Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KESC 62 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 16 OF 2020

MK KOOME, CJ & P, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

OCTOBER 7, 2022

BETWEEN

KENYA HOTEL PROPERTIES LIMITED ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

JUDGES AND MAGISTRATES VETTING BOARD ..... 3RD RESPONDENT

WILLESDEN INVESTMENTS LIMITED ..... 4TH RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION ..... 5TH RESPONDENT

KENYA REVENUE AUTHORITY ..... 6TH RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal Kenya sitting at Nairobi (Makhandia, Kiage, and Murgor, JJ.A.) delivered on the 7th August, 2020, in Civil Appeal No. 404 of 2018)

High Court does not have jurisdiction to re-open and re-hear de novo a concluded appeal

Reported by John Ribia

Jurisdiction *– hierarchy of courts – jurisdiction of the High Court vis-à-vis the jurisdiction of the Court of Appeal - application that sought the High Court to overturn or to request the Court of Appeal to try an appeal de novo - whether the High Court had the jurisdiction to overturn or to order the Court of Appeal to try an appeal de novo a final decision of the Court of Appeal which was determined a Judge who was removed by the vetting board – Constitution of Kenya (2010) articles, 163, 164 and 165.*

Jurisdiction *– jurisdiction of the Judges and Magistrates Vetting Board – decisions by the Judges and Magistrates Vetting Board – effect of decision of the vetting board on decisions rendered by judges/magistrates who were removed from service for impropriety - whether decisions by the Judges and Magistrates Vetting Board were supra-*

judicial pronouncements that had the effect of setting aside every decision made by a judge who was removed for impropriety.

Brief facts

The instant petition for appeal sought to overturn the Court of Appeal's decision in Civil Appeal No. 404 of 2018, which upheld the High Court's decision. The appellant's claim was based on the outcome and report of the Judges and Magistrates Vetting Board (vetting board). At the High Court, the appellant sought to have the Court of Appeal's decision, which was the apex court at the time of the appeal, overturned on the grounds that one of the judges who determined the appeal was unsuitable to continue holding the position of Judge of the Court of Appeal. The petition was dismissed on the grounds that the High Court lacked jurisdiction to order the Court of Appeal to try an appeal de novo or to reverse a Court of Appeal decision. The Court of Appeal upheld the decision of the High Court. The aggrieved appellant petitioned the Supreme Court for orders that the High Court erred in law in determining that it lacked jurisdiction to hear the case.

Issues

i. Whether the High Court had the jurisdiction to set aside a judgment issued by the Court of Appeal to try an appeal *de novo*.

ii. Whether decisions by the Judges and Magistrates Vetting Board were supra-judicial pronouncements that had the effect of setting aside every decision made by a judge who was removed for impropriety.

Held

1. The issue faced by the High Court was not on whether the High Court had jurisdiction to entertain a constitutional petition and its dispensation, but on whether the High Court had the jurisdiction to set aside a judgment issued by the Court of Appeal as well as to order the Court of Appeal to try an appeal *de novo*.
2. Jurisdiction was everything, as it denoted the authority or power to hear and determine judicial disputes. Civil Appeal No. 149 of 2007 was conclusively determined on April 2, 2009, and that judgment stood save for the review judgment issued on November 20, 2009, that altered the dates of interest. Similarly, the High Court judgment in HCCC No. 367 of 2000 stood, and the appellant had not sought any orders to have that judgment impugned. The appellant was asking the Supreme Court to make its determination based on proceedings brought under the Constitution where the decision of the Judges and Magistrates Vetting Board (vetting board) was the basis for its main argument that the judgment by the Court of Appeal in Civil Appeal No. 149 of 2007 was obtained through alleged bias or impropriety on the part of O'Kubasu JA despite the appellant not having any complaints against the other two Judges of the Court of Appeal who determined Civil Appeal No. 149 of 2007.
3. The High Court could not overturn a final decision of the Court of Appeal. The Constitution could not itself to issue the reliefs sought by the appellant.
4. Article 163(4)(b) of the Constitution did not confer the Supreme Court with the jurisdiction to entertain appeals from the Court of Appeal before the coming into force of the 2010 Constitution, the same principle applied in that the High Court could not and did not have any jurisdiction to reopen cases finalized by the Court of Appeal, which was the apex court at the time.
5. The Constitution could address any injustice with the High Court having jurisdiction under article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. However, the High Court could not overturn or order final decisions issued by higher courts than itself to start *de novo*, especially on appeals that had been finally concluded by the highest court at the time.
6. Superior courts could not grant orders to reopen or review decisions of their peers of equal and competent jurisdiction, much less those courts higher than themselves.
7. A court's jurisdiction flowed from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the constitution or other written law. The decisions by

the vetting board could not be elevated to supra-judicial pronouncements that would have the effect of setting aside every decision made by a judge who was removed for impropriety.

8. The appellant, having exercised his right of appeal (albeit unsuccessfully) to a higher court, in the instant case, the Court of Appeal, could not proceed to launch an attack upon a judgment of the Court of Appeal, by making an application for redress under article 23 of the Constitution to the High Court, another superior court nonetheless, but one inferior to the court that delivered such judgment. To allow such an action would be subversive to the principle of rule of law.

9. Though the courts found bias to amount to a breach of constitutional rights, the inferior courts were not asked to set aside the judgments made by superior courts, the vetting bard proceedings notwithstanding. The principle of finality in litigation was relevant. There had be an end to litigation and it was intolerable that litigants could be allowed to approach courts to reconsider final orders made in judgments by a superior court in the hierarchy of courts and to have such final judgments re-opened. There was no justifiable fault in the decision of the appellate court affirming the trial court's decision.

Appeal dismissed.

Orders

Each party was to bear its own costs.

Citations

Cases

Kenya

1. *Asanyo, Geoffrey M & 3 others v Attorney General* Petition 21 of 2015; [2018] eKLR - (Explained)
2. *Federation of Women Lawyers in Kenya (FIDA) v Attorney General & another* Petition 164B of 2016; [2018] eKLR - (Applied)
3. *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013; [2015] eKLR - (Applied)
4. *Kenya Anti- Corruption Commission v Willesden Investments Limited & 7 others* Civil Appeal No 325 of 2013; [2019] eKLR - (Mentioned)
5. *Kenya Hotel Properties Limited v Attorney General & 5 others* Application No 27 of 2020; [2020] eKLR - (Explained)
6. *Macharia v Kenya Commercial Bank Limited & 2 others* [2012] 3 KLR 1999 - (Explained)
7. *Macharia, Mwangi Maina & 87 others v Davidson Mwangi Kagiri* Civil Appeals 6, 26 & 27 of 2011; 2014] eKLR (Consolidated) - (Applied)
8. *Outa, Fredrick Otieno v Jared Odoyo Okello & 3 others* Petition 6 of 2016; [2017] eKLR - (Applied)
9. *Rai & 3 others v Rai & 4 others* [2013] 1 KLR 685 - (Mentioned)
10. *Rawal, Kaplana H v Judicial Service Commission & 2 others* Civil Appeal (Application) 1 of 2016; [2016] KECA 717 (KLR) - (Applied)
11. *Republic v Karisa Chengo* Petition 5 of 2015; [2017] eKLR - (Explained)
12. *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited & 2 others* Civil Application Nai 224 of 2006; [2016] eKLR - (Applied)

South Africa

De Lacy & another v South African Post Office (CCT 24/10) [2011] ZACC 17; 2011 (9) BCLR 905 (CC) - (Applied)

United States

Marbury v Madison 5 US 137 (1803) - (Explained)

Regional Court

Karua, Martha v Attorney General of the Republic of Kenya & 2 others Reference No 20 of 2019 - (Applied)

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) section 5(3)(i) - (Interpreted)
2. Constitution of Kenya articles 1, 10, 23 (1); 50; 163(4)(a)(b);165(6); 239(1); 259; Schedule Sixth - (Interpreted)
3. Supreme Court Act (cap 9B) section 14 - (Unconstitutional)

Advocates

None mentioned

JUDGMENT

A. Introduction

1. This petition of appeal dated and lodged on August 28, 2020 is brought pursuant to the provisions of article 163(4)(a) of the *Constitution*. The appellant seeks to set aside the Judgment of the Court of Appeal (Makhandia, Kiage, and Murgor, JJA) in Civil Appeal No 404 of 2018 delivered on August 7, 2020 which affirmed the High Court (Mwita, J) Judgment in Constitutional Petition No 438 of 2015 delivered on September 28, 2018.

B. Background

2. The appellant and the 4th respondent have been involved in multiple and endless proceedings around the same dispute involving land ownership for a period spanning over two decades. The origin of the dispute is hereby traced as follows;-

3. Willesden Investment Ltd, the 4th respondent, as the registered proprietor of LR No 209/12748 IR No 66986 (the property) filed HCCC No 367 of 2000 Nairobi against Kenya Hotel Properties Ltd, the appellant. It sought damages for trespass and mesne profits arising from the appellant's use of the property as a parking lot, having leased it from the Nairobi City Council to which the appellant was paying rent. In a Judgment delivered on December 14, 2006, the High Court (OK Mutungi, J) awarded the 4th respondent Kshs 54,102,400 in mesne profits; Kshs 10,000,000 in general damages for trespass and; Kshs 6,000,000 for loss of business opportunity plus interest and costs.

4. The appellant appealed the High Court decision at the Court of Appeal (O'Kubasu, Onyango-Otieno & Aganyanya, JJA) in Civil Appeal No 149 of 2007. In a Judgment delivered on April 2, 2009, the Court of Appeal reduced the award by the High Court to Kshs 22,729, 800 with interest at court rates from January 1994 to the date of payment.

5. Further aggrieved by that judgment, the appellant filed an application for review of the said judgment before the Court of Appeal. The same bench that had heard the substantive appeal (O'Kubasu Onyango-Otieno and Aganyanya, JJA) delivered its ruling on September 20, 2009 partially allowing the application for review to the effect that interest on court rates would start running from September 15, 1995 and not January 1994.

6. The appellant's claim is predicated on the outcome and report by the Judges and Magistrates Vetting Board, ('The Board'). This Board was established under section 23 of the 6th schedule of the *Constitution* of Kenya that was vested with power of vetting the suitability of all serving Judges and Magistrates who were in office on the effective date of the promulgation of the *Constitution*. A complaint was lodged by the appellant against O'Kubasu JA over his handling of Civil Appeal No 149

of 2007 largely alleging bias on the part of the said Judge. In a decision issued on April 25, 2012, the Board made a determination that:

> "At the same time, the judgment, which was principally authored by the judge, contains anomalies evident from the record concerning whether arguments about the existence or otherwise of the trespass had been considered at all in the judgment; the basis on which damages were computed and the manner in which interest was to be calculated. Taken together and coupled with the judge's resolute refusal to reconsider and reflect upon what appears to be manifest incongruities, they suggest a worrying lack of capacity on the part of the judge for objective and persuasive reasoning."

7. It was this finding that partly actualized the Board's finding of unsuitability of O'Kubasu JA to continue holding the position of a judge. O'Kubasu JA filed an application for review of that decision but the Board dismissed the application on July 20, 2012, and so he stood removed as a Judge.

8. It is upon that basis of removal of the Judge as one of the members of the bench who determined Civil Appeal No 149 of 2007 that the appellant sought to have the judgment issued in Civil Appeal No 149 of 2007 annulled by claiming that its rights and fundamental freedoms were violated.

C. Litigation History

i. Proceedings of the High Court

9. The appellant filed before the High Court, Constitutional Petition No 438 of 2015. The appellant's claim was that since the Board had found O'Kubasu JA unfit to serve as a judge and he had principally authored the impugned judgment as the presiding judge, the same was an indictment and proof of judicial bias. It was thus the appellant's claim that the judgment O'Kubasu JA had presided over should be annulled for those reasons. Subsequently, the appellant sought several orders namely: that the Court of Appeal's decision in Civil Appeal No 149 of 2007 was a nullity and should have been set aside; a declaration that the applicant's right to fair hearing was infringed by the bias shown by the presiding judge in Civil Appeal No 149 of 2007; a declaration that the Court of Appeal's judgment could not stand following the removal of the Judge by the 3rd respondent; an order of *certiorari* to quash that judgment; an order directing that the appeal arising from the judgment of the High Court in HCCC No 367 of 2000 be heard de novo and a permanent injunction restraining the 1st and 4th respondents from executing the decree in HCCC No 376 of 2000.

10. In its Judgment delivered on September 28, 2018, the High Court (Mwita, J) identified and addressed one issue for consideration; whether the court had jurisdiction to grant the reliefs sought in the petition. The trial court acknowledged that article 165 of the *Constitution* grants the High Court wide jurisdiction, but noted that the *Constitution* places a constitutional caveat that the High Court cannot supervise other superior courts. The learned Judge in addition noted that though the High Court has wide jurisdiction to hear any dispute and grant appropriate relief, that the same does not translate to hearing any petition and granting any relief as sought by any party. The learned Judge held that:

> 48. Based on the above analysis, can this court answer the petitioner's grievance in the affirmative and annul a decision of the Court of Appeal taking into account the pecking order of the superior courts in this country? And can this court issue an edict to the Court of Appeal directing that court to reopen a closed appeal and hear it *de novo*? My answer to the above questions must be in the negative. If what the petitioner asks of this court were to happen, it would certainly amount to under mining the authority of the Court of Appeal by

another superior court but inferior to it. It would be against clear words of article 165(6)."

11. The learned judge further went on to consider the claim of judicial bias as raised by the appellant and noted that the appellant only raised it as a basis for the High Court to intervene and annul the judgment of the Court of Appeal merely because the appeal was presided over by O'Kubasu, JA and not any of the other two members of the Bench or the High Court decision that gave rise to the appeal before the Court of Appeal. For these reasons, the learned judge determined the petition on the basis of the issue of jurisdiction and went on to hold:

> " 60. In my view, if the petitioner believed that its fundamental rights were violated by the decision of the Court of Appeal, its cause of action would have been to file a claim for redress of infringement and violation of rights and fundamental freedoms and prove infringement and violations after which the court would consider the appropriate remedy to grant. It did not have to seek this courts assistance in annulling a decision of a superior court and direction to that court to hear the appeal afresh. That would clearly violate the constitution and breach judicial hierarchical norm. To my mind, the intention of the framers of our constitution in including article 165(6) was to confine the jurisdiction of this court to matters referred to in article 165(3), (4) and (7) even when exercising its jurisdiction under articles 22 and 23(1), (3) of the constitution in enforcing the Bill of Rights."

12. The trial court thus dismissed the petition for failing to meet the threshold for an application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom as contemplated under article 23(1) of the *Constitution*.

ii Proceedings at the Court of Appeal

13. Aggrieved, by the decision of the High Court, the appellant filed Nairobi Civil Appeal No 404 of 2018 where the issues for determination were summarized as follows:

    i. Whether the learned Judge erred in holding that he had no jurisdiction to grant the orders sought for the annulment of a judgment of the court; and

    ii. Whether he was wrong not to consider the merits of the petition.

14. On the issue of jurisdiction, the Court of Appeal agreed with the High Court that it indeed lacked jurisdiction to reverse a decision of the Court of Appeal as it lacks the jurisdiction to supervise superior courts. The appellate court added that it was unthinkable that the High Court could grant the orders the appellant sought as against the decision of a Court of Appeal to quash or annul them, or purport to direct the court to re-open and re-hear a concluded appeal. It was the court's view that the appellant was inviting the learned judge to defy constitutional barriers to the extent of his jurisdiction and tread on forbidden ground. The court in addition held that there was no error in the learned Judge's holding that he did not have jurisdiction to entertain or grant the prayers sought in the appellant's petition. Accordingly, it was the appellate court's finding that the Judge downed his tools in deference to and compliance with the express jurisdictional caveat explicit in article 165(6) of the *Constitution*.

15. With regard to the issue of whether the Board found O'Kubasu, JA biased in the handling of Civil Appeal No 149 of 2007, the Court of Appeal noted that there was no finding of bias, either actual or perceived from the determination by the Board, hence justifying the need to set aside a decision by the Court of Appeal. The appellate court noted that it was not bias that the Board found but "a worrying

lack of capacity on the part of the judge for objective reasoning." The court thus noted that this was not a case fit for setting aside a court's decision which was in any event a unanimous. The appeal was consequently dismissed.

iii Proceedings before the Supreme Court

16. Aggrieved by the judgment and orders of the Court of Appeal, the appellant has filed this petition on eight (8) grounds of appeal arguing that the learned Judges of the Court of Appeal erred in law and in fact in;

    i. Failing to consider the proceedings before the Vetting Board that led to the removal of the presiding judge in Nairobi Civil Appeal No 149 of 2007.

    ii. Refusing to hear the dispute on the merit.

    iii. Failing to consider the ratio decidendi of the Vetting Board leading to the removal of the presiding judge.

    iv. Misinterpreting and misapplying the Supreme Court decision in *Rai & Estate of Jasbir Singh Rai & 3 others v Tarlochan 4 others*.

    v. Failing to provide a lawful remedy to the appellant on account of the miscarriage of justice.

    vi. Being biased against the appellant by showing more concern about the multiple endless proceedings instead of addressing the appellant's quest for justice.

    vii. Failing to develop the law following the determination by the Vetting Board and instead focused on the chaos that would be created if judgments that led to removal of judges were set aside.

    viii. Failing to consider the constitutional tenets of a fair trial and the remedy for breach of fundamental rights following the removal of a judge by the Vetting Board.

17. The appellant now seeks the following reliefs:

    a. That the appeal do proceed by fresh hearing by evaluation of all the material facts leading to the removal of Justice O'Kubasu by the Judges and Magistrates Vetting Board on April 25, 2012 following the complaint over his handling of the appeal in Civil Appeal No 149 of 2007- *Kenya Hotel Properties v Willesden Investments Limited*.

    b. The appeal be allowed and the judgment of the Court of Appeal dated 7th August 2020 be set aside.

    c. The amended petition dated November 12, 2015 filed in the High Court in Constitutional Petition No 438 of 2015 be allowed with costs to the appellant as prayed in the following terms:

        i. A declaration that the Court of Appeal judgment dated April 2, 2009 in Civil Appeal No 149 of 2007 is a nullity and should be set aside on account of judicial bias following the removal of Justice O'Kubasu by the Vetting Board.

        ii. A declaration that the appellant's right to a fair trial under article 50 of the *Constitution* was infringed by the bias shown by the presiding judge in Civil Appeal No 149 of 2007.

        iii. A declaration that the judgment dated April 2, 2009 in Civil Appeal No 149 of 2007 cannot stand following the removal of the presiding judge by the Vetting Board and the

appeal should be retried de novo by the Court of appeal excluding Justices Makhandia, Kiage and Murgor, JJA.

iv. An order of *certiorari* be issued quashing the Court of Appeal judgment in Civil Appeal No 149 of 2007.

v. An order directing that the appeal arising from the judgment and decree of the High Court at Nairobi (Mutungi, J) dated November 14, 2006 in HCCC No 367 of 2000- *Willesden Investments Limited v Kenya Hotel Properties Limited*, be heard de novo by the Court of appeal excluding Justices Makhandia, Kiage and Murgor, JJA.

vi. A permanent injunction be issued restraining the 4th and 6th respondents, their servants or agents from executing the decree in any manner whatsoever in HCCC No 367 of 2000 and calling up the bank guarantee issued by Development Bank of Kenya Limited pending the determination of the appeal to be heard de novo by the Court of Appeal.

vii. The court be pleased to grant any further reliefs in the interest of justice in accordance with the directions of the Chief Justice and Deputy Chief Justice in the case of *Jasbir Singh Rai & 3 others v Tarlohcan Singh Rai (Estate of) & 4 others* [2013] eKLR.

viii. The costs of the appeal, in Nairobi Civil Appeal No 404 of 2018 and High Court Petition No 438 of 2015 be awarded to the appellant.

D. Parties' Submissions

a. Appellant's submissions

18. During the virtual hearing of this appeal, Mr Gichuhi learned counsel for the appellant relied on his clients written submissions dated September 6, 2021 were filed on September 9, 2021 and its supplementary submissions dated October 14, 2021 which were filed on October 19, 2021 and made extensive oral highlights of the same.

19. Firstly, counsel for the appellant postulated that the Court of Appeal failed to read, consider and evaluate the Hansard proceedings of the Board that led to the removal of O'Kubasu JA That this was not only in breach of article 1 of the *Constitution* but also affected the appellant's right to fair trial. It is furthermore the appellant's argument that a decision of a three- judge bench of the Court of Appeal cannot stand when one judge, who principally authored the judgment was removed. They submit that, O'Kubasu JA's impartiality infringed on the appellant's right to a fair trial and access to justice as guaranteed by the *Constitution*. Therefore, counsel for the appellant contends that the Court of Appeal, in appropriate circumstances, had jurisdiction to set aside its judgment and hear the appeal afresh. In that regard, the appellant relies on the South African case of *De Lacy & another v South African Post Office* [2011] ZACC 17 where the court held that an allegation of bias was a constitutional matter that should be addressed as a matter of right. The appellant also cites the Court of Appeal's decision in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited & 2 others* [2016] eKLR where the court agreed that in appropriate circumstances, the Court of Appeal had jurisdiction to set aside its judgment and hear an appeal afresh.

20. Further to the above, the appellant also submits that since O'Kubasu, JA was found biased and unsuitable to be Judge, then the entire judgment by the Court of Appeal became tainted with illegality hence unconstitutional for failing to have the requisite number of Judges as provided for under section 5(3)(i) of the *Appellate Jurisdiction Act*. That a decision of one judge cannot stand when the principal judge who authored the judgment is removed on allegations of bias. This court's decision in *Geoffrey*

M Asanyo & 3 others v Attorney General [2018] eKLR was cited in support of that proposition and where this court held that a judgment of a three-judge bench of the Court of Appeal cannot be valid if delivered by two judges.

21. Furthermore, the appellant submits the Court of Appeal failed to consider the constitutional tenets of a fair trial and breach of fundamental rights by submitting that articles 10, 50 and 259 of the *Constitution* provide the basic minimums expected of a fair trial. They also argue that a judge, having been found unsuitable to hold office, then his removal automatically leads to a nullification of judgment, with the matter having to start *de novo*. They rely on the Court of Appeal decision in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR to buttress this submission. It is also on this basis that the appellant asserts that it logically follows that the vetting process that found a judge unsuitable on account of the particular case that led to his removal must automatically lead to the nullification of the judgment and the matter be heard *de novo*.

22. It is the appellant's further submission that both superior courts erred in law by misinterpreting and applying this court's decision in the *Rai* case (*supra*) wherein, Mutunga CJ, pronounced that the remedy for injustice when a party seeks to set aside a judgment that has led to the removal of a judge by the Vetting Board was the filing of a constitutional petition before the High Court.

23. The appellant also faults the Court of Appeal judges for restricting themselves to one issue for determination; the jurisdiction of the High Court in a constitutional petition to overturn the decision of the Court of Appeal. The appellant submits in that context that, the supremacy of the courts is subordinate to the citizens' enjoyment of fundamental rights and freedoms and the same cannot be applied in such a rigid manner so as to curtail the guaranteed rights and freedoms under the Constitution. To support this argument, the appellant cites the decision of the East African Court of Justice (EACJ) in the case of *Martha Karua v Attorney General of the Republic of Kenya & 2 others*, Reference No 20 of 2019 where the court held that in providing the balance between procedural law and protection of fundamental freedoms, the Constitution of Kenya has already set the trajectory to be taken which is enshrined in articles 10, 48, 159 and 259.

24. The appellant also argues that the superior courts failed to adhere to article 259 of the *Constitution* which obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the rule of law, human rights and fundamental freedoms in the bill of rights and contribute to good governance'. It is their argument in that regard that this approach has been described as 'a mandatory constitutional canon of statutory and constitutional interpretation'. Consequently, the duty to adopt an interpretation that conforms to article 259 is mandatory. For these propositions the appellant cites the High Court cases of *Federation of Women Lawyers in Kenya (FIDA) v Attorney General & another* [2018] eKLR and *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR.

25. In an attempt to demonstrate that the Court of Appeal deviated from the merits of the case, it is the appellant's argument that the court repeatedly castigated it for dragging on the dispute for years in court yet the appellant, like any other individual with rights guaranteed under the Constitution, has the freedom to fight for justice. The appellant therefore submits that it cannot be blamed for the multiplicity of proceedings when the Supreme Court in the *Rai* case developed the law by providing judicial directional guidance.

26. The appellant furthermore affirms that section 14 of the *Supreme Court Act* provided a special jurisdiction to the Supreme Court to re-open and review judicial decisions of judicial officers found unsuitable to hold office, provided that the said decisions were the basis for their removal from office; and that, while this court in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others*;

SC Application No 2 of 2011; [2012] eKLR, '*Samuel Kamau Macharia* Case' delivered a pertinent ruling declaring section 14 aforesaid as unconstitutional in so far as it purported to review decisions of judicial officers who were removed by the Vetting Board on account of those decisions ,it did not nonetheless close the window for aggrieved parties.

27. In addition, the appellant submits that the learned High Court Judge misapprehended the essence of judicial bias by finding that O'Kubasu, JA was not a party to the proceedings to answer to the question of judicial bias. The appellant decries that the learned Judge failed to consider that the findings of the Vetting Board were final and not subject to any appeal whatsoever. Hence, in that regard there was absolutely no legal requirement to make the judge a party to the proceedings. He submits that it was an unfortunate misdirection especially when article 25(c) of the *Constitution* expressly provides that the right to fair trial cannot be limited.

28. Lastly, the appellant asserts that when the Supreme Court directed that the High Court had jurisdiction to deal with the aspect of fundamental rights when faced with a constitutional petition seeking justice, the learned High Court judge abdicated his oath of office by failing to render justice and fairness in a petition that was sui generis. For these reasons, the appellant urges this court to allow its appeal.

1st and 3rd Respondents Submissions

29. The 1st and 3rd respondents' submissions are dated September 17, 2021 and filed on November 25, 2021. Therein, they address one key issue of determination: whether the learned judges erred in failing to consider the import of the proceedings before the Vetting Board that led to the removal of the O'Kubasu, JA. It is their submission in that context that the superior courts did not err in failing to consider the proceedings before the Vetting Board. They contend instead that the Court of Appeal did not need to go into the merits of the petition at the High Court because the issue of jurisdiction is what had been raised before the High Court. In this regard, they submit that when an issue of jurisdiction is raised in any court of law, it must first be determined before other issues are considered. That the jurisdiction of the High Court as stipulated in the Constitution does not in any event include power to review and entertain any application to nullify a decision of the Court of Appeal, which principle they argue, the Court of Appeal equally recognized. They thus submit that the High Court and Court of Appeal had no business looking into the evidence when the issue of jurisdiction had been raised.

30. They however argue that though O'Kubasu JA was found unfit to serve as a judge by the Vetting Board, the said decision was not solely based on Civil Appeal No 149 of 2007 as there were other factors that were considered before the said Judge was removed. It is their view therefore that the decision that was delivered by the Court of Appeal on April 2, 2009 was in good faith and should not attract other proceedings. Moreover, they submit that the appellant had failed to prove by way of material evidence how there was bias on the part of the presiding judge. In this regard they cite the Court of Appeal case of *Kaplana H Rawal v Judicial Service Commission & 2 others* [2016] eKLR to support their submission. They urge this court to uphold the judgement of the Court of Appeal and dismiss the instant petition for the above reasons.

4th Respondent's Submissions

31. The 4th respondent submissions are dated September 30, 2021 and filed on October 5, 2021. They begin by submitting that prior to the institution of this appeal on October 14, 2020, the appellant had also filed Civil Application No E003 of 2020 at the Court of Appeal seeking inter alia that the court should certify the intended appeal from the judgment in Civil Appeal No 149 of 2007 as a matter of general public importance and; that the appellant never deemed it right to obtain certification before

filing the present petition in as much as it alleges that the matters are related. They thus submit that this matter does not create a healthy envirIt therefore contends that this matter is not properly before this court for want of certification and it ought to be struck out with costs.

32. Alternatively, it submits that should this court be of the opinion that the matter presented did not require certification, it prays that this court finds that the appellant has not demonstrated sufficient grounds to warrant it to depart from the decisions in the *Samuel Kamau Macharia* case and the *Rai* case where it held that it did not have the jurisdiction conferred by section 14 of the *Supreme Court Act* thus declaring the said provision unconstitutional.

33. The 4th respondent also contends that the petition does not elucidate a justiciable dispute capable of being determined by this court and that it is moot and collusive coupled with fabricated allegations of violation of human rights. They argue further that the petition is collusive as it is instituted in bad faith aimed at frustrating the 4th respondent's right to immediate realization of the fruits of its judgment and moot for it does not illuminate a justiciable cause of action.onment for invoking the inherent powers of this court in allowing the petition. In support of its argument, it heavily relies on the decision by this court in *Kenya Hotel Properties Limited v Attorney General & 5 others*, SC Application No 27 of 2020; [2020] eKLR, where this court, while determining the appellant's application for stay of execution, stated as follows:

> 30. On public policy, it is now obvious that we are disinclined to agree with the applicant in its quest not to realise that even if we were to agree with it on any part of its complaint, reopening Civil Appeal No 147 of 2007 is not an action that this court or indeed any other court can undertake. Once the Court of Appeal finalized the review of that Judgment, the matter came to an end, the Vetting Board proceedings notwithstanding. Remedies available to the applicant lie elsewhere than in such an action and we shall address such remedies, if any, at the hearing of the appeal."

34. On the allegations of bias, the 4th respondent contends that although the appellant claims that O'Kubasu, JA was biased, it has not attacked the other members of the bench who played a major role in coming up with the decision and therefore no allegation of breach of fundamental rights is capable of being remedied by this court.

35. On the right to fair hearing, the 4th respondent submits that all parties in Civil Appeal No 149 of 2007 and Constitutional Petition No 438 of 2015 were afforded a fair hearing and given the chance to be heard and to argue their respective cases and therefore to say that, because O'Kubasu, JA was removed by the Vetting Board and the decision made by him in the matter was not in favour of the appellant, does not mean that it was not accorded a fair hearing. That therefore its submissions in that regard are completely ludicrous, unreasonable and misguided and a tactic aimed at re-opening a concluded case.

36. On the allegations that the Court of Appeal bench in the impugned appeal was not quorate, the 4th respondent submits that the matter was determined by a three-judge bench (O'Kubasu, Onyango Otieno & Aganyanya, JJA) and their decision cannot be severed unjustifiably to blaming one judge and sanitise the others. Consequently, it is their submission that the claim by the appellant that a decision by a three-judge bench of the Court of Appeal cannot stand when one judge is removed is not only absurd but false as all the judges in the case were considered competent and capable of writing the said judgment otherwise, they would not have been appointed as appellate judges.

37. Finally, the 4th respondent is emphatic that litigation must come to an end as this matter has gone back and forth in very many courts over the same issues and the decisions by different courts has always been

to annul the prayers sought by the appellant. They thus submit that the present appeal is just but an attempt by the appellant to re-open a case that has already been finalized and there are no novel issues arising out of the appeal requiring our intervention. In view of the foregoing, they urge this court to dismiss the appeal and find the same to be frivolous and an abuse of the court process.

5th Respondent's Submissions

38. The 5th respondent submissions are dated September 23, 2021 and filed on November 4, 2021. Therein, they begin by submitting that the crux of the dispute ultimately turns on the legality of the title held by the 4th respondent in LR No 209/12748 IR No 66986 and that this would be the proper context for this petition to be determined. However, the 5th respondent recognizes that the said dispute is not for this court to determine but is within the purview of the Environment and Land Court (ELC). To put this averment into perspective, it gave a brief background as follows: that shortly after an award was made in HCCC No 367 of 2000 (the impugned award) which essentially is the subject of the order appealed from, the 5th respondent filed ELC Suit No 35 of 2010 *Kenya Anti- Corruption Commission v Willesden Investments Limited & 7 others* [2019] eKLR in the then Environment and Land Division of the High Court; that that case was dismissed on account of res judicata but reinstated by the Court of Appeal in *Kenya Anti- Corruption Commission v. Willesden Investments Limited & 7 others*, Civil Appeal No 325 of 2013; [2019] eKLR. Thus, it is the 5th respondent's case that the issue of legality of title to the parcel of land out of which the impugned award was made, is challenged, is awaiting determination and further, that in a ruling delivered on February 11, 2015, the Environment and Land Court in ELC Suit No 35 of 2010 recognized that the 5th respondent had raised serious issues on the legality of the 4th respondent's title and which required determination by that court.

39. The 5th respondent is also of the view that the High Court dismissed the appellant's petition purely on the issue of want of jurisdiction and on account of judicial hierarchical norm. It is upon this basis that they submit that this petition would not fit the category of cases that this court, as the apex court, is called upon to exercise its inherent jurisdiction and do justice in the circumstances and provide a remedy serving public policy and interest. It relies on *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR to support this position.

40. In conclusion, the 5th respondent urges this court not to invoke its inherent jurisdiction by granting any relief in the interest of justice as sought in the petition so that in light of the pending suit in ELC No 35 of 2010, this court may not in the ultimate produce results which may appear arbitrary and unjust.

E. Analysis and Determination

41. Having considered the respective parties' pleadings and submissions in the instant petition, this court is of the considered view that the issues arising for determination are:

    i. Whether the High Court had the jurisdiction to grant reliefs sought by the appellant

    ii. If not, what other remedies are available to the appellant?

42. We shall determine each issue separately as here below:

i Jurisdiction

43. Following the above, it is evident that the real issue in controversy before this court is the finding by the High Court that it lacked jurisdiction to grant the constitutional reliefs sought by the appellant in Constitutional Petition No 438 of 2015. The jurisdiction of the High Court to determine the petition was challenged primarily on the premise that the appellant sought to have the High Court annul the

decision in Civil Appeal No 149 of 2009 that was delivered by the Court of Appeal which is a court superior to the High Court. It would in that context be best to repeat the reliefs sought before the High Court for emphasis:

1. A declaration that the Court of appeal judgment dated April 2, 2009 in Nairobi Civil Appeal No 149 of 2007- *Kenya Hotel Properties v Willesden Investments Limited* is a nullity and should be set aside on account of judicial bias following the removal of the Judge of appeal Emmanuel Okelo Okubasu by the Judges and Magistrates Vetting Board on April 25, 2012 following a complaint over his handling of the appeal.

2. A declaration that the petitioner's right to a fair trial under article 50 of the *Constitution* was infringed by the bias shown by the presiding judge in Nairobi Civil Appeal No 149 of 2007- *Kenya Hotel Properties v Willesden Investments Limited*.

2. A declaration that the judgment dated April 2, 2009 in Nairobi Civil Appeal No 149 of 2007- *Kenya Hotel properties v Willesden Investments Limited* cannot stand following the removal of the presiding judge by the judges and Magistrates Vetting Board on April 25, 2012 and the appeal should be retried de novo by the court of appeal.

44. The issue faced by the High Court was therefore not on whether the court had jurisdiction to entertain a constitutional petition and its dispensation, but on whether the High Court had the jurisdiction to set aside a Judgment issued by the Court of Appeal as well as to order the Court of Appeal to try an appeal *de novo*.

45. The appellant argues that the High Court erred in finding that it lacked jurisdiction to grant the orders sought and erred in failing to determine the petition on the its merits. The appellant also faults the Court of Appeal for upholding the High Court's judgment, arguing that the supremacy of the courts is subordinate to the citizens' enjoyment of fundamental rights and freedoms and the same cannot be applied in such a rigid manner and to curtail the guaranteed rights and freedoms under the Constitution.

46. The High Court, in determining the matter before it, acknowledged the wide powers conferred to the court under articles 239(1) and 165(3) of the *Constitution* to address violation, infringement and/or a threat to a right or fundamental freedom and stated thus in that regard:

> " 38. Article 165(3) of the *constitution* confers on this court with very wide jurisdiction to deal with any matter that falls within its jurisdiction. That jurisdiction is not exhaustive given that article 165(3)(e) states that the court can have any other jurisdiction, original or appellate, conferred on it by legislation. In terms of article 165(3)(d)(ii), the court has jurisdiction to determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the *constitution*. article 23(1) also states that the court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. This jurisdiction is to be exercised in accordance with article 165 of the *Constitution*. Article 23(3) of the *constitution* undoubtedly confirms the extent of the width of the jurisdiction of this court to grant appropriate relief."

47. The High Court however noted that such supervisory power is only limited to a jurisdiction over the subordinate courts but not over a superior court. It opined in that context as follows:

> "46. Turning to the facts of this petition, the judgment sought to be annulled is by the Court of Appeal. It is therefore not in dispute that the impugned judgment is by a court superior to this court in terms of judicial hierarchy. It is a judgment binding on this court in terms of precedent. From the jurisdictional perspective of article 165 of the *constitution*, this court has wide jurisdiction which is exhaustively provided for by the *constitution*. However, the *constitution* itself places a constitutional caveat that this court cannot supervise other superior courts.
>
> 47. Article 165(6) states in plain language that this court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial junction but not over a superior court. Superior courts in terms of article 162(1) of the *Constitution* are the Supreme Court, the Court of Appeal, the High Court and courts of equal status namely; the Employment and Labour Relations Court and the Environment and Land Court. The edict in article 165(6) is in form of a constitutional limitation imposed on this court not to do anything that would amount to supervising or superintending other superior courts.
>
> 48. Based on the above analysis, can this court answer the petitioner's grievance in the affirmative and annul a decision of the Court of Appeal taking into account the pecking order of the superior courts in this country? And can this court issue an edict to the Court of Appeal directing that court to reopen a closed appeal and hear it *de novo*? My answer to the above questions must be in the negative. If what the petitioner asks of this court were to happen, it would certainly amount to under mining the authority of the Court of Appeal by another superior court but inferior to it. It would be against clear words of article 165(6)."

48. It is on the above analogy that the High Court declined to assume jurisdiction and determine the appellant's petition.

49. Similarly, the Court of Appeal in agreeing with the High Court, noted the absurdity of asking a High Court to purportedly re-open a decision of the Court of Appeal, noting that no such jurisdiction exists by holding:

> "Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of article 165(6) is supervise superior courts.
>
> Moreover, under article 164(3) of *the Constitution*, this court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could

make the orders the appellant sought as against a decision of this court to quash or annul them, or that it could purport to direct this court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing.

It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere."

50. On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In *R v Karisa Chengo* [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;

> "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

51. We have to reiterate at this point that Civil Appeal No 149 of 2007 was conclusively determined on April 2, 2009 and that judgment still stands save for the review judgment issued on November 20, 2009 that altered the dates of interest. Similarly, the High Court judgment in HCCC No 367 of 2000 still stands and the appellant has also not sought any orders to have this judgment impugned. The appellant is therefore asking this Court to make its determination based on proceedings brought under the *Constitution* where the decision of the Vetting Board is the basis for its main argument that the judgment by the Court of Appeal in Civil Appeal No 149 of 2007 was obtained through alleged bias or impropriety on the part of O'Kubasu JA despite the appellant not having any complaints against the other two Judges of the Court of Appeal who determined Civil Appeal No 149 of 2007 (Onyango-Otieno and Aganyanya JJA).

52. The appellant in that regard is therefore asking us to make a determination on whether a decision rendered by a Judge removed by the Vetting Board for impropriety should be left to stand or should be overturned. The appellant strongly urges this point by relying on the concurring opinion by Mutunga CJ, in *Jasbir Singh Rai* that the appellant can obtain the said reliefs sought before the High Court where the right to a fair trial is denied because of the misconduct of Judges who voluntarily or involuntarily left the Bench. The learned Chief Justice had held:

> " Article 10 of the *Constitution* requires Parliament to be non-discriminatory when it enacts laws. Parliament violated article 10 when it enacted section 14 of the *Supreme Court Act* because it limited the remedy of a new trial only to those who could prove that the Judge in their case had been removed, retired or resigned on the basis of their complaints. The right to a fair trial, however, applies to everyone, not just those who were denied the right because of the misconduct of Judges who then voluntarily or involuntarily left the bench. It also applies to those litigants whose rights were violated even though their respective Judges had been found suitable by the Judges and Magistrates Vetting Board, or who did not have to be vetted

under the Act. If the right to a fair trial belongs to everyone, the remedy must also belong to everyone. Therefore, based on the provisions of article 10 that promote and protect the principle on non-discrimination and the equal protection afforded by article 27, I find no basis for this discrimination and I would have declared section 14 unconstitutional."

53. It is on this finding that the appellant strongly argues that the reliefs sought in his constitutional petition can be purportedly issued by the High Court in an attempt to have the High Court overturn a final decision of the Court of Appeal. Needless to say, this cannot be any closer to the truth. Our Constitution cannot by any stretch of imagination mold itself to issue the reliefs sought by the appellant. In the Samuel Kamau Macharia case, this court declared section 14 of the *Supreme Court Act* unconstitutional, for the sole reason that it sought to confer special jurisdiction to the Supreme Court to review a judgment or decision of a judge who has been removed, resigned or retired from office. The court specifically stated:

> "(65) In the instant case, we find that a final Judgment by the highest court in the land at the time vested certain property rights in, and imposed certain obligations upon the parties to the dispute. We hold that article 163(4)(b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of *Constitution*".

54. Again, we reiterate that this finding applies emphatically to this case because, though this court categorically found that article 163(4)(b) does not confer the Supreme Court with the jurisdiction to entertain appeals from the Court of Appeal before the coming into force of the 2010 Constitution, the same principle applies in that the High Court cannot and does not have any jurisdiction to reopen cases finalized by the Court of Appeal, which was the apex court at the time. Mutunga CJ, in his concurral opinion in *Rai v Rai* indeed acknowledged that the *Constitution of Kenya 2010* may address any injustice with the High Court having jurisdiction under article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill or Rights. It was his finding that:

> "[110] As stated above, the Supreme Court of India has the power to redress all violations of fundamental rights. The High Court of Kenya has similar jurisdiction. This jurisdiction has been donated to the High Court under articles 23 and 165(3)(b) of the *Constitution*:
>
> > "23. (1) The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights".
>
> [111] Therefore, while accepting Senior Counsel Nowrojee's contentions that there have been injustices in this case, the choice of forum is in question. The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental right (articles 23 as read with article 165 of the *Constitution*). The High Court, on this point, has correctly pronounced itself in a Judgment by Justices Nambuye and Aroni, in *Protus Buliba Shikuku v R,* Constitutional Reference No 3 of 2011, [2012] eKLR.

[112] The Shikuku case fell within the criminal justice system; it involved a claim of violation of the petitioner's fundamental rights by the Court of Appeal, in a final appeal. The trial court failed to impose against the petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned Judges, relying on articles 20, 22 23 and 165 of the *Constitution* rightly held that the High court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated with approval the dicta of Shield J, interpreting the provisions of the 1963 Constitution in *Marete v Attorney General* [1987] KLR 690:

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

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

55. We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher courts than itself to start *de novo*, especially on appeals that have been finally concluded by the highest court at the time. Furthermore, the concurrence by Mutunga SCJ cannot override the judgment by the majority, despite what the appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves. Again, we take cognizance of our finding in the *Samuel Kamau Macharia* case where we held that:

> "A court 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 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." (emphasis supplied)

56. Furthermore, and more fundamentally, we reiterate what we stated in *Kenya Hotel Properties Limited v Attorney General & 5 others*, SC Application No 27 of 2020; [2020] eKLR on the appellant's application for stay of execution that the decisions by the Vetting Board cannot and should not be elevated to supra-judicial pronouncements that would have the effect of setting aside every decision made by a judge who was removed for impropriety.

57. The appellant, having exercised his right of appeal (albeit unsuccessfully) to a higher court, in this case, the Court of Appeal, cannot proceed to launch an attack upon a judgment of the Court of Appeal, by making an application for redress under article 23 of the *Constitution* to the High Court, another

superior court nonetheless, but one inferior to the court that delivered such judgment. To allow such an action, would in the view of this court be quite subversive to the principle of rule of law as enshrined in our Constitution.

58. The appellant also seeks to rely on the South African decision in *Brian Patrick De Lacy & another v South African Post Office* [2011] ZACC 17, where the South African Constitutional Court in its judgment held that a complaint of perceived judicial bias is a constitutional matter calling for intervention of the constitutional court as well as the English decision of *Marbury v Madison* 5 US 137 where the court held that there was no injustice that courts could not cure as there can be no right without a remedy.

59. The two cases cannot apply in this regard because though the courts found bias to amount to a breach of constitutional rights, the inferior courts were not asked to set aside the judgments made by superior courts, the Vetting Board proceedings notwithstanding and we have explained why.

60. To our minds, the principle of finality in litigation is relevant, more so in this appeal. There must be an end to litigation and it is intolerable that litigants could be allowed to approach courts to reconsider final orders made in judgments by a superior court in the hierarchy of courts and to have such final judgments re-opened.

61. In light of this, we find no justifiable fault in the decision of the appellate court affirming the trial court's decision.

62. Consequently, the appeal stands dismissed.

ii Appropriate Remedies

63. As was noted by the Court of Appeal, the issue of jurisdiction and appropriate remedies are one and intertwined. This is so because having found that the High Court lacked jurisdiction to determine the petition, we ask ourselves, what other remedies are available to the appellant at this point? Again, as we have quite succinctly explained above, once the Court of Appeal finalized the review judgment, the matter came to an end, the proceedings from the Vetting Board notwithstanding. Any remedies available to the appellant, lie elsewhere than in this appeal.

64. In any event the appellant has filed before the Environment and Land Court ELC Suit No 35 of 2010 and the ELC did recognize in an interlocutory ruling that the 5th respondent had raised triable issues regarding the legality of the title issued to the 4th respondent. In our considered view that is where the appellant who claims there was a violation of fundamental rights as persistently agitated can be ventilated. We see no other remedy available to the appellant in the matter before us and we so hold.

65. On costs, the dispute has come to end before us after decades of incessant litigation before the superior courts below. It is best that we exercise discretion and order each party to bear its costs.

D. Orders

66. Flowing from above, the final orders are that:

    i. The petition of appeal dated and filed on August 28, 2020 is hereby dismissed.

    ii. Each party shall bear its costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

.....

M.K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I.LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA