction on it, not in the Constitution itself, but outside of it, in a statute, namely the Appellate Jurisdiction Act, 1977 at Section 3(1). The earlier Section 180, repealed by the 1965 Act, was never restored to the Constitution. Section 3(1) of the Appellate jurisdiction Act reflects the notion that appeals to this Court must be conferred by statute. It provides;

> " The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law".(My emphasis)

39. For the longest time then, indeed up until the 2010 Constitution, the jurisdiction of the Court of Appeal, which of course could only be excersible in appeals that were properly before it, was a sort of treasure hunt: the Constitution as it then was did not provide it, so one had to seek it in the Appellate Jurisdiction Act which, in turn, made it dependent on some other law. This is important to bear in mind, when considering the jurisprudence of this Court on its jurisdiction over appeals. Two cases in particular stand out: Munene and Anarita. In both, the Court was grappling with the gaping jurisdictional hole in the Constitution for this Court, with the consequence that it had to be conferred by statute. The two benches handled the question in totally disparate ways.

40. In Munene, the Court was divided. Madan and Law JJ.A (with Wambuzi J.A dissenting) held that although there is no right of appeal except as may be conferred by statute, once a question has properly been referred to a court, the ordinary incidents of procedure of that court (including a right of appeal from its decision) apply, in the absence of statutory provisions to the contrary. To them, a right of appeal existed even though it was not expressly conferred by statute. In arriving at that conclusion, the

distinguished Justices of Appeal, doubtless aware that criticism would come their way, stated that they were not thereby usurping jurisdiction, but were interpreting their extant jurisdiction liberally.

41. The approach of the Munene bench was roundly criticized in Anarita which re-affirmed that there could be no right of appeal apart from statute, and that without an express grant of it by statutory authority, it does not exist as it cannot come into being by mere implication or by inference. Anarita has since been accepted by this Court as good law and I, for myself, do think that it was properly decided in the context of the constitutional and statutory framework then in place, to which I shall presently return. The Court there embarked on a thorough and expansive discussion of the jurisdiction of a Court of Appeal and came to this observation;

> " The conferment of jurisdiction on a Court of Appeal takes one of two forms. The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court. Here, where the Court of Appeal is to be deprived of jurisdiction, that is done specifically in a particular enactment. The second is where the legislature establishes a Court of Appeal expressly without jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one of two forms: either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court; or by conferring jurisdiction on the Court of Appeal in particular enactments, as considered appropriate". (Emphasis mine)

42. The learned Justices of Appeal then analyzed and illustrated the provisions from various jurisdictions that fell under either form of conferment of appellate jurisdiction. The first form was exemplified by the English Court of Appeal established by the Supreme Court of Judicature Act, 1873.The same form was adopted by India where the Supreme Court's appellate jurisdiction followed that of the Court of Appeal of England, to be followed by Section 132 of the Constitution of India. They had this to say, which, to me, is of great significance to our current position;

> " It is sufficient for us to say that the operative words in the enactments before independence, [India?s, that is] and in the Constitution, were to the effect that an appeal should lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India".

43. As for the second form of conferment, the Anarita bench found it to have been the case in the East African Protectorate(Court of Appeal) Orders in Council1902, 1906 and 1909 which were later replaced by the East African (Court of Appeal) Order in Council1921, itself replaced by the East African (Court of Appeal) Order in Council 1950 by then applying, after a territorially incremental process, to the Colony and Protectorate of Kenya, the Uganda Protectorate, the Nyansaland Protectorate, the Zanzibar Protectorate, Tanganyika Protectorate, the Sychelles and Somaliland.

44. Dealing specifically with Kenya (with a passing but relevant contrasting mention of Aden and Tanzania) the Court stated;

> " This Court was established by the Constitution of Kenya (Amendment) Act 1977 which replaced section 64 of the Constitution, the jurisdiction being identical to that of the old Court. The appellate jurisdiction Act was replaced in 1977 by the Appellate Jurisdiction Act and, again, the jurisdiction of this Court is identical to that of the old Court. That is, the establishment and jurisdiction of this Court , and its predecessors, has remained, in effect, unaltered from 1092 until the present with the result that we can safely rely on authorities contained in our law reports going back to that date, all of which are

authority for interpreting strictly the enactments conferring jurisdiction on this Court and its predecessors.

Aden and Tanzania, as will emerge when we refer to the authorities, adopted the first form of conferment of jurisdiction on the Court of Appeal, that is (in their appellate jurisdiction legislation) jurisdiction was conferred on the Court of Appeal to hear all appeals from the High Court. Kenya adopted the second form of conferment of jurisdiction on the Court of Appeal. In our Appellate Jurisdiction Act the conferment of jurisdiction took the form of, in effect, repeating the provisions of the Constitution, so leaving it to particular statues to confer jurisdiction on this Court, and these are the Civil Procedure Act and the Criminal Procedure Act". (Emphases mine)

45. If I may pause here for a moment, it seems to me that a complete and careful reading of Anarita reveals a very thoughtful approach by the Court which took the trouble to not only trace the legislative position of various jurisdictions, but also placed them in proper historical context. It will be noted that when dealing with the second form of jurisdictional conferment which obtained in various countries including Kenya, the issue under discussion was, always, the statutes establishing the respective Courts of Appeal which all left jurisdictional conferment to yet other Acts of Parliament, in our case the procedural statutes mentioned.

46. In none of the jurisdictions which adopted the second form of conferment was the jurisdiction of the Appellate Court conferred by the countries? Constitutions. Statute and most definitely the Constitutions of those countries did not confer jurisdiction. That occurred only in the first form of conferment, which was present in England and in India, with the latter hoisting it to constitutional level. England, of course, does not have a written Constitution, which ought to inform any engagement with decisions which point to the need for statutory conferment of the right of appeal with no mention of the Constitution.

47. A failure to appreciate this salient difference in mode of conferment, in my respectful view, is productive of much of the confusion and disputation that has surrounded this issue. What can be discerned from a majority of judicial pronouncements that have quoted and applied the "there is no right of appeal without express statutory conferment" mantra, is that they have paid scant attention to the context and have thereby fallen into the trap, described by Lord Parker in National Telephone Co. Ltd (in Liquidation) –vs- His majesty's Postmaster-generaL [1913] AC 545, as "a most dangerous practice" of quoting extracts of judgments;

> " again and again in cases reported in our law reports, in most instances out of context, and in many cases as part of a quotation taken from the judgment of another case".

48. Ironically, this fate, appreciated by the Anarita bench, has befallen their own judgment over the last thirty-six years of constant repetition.

49. In Equity Bank, I stated, and I think it bears repeating, that Anarita was properly decided, in context;

> " The case of Anarita Karimi Njeru Vs The republic (No.2)(1976-80) I KLR 1283 cited by the respondent entails an excellent exposition of the evolution of this and its predecessor Court's appellate jurisdiction over time going back to the dawn of the 20th century. Through that march of time, the one theme that has remained constant is that as an appellate tribunal, this Court has been able to entertain only such appeals as statute has declared appellable to it. This Court has never enjoyed a general supervisory role. It was for that reason that the main holding in that case was that, in the absence of express provisions, the court had no

jurisdiction (at the time) to hear appeals from decisions of the High Court under Section 84 of the Constitution (enforcement of fundamental rights and freedoms). In arriving at that conclusion, correctly, given the context, in my view, the Anarita Karimi court criticized the earlier decision of Munene Vs Republic (No. 2) 1976-80) I KLR 838;[1978] KLR 105... The criticism was, I think well-deserved for:

> " This Court then assumed jurisdiction which was not within that conferred by any statute and which had been expressly excluded by statute. With respect, to do so appears to us to do violence to the principles accepted by the court that there is no right to appeal outside of statute? p1286?"

50. This Court in Kakuta Maimai endorsed that view. I do not think, however, that Kakuta Maimai stands as authority for the proposition that even under the 2010 Constitution, this Court is bereft of jurisdiction to entertain appeals and that one must show a statute that donates a right of appeal. It may well flow from the Constitution itself. The Court stated that "no right of appeal exists absent an express donation by the Constitution, or by statute or by other law". It is not lost to me that the Court after citing Section 3(1) of the Appellate Jurisdiction Act stated thus;

> " The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal. It behooves an intending appellant to be able to show under which law his right of appeal is donated. Unless such-appeal-donating law can be found, no appeal can lie".

51. I think, with respect, that the Court's dictum above must be understood in the immediate context of Section 3(1) of the Appellate Jurisdiction Act and of Rule 35 of the Elections (Parliamentary and County Elections) Petition Rules 2013 which provided that;

> " An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules".

52. The Court there held, and I think correctly, that appeals could only lie from final orders in electoral disputes but not from interlocutory rulings and orders. We took the view that interlocutory appeals were not cognizable by this Court. I think that the Kakuta MAIMAI decision does not therefore present much difficulty although I am ready to accept that its applicability to interlocutory electoral appeals should be the central focus.

53. The Equity Bank decision does not also present special difficultly because, first, as Githinji J.A pointed out, it was not dealing with the specific issue of the jurisdictional scope of this Court under Article 164(1) of the Constitution, but rather the limited question of whether the Court had jurisdiction to entertain applications for interim relief under Rule 5(2) (b) of the Court of Appeal Rules. Moreover, the opinions expressed by all five Judges of Appeal who determined the Preliminary Objection on the point rejected the submissions that the 2010 Constitution had restricted or constricted this Court's appellate jurisdiction. I stated there that, unlike before, the jurisdiction of this Court now flows from the Constitution itself, and that the said jurisdiction had in fact been expanded and not constricted as had been argued;

> " the text of Article 164(3) seems plain enough on the jurisdiction of this Court which is to hear appeals. The appeals this Court hears emanate from two distinct sources namely;
>
> (a) the High Court and

(b) any other court or tribunal as prescribed by an Act of parliament.

The High Court as the originator of appeals that this Court hears is a matter of constitutional conferment. The right to appeal from that court to this flows directly from the Constitution itself. In this respect, the Constitution restates the situation that existed under Section 64 of the former Constitution which is that the High Court was the only catchment area for and exclusive source of appeals to this Court.

What the Constitution has now done under Article 164(3) (b) is to potentially expand the sources of appeals to this Court. It gives Parliament the mandate to pass legislation that would confer a right of appeal to this Court in respect of matters emanating from other courts and tribunals. When such legislation should come into being, the source – and subject matter – jurisdiction of the Court will definitely be expanded". (Emphases added)

54. My learned brother M'Inoti J.A was of the same but even more emphatic view that the 2010 Constitution now provides a general right of appeal, so that previous decisions such as Anarita must be understood in, and confined to, the context of the legislative framework of the time of their decision. I can do no more than fully agree with and quote him thus, in extenso;

" Section 64(1) of the Constitution of Kenya, 1969 conferred jurisdiction in the second form identified above, that is, by establishing the Court of Appeal to hear appeals from the High Court, but leaving it to statute law to determine the precise jurisdiction and powers. That provision was introduced in 1977 to establish the Kenya Court of Appeal following the break-up of the former East African Community and the attendant demise of the East African Court of Appeal. Under that Constitution, the jurisdiction of the Court could be expanded or limited by legislation. To claim jurisdiction to hear a particular appeal one was required to identify specific legislation that granted the right of appeal to the Court of Appeal. It was in this context that it was always asserted that there was no right of appeal where none was created by statute.

The Constitution of Kenya 2010, on the other hand confers jurisdiction of the Court in the first form by simply stating that the Court has jurisdiction to hear appeals from the High Court. The new Constitution can be said to have broadened the right of appeal, in the sense that the Constitution itself has expressly provided a general right of appeal from decisions of the High Court, but left it to legislation, if necessary to provide additional right of appeal from decisions of tribunals and other courts established by the Constitution.

In my opinion, the effect of Article 164(3) is, as far as appeals from the High Court are concerned, to make it henceforth unnecessary for a party to first identify specific legislation which confers jurisdiction on the Court of Appeal before the Court can assume jurisdiction. Arguments such as that advanced in AnaritaKarimiNjeru that there was no right of appeal from decisions of the High Court under section 84 of the Constitution of Kenya 1969, as it then stood (before introduction of section 84(7) in 1992 to expressly provide for a right of appeal) are no longer tenable.

This is not to suggest that, by dint of Art 164(3) all and sundry decisions of the High Court are appealable to the Court of Appeal. A holistic and purposive reading of Constitution, particularly the right to access justice (in this context "appellate justice" (Article 48)) the right to fair hearing (Article 50), judicial authority (Article 159) and Article 164(3)

itself would accommodate limitation of what is appealable, if the limitation satisfies the requirements of Article 24 of the Constitution. I certainly do not subscribe to the view that all limitations on the right of appeal set by statutes that antedate the Constitution are saved lock, stock and barrel by clause 7 of the sixth schedule of the Constitution." (My emphasis)

55. I state and hold, unhesitatingly, that both the jurisdiction and the right of appeal from the High Court to this Court are now founded, in the first instance, on the Constitution of Kenya 2010. The jurisdiction invested on this Court is not qualified by words such as „where a right of appeal arises?. It provides both the right of approach from the High Court and the power to hear those who have so approached. That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself. The wording of Article 164(3) of the Constitution admits to no other interpretation.It would be inimical to the general tenor of the Constitution and the centrality of the Bill of Rights were this or any other court to pronounce itself that in matters to do with the interpretation or application of the Constitution and the enforcement of fundamental rights and freedoms, this Court has no role to play. There is neither rhyme nor reason; neither doctrine nor policy that can justify such a conclusion. If anything, the Constitution imposes under Article 21(1) a duty on the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. I am unable to fathom how this Court would perform that duty were it to shirk its judicial responsibility, as urged by the JSC.

56. I now must comment on the Nyutu case cited to us by Mr. Abdullahi, SC. I must, with great respect, confess to having much difficulty with conclusions made by this Court in that case which I have anxiously read and re-read. I am not sure, from my said reading, that there is a discernible engagement with the epochal shift of jurisdictional and right of appeal source location from statute to the Constitution that I have adverted to herein. I apprehend that there was not sufficient weight placed on the cases, including Anarita, which all show the legal consequence of a situation where jurisdiction is constitutionally conferred, as now is under Article 164 (3) of the Constitution. I am not, moreover, convinced that Sections 35 and 39 of the Arbitration Act, separately or together, have the effect of denying a right of appeal from a decision of the High Court. It is indeed perplexing that the Court construed Section 39 of that Act in exclusionary as opposed to inclusionary terms. I am also troubled that in professing to respect and uphold finality of the arbitral process, this Court inadvertently invested the High Court and not the arbitrator, with finality – even where the High Court may have set aside or refused to set aside an award, or otherwise acted in plain error. Far from being a basis for the contention that even post-2010 this Court's jurisdiction and the right to appeal to it must still be donated or conferred by some statute in express terms, I would for my part treat the Nyutu decision with much caution. It denies a right of appeal absent express statutory exclusion and I find it quite confounding. At any rate, I am persuaded that the majority decision in Kenya Shell represents the correct position in law.

57. The upshot of my consideration of the motion is that it must fail. I am without a doubt that this Court is possessed of the jurisdiction flowing from the Constitution itself in plain and unambiguous terms, to hear and determine appeals from the High Court on matters touching on the interpretation and application of the Constitution, and of the enforcement of the fundamental rights and freedoms in the Bill of Rights. Moreover, there being no express denial limitation of it, there is an undeniable right of appeal from the High Court's final orders in those matters, to this Court. Any other view is inimical to the letter and spirit of the Constitution of Kenya 2010.

58. I would dismiss the motion by the JSC but, given the importance of the issues raised and there being a plausible jurisprudential basis for doing so, I would make no order as to costs.

RULING OF J. MOHAMMED, J.A.:

Background

1. The application before the Court stems from a Notice of Motion dated 23rd December, 2015 brought by the applicants, pursuant to Articles 23, 159, 164(3), 165(3) Constitution of Kenya; S. 3A and 3B of the Appellate Jurisdiction Act and Rules 5(2)(b), 42, 84 of the Court of Appeal Rules 2010 to strike out the respondent's notice of appeal dated 14th December, 2015.

2. Judgment was delivered in High Court Petition No. 386 of 2015 by a five judge bench of the High Court (Mwongo, Korir, Ong?undi, Meoli and Kariuki, JJ) on 11th December, 2015 which determined, inter alia, that the retirement age of a judge in accordance with the Constitution, 2010 is seventy [70] years.

3. Aggrieved by that decision, the respondent filed a Notice of Appeal dated 14th December, 2015, intending to appeal against part of the High Court's judgment in regard to the retirement age. The Notice of Motion seeks to strike out the notice of appeal dated 14th December, 2015 on the ground that the Court of Appeal lacks jurisdiction to hear appeals from the High court on matters touching on fundamental rights and freedoms in the absence of a statute conferring the right of appeal.

4. This application is supported by the sworn affidavit of Winfrida Mokaya, the Registrar of the 1st applicant and with the authority of the 2nd applicant, sworn on 23rd December 2015. It is deponed that the judgment of the High Court is final as the respondent lacks the right of appeal against the decision of the High Court to the Court of Appeal. Accordingly, the Notice of Appeal is incurably defective and should be struck out with costs.

5. An application under Rule 5(2)(b) of the Court of Appeal Rules had been scheduled for hearing before the Court. The applicants, however, urged the Court to hear the application to strike out the notice of appeal first as it touched on jurisdiction of the Court and thus should be heard independently and in priority to the Rule 5(2) (b) application.

6. The court conceded and proceeded to hear the notice of motion on the question of jurisdiction. All the parties were represented by learned counsel: the applicants were represented by Mr Ahmednasir Abdullahi, SC together with learned counsel Mr Charles Kanjama; the respondent was represented by Mr George Oraro, SC, the Interested Party, Mr Omtatah appeared in person, International Commission of Jurists (ICJ) was represented by Mr Ken Nyaundi while Dr Khaminwa represented Kituo cha Sheria, the 1st and 2nd amicus curiae respectively.

Submissions

7. In his submissions made before the Court, counsel for the applicants, Mr Ahmednasir Abdullahi submitted that the respondent has no right of appeal; that a long line of cases have clearly stated that a right of appeal must be conferred by statute; that the Constitutional Petition before the High Court was founded upon perceived violations of the fundamental rights and freedoms guaranteed by the Bill of rights, particularly Articles 10, 19, 20, 21, 41, 165, 167 and 168 of the Constitution of Kenya 2010; that even though Articles 20, 21, 23, 24 and 25 of the Constitution provide for mechanisms for ventilating against violations fundamental rights and freedoms, the Constitution did not provide remedy for parties who are aggrieved with a decision of the High Court; accordingly, there is no right of appeal to the Court of Appeal in the absence of a statute conferring that right.

8. Counsel submitted that Article 164(3) of the Constitution merely sets out the jurisdiction of the Court of Appeal but does not provide for an automatic right of appeal; that a similar lacuna existed in the repealed Constitution where there was no right of appeal to the Court of Appeal from the High Court. This was remedied in 1992 by a constitutional amendment which introduced S. 84(7) allowing for appeals to the Court of Appeal; that since the 2010 Constitution does not make such express provision, the current position is akin to that prior to the amendment of the repealed Constitution; and the respondent does not therefore have a right of appeal.

9. Counsel further submitted that numerous authorities have held that a right of appeal must be expressly conferred by statute. Counsel relied on Anarita Karimi Njeru V Republic, (1979) Eklr, rafiki Enterprises limited V Kingsway Tyres & Automart Limited, (1996) Eklr, Kakuta Maimai Hamisi V Peris Pesi Tobiko & 2 Others, (2013) Eklr; Equity Bank Limited V West Link Mbo Limited, (2013) Eklr; and Nyutu Agrovet Limited V Airtel Networks Limited, (2015) eKLR in support of his proposition. Counsel submitted that there is a missing rung from the High Court to the Supreme Court in view of the fact that A. 163 (4) provides for appeals from the Court of appeal to the Supreme Court "as of right" yet there is no corresponding provision in respect of appeals to the Court of Appeal from the High Court. Counsel concluded that in the absence of a statute conferring a right of appeal, the respondent has no recourse once the High Court determines the Constitutional Petition in respect of the application and enforcement of her fundamental rights and freedoms. Counsel concluded that the respondent has no right of appeal and the notice of appeal should be struck out with costs.

10. Mr Nyaundi, for the 1st amicus curiae supported the application stating that the question for this Court's determination is whether there is a right of appeal to this Court on issues touching on the Bill of Rights. In counsel's view, as much as he sympathised with the 1st respondent, there was no right of appeal against the judgment of the High Court in view of the fact that there is no statute conferring the right of appeal on matters touching on fundamental rights and freedoms. Counsel submitted that this application raises a matter of public importance and raises issues of law that transcends the parties in dispute.

11. Mr Oraro opposed the notice of motion and submitted that under the repealed Constitution, a right of appeal had to be conferred by statute for the Court of Appeal established by S. 64 to hear and determine appeals. The rights of intending appellants in civil and criminal matters were conferred by the Civil Procedure Act and the Criminal Procedure Code respectively. Counsel averred that the jurisdiction of this Court is conferred by the Constitution under Article 164 and not by statute, that the right of appeal from the High Court to the Court of Appeal on matters involving the Bill of Rights is granted by the Constitution itself.

12. Counsel further submitted that Article 163(4) of the Constitution gives a right of appeal to the Supreme Court from the Court of Appeal in matters involving the interpretation or application of the Constitution, as of right.

13. Counsel submitted that the Nyutu case referred to by the applicants can be distinguished from the present application. Counsel argued that the Nyutu case was in respect of the Arbitration Act and the effect of S. 35 and 39 of the Arbitration Act and did not pronounce itself on the general right of appeal. Counsel also relied on the determination by Kiage, JA in Equity Bank case (supra) in his arguments that:

> " In view of our current Constitution, there is a general right of appeal to the Court of Appeal from the High Court unless such right is limited by statute."

14. Counsel argued that the Constitution confers a general right of appeal to the Court of Appeal in matters touching on fundamental rights and freedoms. Counsel argued that there was no basis for the notice of motion and urged the Court to dismiss the notice of motion with costs.

15. Mr Omtatah, the Interested Person, opposed the motion and aligned himself with Mr Oraro's submissions on the issue of the right of appeal. Mr Omtatah submitted that Article 163(4) confers a right of appeal to the Supreme Court as of right yet the Supreme Court has appellate jurisdiction to hear and determine appeals from the Court of Appeal. Article 25 of Constitution states that the right to a fair trial should not be limited; that an appeal is also a „hearing? and a right to appeal is part of a right to fair trial. Accordingly, Mr Omtatah argued this right cannot be limited; that a litigant should have absolute access to this Court and that it was incumbent upon this Court to develop the law to protect the rights conferred by the Constitution and not to limit that right. Mr Omtatah urged the Court to dismiss the application with no order as to costs.

16. Dr Khaminwa opposed the application and submitted that the applicants? arguments belong to the old constitutional order and are no longer applicable and if adopted would interfere with the 2010 Constitution which protects fundamental rights and freedoms. Counsel supported the submissions of both Mr Oraro and Mr Omtatah. Counsel cited Article 50(1) which provides for fair hearing and urged the Court not to separate an „appeal? from the concept of „fair hearing?. Counsel referred the Court to the case of SINGH V AG, [2014] 2 EA 319 and Karuhanga V AG, [2014] 3 EA 218 to support his proposition. Counsel urged the Court to dismiss the application with no orders as to costs.

17. In reply, Mr Ahmednassir, SC reiterated his arguments and urged the Court to follow the principle of stare decisis. Counsel pointed out that Mr Oraro failed to point out where the right of appeal emanates from. Mr Kanjama cited authorities determined subsequent to enactment of the new Constitution:

> Kakuta M Hamisi (supra); and Joseph Mchere Aoko V Civicon limited, (2015) eKLR. Counsel urged the Court not to depart from settled principles of law.

Determination

18. This application raises a fundamental question of law - whether an intending appellant has a right of appeal to the Court of Appeal in matters involving fundamental rights and freedoms in the absence of a statute conferring that right.

19. Counsel for the applicant has argued that the respondent has no right of appeal to this Court in view of the fact that there is no right of appeal conferred by statute. Counsel argued that A.164 (3) confers jurisdiction on the Court of Appeal but there is no right of appeal conferred. Counsel argued that a right of appeal must be conferred by statute in keeping with a long list of authorities including the case of Anarita Karimi Njeru [supra] which stated:

> " There is no right of appeal to this Court apart from statute."

Article 164 (3) provides as follows:

> " (3) The Court of Appeal has jurisdiction to hear appeals from—
>
> (a) the High Court; and
>
> (b) any other court or tribunal as prescribed by an Act of Parliament."

20. Black's Law Dictionary, 9th Edition, pg 927 defines 'jurisdiction' as follows:

> "Jurisdiction" connotes the court's power to decide a case or issue a decree.
>
> Black's Law Dictionary, 8th Edition, 07 defines "appellate jurisdiction" as:
>
> > The power of a court to review and revise a lower court's decision.
>
> An attribute of appellate jurisdiction is the power to reconsider a lower court's decision, to confirm it, reverse it, annul it, modify it or remit it back to the lower court for re-hearing."

21.. The case of Anarita Karimi Njeru, [supra] stated:

> "We acknowledge that the conferment of jurisdiction on a Court of Appeal takes one of two forms:
>
> The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court. Here, where the Court of Appeal is to be deprived jurisdiction, that is done specifically in a particular enactment. The second is where the legislature establishes a Court of Appeal expressly without jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one of two forms: either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court; or by conferring jurisdiction on the Court of Appeal in particular enactments, as considered appropriate."

22. M'Inoti, JA stated in the Equity case [supra]:

> "Section 64(1) of the Constitution of Kenya, 1969 conferred jurisdiction in the second form identified above, that is, by establishing the Court of Appeal to hear appeals from the High Court, but leaving it to statute law to determine the precise jurisdiction and powers. That provision was introduced in 1977 to establish the Kenya Court of Appeal following the break-up of the former East African Community and the attendant demise of the East African Court of Appeal. Under that Constitution, the jurisdiction of the Court could be expanded or limited by legislation. To claim jurisdiction to hear a particular appeal one was required to identify specific legislation that granted the right of appeal to the Court of Appeal. It was in this context that it was always asserted that there was no right of appeal where none was created by statute.
>
> The Constitution of Kenya 2010, on the other hand confers jurisdiction of the Court in the first form by simply stating that the Court has jurisdiction to hear appeals from the High Court. The new Constitution can be said to have broadened the right of appeal, in the sense that the Constitution itself has expressly provided a general right of appeal from decisions of the High Court, but left it to legislation, if necessary to provide additional right of appeal from decisions of tribunals and other courts established by the Constitution.
>
> In my opinion, the effect of Article 164(3) is, as far as appeals from the High Court are concerned, to make it henceforth unnecessary for a party to first identify specific legislation which confers jurisdiction on the Court of Appeal before the Court can assume jurisdiction. Arguments such as that advanced in Anarita Karimi Njeru that there was no right of appeal from decisions of the High Court under section 84 of the Constitution of Kenya 1969, as

it then stood (before introduction of section 84(7) in 1992 to expressly provide for a right of appeal) are no longer tenable."

23. The 2010 Constitution is a progressive Constitution at whose heart is the Bill of rights. The intention of the drafters of the 2010 Constitution was to place the issue of the recognition, promotion and protection of human rights at centre stage. Dr Morris Kiwinda Mbondenyi and John Osogo Ambani opine in their book „The New Constitution of Kenya: Principles, Government and Human Rights' that:

> "Constitutions are therefore judged based on how effectively they secure fundamental human rights and liberties. So crucial are human rights in Kenya's context the problems of the Bill of Rights in the repealed Constitution were a prominent reason why the people opted for constitution review in the first place. (Mbondenyi and Ambani, The New Constitution of Kenya: Principles, Government and Human Rights (Law Africa 2013) 169)."

Under the new constitutional dispensation interpretation of the Constitution has changed as previously seen in cases such as Republic V Elman, (1969) EA 357, where the High Court set the precedent that the Constitution is to be taken as any other piece of legislation and ought to be interpreted in a strict, rigid, legalistic and conservative manner.

24. Crispus Karanja Njogu V Attorney-general, Criminal Application 39 of 2000, a three judge bench of the High Court had this to say on constitutional interpretation:

> "We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme ... it is our considered view that, constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way, that is restrictive way. Constitutional provisions must be read to give 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."
>
> [Emphasis added]

25. Case law is replete with determinations that the Constitution should be read as an integrated whole. For example, the Ugandan case of Tinyefuza V attorney General, Constitutional Appeal No. 1 of 1997, the court held as follows:

> "The entire Constitution has [to] be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountancy (sic) of the written Constitution."

26. In addition to reading the Constitution as a whole, it must also be read in order to give effect to the purpose that it was intended. In Smith Dakota v North Carolina, 192 U.S. 268 [1940] it was stated that:

> "It is an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone but that all

the provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effectuate the great purpose of the instrument."

Further in Julius Ishengoma Francis Ndyanabo V The Attorney general, CA NO. 64 OF 2001 (Unreported) the Court of Appeal of Tanzania (Samatta C.J.) at pp. 17-18 laid down five principles inter alia:

1. The Constitution of the United Republic is a living instrument, having a soul and consciousness of its own. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purpose for which its makers framed it.

2. The provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions, but grows and the will and dominant aspirations of the people prevail." [Emphasis added]

27. A holistic and purposive reading of the intention of the drafters of the constitution is that it was intended that the constitution grants a party before it the right to have a case touching on one's fundamental rights and freedoms concluded to its logical end, which would invariably include a right of appeal if desired. Limiting the right to appeal would be unconstitutional as it would deny a party the right of appeal which is part of the right to a fair hearing conferred by Article 50.

28. The Bill of Rights, under Article 19 of the Constitution has been expressly identified as an integral part of our democratic State. PLO Lumumba and L. Franceschi in their book The Constitution of Kenya 2010: An introductory Commentary state that the Bill of Rights is:

> "the framework on which all socio-economic and cultural policies are to be premised. This means that, in terms of legal authority, the Bill of Rights enjoys priority over any other countervailing considerations and that it ought to be instructive with regard to the determination of what the policy guidelines for development in Kenya should be."

Kenyans expressed their displeasure through the Constitutional of Kenya Review Commission (CKRC) at the denial of the right to appeal by an aggrieved party on constitutional matters and a right of appeal on Constitutional matters was provided by the 2010 Constitution.

29. Under the repealed Constitution the High Court on occasion sat as a Constitutional Court, and despite there being a Court of Appeal, its decisions sitting as a Constitutional court were final. However Kenyans expressed displeasure with the situation in the repealed Constitution where there was no provision for appeal on matters when presented to the High Court. It was seen as 'a denial of the right of appeal of the aggrieved party'. Consequently, in the 2010 Constitution a decision of the High Court on a constitutional matter can be appealed to the Court of Appeal?. PLO Lumumba and L. Franceschi - Introductory Commentary, The Constitution of Kenya, page 490, Strathmore University Press.

The Bill of Rights are not granted by the State but belong to each individual. They are natural rights belonging to each individual by virtue of their humanity.

30. As has been succinctly stated by the Hon. Justice (Prof.) Jackton B. Ojwang?, Judge of the Supreme Court of Kenya, in his book "Ascendant Judiciary in East Africa":

> "What is special as regards the Judiciary as the bearer of the people's mandate is that it is the primary and ultimate arbiter, when the operations of the several public bodies run

into conflict; it is the dominant interpreter not only of the totality of the Constitution, but also of all other laws applying in the land... Notable as a central theme of the Constitution constantly falling within the judicial mandate, is its longest chapter, on the Bill of Rights. The Bill of Rights indeed, is the main bond in the Constitution that creates the integrality of the judicial function and the processes of governance." [Emphasis added]

The Bill of Rights under Article 22(1) unequivocally spells out the judicial function of the Judiciary in the adjudication of rights as follows:

"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". [Emphasis added].

31. Article 27 of the Constitution further provides that:

"Every person is equal before the law and has the right to equal protection and equal benefit of the law."

Article 259(1) clearly gives guidance on the interpretation of the Constitution:

"This Constitution shall be interpreted in a manner that – promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance." [Emphasis added]

Article 259 (3) provides that:

"Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking."

Article 20 (3) provides that:

"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."

Article 20 (4) provides that:

"In interpreting the Bill of Rights, a court, tribunal or other authority shall promote-

(a) the values that underlie an open and democratic society based on human dignity, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights."

Judicial Authority vested in the Courts under Article 159(e) is to be exercised in a manner that promotes and protects the principles of this Constitution, inclusive of the protection of the fundamental rights and freedoms.

32. The Constitution therefore must be read to give effect to Articles 19, 20 (Application of the Bill of Rights), 25 (right to fair trial), and 48 (Access to Justice, in this case appellate Justice). In doing so, a party has a right to appeal to the Court of Appeal from a decision of the High Court on matters involving alleged violations of fundamental rights and freedoms. The Constitution contemplates a right of appeal as of right in matters touching on fundamental rights and freedoms. The right of appeal to the Court of Appeal on matters touching on fundamental rights and freedoms does not derive from any particular statute but from the Constitution itself.

Section 3(1) of the Appellate Jurisdiction Act (Cap 9) provides as follows:

> " The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and other Court of Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law." [Emphasis added]

(a) This provision provides that the Court of Appeal has jurisdiction to hear and determine appeals in which an appeal lies under law. The Constitution is the Supreme Law of the Republic [Article 2(1)] and grants a right of appeal.

Accordingly, an intended appellant has a right of appeal to the Court of Appeal which right is conferred by the Appellate Jurisdiction Act in conformity with the Constitution.

33. Article 163 (4) (a) of the Constitution provides that „Appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution.

In the absence of a right of appeal as of right from the High Court to the Court of Appeal on cases involving the interpretation or application of the Constitution, Article 163(4) would be rendered inoperative in view of the fact that Article 163(3) grants the Supreme Court appellate jurisdiction to hear and determine appeals from the Court of Appeal. The Constitution therefore contemplates that there is a right of appeal on matters touching on fundamental rights and freedoms to the Court of Appeal and finally to the apex court, the Supreme Court. To interpret otherwise would render A. 163(4) superfluous and defeat the right to a fair hearing which cannot be limited. (Article 25)

34. Article 22(3) of the Constitution requires the Chief Justice to make rules providing for Court proceedings in the enforcement of the Bill of Rights.

> " (3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—
>
> (a) the rights of standing provided for in clause (2) are fully facilitated;
>
> (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
>
> (c) no fee may be charged for commencing the proceedings;
>
> (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
>
> (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

> The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court."

35. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, ("the Mutunga Rules") were drafted in compliance with the Constitutional requirement. Rule 32 provides that, "An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed."

36. The Mutunga Rules though subsidiary legislation, therefore envision a scenario where an aggrieved person has a right to appeal and made provision for it.

37. Article 2(6) provides as follows:

> " Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

Kenya is a signatory to many International Human Rights Instruments that promote and protect fundamental rights and freedoms including The African (Banjul) Charter on Human and Peoples? Rights,.

Articles 1 and 7 thereof provide:

> " Article 1
>
> The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.
>
> Article 7
>
> Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; ..." [Emphasis added]

A right of appeal is clearly provided in the African Charter in matters involving fundamental rights and freedoms.

31. In consideration of the above it is my opinion that the 2010 Constitution has widened the jurisdiction of this Court and has created a right of appeal allowing the intending appellants to appeal the decisions of the High Court in matters involving fundamental rights and freedoms. The respondent herein, therefore, has a right of appeal to this Court. Accordingly, I would dismiss the notice of motion dated 23rd December, 2015, with no orders as to costs.

RULING OF OTIENO-ODEK J.A.

1. Jurisdiction is conferred upon a court of law while the right of appeal is granted to a litigant. This Ruling relates to an application that raises the issue whether there is a right of appeal to this Court on enforcement of the Bill of Rights under the 2010 Constitution. The complexity of the application is due to two jurisdictional concepts: first, the extent of the jurisdiction of courts to interpret and apply the Constitution and second, the jurisdiction of courts to enforce the Bill of Rights. These two

jurisdictional concepts are separate and the distinction must be kept in mind in analyzing whether there is a right of appeal to this Court from a decision of the High Court on matters relating to enforcement of the Bill of Rights. The architecture of Kenya Constitution from independence to the 2010 Constitution has maintained the separate and distinct jurisdictional competence for courts in the interpretation and application of the Constitution and enforcement of the Bill of Rights. The original jurisdictional procedures for enforcement of the Bill of Rights and the right to appeal have also been kept separate and distinct.

2. The instant application is further made complex by failure to succinctly distinguish if the dispute between the parties is one of interpretation and application of the Constitution or if it relates to enforcement of the Bill of Rights or both.

3. The Bill of Rights in Chapter 4 of the 2010 Constitution is progressive and acknowledges that rights and fundamental freedoms belong to each individual and are not granted by the State. (See Article 19 (3) of the Constitution). The Bill of Rights is transformative and contemporary and for this reason, there is need to rethink the relationship between the old constitutional order resplendent with its case law and contrast it with the values and principles embodied in the transformative 2010 constitutional order.

4. The respondent, Hon. Lady Justice Kalpana H. Rawal, on 14th September 2015 filed Petition No. 386 of 2015 at the High Court and at paragraphs 44 and 63 of the Petition alleges that her rights to fair administrative action and freedom from discrimination based on age are threatened with violation. At paragraph 50, the respondent alleges threatened violation of her right to legitimate expectation.

5. In the Petition, the respondent sought interpretation of the constitutionality of her retirement upon attaining the age of 70 years contending that she had a constitutional right to retire at the age of 74 years under the repealed Constitution; that some judges have been allowed to retire at 74 years yet she is being compelled to retire at 70 years and this is discrimination based on age and an unfair labour practice.

6. Upon hearing the parties, a five judge bench of the trial court delivered a judgment dated 14th December 2015 to the effect that the respondent is required to retire upon attaining the age of 70 years which fell on 15th January 2016. Consequent to the judgment, the respondent lodged a Notice of Appeal to this Court and filed Civil Appeal No. 1 of 2016.

7. The applicant in this matter has applied to strike out the Notice of Appeal and Civil Appeal No. 1 of 2016. The importance of a Notice of Appeal cannot be underestimated. A Notice of Appeal is the procedural mechanism for transferring jurisdiction from the trial court to the appellate court; it is a jurisdictional transfer mechanism; the filing of the Notice ends the exercise of original jurisdiction and begins the exercise of appellate jurisdiction. In the instant application, the applicant contends that the respondent had no right in law to file the Notice of Appeal and urge that the said Notice be struck out. The instant application to strike out the Notice of Appeal and the Appeal evinces public interest and is of great public importance.

8. By Notice of Motion dated 23rd December, 2015, the applicants, Judicial Service Commission (JSC), and The Secretary to JSC seek an order to strike out the respondent's Notice of Appeal dated 14th December, 2015, filed in Nairobi Civil Appeal No. 1 of 2016. By Notice of Preliminary Objection dated 23rd December, 2015, the applicants did give notice that they will raise a preliminary point of law to wit that this Court has no jurisdiction to entertain Civil Appeal No. 1 of 2016, as no leave was granted to the respondent to file an application for injunction under Rule 5 (2) (b) of the Rules of this Court; that no leave was granted to lodge the Notice of Appeal and that there is no express right of appeal to this Court on matters relating to enforcement of the Bill of Rights.

9. The grounds in support of the application to strike out the Notice of Appeal as stated on the face of the application and in the supporting affidavit of Ms Winfrida Mokaya are as follows:

> "(a) That in High Court Petition No. 386 of 2015, the respondent questioned the applicability of the provisions of the 2010 Constitution to her on the ground of violation of her fundamental rights and freedoms; that the Petition was heard and determined and judgment delivered by a five judge bench of the High Court.
>
> That the judgment of the High Court was a final judgment and the respondent has no right to appeal against the judgment, and the notice of appeal filed on 14th December 2015 is incurably defective and should be struck out with costs.
>
> That as per the 2010 Constitution and existing law, there is no right of appeal in matters relating to fundamental rights and freedoms embodied in the Bill of Rights."

10. The Interested Party filed a response to the instant application and at paragraphs 3 to 26 thereof, opposes the preliminary objection and the application to strike out the Notice of Appeal. At paragraph 7, the Interested Party submits that by dint of Article 164 (3) (a) of the Constitution, there is a right of appeal from the High Court to the Court of Appeal on any matter; that all decisions from the High Court are automatically appealable to the Court of Appeal and no leave is required; that by dint of Article 164 (3) as read with Article 163 (4) (a) of the Constitution, there is a right of appeal from the Court of Appeal to the Supreme Court; that matters touching on rights and fundamental freedoms are proceedings under Article 22 of the Constitution and such proceedings are not governed by an Act of Parliament but by Rules made by the Chief Justice under Article 22 (3) of the Constitution (the rules so made are hereinafter referred to as the MUTUNGA Rules); that the MUTUNGA Rules, do not impose the requirement for litigants to seek and or be granted leave to appeal decisions of the High Court; that Section 2 (sic) of the MUTUNGA Rules states that Court of Appeal means Court of Appeal as established by Article 164 of the Constitution; that under Section 32 (sic) of the MUTUNGA Rules, appeals from the High Court to Court of Appeal is as a matter of course; that the right to access the Court of Appeal without leave is enshrined in various Articles of the Constitution such as Article 23:1; Article 20 (4); Article 22 (1); Article 25 (c); Article 48; Article 50 (1) and Article 159 (2); that the right to access the Court of Appeal without leave is also enshrined in the principles of natural justice and this Court's inherent jurisdiction; that this Court has jurisdiction to entertain the Respondent's application seeking injunctive and or conservatory orders; that this Court has jurisdiction to hear and entertain the intended appeal filed without leave since there is no requirement that leave be obtained; that the preliminary objection and the application to strike out the Notice of Appeal have no merit and should be dismissed.

11. In opposing the preliminary objection and the instant application, the respondent urges that Article 164 (3) of the 2010 Constitution stipulates that the Court of Appeal has jurisdiction to hear appeals from the High Court and any other Court or Tribunal as prescribed by an Act of Parliament.

12. At the hearing of this application, Senior Counsel Ahmednassir Abdullahi teaming up with learned counsel Mr. Charles Kanjama appeared for the applicants while learned counsels Messrs George Oraro, Waweru Gatonye, Kioko Kilukumi, Abas Ismail and Daniel Okoth appeared for the respondent. Learned counsels Messrs Ken Nyaudi and Dr. John Khaminwa appeared for the 1st and 2nd Amicus Curiae's respectively while the Interested Party acted in person.

Applicant's Submissions

13. The ground in support of the application to strike out the Notice of Appeal and the Appeal is that there is no express right of appeal conferred by statute or the 2010 Constitution that permits the respondent to file an appeal in relation to enforcement of the Bill of Rights. Counsel emphasized that the respondent's Petition before the trial court was grounded on violation of her fundamental rights under the Bill of Rights; that the respondent's Petition was premised inter alia on Articles 27(4), 41(1), 47 and Article 167 (1) of the Constitution as read with Sections 6, 31 and 32 of the Sixth Schedule to the Constitution; that the Petition before the trial court having been founded on the Bill of Rights, there is no right of appeal against a judgment of the High Court on enforcement of the Bill of Rights. Senior Counsel submitted that a judgment of the High Court on enforcement of the Bill of Rights is final and unless there is express statutory or constitutional provision to the contrary, there is no right of appeal.

14. Senior Counsel Ahmednassir submitted that in the 2010 Constitution, there is no express right of appeal relating to enforcement of the Bill of Rights. He submitted that whereas Article 164 (3) of the Constitution gives appellate jurisdiction to this Court and whereas Article 23 stipulates how any grievance relating to the Bill of Rights is to be ventilated, Article 23 (1) confers upon the High Court the jurisdiction for enforcement of the Bill of Rights. It was submitted that the 2010 Constitution is silent on what happens if a person is aggrieved by a High Court judgment delivered pursuant to Article 23; that the repealed Constitution addressed this silence vide the 1997 amendment to Section 84 of the Repealed Constitution and Section 84 (7) was introduced which section conferred a right of appeal to the Court of Appeal against decisions of the High Court relating to enforcement of the Bill of Rights. Counsel submitted that the new 2010 Constitution does not have a provision similar to Section 84 (7) of the Repealed Constitution and this means that there is no constitutional right of appeal on enforcement of the Bill of Rights.

Judicial decisions between 1963 and 1997 on the right of appeal in relation to Bill of Rights

15. Senior Counsel Ahmednassir made extensive submissions on Kenya's jurisprudential and legal history on the right of appeal in relation to enforcement of the Bill of Rights. In his submissions, counsel cited two categories of judicial decisions: the first category are decisions prior to the 1997 Constitutional amendment that introduced Section 84 (7) in the repealed Constitution; the second category are decisions of this Court after promulgation of the 2010 Constitution and which decisions interpret the extent of the jurisdiction of this Court in Article 164 (3) of the Constitution in relation to the right to appeal.

16. The following cases were cited as pre-1997 decisions enunciating the right of appeal in relation to Bill of Rights litigation: Republic -v- Shem Agungo & 5 Others; Anarita Karimi Njeru -v- Republic, (1979) eKLR and Rafiki Enterprises Limited -v- Kingsway Tyres & Automart Limited, (1996) eKLR. Justice F. K. Apaloo, JA in Republic -v- Shem Agungo & 5 Others which is a pre-1997 decision observed that it is a well settled principle that an appeal being a creature of statute cannot be entertained unless a statute expressly authorizes it; that there is no right of appeal apart from statute, either it is expressly granted by statute or it is not; there is no right of appeal by mere implication or by inference and a court has no jurisdiction to entertain an appeal unless such appellate right is conferred on it by statute.

17. In Rafiki Enterprises Limited – v- Kingsway Tyres & Automart Limited, (1996) eKLR, Civil Application No. Nai. 375 of 1995, this Court expressed that "it is now trite that a right of appeal must be expressly given by law and such a right cannot be implied or inferred."

18. The case of Anarita Karimi Njeru -v- Republic (1979) eKLR; Criminal Appeal No. 4 of 1979, confirmed the principle that it is well established that there is no right of appeal apart from statute and there is no right of appeal by implication or inference. A momentous pronouncement in Anarita Karimi Njeru -v- Republic, (1979) eKLR is captured in the following quotation from the judgment:

> " In the case before us, the particular enactment (Section 84 of the Constitution), conferred jurisdiction on the High Court. It is necessary to examine the extent of the provision of a right of appeal, from the exercise by the High Court of the jurisdiction conferred upon it by the Constitution, during the years since independence. We must mention that at Independence, the High Court was named the Supreme Court.
>
> Section 176 (1) of the Constitution of 1963 provided that the Court of Appeal for Eastern Africa (as it then was named), was to have such jurisdiction in relation to appeals from the Supreme Court as might be conferred on it by law. Section 176 (3), provided that jurisdiction should not extend to:
>
> (a) any question as to the interpretation of the Constitution; or
>
> (b) any question as to the contravention of any of the provisions of Sections 14 to 27 (inclusive) of this Constitution (which relate to fundamental rights and freedoms).
>
> Sections 14 to 27 were re-enacted as Sections 70 to 83 of the Constitution of 1969; and Section 28 (which is concerned with the enforcement of fundamental rights and freedoms) was re-enacted as Section 84 of the Constitution of 1969.
>
> Section 180 of the Constitution of 1963 provided that, if a Court of Appeal for Kenya were established, an appeal should lie to that Court as of right of decisions of the Supreme Court in the following cases –
>
> (a) final decisions in any civil proceedings on questions of the interpretation of the Constitution;
>
> (b) final decisions in any civil or criminal proceedings on questions of the interpretation of the Constitution;
>
> (c) final decisions given in exercise of the jurisdiction conferred on the Supreme Court by Section 28 of the Constitution (which relates to the enforcement of fundamental rights and freedoms).
>
> The Constitution of Kenya (Amendment) Act 1965, ... made a number of amendments. Sub-section (3) ... of section 3 was repealed. The effect of the repeal was that Parliament was authorized (by Section 176 (1)) to confer appellate jurisdiction in these matters on the Court of Appeal for Eastern Africa by Act of Parliament. Parliament did not do so, and no such jurisdiction was conferred on that Court by the Constitution of 1969. In the result, there was no right of appeal from the High Court to the Court of Appeal for Eastern Africa on these matters.
>
> Another repeal effected by the Act of 1965 was Section 180 (set out above), the position then was that, if Parliament established a Court of Appeal for Kenya, it would be for Parliament to confer on that court such jurisdiction in relation to constitutional matters as Parliament saw fit.

As we have seen, Parliament established a Court of Appeal for Kenya by substituting Section 64 of the Constitution, and conferred on it jurisdiction by Section 3(1) of the Appellate Jurisdiction Act 1977. Nowhere was the jurisdiction conferred by Section 180 of the Constitution of 1963 (and repealed by the Act of 1965) restored, with the inescapable conclusion that this Court has no jurisdiction to hear appeals from the decisions of the High Court exercising its jurisdiction under Section 84 of the Constitution of 1969". (Emphasis mine)".

19. In as far as the right of appeal in respect to enforcement of the Bill of Rights under Section 180 of the 1963 Constitution, there was a right of appeal to the Court of Appeal if the Court were to be established; Section 180 was repealed by the 1965 Constitutional amendment and the 1969 Constitution did not restore the right of appeal as had been provided in Section 180 in matters relating to the Bill of Rights. The jurisprudence from this Court between 1965 and 1997 is to the effect that there was no right of appeal to this Court from a judgment of the High Court on enforcement of the Bill of Rights. The seal and hallmark of the decisions of this Court in the epoch of 1965 to 1997 is the case of Anarita Karimi Njeru -v- Republic, (1979) eKLR]

1997 Constitutional Amendment and the Right of Appeal on enforcement of the Bill of Rights

20. In the early 1990s, Kenya witnessed agitation for respect for the rule of law, human rights and democracy. One of the grievances was denial of the right of appeal on enforcement of the Bill of Rights. A Constitutional amendment was effected in 1997 to address the grievance. The amendment inserted

Section 84 (7) to the 1969 Constitution which provides:

" Section 84 (7):

" A person aggrieved by the determination of the High Court under this Section may appeal to the Court of Appeal as of right".

21. In moving the 1997 Constitutional amendment, the then Attorney General Amos Wako stated "we shall be enhancing the protection of the fundamental rights of Kenyans in as much as they will now have another avenue of appeal, should they feel that their rights have been violated". (See Hansard Parliamentary Debates of 15th October 1997 at page 2901). After the 1997 amendment, the jurisprudence of this Court shifted and appeal as of right lay to this Court on enforcement of the Bill of Rights.

Right of Appeal and jurisdiction of this Court under Article 164 (3) of the 2010 Constitution

22. Senior Counsel Ahmednassir cited the following post-2010 decisions of this Court interpreting the right of appeal in the context of the jurisdiction of this Court in Article 164 (3) of the Constitution: Nyutu Agrovet Limited -v- Airtel Networks Limited, (2015) eKLR; Kakuta Maimai Hamis -v- Peris Pesi Tobiko & 2 Others, (2013) eKLR; Joseph Mchere Aoko -v- Civicon Limited, (2015) eKLR; Equity Bank Limited -v- West Link Mbo Limited, (2013) eKLR and Basil Criticos -v- Independent Electoral and Boundaries Commission & 2 Others, (2014) eKLR.

23. In Kakuta Maimai Hamis -v- Peris Pesi Tobiko & 2 Others, (2013) eKLR, this Court stated that the right to appeal goes to jurisdiction and that Article 159 (2) (d) of the Constitution is not a panacea that cures and mends all ills. The Court expressed that an intending appellant must show under which law his right of appeal is donated and unless such appeal-donating law can be found, no appeal can

lie. It was further held that no right of appeal exists absent an express donation by the Constitution, statute or other law.

24. In a post - 2010 decision, Okwengu, J.A. in Basil Criticos -v- IEBC & 2 Others, CA No. MSA 33 of 2013, (Mombasa) expressed as follows:

> "It should further be noted that the general jurisdiction to hear appeals, which is conferred on the Court by Article 164 of the Constitution, is distinct from a right of appeal, which is not automatic but is conferred through specific legislation..."

25. The applicant's counsel emphatically cited the post-2010 decision of a five judge bench of this Court in Nyutu Agrovet Limited -v- Airtel Networks Limited, (2015) eKLR (Civil Application No. 61 of 2012). Senior counsel emphasized that all the five judges, in separate decisions, concluded that a right of appeal must be conferred expressly by statute; that each of the judges held that Article 164 (3) of the Constitution that establishes the Court of Appeal does not confer a right of appeal. The relevant quotation from the individual judgments is as follows:

As per Mwera, J.A:

> "I do not agree that Article 164 (3) of the Constitution, Section 3 (1) of the Appellate Jurisdiction Act and even Section 75 of the Civil Procedure Act, giving this Court jurisdiction to hear appeals from the High Court, should be read to mean that these provisions of law also confer the right of appeal to the litigants. The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this Court....But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal before us. However, be it appreciated that such leave does not constitute the right to appeal. The right must precede leave."

As per Karanja, J.A:

> "I am convinced that a right of appeal is conferred by statute and cannot be inferred.....On the issue of applicability of Article 164 (3) of the Constitution...I would emphasize that however much we would want to stretch it, Article 163 (4) is not a carte blanche for any litigant to come to the Court of Appeal on any matter even where leave has hitherto been considered a pre-requisite. This in my view is not an obstruction to access to justice."

As per Musinga, J.A:

> "Article 164 of the Constitution does not confer an automatic right of appeal in respect of each and every decision of the High Court.... There is a clear distinction between the general jurisdiction of the Court to hear appeals from the High Court as conferred to it by the Constitution and a right of appeal which is vested on a litigant by statute and that right is not absolute."

As per M'Inoti, J.A.

> "...Article 164 (3) does not contemplate appeals to this Court from all decisions of the High Court and that a right of appeal, as distinct from the jurisdiction of this Court which is conferred by Article 164 (3), must be conferred by statute..... Jurisdiction and right of appeal must coincide for a party to be heard on appeal in this Court. Article 164 (3) confers

jurisdiction on this Court to hear appeals where there is a right of appeal. The conferment of jurisdiction on the Court by Article 164 (3) to hear and determine appeals from the High Court cannot be understood to create the right of appeal to this Court from all decisions of the High Court. The right of appeal as distinct from jurisdiction must be expressly conferred by the Constitution or by statute."

26. Senior Counsel for the applicant emphasized that the central point in the instant application is that under the 2010 Constitution, there is no provision similar to Section 84 (7) of the repealed Constitution and that failure to have such a similar provision means that there is no right of appeal and hence the respondent's Notice of Appeal is fatally defective and should be struck out. It was submitted that the respondent had failed to identify any constitutional or statutory provision that expressly donates or confers a right of appeal in enforcement of the Bill of Rights.

1ST Amicus Curiae Submission

27. Learned counsel Mr. Ken Nyaundi for the 1st Amicus Curiae supported the application to strike out the Notice of Appeal and associated himself with submissions by Senior Counsel for the applicant. Counsel submitted that on matters relating to the Bill of Rights in Chapter 4 of the Constitution, there is no right of appeal or jurisdiction vested upon this Court to hear a Bill of Rights appeal; that whereas Article 50 (2) (q) confers a right of appeal in fair trial, this is one of the instances where the Constitution has expressly conferred a right of appeal. Counsel submitted that his client, the International Commission of Jurist (ICK – Kenya) is of the view that after the promulgation of the 2010 Constitution, there is no right of appeal on matters relating to enforcement of the Bill of Rights and the legal position in Kenya is what existed pre-1997 amendment to the repealed Constitution.

28. Learned counsel Dr. Ken Nyaundi submitted that the case of Anarita Karimi Njeru -v- Republic, (1979) eKLR is back and is the law in Kenya after the 2010 Constitution. He submitted that there is a vacuum in the 2010 Constitution as it did not provide for a right of appeal as was stipulated in Section 84 (7) of the repealed Constitution; that although the Supreme Court has jurisdiction to hear as of right appeals relating to interpretation and application of the Constitution, there is a missing link or rung in the chain or ladder of courts from the High Court to the Court of Appeal and then to the Supreme Court; the missing link is that there is no provision conferring a right of appeal to the Court of Appeal on enforcement of the Bill of Rights. Counsel observed that in transplanting the provisions of the Bill of Rights in Chapter 5 of the repealed Constitution to Chapter 4 of the 2010 Constitution, Section 84 (7) was not transplanted and this created a vacuum and the right of appeal that was embodied in Section 84 (7) was repealed. Counsel was cognizant of the provision of Article 159 (2) (d) of the Constitution that enjoins this Court to administer justice without undue regard to technicalities of procedure. However, he submitted that whereas he sympathized with the respondent that there is no express right of appeal, sympathy per se and Article 159 (2) (d) cannot confer jurisdiction to this Court or grant the right of appeal. This Court was urged to find and hold that the case of Anarita Karimi Njeru case (supra) is the law in Kenya today.

Respondent's Submissions

29. Learned Counsel Mr. Oraro for respondent observed that the applicant in this case is the Judicial Service Commission which is a State Organ and it was a pity that a State organ can seek to curtail a citizens' rights and freedoms. Counsel submitted that it was saddening to note that the applicant is celebrating the case of Anarita Karimi Njeru case (supra) which represents a dark and sad epoch in the history of Kenya in so far as human rights and enforcement of the Bill of Rights is concerned.

Counsel submitted that the case of Anarita Karimi Njeru case (supra) should be analyzed in the context in which it was pronounced taking into account the sad epoch in Kenyan's struggle for freedom, democracy and human rights; that in that context, under Section 164 of the repealed Constitution, the Court of Appeal had no appellate jurisdiction unless statute conferred the right to appeal; that denial of the right of appeal in relation to the Bill of Rights as espoused in the case of Anarita Karimi Njeru case (supra) was one of the reasons for the struggle for the new Constitution and Anarita should not be celebrated; he submitted that Anarita belongs to history and the old constitutional order and it should not be relied upon by this Court; that there was a time in Kenya when there were no Bill of Rights enforcement rules and Kenyan citizens were barred from accessing the High Court (See for example Gibson Kamau Kuria -v- The Attorney General, Nairobi HC Misc. Case No. 550 of 1988. Counsel emphasized that times have changed and the 2010 Constitution vide Article 22 (4) thereof expressly states that the absence of such rules does not limit the right of any person to commence a Bill of Rights litigation; that following the atrocious law in Anarita Karimi Njeru case, (supra) the repealed Constitution was amended in 1997 to introduce Section 84 (7) of the Repealed Constitution. Counsel submitted that since 1997, this country has made positive strides in the protection and enforcement of the Bill of Rights and this Court should not adopt and uphold the sad epoch of Anarita in Kenya's history.

30. Counsel for the respondent submitted that there is a noticeable dissimilarity between Section 164 of the Repealed Constitution that did not establish the Court of Appeal with an appellate jurisdiction and Article 164 (3) of the 2010 Constitution that establishes the Court of Appeal with appellate jurisdiction to hear appeals from the High Court. He submitted that pursuant to Article 164 (3), this Court has jurisdiction to hear appeals from the High Court in matters relating to enforcement of the Bill of Rights; he observed that prior to the new Constitution, the right of appeal had to be expressly conferred by law and this is not so under the 2010 Constitution; it was submitted that Section 7 of the Sixth Schedule to the 2010 Constitution is relevant as it provides that all laws in force immediately before the effective date continues in force and because Section 84 (7) of the Repealed Constitution was an existing law, it continues in force pursuant to Section 7 of the Sixth Schedule.

31. The respondent submitted that the jurisdiction of this Court to hear Bill of Rights appeals should be analyzed in the context of the jurisdiction of the Supreme Court; that contextually, the jurisdiction of the Supreme Court flows from the original jurisdiction of the High Court with an appeal to the Court of Appeal; that Article 163 (4) (a) and (b) of the Constitution gives the Supreme Court jurisdiction to hear appeals and the Supreme Court's appellate jurisdiction presupposes that a matter has been heard and determined by the Court of Appeal.

32. Counsel for the respondent distinguished the cited case of Nyutu Agrovet Limited -v- Airtel Networks Limited, (2015) eKLR. He submitted that the case of Nyutu Agrovet Limited case (supra) should be confined to the specific provisions of Section 35 of the Arbitration Act that was the subject of interpretation in the case. He opined that Nyutu Agrovet Limited case (supra) did not deal with enforcement of the Bill of Rights; that the case of Nyutu Agrovet Limited case (supra) cannot be of general application and must be confined to the Arbitration Act and consent of parties in arbitration proceedings. Counsel submitted that Article 163 (4) confers a right of appeal unless that right is limited by law; he submitted that the case of Republic –v Shem Agungo & 5 Others, Criminal Appeal No. 168 of 1987 was irrelevant to the instant application.

33. Learned counsel Oraro reminded this Court the provisions of Section 66 of the Civil Procedure Act (Cap 21 Laws of Kenya), which stipulates that unless expressly stated, an appeal shall lie from a decree or any part of decree or order of the High Court to the Court of Appeal. He further cited Rule 9 (5) of the Fair Administrative Action Act of 2015 which states that "a person aggrieved by an order

made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal." The provisions of Section 8 (5) of the Law Reform Act (Cap 26 of the Laws of Kenya), was cited which states that any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court in relation to Mandamus, Prohibition and Certiorari may appeal to the Court of Appeal. He cited dicta by Ibrahim, SCJ, in Yusuf Gitau Abdallah - v- Building Centre (K) Limited & 4 Others, (2014) e KLR, where it was stated that the Supreme Court will only hear those matters that reach it through the laid down hierarchical judicial framework.

34. The respondent cited the Supreme Court's dicta InAdvisory Opinion in the Matter of Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 at paragraphs 43 where the Court expressed itself thus:

> "[43] Quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself does not confer upon the High Court an exclusive jurisdiction, for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court.....Only where litigation takes place entailing issues of constitutional interpretation, must the matter come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages." (Emphasis mine).

Interested Party's Submission

35. The Interested Party, Mr. Okiya Okoiti Omtata, in opposing the application posited several questions to wit: what was the purpose of having the Supreme Court if not to hear issues of interpretation and application of the Constitution? How will the Supreme Court exercise its right to interpret the Constitution if appeal does not come from the Court of Appeal? In his view, if an appeal lies as of right to the Supreme Court under Article 163 (4) (a) of the Constitution on interpretation and application of the Constitution, it follows that an appeal must lie as of right from the High Court to Court of Appeal on interpretation and application of the Constitution. The Interested Party submitted that there is a distinction between appeal as of right and a right of appeal; that there are appeals as of right and appeals that require a right of appeal; that on matters of interpretation and application of the Constitution, such as in the instant case, appeal is as of right and on other appeals, a right of appeal must expressly be provided for in the Constitution or statute.

36. Mr. Omtata submitted that pursuant to Article 19 (3) (a) of the Constitution, the rights and fundamental freedoms in the Bill of Rights belongs to each individual and is not granted by the State. He posited that in this context, from where would the State or Parliament get the right that it can confer a right of appeal in relation to the Bill of Rights? The Interested Party submitted that the legislature cannot confer a right that it does not have; that under 2010 Constitution, neither the State nor the legislature have any right or fundamental freedom that they can grant or confer to a person; in his view, the right of appeal is part of the right to a fair trial especially in Kenya where there is no constitutional court.

37. The Interested Party submitted that this Court is enjoined under Article 20 (3) of the Constitution in applying the Bill of Rights to develop the law to the extent that it gives effect to a right or fundamental freedom and to adopt the interpretation that most favours enforcement of a right or fundamental freedom. Commenting on the post -2010 judicial decisions that there must be an express right of appeal, he submitted that such decisions should be declared null and void as they derogate or limit the right of access to courts. He submitted that under Article 24 (1) of the Constitution, a right or

fundamental freedom shall not be limited except by law and in the instant case there is no legislation limiting the right of appeal and in any event, no legislation or judicial decision can oust constitutional provisions that confer the right to a fair trial which encompass the right to appeal. This Court was urged to consider the history of the country and the centrality of the Bill of Rights that led to locus standi being a non pre-requisite in Bill of Rights litigating pursuant to Article 22 (3) (e) of the Constitution and in Rules 6 and 7 of The Mutunga Rules. The Interested Party urged the instant application to be dismissed with no order as to costs.

2nd amicus Curiae Submissions

38. Dr. John Khaminwa for the 2nd Amicus Curiae urged that the instant application had no merit and should be dismissed without costs. Counsel urged that if this Court were to find there was no right of appeal in Bill of Rights litigation, this Court would be joining the group of persons who are interfering with the 2010 Constitution and taking the country back to pre-2010 and the dark epoch in Kenya's history. He submitted that out of the two hundred and sixty (260) Articles of the Constitution, forty-one (41) Articles are devoted to the Bill of Rights and this underscores the centrality of rights and fundamental freedoms in the Kenyan society; that the concept of fair hearing embodied in the opening phrase and words of Article 50 of the Constitution involves a right of appeal; that one cannot divorce the right of appeal from the concept of fair hearing. Counsel submitted that Kenya as a country is committed to the Universal Declaration of Human Rights, the 1966 United Nations Conventions on Civil and Political Rights and the African Charter on Peoples and Human Rights; that under these instruments, an aggrieved party has a right of appeal. Article 7 (1) of the African Charter stipulates that "every individual shall have the right to have his cause heard and this comprises the right to an appeal to a competent national organ against acts violating fundamental rights as recognized by conventions, laws, regulations and customs in force."

39. Counsel emphasized that the dispute between the parties in this matter involves interpretation and application of the Constitution and when dealing with the Bill of Rights, these are matters of general public importance. He urged us to uphold the right to access this Court and the Supreme Court. In support of his submissions, counsel cited two persuasive decisions from Uganda being the cases of Karuhanga -v- Attorney General, (2014) 3EALR 218 and Singh -v- Attorney General (2014) 2 EALR 319. Counsel urged us to dismiss the instant application with no order as to costs.

Applicant's Replying Submissions

40. Senior Counsel Ahmednassir concurred that the instant application was of public importance. He observed that the doctrine of state decisis was part of Kenya's legal system and urged us to uphold the same. He submitted that there was a long line of judicial decisions from this Court that establishes the principle that Article 164 (3) of the Constitution does not confer a carte blanche right of appeal; that it is settled law that a right of appeal must expressly be conferred by the Constitution or Statute and in the absence of such an express provision, there is no right of appeal. Counsel reiterated that the respondent had not been able to identify and pin point any Constitutional or statutory provision that expressly confers a right of appeal in Bill of Rights litigation.

41. Reacting to the respondents submission that JSC as a State organ was keen to limit the citizen's Bill of Rights, Senior Counsel submitted that it was not JSC limiting the right of appeal but the 2010 Constitution as voted for by citizens in the referendum and as promulgated on the effective date. Counsel opined that he had nothing useful to comment on Dr. Khaminwa's submission and that the Articles of the Constitution cited by the Interested Party were not relevant to the present application.

42. Learned counsel, Mr. Charles Kanjama, while replying to the respondent's submissions urged this Court to uphold the principle of certainity and predictability in law as part of good governance. He submitted that there are unambiguous judicial decisions subsequent to the promulgation of the 2010 Constitution that plainly state that a right of appeal must expressly be conferred by the Constitution or statute; he reiterated that in Kakuta Maimai Hamisi -v - Peris Tobiko & 2 Others, (2013) eKLR, it was clearly stated that a right of appeal is conferred by law; that the decision in Anarita Kirimi Njeru (supra) and Nyutu Agrovet Limited (supra) uphold the principle that a right of appeal must be expressly conferred by law. Counsel submitted that in Frederick Otieno Outa -v- Jared Odoyo Okello & 4 others, SCP No. 10 of 2014, the Supreme Court reinforced the principle that a right of appeal must be conferred by law and the said law can limit or restrict the exercise of that right of appeal. Counsel submitted that when a principle of law is well settled, this Court should not depart from it as this would be tantamount to bad governance and a cause of injustice to litigants who had been denied access to this Court.

Analysis

43. I have considered submissions by counsel and various Articles of the Constitution cited by all parties. The Bill of Rights and the principles of fair administrative action and access to courts as espoused in the 2010 Constitution must visibly be guarded by judicial institutions. Article 22 (1) of the Constitution provides that "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." The exercise of this right can only be limited as provided for in Article 24 of the Constitution which expressly states that a right or fundamental freedom in the Bill of Rights shall not be limited except by law. Article 24 (2) (b) stipulates that a legislation limiting a right or fundamental freedom shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation and shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

44. In arriving at my final decision in this matter, I am cognizant of the decision of this Court in Onyango -v- Republic 1983 KLR 252 where it was held that in the absence of any prior statutory provision conferring a right of appeal, a right of appeal to the Court of Appeal cannot be inferred from the repeal of a provision to the effect that no appeal shall lie from the High Court. I also note the dicta in Jivraj -v- Devraj (1968) EA 263 where it was stated that there is a principle of law that where a court has interpreted the law in a certain manner and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustice.

45. It is the applicant's submission that there is no right of appeal from a judgment of the High Court on matters relating to enforcement of rights and fundamental freedoms in the Bill of Rights. The gist of the applicant's submission is that when Section 84 (7) of the repealed Constitution was not transplanted or transposed into the 2010 Constitution, the right of appeal in Bill of Rights litigation as was embodied in Section 84 (7) was repealed and abolished.

46. The foundation of the appellate jurisdiction of a court was expressed by the Supreme Court in Samuel Kamau Macharia & Another -v- Kenya Commercial Bank and 2 Others, eKLR 2012 at paragraph 50 of its judgment as follows:

> "(a) An appeal is granted in specific terms by the Constitution or a statute. The scope of appellate jurisdiction is clearly delimited by the legal source

from which it derives its existence. A Court of law cannot assume appellate jurisdiction where none has been specifically granted by the Constitution or statute.

(b) .....

(c) .....

(d) ....."

47. Reaffirming the jurisdictional competence of a court, the Supreme Court at paragraph 68 of Samuel Kamau Macharia & Another -v- Kenya Commercial Bank and 2 Others, e KLR 2012 , expressed itself thus:

> " 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...."

48. In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011, the Supreme Court observed that 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.

49. This Court in Judicial Service Commission -v- Gladys Boss Shollei & Another, Civil Appeal No. 50 of 2014 expressed as follows:

> " Article 23 (1) & Article 165 (3) (b) of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, Article 23 (2) provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, Article 23 (3) does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers "a court" to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is Article 20 (3) that places an obligation on "any court" in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. <u>These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts</u>." (Emphasis mine).

50. In Timamy Issa Abdalla –v - Swaleh Salim Swaleh Imu & 3 Others, [2014] eKLR (Civil Appeal No. 36 of 2013) this Court expressed itself as follows:

> " ...The Constitution of Kenya 2010 that establishes the Court of Appeal under Article 164 (1) grants it jurisdiction under Article 164(3).... The Court of Appeal has a general jurisdiction to hear and determine appeals. Whereas the Constitution has not provided any limitation to this general jurisdiction, it has provided a window for the scope of the exercise of the jurisdiction to be limited by statute. Article 164 (3) of the Constitution has to be read together with the Appellate Jurisdiction Act Cap 9 which is a statute specifically enacted to confer jurisdiction on the Court of Appeal. Section 3(1) of this Act states as follows:

3. Jurisdiction of Court of Appeal

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies in the Court of Appeal under law.

The Appellate Jurisdiction Act has introduced one qualification for the exercise of the court's jurisdiction, that is, that the law must specifically provide for the right of appeal."

51. In Nova Chemicals Ltd -v- Alcon International Ltd, H.C. Misc. Application No.1124/2002 it was stated that the right of appeal is either conferred by statue or by leave and not by implication. In Kakuta Maimai Hamisi -vs- Peris Peris Tobiko & Others, Civil Appeal No. 154 of 2013, it was held:

> " It is enough to say that the right of appeal must be statute or other law based and so viewed there is nothing doctrinally wrong or violative of the constitution from such right to be circumscribed in ways that render certain decisions of courts below non appealable".

52. When moving the motion in Parliament to support promulgation of the 2010 Constitution, the then Minister for Justice, National Cohesion and Constitutional Affairs Hon. Martha Karua expressed herself as follows:

> " In this draft, the Bill of Rights is allowing any citizen, a group of citizens or an organization to enforce the Bill of Rights through going to the constitutional court, which in this case will be the Supreme Court. (See Parliamentary Hansard Report Tuesday 23rd March 2010)".

53. My analysis and determination of the pertinent issue in this application is guided by the Supreme Court dicta in Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 where at paragraph 86 it is stated:

> " ...The Constitution has incorporated non-legal considerations which must be taken into account in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions 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 and political realities and aspirations that are critical in building a robust patriotic and indigenous jurisprudence in Kenya..."

54. I find that in this application, it is necessary to appraise the appellate jurisdiction of the Supreme Court on interpretation and application of the Constitution. Article 163 (4) (a) of the 2010 Constitution provides:

> " 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".
>
> (b) .....

55. Section 19 (a) of the Supreme Court Act echoes Article 163 (4) (a) of the Constitution to wit the Supreme Court shall hear and determine appeals from the Court of Appeal only to the extent that a written law provides for the bringing of such an appeal to the Supreme Court. It is manifest

from Article 163 (4) (a) that the Supreme Court has appellate jurisdiction to hear an appeal as of right in any case involving interpretation or application of the Constitution. Pursuant to Section 19 (a) of the Supreme Court Act, the Supreme Court has jurisdiction to hear appeals only if a written law provides for such an appeal. In this regard, an appeal as of right is an appeal that does not require permission of the trial court or appellate court as a prerequisite to taking the appeal. Conversely, the right of appeal is a right to appeal conferred by the Constitution or statute.

56. In the instant case, it is not in dispute that the respondents Petition No. 386 of 2015 involved interpretation and application of the Constitution. More specifically, the issue in the Petition and in Civil Appeal No. 1 of 2016 relates to the correct interpretation of Article 167 (1) of the Constitution as read with Sections 7 and 31 of the Sixth Schedule to the Constitution.

57. The dispute between the parties also relate to the correct interpretation of the transitional provision in Sections 6 and 31 of the Sixth Schedule as read with Article 167 (1) of the Constitution. Section 3 (d) of the Supreme Court Act enjoins the Court to deal with matters relating to transition from the former to the present constitutional dispensation.

58. My interpretation and application of Article 163 (4) (a) of the Constitution as read with Sections 3(b) and (d) of the Supreme Court Act aptly show that questions of interpretation and application of the Constitution and issues relating to transition from the former to present constitutional dispensation are appealable as of right to the Supreme Court.

59. The pertinent legal issue is how can the Supreme Court exercises its appellate constitutional jurisdiction under Article 163 (4) (a) and Section 3 (b) and (d) and Section 15(2) of the Supreme Court Act if the constitutional Article whose interpretation is in dispute has not been canvassed and determined at the first instance by the High Court and then on appeal by the Court of Appeal?

60. In Peter Oduor Ngoge -v- The Hon Francis Ole Kaparo & 5 Others, Petition No. 2 of 2012, the Supreme Court expressed itself thus:

> " In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs to resolve all matters turning on the technical complexity of the law, and only cardinal issues of law or of jurisprudential moment will deserve the further input of the Supreme Court".

61. In Lawrence Nduttu & 6000 Others -v- Kenya Breweries Ltd & Another (Tunoi and Wanjala, SCJJ.) SC Petition No. 3 of 2012; (2012) e KLR; at paragraph 28 the Supreme Court pronounced that:

> " The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation..." (Emphasis mine).

62. Guided by the dicta that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the competence to interpret the Constitution and that an appeal to the Supreme Court must originate from a court of appeal case, I am of the considered view that (except where the Supreme Court has original, advisory or direct appeals with leave under Section 17 of the Supreme Court Act or appellate jurisdiction under Article 168 (8) of the Constitution or other law) a condition precedent to the Supreme Court's exercise of its appellate jurisdiction is existence of a judgment, order or ruling by the Court of Appeal. If the intended appeal is against a judgment or decision of the High Court on

interpretation or application of the Constitution, how would the Supreme Court exercise its appellate jurisdiction under Article 163 (4) (a) and Sections 3 (b), (d) and 15 of the Supreme Court Act if there is no judgment or ruling or a determination by the Court of Appeal?

63. In my view, the Supreme Court's appellate jurisdiction under Article 163 (4)(a) is unqualified and unrestricted. The applicant submitted that in the absence of a right of appeal to the Court of Appeal in relation to the Bill of Rights, it follows that likewise the Supreme Court has no jurisdiction to hear and entertain appeals on Bill of Rights. In the applicant's Counsel's own words, "there is no ladder upon which to climb from the High Court to the Court of Appeal and then to the Supreme Court. The ladder or step to the Court of Appeal was removed when Section 84 (7) of the repealed Constitution was not transferred or transposed to and or re-enacted in the 2010 Constitution with the legal and constitutional consequence that there is no right of appeal on Bill of Rights."

64. If this Court is to hold that it has no jurisdiction to hear an appeal on enforcement of the Bill of Rights, the Court would be saying that either there is a direct appeal as of right to the Supreme Court pursuant to Article 163 (4) of the Constitution on matters of interpretation and application of the Constitution or that there is no appeal both to the Court of Appeal and the Supreme Court. It is the applicant's contention that this Court should hold that there is no right of appeal to both the Court of Appeal and the Supreme Court; that a judgment of the High Court on the Bill of Rights is final.

65. In my view, within the exceptional limits prescribed in Section 17 of the Supreme Court Act, Kenya's legal system does not recognize somersaulting or overlapping or side-stepping the hierarchy of court system. In the superior court structure, litigation must commence at the High Court with an appeal to the Court of Appeal and then to Supreme Court each within their jurisdictional competence. Unless expressly provided for in the 2010 Constitution, access to the superior courts in Kenya is linear, vertical and hierarchical; there is no a side-stepping, overlapping, and by-passing or a circumvention approach of access to any of the superior courts. Access to justice must follow the vertical hierarchical structure of the judicial system which is an obligatory and peremptory procedure in litigation.

66. The Supreme Court has aptly captured this position in Erad Supplies & another -v- National Cereals and Produce Board, Supreme Court Petition 5 of 2012 (paragraph 13A), where it is stated that:

> " ...a question involving the interpretation or application of the Constitution that is integrally linked to the main cause in a superior Court of first instance is to be resolved at that forum in the first place, before an appeal can be entertained...." (Emphasis mine).

67. In my view, adopting the applicant's submission would render some Articles of the 2010 Constitution non-justiciable before the Court of Appeal and Supreme Court. Does the 2010 Constitution envisage that some of its Articles, especially the Bill of Rights, are only justiciable at the High Court and not before any other superior court in Kenya? If I were to agree with the applicant's submission that a judgment of the High Court is final on matters relating to the Bill of Rights, this would be tantamount to a judicial limitation and or amendment to Article 163 (4) (a) of the Constitution which confers appellate jurisdiction "as of right" to the Supreme Court in interpretation and application of the Constitution. In my view, all the Constitutional Articles are justiciable and amenable to interpretation by this Court and the Supreme Court for a specific determination whether an Article(s) has been correctly interpreted and applied by the High Court in accordance with the Constitution. I have not found any express Constitutional provision excluding some Constitutional Articles from justiciability and interpretation before this Court and the Supreme Court.

68. I am fortified in my view taking into account the Supreme Court's dicta in Gatirau Peter Munya -v- Dickson Mwenda Kithinji, (Ojwang & Wanjala, SCJJ,) at paragraph 79 where it was stated:

> " This Court, by the terms of the Constitution, and specifically under the Supreme Court Act, 2011 (Act No. 7 of 2011) which reposes the mandate to "assert the supremacy of the Constitution" [Section 3(a)] and to "provide authoritative and impartial interpretation of the Constitution" [Section 3(b)], has the responsibility to hear the parties and to interpret the Constitution as appropriate".

69. In my reading of the Constitution, Article 22 is titled Enforcement of Bill of Rights. It is one of the Articles providing the legal framework for enforcement of Bill of Rights. Article 23 (1) as read with Article 165 (3) (b) confers jurisdiction upon the High Court to be the Court of original jurisdiction to enforce and redress violations and infringement of the Bill of Rights. As correctly pointed out by the Interested Party, Article 22 (3) of the Constitution mandates the Chief Justice to make Rules providing the procedure for enforcement of the Bill of Rights. Pursuant to Article 22 (3).

The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013 came into force. Rule 3 expressly stipulates that it applies to proceedings under Article 22 of the Constitution. Rule 32 (1) provides that

> " An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed. Rule 32 (3) stipulates that "A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct".

70. Rule 32 (1) and (3) envision that an appeal may be lodged against a decision relating to the protection of rights and fundamental freedoms. Where shall the first and second appeals be lodged if not at the Court of Appeal and Supreme Court respectively? Under the Mutunga Rules, court is defined as High Court and it follows that an appeal from the court is to the Court of Appeal. It is my considered view that Rule 32 envisages a right of appeal on matters relating to protection and enforcement of rights and fundamental freedoms. The rule does not state that leave to appeal is required. The applicant's counsel in his oral submissions was of the view that Rule 32 (1) and (3) of the Mutunga Rules are meant for future application if and when the Constitution or other law confers a right of appeal on matters relating to the Bill of Rights. I do not agree. All rules in the "Mutunga Rules" took effect on the same day and there is no provision in the Rules suspending the application and implementation of Rule 32 allegedly until such time as a right of appeal shall be conferred.

71. In arriving at my decision in this application, I have taken judicial notice of the struggle for the new constitutional dispensation in Kenya and the context in which the 1997 Constitutional amendment was made and events leading to the promulgation of the 2010 Constitution. Within this context, I observe that in Equity Bank Limited -v- West Link Mbo Limited, (2013) eKLR, M'Inoti, JA expressed himself as follows:

> " The next issue relates to the jurisdiction of the Court of Appeal under the Constitution of Kenya, 2010. There is no doubt that the jurisdiction of the Court of Appeal is conferred by Article 164 (3) of the Constitution.
>
> > " In my opinion, the effect of Article 164(3) is, as far as appeals from the High Court are concerned, to make it henceforth unnecessary for a party to first identify specific legislation which confers jurisdiction on the Court of Appeal

> before the Court can assume jurisdiction. Arguments such as that advanced in Anarita Karimi Njeru that there was no right of appeal from decisions of the High Court under Section 84 of the Constitution of Kenya 1969, as it then stood (before introduction of Section 84(7) in 1992 (sic) to expressly provide for a right of appeal) is no longer tenable. ....
>
> The Constitution of Kenya, 2010 has placed great premium on access to justice for the people of Kenya. The Judiciary is evidently revamped in Chapter 10. Article 48 requires the State to ensure access to justice for all persons. In criminal cases, Article 50 (2) (q) confers on a convicted person a right to appeal to a higher court as prescribed by law; "justice shall be administered without undue regard to procedural technicalities" and "the purpose and principles of this Constitution shall be protected and promoted". Above all, the Constitution has created an extra level of court in the form of the Supreme Court at the apex; to which appeals on the interpretation of the Constitution lie as of right and on other matters upon certification by the Court of Appeal or by the Supreme Court itself. We must ask ourselves, what is the purpose of these provisions? Was it merely to create institutions without any regard to their efficacy and ability to deliver on the promise of the Constitution, the fulfillment of which these institutions were created? To my mind the answer is clearly NO. I am convinced that the purpose of all these constitutional provisions was to create efficacious courts that can address real-life complaints and problems of Kenyans".

72. In my considered view, to interpret Articles 165 (3) (b) and 164 (3) of the Constitution in order to strip the Court of Appeal the right to hear appeals and determine if the High Court correctly interpreted and applied any Article in the Bill of Rights cannot be to promote and fulfill the rights and fundamental freedoms as required by Article 21 (1) of the Constitution. It will mean that the Court of Appeal has no role to play in protecting the rights and fundamental freedoms of Kenyans. The rights and fundamental freedoms of an individual is the quintessence of human rights, dignity, liberty, livelihood and life. Of what use is a Court of Appeal that has no role in determining if the Constitutional Articles on rights and fundamental freedoms of an individual have been correctly interpreted and applied by the High Court? As correctly posited by M'Inoti, J.A, in Equity Bank Limited case (supra) what kind of access to justice is it where a party who has litigated from the subordinate courts, through the High Court reaches and succeeds in the Court of Appeal only to be told, "sorry, your judgment is not worth the paper it is written on because the subject matter of your litigation disappeared irretrievably the moment you left the High Court?" It is my considered view that the 2010 Constitution did not establish a ceremonial Court of Appeal in so far as enforcement of the Bill of Rights is concerned. By conferring appeal as of right to the Supreme Court on matters of interpretation and application of the Constitution, the 2010 Constitution ipso jure conferred appeal as of right to the Court of Appeal on matters relating to interpretation and application of the Constitution.

73. I am fortified in my view as I note the dicta In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Supra) where the majority bench of the Supreme Court opted for the interpretation of the Constitution that would enable, as much as possible organs established by the Constitution to fully discharge their mandate. The Court stated:

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

enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution...."

74. In the persuasive case of Habre International Co. Ltd -v- Kassam and Others, [1999] 1 EA 125, it was stated that:

> " The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard....."

75. In reading the Constitution holistically, whereas Article 165 (3) (b) vests upon the High Court original jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; taken in context, Article 165 (3) (b) does not restrict or oust the jurisdiction of the Court of Appeal to hear appeals on interpretation and application of the Articles on enforcement of the Bill of Rights or violation of the fundamental rights and freedoms of the individual.

76. Contextually, as Article 165 (3) does not expressly oust the appellate jurisdiction of the Court of Appeal in relation to the Bill of Rights and because Article 163 (4) (a) expressly confers appeal as of right to the Supreme Court, and since Rule 32 (1) of the Mutunga Rules expressly envisage an appeal and second appeal in matters relating to protection of rights and freedoms and guided and persuaded by the dicta in Onyango -v-Republic (supra) and Mbuthi -v- Mbuthi, 1976-1980 1(KLR) 145; I am of the considered view that a judgment, ruling, decision or determination of the High Court on matters relating to interpretation and application of the Bill of Rights or rights and fundamental freedoms is not final and any person aggrieved by such a judgment, ruling, decision or determination can appeal as of right to this Court and ultimately as of right under Article 163 (4) (a) to the Supreme Court. The express right of appeal to the Supreme Court on matters of interpretation and application of the Constitution ipso jure denotes appeal as of right to the Court of Appeal on matters of interpretation and application of the Constitution. Subject to Articles 24 and 25 of the Constitution, it is my considered view that all Articles in the Bill of Rights are justiciable and amenable to appellate interpretation without any limitation before all the superior courts of Kenya.

77. For the avoidance of doubt, I am of the view that given the historical context in which the 1997 Constitutional amendment was made to introduce Section 84 (7) in the repealed Constitution, the principle in the case of Anarita Karimi Njeru (supra) that there is no right of appeal in Bill of Rights litigation was dead and buried in 1997. The 1997 Constitutional amendment overturned, set aside or impliedly repealed the principle in Anarita as law in Kenya. Anarita was decided under the old constitutional order that was grounded in totalitarian values where fundamental rights and freedoms did not belong to the individual but were granted by the State. Save for historical narrative of the origins of the rights of appeal in Bill of Rights litigation, I refuse and decline, even if I am alone, to be the judge who exhumes and revives the principle in Anarita Karimi Njeru case (supra) as representing the law in Kenya today after promulgation of the 2010 Constitution. Unless expressly stated, repeal of law that repealed an earlier law does not revive the earlier law (See Section 20 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya). The repeal of the former 1969 Constitution by the 2010 Constitution does not revive the principle in Anarita Karimi Njeru (supra) to the effect that there

is no right of appeal in Bill of Rights litigation. In Mbuthi -v- Mbuthi, (1976) KLR 120 or 1976-1980 1(KLR) 145, the legal effect of deletion of a statutory provision was expressed as follows:

> " The deletion of section 9 from the Indian (Amendment) Act which provided that the provisions of the Indian Acts which applied to Kenya should apply to Africans only to the extent expressly provided by the Statute Law (Miscellaneous Amendments) Act 1968 did not have the effect of restoring the position which had existed before those provisions were first enacted".

78. Counsel for the applicants cited the following post-2010 decisions of this Court in support of his submissions: the cases are Nyutu Agrovet Limited - v- Airtel Networks Limited, (2015) eKLR; Kakuta Maimai Hamis -v-Peris Pesi Tobiko & 2 Others, (2013) eKLR; Joseph Mchere Aoko -v-Civicon Limited, (2015) eKLR; Equity Bank Limited -v- West Link Mbo Limited, (2013) eKLR and Basil Criticos -v- Independent Electoral and Boundaries Commission & 2 Others, (2014) eKLR.

79. I have considered these decisions in light of the contention that there is no right of appeal under the Bill of Rights. At the outset, I state that the decisions cited are good law. However, the decisions are not applicable to the instant application. First, none of these cases considered the question of right of appeal in relation to the Bill of Rights as entrenched in the Constitution; second, all the cases dealt with interpreting the nature and extent of the right of appeal within the context of specific statutory provisions conferring the right of appeal either the Arbitration or Elections Act; third, none of the cases dealt with interpretation and application of transitional provisions in the current Constitutions and which jurisdiction on transitional matter is ultimately reposed in the Supreme Court as per Sections 3 (b) and (d) of the Supreme Court Act. Finally, all the cited cases are not grounded on the philosophical restructuring of the Kenya society in the historical context in which the Bill of Rights came to be expanded, modernized and entrenched in the 2010 Constitution.

Distinction between jurisdiction to interpret and apply the Constitution and jurisdiction to enforce the Bill of Rights

80. At the beginning of this ruling I posited the issue of distinction between jurisdiction to interpret and apply the constitution and jurisdiction to enforce the Bill of Rights under the repealed and the present 2010 Constitutions.

81. The repealed Constitution had a clear distinction between jurisdiction to interpret and apply the Constitution and jurisdiction to enforce the Bill of Rights. Both the High Court and Court of Appeal had the general jurisdiction to interpret and apply the constitution as part and parcel of the day to day judicial work. It is in this context that this Court in Rafiki Enterprises Vs Kingsway Tyres and Automart Ltd, (1996) eKLR held that:

> " ...If and when a matter touching on the interpretation of the Constitution arises in this court, the Court must itself determine that issue as part of the problems of law it is called upon to deal with in the exercise of its appellate jurisdiction".

82. However, under the repealed Constitution, as regards the Bill of Rights a separate and distinct procedural and substantive jurisdiction was vested upon the High Court whose decision was final with no right of appeal to this Court. Case law from the old constitutional legal order culminating with the decision in Anarita Karimi Njeru (supra) affirms the distinction with the dicta that the Court of Appeal had no appellate jurisdiction on matters relating to enforcement of the Bill of Rights.

83. The legal question is whether the 2010 Constitution maintains the distinction between jurisdiction of a court to interpret and apply the constitution and its jurisdiction to enforce the Bill of Rights. In the old constitutional order, the distinction was grounded in Section 84 of the repealed Constitution before the amendment that introduced Section 84 (7) thereto. The 2010 Constitution repealed the 1969 Constitution and while doing so, did not transpose Section 84 (7) to the new 2010 Constitution. What is the legal consequence of failure to transpose Section 84 (7) to the 2010 Constitution? The answer to this question is dependent inter alia on the legal effect of repeal of law without replacement.

84. The 2010 Constitution was not a repeal and re-enactment of the 1969 Constitution. Repeal and re-enactment takes places where the law in the area is being up-dated. In my view, the 1969 Constitution that incorporated Section 84 (7) was rejected, overhauled and replaced by the 2010 Constitution that is transformative, modern, progressive and which ingrains constitutionalism and restructures the Kenyan societal fabric and institutions of governance. The repealed Constitution did not a have a collective national value system and was replaced by the 2010 Constitution embedded with collective national ethos and values suitable for the modern era. One of the collective values in the 2010 Constitution is the promotion of protection and enforcement of the Bill of Rights.

85. Articles 10, 20 (4) (b), 21 (1) and 22 (1) of the 2010 Constitution constitutes a "strong adjuration" protecting citizen's rights and fundamental freedoms. I pose the question, should courts interpret the failure to re-enact or transpose Section 84 (7) into the 2010 Constitution as abolition of the right of appeal in relation to Bill of Rights? I repeat the quote from the then Attorney General Amos Wako who in moving the 1997 Constitutional Amendment, stated "we shall be enhancing the protection of the fundamental rights of Kenyans in as much as they will now have another avenue of appeal, should they feel that their rights have been violated." By failing to transpose Section 84 (7) into the new 2010 Constitution, is it the spirit of the 2010 Constitution not to enhance protection of fundamental rights and freedoms as was stated by the then Attorney General in 1997?

86. The spirit and values embodied in the 2010 Constitution in Articles 10, 20 (4) (b), 21 (1) and 22 (1) enjoins that courts must protect and advance the rights and fundamental freedoms of individuals. In my view, the spirit of the 2010 Constitution does not support the notion that courts in Kenya must restrict and limit rights and fundamental freedoms by curtailing the appellate process. Any limitation of rights and fundamental freedoms must meet the criteria in Article 24 of the Constitution. The Bill of Rights should not be interpreted as bi-directional giving rights and fundamental freedoms with one hand and taking away with another. The Bill of Rights is linear, unidirectional and there are few express Articles in the Constitution that permit limitation of enforcement of rights and fundamental freedoms. The few Articles include 19 (3)(c); 24(2); 24 (5) and 58 (6). The practice in the superior courts since 2010 reveals that both the Court of Appeal and Supreme Court have considered and adjudicated on matters relating to interpretation and application of rights and fundamental freedoms. Does this mean all these decisions were made without jurisdiction? Not so. All superior courts in Kenya have the jurisdictional competence to interpret and apply all Articles of the Constitution including Articles in the Bill of Rights.

87. Having made a finding (and subject to the exceptions stated) that a condition precedent to the Supreme Court's exercise of its appellate jurisdiction in Article 163 (4) (a), (b) of the Constitution and Sections 3 (b, (d) and Section 15 of the Supreme Court Act is the existence of a judgment of the Court of Appeal, I hereby make a finding and determination that there is a right of appeal to the Court of Appeal in matters relating to interpretation and application of the Bill of Rights. I am fortified in this finding as I note that Section 3 (d) of the Supreme Court Act enjoins the Supreme Court to deal with matters relating to transition from the former to the present constitutional dispensation.

Express Statutory Provision conferring a right of appeal to the Court of Appeal on Enforcement of the Bill of Rights

88. I have stated that the 2010 Constitution maintains the distinction between jurisdiction to interpret and apply the Constitution and jurisdiction to enforce the Bill of Rights. The 2010 Constitution maintains the distinction because Article 23 (1) as read with Article 165 (3) (b) specifically provides for the High Court as the court of original jurisdiction to deal with redress, violation or infringement of the Bill of Rights. In addition, special procedure grounded on Article 22 (3) has been provided under the Mutunga Rules for enforcement of the Bill of Rights.

89. It is the applicant's contention that there must be an express constitutional or statutory right of appeal to this Court on matters relating to the Bill of Rights. This position is supported by myriad of post-2010 judicial decisions from this Court. On my part, I hereby cite the express statutory provision that grants and confers a right of appeal to the Court of Appeal in relation to enforcement of the Bill of Rights. This express statutory right of appeal is Section 9 (5) of the Fair Administrative Action Act, No. 4 of 2015.

90. The Preamble to the Fair Administrative Action Act states that the Act is to give effect to Article 47 of the Constitution. The commencement date of the Act is 17th June 2015. Section 2 of the Act defines "administrative action" to include the powers, functions and duties exercised by authorities.... Pursuant to Section 3 (1), the Act applies to all state and non-state agencies, including any person- (a) exercising administrative authority; (b) performing a judicial or quasi-judicial function under the Constitution or any written law; or (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates

91. Section 4 (1) of the Act reproduces Article 47 (1) of the Constitution and stipulates that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

92. It is pertinent to ask if the Fair Administrative Act applies to the Bill of Rights. Yes, it does. First, the Act has its underpinning in Section 47 (3) of the Constitution which is an Article in the Bill of Rights. Second, Section 4 (3) of the Act stipulates that

> "where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person...."

Guided by this provision, it is my interpretation that Section 4 (3) envisages that the Act applies to rights or fundamental freedoms. The third reason why the Act applies to the Bill of Rights emanates from the reading of Section 9 (1) of the Act. Section 9 (1) is explicit that a person aggrieved by an administrative action is to seek review to a court conferred original jurisdiction under Article 22 (3) of the Constitution. The court in Article 22 (3) is only concerned with enforcement of Bill of Rights. Article 22 of the Constitution is entitled "Enforcement of Bill of Rights" and Article 22 (3) is the constitutional underpinning for the "Mutunga Rules." By referring a person aggrieved by an administrative action to the court with original jurisdiction to enforce the Bill of Rights, the Fair Administrative Action Act is applicable to rights and fundamental freedoms.

93. Part III of the Fair Administrative Action Act is entitled Judicial Review. Section 7 (1) of Act provides:

> " Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to- (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law."

94. Section 7 (2) of the Act provides for the grounds of judicial review of an administrative action. Without exhaustively itemizing the same, the grounds of judicial review relevant to this application are in Section 7 (2) (a) (i), (ii); (b); (d); (f); (k); (m) and (n). For example, judicial review can be on the ground that the administrative action violates the legitimate expectations of the person to whom it relates; or the action taken was not in accord with a condition prescribed in the empowering law; or the decision was influenced by an error of law, or the administrator failed to take into account relevant considerations, or failure to act in discharge of a duty imposed under any written law or that the administrative action is unfair or unreasonable.

95. Without delving into the merits of the appeal by the respondent, the claims in the respondent's Petition before the trial court are prima facie inter alia based on the grounds for judicial review in Section 7 (2) (a) (i) (ii); (b); (c); (d) (f); (k) (m) and (n) of the Fair Administrative Action Act.

96. Section 9 (1) of the Fair Administrative Action Act provides:

> " Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution." (Emphasis mine).
>
> Section 8 of the Magistrates Court Act of 2015 provides that:
>
> > " 8.
> >
> > (1) Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction 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.
> >
> > (2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.
> >
> > (3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights."

97. In my interpretation, Section 9 (1) of the Fair Administrative Action Act requires that a person who is aggrieved by an administrative action may apply to the High Court which is the court with original jurisdiction under Article 23 (1) of the Constitution following the procedure provided for in Article 22 (3) of the Constitution as implemented by the Mutunga Rules. Section 9 (1) of the Fair

Administrative Action Act is in tandem and consonance with Articles 22 (3); 23 (1) and Article 165 (3) (b) of the Constitution that vests upon the High Court original jurisdiction to redress, violation and infringement of the Bill of Rights.

98. Under the Mutunga Rules, an aggrieved person may file a Petition before the High Court and a judgment shall be delivered. It is not in dispute that the respondent in this case filed a Petition before the trial court pursuant to the Mutunga Rules. The Petition in paragraph 13 thereof explicitly states inter alia that it is grounded on Article 47 (1) and (2) of the 2010 Constitution. The Petition is further grounded on Articles 10; 19 (2); 20 (1), (2) & (3); 21 (1); 27 (1) & (2); 40; 41 (1); 167 (1); 168 (1); 260 and 262 of the Constitution and Sections 6, 31, and 32 of the Sixth Schedule to the Constitution.

99. Section 9 (5) of the Fair Administrative Action Act provides that:

> " A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal." (Emphasis mine).

100. The jurisdiction of the High Court to review administrative actions that includes enforcement Articles in the Bill of Rights is anchored in the Constitution. The review provisions and the right to appeal in Section 9 (5) of the Fair Administrative Action Act has its underpinning in Article 47 (3) (a) of the Constitution that inter alia provides that Parliament shall enact legislation that shall (a) provide for the review of administrative action by a court.

101. I find that there is an express provision in Section 9 (5) of the Fair Administrative Action Act which has a constitutional underpinning in Article 47 (3) (a) of the Constitution that confers a statutory right of appeal to this Court on matters relating to enforcement of the Bill of Rights. Section 9 (5) confers the right of appeal to this Court from decisions of the High Court sitting as a judicial review court procedurally empowered vide Section 9 of the Act and conferred original Bill of Rights enforcement jurisdiction pursuant to Articles 22 (3); 23 (1) and 165 (3) (b) of the Constitution. With the appellate jurisdiction of this Court conferred expressly vide Section 9 (5) of the Fair Administrative Act, I find that there is internal coherence, certainty and predictability in the decisions made by this Court post-2010 Constitution as regards the requirement for an express constitutional or statutory right of appeal. It is for this reason that I find that the post-2010 decisions of this Court cited by the applicant are and remain good law.

102. To fortify my finding in this matter, it is clear that the right of appeal conferred by Section 9 (5) of the Fair Administrative Action Act is founded on breach of Article 47 of the Constitution. The trial court at paragraph 174 of its judgment explicitly made a finding that Article 47 of the Constitution was not violated. The respondent herein is aggrieved with this specific finding and as per the draft memorandum of appeal at paragraph 12 thereof, one of the intended grounds of appeal is that the trial court erred in finding that Article 47 of the Constitution was not breached.

103. Let it be noted that the provisions of the Fair Administrative Action Act are retroactive and apply to all proceedings pending in court. Section 14 (1) of the Act provides:

> " 14.
>
> (1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.

(2) Despite subsection (1) - (a) if, and in so far as it is impracticable in any proceedings to apply the provisions of this Act, the practice and procedure obtaining before the enactment of this Act shall be followed; and (b) in any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted."

104. Let it be further noted that from the provisions of Section 14 of the Act, it is not mandatory to plead or cite the provisions of the Act in proceedings that were pending prior to the commencement of the Act. Without prejudice to the validity of anything previously done, the Act applies to all proceedings that were pending, preparatory, incidental or consequential to the coming into force of the Act. Pursuant to Section 12 of the Act, the general principles of common law and rules of natural justice continue to be applicable in regard to fair administrative action.

105. In the instant application, the applicant asked where is the ladder to the Court of Appeal in relation to enforcement of the Bill of Rights. Section 9 (5) of the Fair Administrative Action Act is the ladder, it is the missing rung, it is the stepping stone to this Court and ultimately to the Supreme Court.

106. In orbiter, pursuant to Section 8 of the Fair Administrative Action Act, applications or appeals under the Act are not automatically subject to the practice of listing and hearing applications on the basis of first filed first heard. Section 8 of the Act statutorily fast tracks applications or appeals founded on the Act and such applications or appeals must be determined within ninety (90) days of filing. The Section provides:

" An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application."

107. I would like to underscore the meaning and nature of Fair Administrative Action in Article 47 (1) of the Constitution as read with Section 2 and 7 (2) of the Fair Administrative Action Act in the context of the Bill of Rights. Whereas Section 2 of the Fair Administrative Action Act defines what administrative action entails, the concept of "fair administrative action" is a term of art that must be interpreted as having been incorporated in all administrative actions of state and non-state agencies. It is a term with constitutional underpinning grounded in Article 47 (1) of the 2010 Constitution. The provisions of the Fair Administrative Act permeate all laws of Kenya. In its definition of administrative action, there are no exclusions or exceptions. The overarching criteria is that when state or non-state agencies exercise administrative authority that affects the legal rights or interest of any person in terms of an empowering provisions, the Act comes into play.

108. The Act defines "empowering provision" to inter alia include an agreement, instrument or other document in terms of which administrative action is taken; this means that administrative action of private actors are subject to the provisions of the Act. It is in this regard that Section 3 (1) of the Act subjects administrative action of state and non-state agencies to constitutionalism. The Act ensures that Kenya has a rule of law and constitutional democracy. The criteria to determine constitutionality of administrative action is provided as grounds for review in Section 7 (2) of the Act. For example, if an administrative action is not authorized by law or violates a condition prescribed in law or is an act in excess if jurisdiction or is contrary to the legitimate expectations, then such administrative action does not pass the test of constitutionalism. The Act provides explicit justification for judicial intervention with specificity. I hasten to add that the Act borrows heavily from the equivalent Act in South Africa with the caveat that the South African Act has a different definition of administrative action and has

a list of actions excluded from the ambit of the Act. For instance, legislative, executive and judicial actions are excluded.

109. In the Kenya Bill of Rights, unless expressly limited in accordance with Article 24 of the Constitution, violation or threatened violation or infringement of rights and fundamental freedoms is not authorized by law and such violation is a ground for review of the administrative action under Section 7 (2) (a) (i) of the Fair Administrative Action Act. If such a violation of rights and fundamental freedom takes place contrary to express provisions of law, the violation is an act in excess of jurisdiction and the grounds in Section 7 (2) (a) (ii) of the Act come into play. An allegation of constitutional discrimination may be a ground for review inter alia under Section 7 (2) (a) (i), (b), (d), (f), (k) and (m) of the Fair Administrative Action Act.

110. In this context, I concur with the statement of Githinji, JA in the case of Judicial Service Commission -v- Hon. Justice Mbalu Mutava & Another, Civil Appeal No. 52 of 2014, where in his separate judgment at paragraph 22 he observed that fair administrative action refers broadly to administrative justice in public administration and is concerned with control of the exercise of administrative powers by state organs and is guided by constitutional principles and policy considerations. The learned appellate judge at paragraph 23 continued that Article 47 (1) of the Constitution makes an important and transformative development and entrenches the right to administrative action in the Bill of Rights. He concluded that administrative action of public officers and state organs are now subject to Article 47 (1) on the principle of constitutionality.

97. Finally, it is my view that the Anarita case law principle that a person who alleges violation of his/her constitutional right and fundamental freedom must specifically plead and cite the Article violated has now been subsumed and codified in the Mutunga Rules as Rule 10 (c). It follows that the requirement for pleading the specific Article that has been violated is now grounded in the Mutunga Rules and the requirement is not premised on the Anarita case. I conclude by stating that enforcement of the Bill of Rights in Kenya is now a subject of the Fair Administrative Action Act. Based on the foregoing analysis I make a finding that there is an express statutory right of appeal to this Court on matters relating to enforcement of the Bill of Rights. The upshot is that I find the Notice of Motion dated 23rd December 2015 and the preliminary objection lodged has no merit and I hereby dismiss the same with no orders as to costs.

DATED AND MADE AT NAIROBI THIS 29TH DAY OF JANUARY, 2016.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR