Case Number:	Petition No 284 of 2012
Date Delivered:	19 Sep 2013
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Isaac Lenaola
Citation:	Commission on Administrative Justice v Attorney General & another [2013] eKLR
Advocates:	Mr. Mwihuri holding brief for Mr. Regeru for Interested Party Mr. Wamotsa for Respondent
Case Summary:	***Constitutional Law –*** *constitutionality of statutory provisions – constitutionality of sections 16(1) & 2(b) and 23(2) of the Supreme Court Act – claim that sections 16(1) & 2(b) and 23(2) of the Supreme Court Act were ultra vires the Constitution of Kenya, 2010 – where the Supreme Court had previously held that sections 16(1) & 2(b) were not ultra vires the Constitution of Kenya, 2010 – where the High Court held that additional words not considered by the Supreme Court in its previous ruling regarding the constitutionality of section 16(2)(b) of the Supreme Court Act, rendered the section ultra vires the Constitution of Kenya – where the Supreme Court previously settled the issue of the constitutionality of section 23(2) of the Supreme Court Act – Supreme Court Act, sections 16(1) & 2(b) and 23(2)* ***Jurisdiction*** *– jurisdiction of the High Court to hear any question on the interpretation of the Constitution – jurisdiction of the High Court to determine the legality and/or constitutionality of any legislation – constitutionality of sections 16(1) & 2(b) and 23(2) of the Supreme Court Act – claim that sections 16(1) & 2(b) and 23(2) of the Supreme Court Act were ultra vires the*

Constitution of Kenya – where the High Court determined that the additional words not considered by the Supreme Court in its previous ruling regarding the constitutionality of section 16(2)(b) of the Supreme Court Act rendered that section ultra vires the Constitution of Kenya, 2010 - Constitution of Kenya, 2010, article 165(3)(d)(i); Supreme Court Act, 2011 sections 16(1) & 2(b) and 23(2)

Brief Facts:

The Commission on Administrative Justice (the Petitioner) filed a petition challenging the constitutionality of sections 16(1) & (2)(b) and 23(2) of the Supreme Court Act, 2011, submitting that those sections were *ultra vires* the provisions of article 163 of the Constitution.

The Petitioner contended that section 16(1) & (2)(b) of the Supreme Court Act purported to unilaterally and unconstitutionally extend the appellate jurisdiction of the Supreme Court to include areas where the Court was satisfied that the matter was in the interest of justice and where substantial miscarriage of justice may have occurred, which were situations that were not contemplated by the Constitution. The Petitioner submitted that as a matter of fact the Constitution only recognized a matter of general public importance as the basis for admission of an appeal for hearing by the Supreme Court.

The Petitioner further took issue with the composition of the bench of the Supreme Court for purposes of its proceedings, arguing that whereas the Supreme Court Act under section 23(2) provided that any two or more judges of the Supreme Court may act as the Court, the Constitution provided for a composition of five judges. The Petitioner submitted that the unwritten principle was that at no time should the Supreme Court have an even number of judges, and that to that extent any legislation that created a bench of two judges in the Supreme Court was unconstitutional.

The petitioner finally submitted that once the substantive provisions of an Act were declared unconstitutional, any rule(s) that was made

pursuant to those provisions should suffer the same fate.

Issues:

i. Whether the addition of the words 'substantial miscarriage of justice' under section 16(1) and (2)(b) of the Supreme Court, 2011 was an affront to article 163 (4)(b) of the Constitution to the extent that it added to the jurisdiction of the Supreme Court to determine appeals where the Court was satisfied that it was in the interests of justice for the Court to hear and determine the proposed appeal or where a substantial miscarriage of justice may have occurred or may occur unless the Appeal was heard.

ii. Whether section 23(2) of the Supreme Court Act was *ultra vires* the Constitution to the extent that it provided that any two judges could act as the Court.

iii. Whether the consequent provisions of the Supreme Court Rules namely Rules 17, 41, 42 and 43 were unconstitutional.

Relevant Provisions of the Law

Supreme Court Act

Section 16

(1) The Supreme Court shall not grant leave to appeal to the Court unless it is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal.

(2) It shall be in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—

(a) the appeal involves a matter of general public importance; or

(b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.

(3) The Supreme Court shall not grant leave to

appeal against an order made by the Court of Appeal or any other court or tribunal on an interlocutory application unless satisfied that it is necessary, in the interests of justice, for the Supreme Court to hear and determine the proposed appeal before the proceedings concerned is concluded.

(4) The Supreme Court may grant leave to appeal subject to such conditions as it may determine.

(5) The Supreme Court may, on application, vary any conditions imposed under subsection (4) if it considers it fit.

Section 23

(1) For the purposes of the hearing and determination of any proceedings, the Supreme Court shall comprise five Judges.

(2) Any two or more judges of the Supreme Court may act as the Court—

(a) to decide if an oral hearing of an application for leave to appeal to the Court should be held, or whether the application should be determined solely on the basis of written submissions; or

(b) to determine an application for leave to appeal to the Court.

Constitution of Kenya, 2010

Article 163

1. The Supreme Court shall have—

a. exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140; and

b. subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from—

1. the Court of Appeal; and

2. any other court or tribunal as prescribed by national legislation.

3. Appeals shall lie from the Court of Appeal to the Supreme Court—

a. as of right in any case involving the interpretation or application of this Constitution; and

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

Held:

1. Section 16 of the Supreme Court Act introduced the words ' in the interest of justice' and 'substantial miscarriage of justice' over and above that of 'a matter of general public importance'. The meaning attributed to the term 'a matter of general public importance' was settled by the Supreme Court in the *Hermanus Phillipus Steyn* case, but the term 'in the interest of justice' was never addressed.

2. Section 16(2) used the word *'or'* denoting that *'substantial miscarriage of justice'* as an alternative to proof of *'a matter of general public importance' a*s a criteria for leave to appeal to the Supreme Court. From the reading of section 16 of the Supreme Court Act, the addition of the words '*a substantial miscarriage of justice'* granted the Supreme Court an extra criteria and jurisdiction to hear and determine applications for leave to appeal to that court. In that instance, section 16(2)(b) was unconstitutional.

3. The constitutionality of section 23 of the Supreme Court Act was settled as the argument that two judges of that Court could not constitutionally constitute a panel for the purposes of determining certain matters that may be placed before it was dismissed in the case of *Rai v Rai* Petition No4 of 2012.

4. The consequent provisions of the Supreme Court Rules, namely Rules 17, 41, 42 and 43 were unconstitutional as they all arose from section 14 of the Supreme Court Act, which had been declared unconstitutional.

Section 16(2)(b) of the Supreme Court Act 2011 declared to be ultra vires the Constitution, 2010 to the extent that it added to the jurisdiction of the Supreme Court to determine appeals where the Court was satisfied that a substantial miscarriage of justice may have occurred or may occur unless the appeal was heard.

Cases:

East Africa;

1. *Erad Supplies & General Contractors Ltd v National Cereals and Produce Board* Petition No 5 of 2012– (Explained)
2. *Macharia, Samuel Kamau & another v Kenya Commercial Bank Limited & 2 others* Petition No 2 of 2012 – (Explained)
3. *Murang'a Bar Operators & another v Minister of State for Provincial Administration and Internal Security & 2 others* Petition No 3 of 2011 – (Followed)
4. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012 – (Explained)
5. *Steyn, Hermans Phillipus v Giovanni Guecchi Ruscone* Application No 4 of 2012 – (Followed)

India;

6. *Hamrardda Wakhama v Union of India* [1960] AIR 554 – (Followed)

Canada;

7. *Republic v Big M Drug Mart Ltd* [1985] I SCR 295; 18 DLR 321 – (Followed)

Statutes:

East Africa;

	1. Constitution of Kenya, 2010 articles 23, 47, 59(4); 159(2)(a)(b)(d); 160(1); 161; 163(2)(3)(4)(b)(5)(7)(9); 165(1)(3)(d)(i)(5)(a); 258(1)(2); 259(1) of the – (Interpreted) 2. Constitution of Kenya, 2010 section 23 – (Interpreted) 3. Supreme Court Act, 2011 (Act No 7 of 2011) sections 14(1); 16(1)(2)(b); 23(2) – (Interpreted) 4. Supreme Court Rules, 2012 (Act No 7 Sub Leg) rules 17, 41, 42, 43– (Unconstitutional) **Texts & Journals:** 1. Garner. BA., (Ed) (2004) *Black's Law Dictionary*, West Group 8th Edn p 1019
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.284 OF 2012

BETWEEN

COMMISSION ON ADMINISTRATIVE JUSTICE.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

AND

LAW SOCIETY OF KENYA.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner is a Commission established pursuant to **Article 59(4)** of the **Constitution** as read with the provisions of the **Administrative Justice Act, No.23 of 2011** and in its Petition dated 6th July 2012, it raises the following questions for determination;

*i) Whether **Section 14(1)** of the **Supreme Court Act, 2011** is ultra vires **Article 163(3), (4)** and **(5)** of the **Constitution** to the extent that it arrogates new or extended jurisdiction other than that contemplated under the Constitution.*

*ii) Whether **Section 16(1)** and **(2) (b)** of the **Supreme Court, 2011** is ultra vires **Article 163** of the **Constitution** to the extent that it adds to the jurisdiction of the Supreme Court to determine appeals where the Court is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal or where a substantial miscarriage of justice may have occurred or may occur unless the Appeal is heard.*

*iii) Whether **Section 23(2)** of the **Supreme Court Act** is ultra vires the Constitution to the extent that it provides that any two judges may act as the Court.*

*iv) whether the consequent provisions of the **Supreme Court Rules** namely **Rules 17, 41, 42 and 43** are unconstitutional.*

Case for the Petitioner

2. The Petitioner filed written submission on 7/5/2013 and its case is as follows;

3. That it has an obligation and the standing under **Articles 159(2)(d) and 258(1)** and **(2)** of the **Constitution, 2010** to bring the present proceedings and that under **Article 165(1)(d)** of the said **Constitution**, the High Court has jurisdiction to hear and determine whether any law is inconsistent with or in contravention of the Constitution.

4. That the Supreme Court is created by **Article 163** of the **Constitution** and under **Article 163(9),** Parliament is granted the power to make further provision for the operationalisation of the Court but Parliament in doing so, has no powers to expand the constitutional jurisdiction of the Court and that any legislation enacted in that regard should not depart from the jurisdiction specifically conferred by the Constitution.

Article 14 of the Supreme Court Act

5. The Petitioner has admitted that the constitutionality or otherwise of the above Article was settled on 23/10/2012 by the Supreme Court when it declared as follows;

"Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer "special jurisdiction" upon the Supreme Court, contrary to the express terms of the Constitution. Although we have a perception of the good intentions that could have moved Parliament as it provided for the "extra" jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article163 of the Constitution, or under Section 23 of the Sixth Schedule on "Transitional Provisions."

The above finding was made in the case of **Samuel Kamau Macharia & Anor vs Kenya Commercial Bank Limited & 2 Others, Petition No.2 of 2012.**

I need not go further than stating that this Court is bound by the decision of the Supreme Court by dint of **Article 163(7)** of the **Constitution** which states as follows;

"***All courts, other than the Supreme Court, are bound by the***

decisions of the Supreme Court. "

6. There is nothing more to say and the first question, for avoidance of doubt, must therefore be answered in the affirmative and **Rule 17** of the **Supreme Court Rules** like **Section 14** aforesaid are

declared to be unconstitutional.

Section 16(1) and (2) (b) of the Supreme Court Act

7. **Section 16** of the **Supreme Court Act** provides as follows;

"(1) The Supreme Court shall not grant leave to appeal to the Court unless it is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal.

(2) It shall be in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—

(a) the appeal involves a matter of general public importance; or

(b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.

(3) The Supreme Court shall not grant leave to appeal against an order made by the Court of Appeal or any other court or tribunal on an interlocutory application unless satisfied that it is necessary, in the interests of justice, for the Supreme Court to hear and determine the proposed appeal before the proceedings concerned is concluded.

(4) The Supreme Court may grant leave to appeal subject to such conditions as it may determine.

(5) The Supreme Court may, on application, vary any conditions imposed under subsection (4) if it considers it fit."

8. The Petitioner's complaint in this regard is that the provisions above purport to unilaterally and unconstitutionally extend the appellate jurisdiction of the Supreme Court to include areas where the Court is satisfied that the matter is in the *"interests of justice"* and *"where a substantial miscarriage of justice may have occurred or may occur"* which are situations that were and are not contemplated by the Constitution. That in fact the Constitution only recognises *"a matter of general public importance"* as the basis for admission of an appeal for hearing by the Supreme Court and therefore the wide powers given by the Act are ultra vires **Article 163(4)** of the **Constitution** and to that extent are unconstitutional and should be so declared.

Section 23 of the Supreme Court Act

9. **Section 23** of the **Act** provides as follows**;**

"(1) For the purposes of the hearing and determination of any proceedings, the Supreme Court shall comprise five Judges.

(2) Any two or more judges of the Supreme Court may act as the Court—

(a) to decide if an oral hearing of an application for leave to appeal to the Court should be held, or whether the application should be determined solely on the basis of written submissions; or

(b) to determine an application for leave to appeal to the Court."

10. The Petitioner takes issue with the above provision and submits that under **Article 163(2)** of the **Constitution**, the Supreme Court *"shall be properly constituted for purposes of its proceedings if it is composed of five judges.*" That the unwritten principle in that regard is that at no time should the Court have an even number of judge and to that extent any legislation that creates a bench of two judges in the Supreme Court is unconstitutional and should be so declared.

Rules 17, 41, 42 and 43 of the Supreme Court Rules

11. The above **Rules** all flow from the impugned **Section 14** of the **Supreme Court Act** but for clarity of issues, they provide as follows;

"Rule 17

(1) The Court may in proceedings under Section 14 of the Act call for fresh evidence.

(2) A party seeking to adduce fresh, evidence under this rule, may apply orally in Court.

(3) The Court may call for or receive from any Court or Tribunal any record on any matter connected with the proceedings before it."

"Rule 41

(1) An application under Section 14 of the Act, shall be by petition in Form D set out in the First Schedule.

(2) The applicant shall serve the petition upon the Attorney- General and the parties to the proceeding in which the judgment or decision was made.

"Rule 42

(1) The Court may, on its own motion, call for any judgment or decision made by a judge who has resigned or has been removed form office and upon hearing the parties review the judgment or decision.

(2) The Registrar shall issue a notice, to the Attorney-General and the parties to the proceedings in which the judgment or decision was made, inviting them to attend the Court for directions as to the mode and date of hearing."

"Rule 43

A two Judge Bench shall, before hearing the petition under this part, conduct a preliminary inquiry to determine the admissibility of the matter inviting them to attend the Court for directions as to the mode and date of hearing"

The Petitioner's point is that once the substantive provisions of the Act are declared unconstitutional, any rule that is made pursuant to those provisions must suffer the same fate.

Case for the Respondent

12. The Attorney-General as Respondent has urged the point that the issue raised regarding **Section 14** of the Act was settled in the **Samuel Macharia case (supra)** and with regard to **Section 16** aforesaid, that the Petitioner's arguments are self-defeating because whereas it claims to be the primary custodian of the right to fair administrative action, it is also saying that the interests of justice and substantial miscarriage of justice are not matters of general public importance. That the argument made is not sustainable in any democratic State that has respect for the values of justice, rule of law, equity and human rights. In any event, that the issue was addressed by the Supreme Court in **Hermans Phillipus Steyn vs Giovanni Guecchi – Ruscone [2013] eKLR** when it explained what constitutes a matter of general public importance and acknowledged that it is a general principle of rendering justice as contemplated by **Article 159(2)** of the **Constitution**.

13. On **Article 23**, the Respondent's answer to the Petitioner's contention is that the issue was settled in the case of **Erad Supplies & General Contractors Ltd vs National Cereals and Produce Board, Petition No.5 of 2012** where the Supreme Court overruled arguments made that two judges of the Court could not sit to determine simple applications made before the Court.

14. The Respondent further states that whereas the Petitioner qua Commission has the standing to institute the present proceeding, it questions the fact that in its view the Chairman of the Commission is the one who brought the Petition but I will quickly dismiss that argument as it is not borne out by the record.

In any event, the Respondent seeks that the Petition be dismissed with costs.

Case for the Interested Party

15. The Law Society of Kenya was enjoined to these proceedings as an Interested Party and its position is that the Petition is frivolous and without merit because;

*i) The impugned provisions of the Supreme Court Act must be looked at in the circumstances under which the **Constitution 2010** was enacted including the apparent perception, real or imagined, that the Judiciary was generally corrupt, inept and lacked independence and fairness and that it generally disregarded the public interest in its decision-making processes.*

*ii) **Sections 14** and **16** of the **Supreme Court Act** were intended to ensure that persons who may have suffered injustices in the past because of the conduct of judicial officers receive justice in the ultimate and that the provisions are therefore meant to serve theends of justice and are in the general interests of the public.*

*iii) The Petitioner on the other hand is acting contrary to the public interest and its interpretation of the Constitution is narrow, technical and in contravention of **Article 259** of the **Constitution.***

Determination

16. At the beginning of this judgment, I disposed of issue No.1 above in limine for reasons that I have given. Before I go to the remaining questions however, it is imperative to clarify a number of issues that have arisen albeit in passing.

17. The first is the jurisdiction of this Court to interprete the Constitution and to determine the legality and/or constitutionality of any legislation passed under it.In that regard **Article 165(3)(d) (i)** is clear. It provides as follows;

"3)Subject to Clause 5, the High Court shall have-

a) …

b) …

c) ....

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution".

18. The principles applicable in exercising the above jurisdiction are also well set out in various **Articles** of the **Constitution 2010** and they include;

"***Article 2***

(1) This Constitution is the supreme law of the Republic and Supremacy of this binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

"***Article 10***

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them––

(a) applies or interprets this Constitution;

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

(c) makes or implements public policy decisions.

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

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

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

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development".

"Article 159

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

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

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

(b) justice shall not be delayed;

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

(d) justice shall be administered without undue regard to

procedural technicalities; and

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

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law. ”

“Article 160 (1)

In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”

“Article 259(1)

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance. ”

19. The above provisions in the context of the present case must also be viewed from the premise that the High Court is a Court subordinate to the Supreme Court and therefore bound by the provisions of **Article 163(7)** which I have reproduced elsewhere above.

20. Further, the appellate process set out in the Constitution is such that decisions of this Court may well be conclusively affirmed or overturned by the Supreme Court and in that regard, this Court cannot purport to sit on appeal over matters already determined by the Supreme Court and that is why **Article 165(5)(a)** provides that;

"1) …

2) …

3) …

4) ....

The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court

under this Constitution; or

(b) …"

21. In that context, one of the aspects of jurisdiction conferred on the Supreme Court is appellate jurisdiction under **Article 163(4)(a)** which is relevant to the matter at hand.

22. The second issue, minor as it may seem, is still important to address; whether the Petitioner is blowing hot and cold by claiming that while it is the primary custodian of the right to fair administrative action as protected by **Article 47** of the **Constitution**, by filing this Petition it is stifling the realisation of the fruits of the Constitution, 2010 and the need to ensure that the ends of justice and the public interest are met at every instance.

That point need not take my time because it is the merits of the Petition that I shall focus on and not the Petitioner's real or perceived failings in the execution of its mandate under the Constitution and the enabling Act as seen in the eyes of the Respondent and Interested Party.

23. Regarding **Section 16** of the **Supreme Court Act**, I am in agreement with the Respondent that the Supreme Court has also settled the meaning to be attributed to the terms *"a matter of general public importance"*. This was in the case of **Hermans Steyn (supra)** where the Supreme Court gave clear guidance in the following words;

"58. The foregoing comparative survey, in our opinion, sheds sufficient light on the position to be taken by this Court, as contemplated by the terms of Article 163(4)(b) of the Constitution. Before this Court, "a matter of general public importance" warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.

59. ***From the research material availed to this Court, it is clear that a matter of general public interest may take different forms: in instances, an environmental phenomenon involving***

the quality of air or water may not affect all people, yet it affects an identifiable section of the population; a statement of law may affect considerable numbers of persons in their commercial practice, or in their enjoyment of fundamental or contractual rights; a holding on law may affect the proper functioning of public institutions of governance, or the Court's scope for dispensing redress, or the mode of discharge of duty by public officers.

60. In this content, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Court below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. In summary, we would state the governing principles as follows;

(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

(ii) where the matter in respect of which certification is sought raised a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

(iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

(v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court,must still fall within the terms of Article 163(4)(b) of the Constitution;

(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter or which certification is sought;

(vii) determination of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

24. I am wholly guided and I am bound by the above decision but there is then the language of S**ection 16** which introduces the words, "*in the interests of justice",* and *"substantial miscarriage of justice"* over and above that of *"a matter of general public importance".* **Section 16(2)** uses the word *"or"* to denote that *"substantial miscarriage of justice"* is an alternative to proof of *"a matter of general public importance" a*s a criteria for leave to appeal to the Supreme Court.

25. In **Steyn's case,** the Supreme Court addressed the words *"miscarriage of justice"* in passing and in an *obiter dictum*, it stated thus;

"61. Beyond the reliance on the provisions of law for a review of the Court of Appeal's certification, the applicant calls in aid the general principle of the rendering of justice, as contemplated in Article 159(2) of the Constitution of Kenya, 2010: he avers that "the intended appeal is necessary as a substantial miscarriage of justice might have occurred or may occur unless the said appeal is heard".

62. "Miscarriage of justice" is thus defined in Black's Law Dictionary, 8th ed (2004) (atp.1019): "A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite lack of evidence on an essential element of the crime ……... also termed failure of justice."

26. In that judgment, the words *"in the interests of justice"* were never addressed. Those words in any event are only important to the extent that the word *"justice"* is the operative word.

27. The entire Court system in Kenya is however obligated to operate from and within the principles in **Article 159(2)(a)(b)** and **(d) in** that;

i) ***Justice*** *shall be done to all irrespective of status.*

ii) ***Justice*** *shall not be delayed.*

ii) ***Justice*** *shall be administered without undue regard to technicalities.*

28. But what is *"justice"*" Elusive as the term may seem, it is simply *"thefair and proper administration of the Law"* - See Black's Dictionary, (Ninth Edition). The *"interests of Justice"* would therefore simply mean in the *"interests of fair and proper administration of the law"* which is what **Article 159** above lays down and which Courts are routinely expected to do.

29. With that background, I can only say this; clearly the more fundamental issue to be addressed is whether the addition of the words "s*ubstantial miscarriage of justice"* is an affront to **Article 163 (4) (b)** of the **Constitution**.

30. In **Steyn** *(ibid)*, the Supreme Court did not make a firm declaration whether those additions were unconstitutional but reading between the lines, it is obvious where it was headed.

31. I have also elsewhere above stated that this Court is properly clothed with the jurisdiction to go beyond the *obiter dictum* of the Supreme Court and by this Petition it is being called to rise to the occasion and address the issue squarely.

32. In that regard, the Supreme Court itself in the **Macharia case (supra)** set the test to be applied when a Court is considering the constitutionality of a Statute. It stated thus;

"A Court's jurisdiction flows from … 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 isconferred upon it by law. We agree with counsel for the first and second respondents … that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of he 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."

33. Further, declaring **Section 14** of the **Supreme Court** to be unconstitutional and guided by the above principles, the Court rendered itself as follows;

"The Act contemplated by Article 163(9) is operational in nature … Such an Act was never intended to create and confer jurisdiction upon the Supreme Court beyond the limits set by the Constitution....

Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer 'special jurisdiction' upon the Supreme Court, contrary to the express terms of the Constitution. Although we have a perception of the good intentions that could have moved Parliament as it provided for the 'extra' jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article 163(4) of the Constitution, or under Section 23 of the Sixth Schedule on 'Transitional Provisions'."

In addition to the above, the principles applicable when determining the constitutionality of a statute are now settled. For example in **Hamrardda Wakhama vs Union of India AIR 1960 at 554**, it was stated as follows;

"When an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole to its objects and purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at".

The same proposition was expounded on in **Republic vs Big M Drug Mart Ltd [1985] I S.C.R. 295** where the Court stated thus;

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate a legislation. All legislation is animated by an object the legislature intends to achieve.This object is realised through impact produced by the operation and application of the legislation.Purpose and effect respectively, in the sense of the legislations object and its ultimate impact, are clearly, linked, if not indivisible. Intended and achieve effects have been looked to for guidance in assessing the legislation's object and thus the validity"

The High Court has approached the question in a similar fashion –see for example **Murang'a Bar Operators & Anor vs Minister of State for Provincial Administration and Internal Security and Others, Petition No.3 of 2011** per Musinga, J.

34. I am duly guided and looking at **Section 16** of the **Act**, it is obvious that the addition of the words *"a substantial miscarriage of justice"* serves to grant the Supreme Court an extra criteria and jurisdiction to hear and determine applications for leave to appeal to that court.I need not say more than that because the glaring addition is blinding enough.

35. I have chosen to take the above path because the truth of the matter is that the Petitioner's

argument can hardly be challenged and the Respondents failed to point to the constitutionality of the said provisions.

In the instance, there being no other decision on the subject by either the Court of Appeal or the Supreme Court, then this Court will proceed and invoke its jurisdiction under **Article 165 (3)(d) (ii)**and declare that **Section 16(2)(b)** of the **Supreme Court** is unconstitutional and it is so declared. As for the truth, justice non *povit patrem nec matrem; solum verrtatem spectat justitia (justice knows neither father nor mother; justice looks to the truth alone)* and so whether the Supreme Court is in a sense the mother of all courts, the truth of the unconstitutionality of **Section 16** aforesaid must be directed at it.

36. Turning to **Section 23** of the **Act**, I will spend very little time with it because on 6/2/2013 the Supreme Court settled the Applicant's complaint in dismissing the argument made that two judges of that Court cannot constitutionally constitute a panel for the purposes of determining certain matters that may be placed before. They stated as follows in **Rai vs Rai, Petition No.4 of 2012** (Tunoi, Ojwang,Ndungu, Ibrahim and Wanjala, SCJJ)

"By Article 163(2) of the Constitution, the Supreme Court membership comprises seven judges; and this Court is properly composed for normal hearings only when it has a quorum of five judges. We take judicial notice that, for about a year now, the Court has had a vacancy of one member, and also that half of the current membership were previously in service in other superior Courts – and so having the possibility of having heard matters which could very well come up now before the Supreme Court.Recusal, in these circumstances, could create a quorum-deficit which renders it impossible for the Supreme Court to perform its prescribed constitutional functions."

37. Ibrahim, SCJ, in a separate but concurring opinion was even more emphatic on the question at hand when he stated as follows;

"Article 163(1) establishes the Supreme Court comprising of seven judges. Sub-article 2 states that the Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges. The total number of the Supreme Court judges that this Country can have at any given time under the Constitution is seven. The minimum that must sit and determine a matter is five.This means that the only allowance given by the Constitution of the judges who may be away for whatever reason, including illness or worse still, death, is two.If one of the remaining five is required to disqualify him/herself, it may be argued that out of necessity the judge would have to sit to ensure that there will be no failure of justice due to the bench being below the quorum set by the Constitution."

38. I will say no more because the elucidation of the law by the learned judges is not a matter for any opinion on my part save to stand guided by their eloquent exposition of it.

39. Having addressed the three main questions for determination and having found in favour of the Respondent and Interested Party in three out of four of them, it follows that issue No.(iv) must also be answered in the affirmative with respect to **Rules 17, 41, 42** and **43** of the **Supreme Court Rules.** They all flow from **Section 14** of the**Act** which has been declared unconstitutional and similarly those Rules are so declared.

40. The conclusion I must therefore necessarily reach is that the following orders must be issued in favour of the Petitioner;

*i) That **Section 16(2) (b)** of the **Supreme Court Act 2011** is declared to be ultra vires the **Constitution, 2010** to the extent that it adds to the jurisdiction of the Supreme Court to determine appeals where the Court is satisfied that a substantial miscarriage of justice may have occurred or may occur unless the Appeal is heard.*

ii) All other prayers in the Petition are hereby dismissed.

iii) To costs both the Petitioner and the Respondents are organs of State and have no funds of their own. To burden one with costs against the other would be unfair to them and the tax payer. In the event, there shall be no order as to costs.

41. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Mwihuri holding brief for Mr. Regeru for Interested Party

Mr. Wamotsa for Respondent

No appearance for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE