

THE SUPREME COURT BILL, 2011

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A Bill for

AN ACT of Parliament to make further provision with respect to the operation of the Supreme Court pursuant to Article 163(9) of the Constitution, and for connected purposes

ENACTED by the Parliament of Kenya, as follows —

PART I – PRELIMINARY

Short title.

1. This Act may be cited as the Supreme Court Act, 2011.

Interpretation.

2. In this Act, unless the context otherwise requires—

“Chief Justice” means the Chief Justice appointed under Article 166 of the Constitution;

“Chief Registrar” means the Chief Registrar of the Judiciary referred to in Article 161 of the Constitution;

“Court” means the Supreme Court;

“Deputy Chief Justice” means the Deputy Chief Justice appointed under Article 166 of the Constitution;

“Registry” means the registry where all pleadings and supporting documents and all orders and decisions of the Court are recorded and maintained in accordance with the rules;

“Registrar” means the Registrar of the Supreme Court appointed pursuant to section 9;

“rules” mean the rules of the Supreme Court made

pursuant to Article 163(8) of the Constitution;

“Supreme Court” means the Supreme Court of Kenya established by Article 163 of the Constitution.

Object of the Act.

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

- (a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;
- (b) provide authoritative and impartial interpretation of the Constitution;
- (c) develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth;
- (d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;
- (e) improve access to justice; and
- (f) provide for the administration of the Supreme Court and related matters.

PART II - ADMINISTRATION OF THE SUPREME COURT

Vacancy not to affect jurisdiction.

4. A vacancy in the Supreme Court as constituted under Article 163(1) of the Constitution shall not affect the jurisdiction of the Court.

Order of precedence of judges of the Supreme Court.

5.(1) As the head of the Judiciary, the Chief Justice shall have precedence over the other judges of the Supreme Court.

(2) The Deputy Chief Justice shall take precedence immediately after the Chief Justice.

(3) The other judges of the Supreme Court shall take precedence among themselves, according to the dates on which they respectively took office as judges of the Supreme Court.

(4) Where, under subsection (3), two or more judges of the Supreme Court took office on the same day, precedence among them shall be determined according to professional seniority with the most senior judge taking precedence.

Presiding judge.

6.(1) The Chief Justice shall preside over the Supreme Court and in the absence of the Chief Justice, the Deputy Chief Justice shall preside.

(2) If the Chief Justice and the Deputy Chief Justice are absent or unable to preside, or the offices of Chief Justice and the Deputy Chief Justice are vacant, the most senior available judge of the Supreme Court shall preside over the Court.

(3) The presiding by a judge over the Supreme Court pursuant to subsection (2) shall be conclusive proof of the judge's authority to do so and no action of the Judge, and no judgment or decision of the Court shall be questioned on the ground that the necessity for the judge to preside over the

Court had not arisen or had ceased.

Procedure if
judges absent.

7.(1) If at the time appointed for a sitting of the Supreme Court one or more judges are absent, the judge or judges present may adjourn the sitting on such terms as the Court thinks fit.

(2) If at the time appointed for a sitting of the Supreme Court all the judges are absent, the Registrar shall adjourn the sitting until such time as the Court shall next convene.

Manner of
arriving at
decisions.

8.(1) The judgment of the majority of the judges of the Supreme Court shall be the judgment of the Court.

(2) A judge of the Supreme Court shall not sit at a hearing of an appeal against a judgement or order given in a case previously heard before the judge.

Registrar of the
Supreme Court.

9.(1) There shall be a Registrar of the Supreme Court who shall, pursuant to Article 161(3) of the Constitution, be appointed by the Judicial Service Commission.

(2) The Registrar and other officers appointed shall exercise such powers and perform such duties as may be conferred upon them upon directions of the Court, the rules of court and the directions of the Chief Justice.

Functions of the
Registrar.

10.(1) In relation to proceedings before the Supreme Court, the Registrar shall act in accordance with the directions of the Chief Justice, the Court and the rules and shall, in particular, be responsible for—

- (a) the establishment and maintenance of the Registry;
- (b) the acceptance, transmission, service and custody of documents in accordance with the rules;

- (c) the enforcement of decisions of the Court;
- (d) certifying that any order, direction or decision is an order, direction or decision of the Court, or of the Chief Justice or other judge, as the case may be;
- (e) causing to be kept records of the proceedings and the minutes of the meetings of the Court and such other records as the Court may direct;
- (f) the management and supervision of the staff of the Court;
- (g) the day to day administration of the Court;
- (h) the management of the library of the Court;
- (i) ensuring the publication of the judgments of the Court; and
- (j) undertaking any duties assigned by the Court.

(2) The Registrar may consider and dispose of procedural or administrative matters in accordance with the rules or on the direction of the Chief Justice.

Reviews of
decisions of the
Registrar.

11. (1) A person aggrieved by a decision of the Registrar made in accordance with the rules may apply to a judge of the Supreme Court for a review of such decision.

(2) The judge may confirm, modify, or reverse the decision in issue.

(3) No fee shall be payable for an application under this

section.

PART III – JURISDICTION OF THE SUPREME COURT

Determination of disputes arising out of presidential elections.

12. An application to the Supreme Court in respect of a dispute to which Article 163(3)(a) of the Constitution applies shall be submitted by petition and shall further comply with the procedures prescribed by the rules.

Advisory role.

13. An advisory opinion by the Supreme Court under Article 163(6) of the Constitution shall contain the reasons for the opinion and any judges who differ with the opinion of the majority shall give their opinions and their respective reasons.

Special jurisdiction.

14.(1) To ensure that the ends of justice are met, the Supreme Court shall, within twelve months of the commencement of this Act, either on its own motion or on the application of any person, review the judgements and decisions of any judge-

- (a) removed from office on account of a recommendation by a tribunal appointed by the President, whether before or after the commencement of this Act; or
- (b) removed from office pursuant to the Vetting of Judges and Magistrates Act, 2011; or
- (c) who resigns or opts to retire, whether before or after the commencement of this Act, in consequence of a complaint of misconduct or misbehaviour.

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(2) To qualify for review under subsection (1), the judgement or decision shall have been the basis of the removal, resignation or retirement of, or complaint against, the judge.

(3) The Court shall, in exercise of its powers under this section –

- (a) conduct a preliminary enquiry to determine the admissibility of the matter; and
- (b) have all the necessary powers to determine the review under this section, including calling for evidence.

(4) An application for review in respect of a judgement or decision made before the commencement of this Act shall not be entertained two years after the commencement of this Act.

(5) Nothing in this section shall be construed as limiting or otherwise affecting the inherent power of the Court, either on its own motion or on the application of a party, to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the due process of the Court.

PART IV- APPEALS TO THE SUPREME COURT

Appeals to be by leave.

15.(1) Appeals to the Supreme Court shall be heard only with the leave of the Court.

(2) Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

(3) References in any written law, other than this Act, to the leave of the Supreme Court shall be construed subject to the provisions of sections 17 and 18 of this Act.

Criteria for leave to appeal.

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.

Direct appeals only in exceptional circumstances.

17. The Supreme Court shall not grant leave to appeal directly to it against a decision made, a conviction entered, or a sentence imposed in proceedings in any court or tribunal, other than the Court of Appeal, unless in addition to being satisfied that it is necessary, in the interests of justice, for the Supreme Court to hear and determine the proposed appeal, it is also satisfied that there are exceptional circumstances that justify taking the proposed appeal directly to the Supreme Court.

Reasons for refusal of leave to appeal.

18.(1) The Supreme Court shall state its reasons for refusing to grant leave to appeal to the Court.

(2) The reasons under subsection (1) may be stated briefly and in general terms.

Extent of appellate jurisdiction of the Supreme Court.

19. The Supreme Court shall hear and determine appeals from the Court of Appeal or any other court or tribunal against any decision made in proceedings, only to the extent that-

- (a) a written law, other than this Act, provides for the bringing of an appeal to the Supreme Court against such decision; or
- (b) the decision is not a refusal to grant leave to appeal to the Court of Appeal.

PART V – GENERAL

Appeals to proceed by fresh hearing.

20. Appeals to the Supreme Court may, where the Court considers it necessary, proceed by way of a fresh hearing.

General powers.

21.(1) On an appeal in proceedings heard in any court or tribunal, the Supreme Court—

- (a) may make any order, or grant any relief, that could have been made or granted by that court or tribunal; and
- (b) may exercise the appellate jurisdiction of the Court of Appeal according to Article 163(4) (b) of the Constitution.

(2) In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award.

(3) The Supreme Court may make any order necessary for determining the real question in issue in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its

findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal.

(4) Within fourteen days of delivery of its judgment, ruling or order, the Court may, on its own motion or on application by any party with notice to the other or others, correct any oversight or clerical error of computation or other error apparent on such judgment, ruling or order and such correction shall constitute part of the judgment, ruling or order of the Court.

Power to remit proceedings.

22. The Supreme Court may remit proceedings that began in a court or tribunal to any court that has jurisdiction to deal with the matter.

Exercise of powers of the Court.

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.

Interlocutory orders and directions by the Court .

24.(1) In any proceeding before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding.

(2) Any person dissatisfied with the decision of one judge in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of five judges.

(3) Any judge of the Supreme Court may review a decision of the Registrar made within the civil jurisdiction of the Court under a power conferred on the Registrar by the rules, and may confirm, modify, or revoke that decision as the judge thinks fit.

(4) The judges of the Supreme Court who together have jurisdiction to hear and determine a proceeding may—

- (a) discharge or vary an order or direction made or given under subsection (1); or
- (b) confirm, modify, or revoke a decision confirmed or modified under subsection (2).

Judgement of the court.

25.(1) The judgment of the Supreme Court shall be in accordance with the opinion of a majority of the Judges hearing the proceeding concerned.

(2) If the judges are equally divided in opinion, the decision appealed from or under review shall be considered as having been affirmed.

Delivery of judgement.

26.(1) A judgement of the Supreme Court shall be delivered in open court.

(2) Where a matter is heard before the Supreme Court and judgement reserved for delivery on another day, it shall not be necessary for all the judges before whom the matter was heard to be present in court on the day appointed for the delivery of judgement.

(3) A judge who has heard a case and who is absent from the delivery of judgment may sign a copy of the judgement with which the judge concurs or, where the judge has written an opinion, give the opinion to a judge present at the delivery of judgment to announce or read the concurrence or opinion in open court.

(4) Where a judgment is delivered pursuant to subsection (3), a majority of the judges who have heard the case shall be present.

Decisions of the court may be enforced by the High Court.

27. A judgment, decree, or order of the Supreme Court may be enforced by the High Court as if it had been given or made by the High Court.

Contempt of court.

28.(1) A person who—

- (a) assaults, threatens, intimidates, or willfully insults a judge of the Supreme Court, the Registrar of the Court, a Deputy Registrar or officer of the Court, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court; or
- (b) willfully interrupts or obstructs the proceedings of the Supreme Court, in the Court; or
- (c) willfully and without lawful excuse disobeys an order or direction of the Supreme Court in the course of the hearing of a proceeding,

commits an offence.

(2) A police officer, with or without the assistance of any other person, may, by order of a judge of the Supreme Court, take into custody and detain a person who commits an offence

under subsection (1) until the rising of the Court.

(3) The Supreme Court may sentence a person who commits an offence under subsection (1) to imprisonment for a period not exceeding five days, or to pay a fine not exceeding five hundred thousand shillings, or both, for every offence.

(4) The Supreme Court shall have the same power and authority as the High Court to punish any person for contempt of Court in any case to which subsection (1) does not apply.

(5) Nothing in subsections (1) to (3) shall limit or affect the power and authority referred to in subsection (4).

Seal of the
Supreme Court.

29. The seal of the Supreme Court shall be such device as may be determined by the Supreme Court and shall be kept in the custody of the Registrar.

Representation
before the
Supreme Court.

30. Parties may appear in person or be represented by an advocate in all proceedings before the Supreme Court.

Rules.

31. Without limiting the generality of Article 163(8) of the Constitution, the rules made by the Supreme Court under that Article may make provision for—

- (a) regulating the sittings of the Supreme Court and the selection of judges for any particular purpose;
- (b) regulating the right of any person other than an advocate of the High Court of Kenya to practise before the Supreme Court and the representation of persons concerned in any proceedings in the Supreme Court;

- (c) prescribing forms and fees in respect of proceedings in the Supreme Court and regulating the costs of and incidental to any such proceedings;
- (d) prescribing the time within which any requirement of the rules shall be complied with;
- (e) empowering the Registrar, in order to promote access to justice, to waive, reduce, or postpone the payment of a fee required in connection with a proceeding or intended proceeding, or to refund, in whole or in part, such a fee that has already been paid, if satisfied on the basis of criteria prescribed under paragraph (f) that—
 - (i) the person otherwise responsible for payment of the fee is unable to pay or absorb the fee in whole or in part; or
 - (ii) unless one or more of those powers are exercised in respect of a proceeding that concerns a matter of genuine public interest, the proceeding is unlikely to be commenced or continued;
- (f) prescribing, for the purposes of the exercise of a power under paragraph (e), the criteria—
 - (i) for assessing a person's ability to pay a fee; and
 - (ii) for identifying proceedings that concern matters of genuine public interest; and
- (g) any other matter required under the Constitution, this Act or any other written law.

MEMORANDUM OF OBJECTS AND REASONS

This principal purpose of this Bill is to provide for a legislative framework to operationalise Article 163 of the Constitution which establishes the Supreme Court. The objectives of the proposed Act, as set out in clause 3, are to -

- (a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;
- (b) provide authoritative and impartial interpretation of the Constitution;
- (c) develop rich jurisprudence that respects Kenya's history and traditions, and facilitates its social, economic and political growth;
- (d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation be determined having due regard to the circumstances, history and cultures of the people of Kenya;
- (e) improve access to justice; and
- (f) provide for administration of the Supreme Court and related matters.

Part I of the Bill provides for preliminary matters .

Part II provides for the administration of the Supreme Court and its procedure. In addition it creates the office of the Registrar of the Supreme Court and provides for the powers and functions of that office.

Part III sets out the manner of invoking the jurisdiction of the Court in relation to disputes arising out of presidential elections; its advisory role and special jurisdiction to ensure that the ends of justice are met.

Part IV provides for the manner and criteria for the exercise of the Court's appellate jurisdiction. It sets out the threshold and instances upon which the Court may decline to hear appeals.

Part V makes provisions regarding the fresh hearing of appeals, general powers regarding proceedings and the exercise of the powers granted by the Constitution and the law. This Part provides the framework regarding the interim orders of the Court and delivery of judgments.

The enactment of this Bill shall occasion additional expenditure of public funds which shall be provided for through the estimates.

Dated the 20th May, 2011.

MUTULA KILONZO,
*Minister for Justice, National Cohesion
& Constitutional Affairs*