REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION NO. 21 OF 2015

(Coram: Ibrahim, Ojwang, Wanjala, Njoki and Lenaola, SCJJ)

–BETWEEN–

GEOFFREY M. ASANYO ..... 1ST APPELLANT

MAKANA MOTORS ..... 2ND APPELLANT

MULTIPLE SALES PROMOTERS LIMITED ..... 3RD APPELLANT

WAKAM ENTERPRISES COMPANY LIMITED ..... 4TH APPELLANT

–AND–

THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF THE COURT

Lenaola, SCJ, with whom*, Ibrahim, Ojwang, Wanjala and Njoki SCJJ* agree:

A. INTRODUCTION

[1] The Appellants moved this Court via Petition of appeal dated 21st December, 2015 and filed on 22nd December, 2015. The Petition is filed pursuant to Article 163(4)(a) of the Constitution; Section 15(2) of the Supreme Court Act, No. 7 of 2011; and Rules 9 and 33 of the Supreme Court Rules, 2012.

[2] The Appellants challenge two decisions of the Court of Appeal, namely: (i) the Ruling made on 12th November, 2015, dismissing the Appellants' Notice of Motion Application dated 2nd November, 2015 that had sought orders that the

Court of Appeal does withhold the delivery of its Judgment and that the consent filed by the parties in *Civil Appeal No. 260 of 2014*, on 18th September 2015, be adopted as the Judgment of the Court; and (ii) the Judgment delivered on 13th November, 2015 in *Civil Appeal No. 260 of 2014* wherein the Court, (by a majority) partly allowed the Respondent's appeal.

[3] The Appellants seeks the following reliefs from the Court, reproduced verbatim:

1. *The entire Ruling/orders of the Kenya Court of Appeal sitting at Nairobi (E.M. Githinji, M.K. Koome & G.B.M. Kariuki, JJA) dated 13th day of November 2015 in Nairobi Civil Appeal No. 260 of 2014 be set aside.*

2. *The entire judgment of W. Ouko & A.K. Murgor, in the absence of P. Kiage JJA dated 12th November 2015 be set aside and the same be substituted with the Consent judgment dated 11th September 2015 and filed on the 18th September 2015 hence the Appellant herein be awarded damages in the sum of Kshs. 42, 800, 000/- (Forty Two Million, Eight Hundred Thousand Only).*

3. *An Order that the Consent letter dated 11th September 2015 and filed on 18th September, 2015 be adopted as the judgment of the Court of Appeal and judgment be entered in favour of the Petitioners for the sum of Kshs. 42, 800, 000/-.*

4. *In the alternative, the judgment of Court of* [the] *Appeal (Ouko & Murgor JJA) dated 13th November 2015 be set aside in its*

entirety and the same be substituted with the reinstatement of the High Court judgment of Onyancha J. dated 21st May 2014.

5. *That the costs of this Appeal and costs of proceedings in the Court of Appeal and in the High Court be awarded to the Petitioner herein.*

6. *Any other orders that this Court may deem fit in the circumstances.*

B. BACKGROUND

[4] The 1st Appellant is the principal shareholder of the 2nd, 3rd, and 4th Appellants, owning shares of between 80 – 90 % in all the said companies with the balance minority shares being held by his wife and in one company, by his wife and his brother-in-law.

[5] The 1st Appellant was charged in *Anti-Corruption Case No. 18 of 2002*, for allegedly corruptly giving Kshs. 180,000 to one, Zipporah Mbesa Wandera, the then Town Clerk of Nairobi City Council, as an inducement for her to facilitate payments due to the 2nd Appellant. Six years later, the Attorney General withdrew the charges under Section 87 (a) of the Criminal Procedure Code, having tendered no cogent evidence to support the charges.

[6] Upon that withdrawal, the Appellants filed *HCCC No. 671 of 2009*, suing the Attorney General, on behalf of the Kenya Anti-Corruption Commission, for special and general damages as a result of the unlawful arrest and detention, as well as malicious prosecution.

[7] In a Judgment delivered on 21st May, 2014, the High Court, *Onyancha J,* entered Judgment in favour of the Appellants as prayed making a finding *inter alia*, that the 1st Appellant was the brains and engine of the 2nd, 3rd and 4th Appellants and that his arrest and detention was unjustified, malicious and without probable and/or reasonable cause, hence it affected the 1st Appellant's liberty and reputation. In the ultimate, the Learned Judge awarded the 1st Appellant general damages of Kshs. 10,000,000/= for unlawful arrest and detention and Kshs. 20,000,000/= for malicious prosecution. He also awarded him Kshs. 15,000,000/= as special damages, being the sum of legal fees spent in defending the criminal charges over the period of six years. The 2nd Appellant was awarded Kshs. 50,000,000/= as general damages for loss of profit; the 3rd Appellant was awarded Kshs. 115,000,000/= and Kshs. 175,000,000 as loss of profit on the first contract and second contract respectively; while the 4th Respondent got Kshs. 87,000,000/= as general damages for loss of profit.

[8] The Respondent, the Attorney General, was dissatisfied with the entire judgment and filed an Appeal before the Court of Appeal, being *Civil Appeal No. 260 of 2014*. The Appeal proceeded to full hearing and Judgment was reserved to be delivered on a later date. (As the matter before this Court does not fundamentally concern the Court of Appeal's *ratio decidendi* on the factual substantive determination of the appeal, we delve not into the parties' cases before the Appellate Court).

[9] In any event, it emerged that during the pendency of the appeal before the Court of Appeal, the parties were engaged in negotiations towards an amicable settlement of the matter. Consequently, an offer of settlement from the Respondent was accepted by the Appellants to settle the claim at an all-inclusive amount of Kenya Shillings Forty-Two Million, Eight Hundred Thousand (Kshs. 42, 800,000/=) in full and final settlement of the appeal. This was reduced into a

written consent ("the consent") that was duly executed by parties on 11th September 2015 and filed in Court on 18th September 2015.

[10] Notwithstanding the above development, on 21st September 2015, a *Notice of Delivery of Judgment* was sent by the Deputy Registrar of the Court of Appeal notifying the parties that Judgment in the matter was to be delivered on 25th September 2015 at 9:00 am. This propelled the Appellants' advocate (M/s Wagara, Koyyoko & Co. Advocates) to swing into action. On 23rd September 2015 they wrote to the Deputy Registrar informing the Court that the parties had reached a consent settling the appeal and that the same had been filed in Court on 18th September 2015. They therefore requested that the matter be removed from the Judgment List and be mentioned for purposes of adoption of the said consent.

[11] On 24th September 2015 the *Deputy Registrar wrote back to all the parties* acknowledging the above letter and indicated that the matter had been removed from the Judgment List; and that the parties would be informed of a Mention Date when the consent would be recorded by the Court.

[12] On 2nd October 2015 the parties were served with a Mention Notice for 5th October, 2015. On 5th October 2015, during the mention, the Court (*Visram, Okwengu, J. Mohammed, JJA*) directed that the matter be placed before the 'Original Bench' that had heard the matter, as there had arisen a difference of opinion as regards the consent (*the State Counsel, for the Attorney General wanted the judgment delivered stating that delay in delivery of the judgment had been the reason for the parties entering into consent; while Counsel for the Appellants wanted the consent entered as order of the Court*). Meanwhile, Judges of the 'Original Bench' (Ouko, Murgor & Kiage JJA) had been transferred from Nairobi to Malindi, Kisumu, & Nyeri respectively and were not able to sit as such.

[13] On 6th October 2015, the advocate for the Appellants wrote to the Deputy Registrar seeking directions or approval from the 'Original Bench' adopting the

consent. On 30th October 2015, before a response to the above letter (of 6th October, 2015) was received, a Notice of Delivery of Judgment dated 28th October 2015 was issued by the Court stating that Judgment would be delivered on 6th November, 2015.

[14] Aggrieved by this development, on 2nd November, 2015, the Appellants filed a Notice of Motion Application dated the same day, under certificate of urgency seeking to arrest the delivery of the Judgment slated for 6th November 2015 and praying that the Court does adopt the consent settling the said Appeal as filed by the parties on the 18th September 2015.

[15] The Application was heard and dismissed on 12th November, 2015 by the Court (Githinji, Koome & G.B.M. Kariuki, JJA). In their Ruling, the Learned Judges of Appeal observed *inter alia* that there was no consent by the parties that Judgment of the Court of Appeal should not be delivered. It added that *"parties were at liberty to withdraw the appeal, as provided for in the Rules and the Court has power to have it struck out or withdrawn"*. However, the Appellate Court opined that, *"there is no provision in the Rules for withholding a judgment of the Court before delivery"*.

[16] As regards the consent in contention, the Court specifically stated:

> ***"[14] The only consent that disposes an appeal provided for by the rules is the consent to withdraw the appeal under Rule 96. But as rule 96(1) provides, the consent to withdraw the appeal should be entered into before the appeal is called on for hearing. The appeal was fully heard and a judgment date fixed by the Court. The Parties lost an opportunity to enter into any consent in the appeal and the court became fully seized of the appeal. Its only remaining duty***

being the determination of the appeal and the delivery of the judgment…

[15] A consent order cannot be adopted in place of the judgment of the Court in its appellate jurisdiction. Such an order is filed in the High Court, and then the appeal is withdrawn or struck out. Indeed, if the said consent order was adopted in place of the judgment of the Court, that would be misleading, because there is an appeal that was heard according to the record of appeal, against the decision of the High court. A consent order cannot become the judgment of the Court. That state of affairs is not provided for in the Rules and we decline to substitute the consent by the parties for the judgment of the Court".

[17] Consequently, the application was dismissed and the Court ordered that the pending Judgment be delivered the following day, 13th November 2015, at 9.00am. This Ruling aggrieved the Appellants and it forms part of the appeal before this Court. The Appellants in that regard duly filed a Notice of Appeal dated 24th November 2015 at the Court of Appeal on 25th November 2015 signaling their intent to appeal against that Ruling.

[18] Subsequently, as ordered by the Court in the above Ruling, the Judgment in the Court of Appeal was delivered on the said 13th November, 2015 by Mwera, J (on behalf of Ouko, Murgor & Kiage JJA who had heard the appeal). As the substantive content of the Judgment is not the subject of this appeal we shall not go into its details, save to state that by 'a majority', the Court partially allowed the appeal with *Ouko, JA*, with whom *Murgor, JA* concurred with, holding thus in the ultimate:

> ***"[T]he appeal partially succeeds on quantum but fails entirely on liability. For unlawful arrest and detention, I set*** (sic) ***aside the award of Kshs. 10,000,000 and substitute it with Kshs. 3,000,000 and similarly the award of Kshs. 20,000,000 is set aside and substituted with Kshs. 5,000,000 for malicious prosecution.***
>
> ***The award on special damages of Kshs. 15,000,000 is set aside.***
>
> ***The appellant shall have half of the costs of this appeal and those in the high Court."***

[19] It is worth noting that while a Three Judge Bench had heard the Appeal, only two Judges (*Ouko & Murgor, JJA*) availed their Judgments for delivery which were duly delivered on their behalf by *Mwera, JA*. The third Judge, *Kiage, JA,* had expressed his reservations towards delivery of the Judgment in the matter, the parties having filed a consent to settle it. In an email to the President of the Court of Appeal on 30th October, 2015, the Learned Judge wrote thus:

> ***"Subject: Re: Civil Appeal 260 of 2014- Attorney General vs Geoffrey Assanya***
>
> *Thank you, your Honour, Mr. President.*
>
> *Given the position I have consistently expressed herein and the law I have cited, my expectation is that a second bench, as such, would have to adopt the consent. The mere reading of a judgment would otherwise be by a single judge, which one of us even offered to do, pronto. Still, I cannot second guess them.*

> *In case that bench decides to read my colleagues' two judgments, I request that the following be placed on the record by the said bench:*
>
> *"Kiage JA declined to avail his judgment and to participate in the final disposal of this appeal out of conviction that the Court had no further adjudicative role once the parties filed the consent settlement herein."*

Consequently, when Mwera, JA delivered the above Judgments, he equally read out the above email communication to the parties and the same became part of the court record.

[20] The Appellants were aggrieved by the Judgment and filed a Notice of Appeal dated 24th November, 2015 at the Court of Appeal on 25th November, 2015 signaling their intention to appeal the whole of that Judgment to the Supreme Court under Article 163(4)(a) of the Constitution. Hence, cometh this composite appeal before this Court.

C. PETITION BEFORE THE COURT

[21] The Petition is based on 14 grounds. The first three (3) grounds are subject of the appeal against the Judgment of 13th November, 2015, summarized thus:

1) *That the learned Judges of the Court of Appeal (Ouko & Murgor JJA) blatantly infringed on the Appellants inviolable constitutional right to a fair trial as enshrined under Articles 25(c) and 50(1) of the Constitution by purporting to dispose off Civil Appeal No. 260 of 2014 vide their written reasons in the absence of due consideration of the facts and the law by the Third Judge.*

2) *They erred in law by purporting to deliver a judgment in a three judge bench in the absence of a decision by one judge thereof, hence violating the Appellants' rights under Article 48 of the Constitution.*

3) *That the learned Appellate Judge, Ouko, JJA, misapplied section 32(3) of the Court of Appeal Rules, by purporting to deliver a unanimous decision of a three- judge bench without taking into account that one judge, Kiage J.A, had declined to avail his judgment. That to this end the Court of Appeal as presently constituted did not have jurisdiction to confirm, reverse or vary the decision of the superior Court. Hence a violation of Articles 25(c), 48 and 50(1) of the Constitution.*

[22] The other grounds of appeal attack the Ruling of the Court of Appeal (*Githinji, Koome and GBM Kariuki, JJA*) delivered on 12th November, 2015 in the following words:

1) *The Learned Judges erred in failing to appreciate that the Consent filed before the Court on 18th September 2015 was binding upon the parties and had the net effect of effectively disposing off the Appeal hence went against the Supreme Court case of* ***Richard Nyagaka Tongi v. Chris Bichage & 2 Others****, SC Petition No. 17 of 2014, contrary to Article 163(7) of the Constitution.*

2) *The Learned Judges arrogated themselves jurisdiction when the Court had been rendered functus officio the moment the Consent letter was filed, thereby effectively disposing off the parties' rights in relation to the said case.*

3) *The Learned Judges grossly misapplied and misinterpreted Article 159 of the Constitution and solely relied on Rule 96(1) and (2) of the Court of Appeal Rules, hence occasioning a total miscarriage of justice in breach of Article 2 of the Constitution on Supremacy of the Constitution.*

4) *The Learned Judges erred when they ignored the express wishes of the parties as contained in the Consent hence breached Articles 25(c) and 50(1) of the Constitution when they blatantly and patently breached the Petitioner's inviolable rights to have a dispute that can be resolved by the application of law dealt with in a fair manner and without undue regard to technicalities.*

5) *The Learned Judges exhibited bias by ignoring the decision of 6th October, 2015, by Visram, H. M., Okwengu and J. Mohammed, JJA, that had directed that the matter be placed before the original bench for directions, hence breached Articles 27(1) and 50(1) of the Constitution.*

6) *The Learned Judges erred in holding that a consent judgment determining the appeal could only be filled before the High Court, yet the said High Court had already been rendered functus officio upon its final judgment on 21st May, 2014. This holding was contrary to section 3(2) of the Appellate Jurisdiction Act and violated the Appellant's right to access to justice under Article 48 of the Constitution.*

7) The Learned Judges erred in holding that the only consent that can be filed in the Court of Appeal by parties is a consent withdrawing the appeal.

[23] The Appellants have framed two issues for determination:

(i) Whether the Ruling and Order of the Court of Appeal sitting at Nairobi (E.M. Githinji, M.K. Koome & G.B.M. Kariuki JJA) dated the 12th day of November 2015 in Nairobi Civil Appeal No. 260 of 2014, violates the provisions of Articles 2(4) and 159(2) of the Constitution of Kenya and is thus a nullity ab initio in view of the consent already filed in Court by the parties.

(ii) Whether the Judgment and/or Order of the Court of Appeal (W. Ouko, & A.K Murgor JJA) in the absence of any consideration of the appeal on merit of Kiage, JA as delivered on 12th November 2015 was lawful and binding.

[24] The appeal was argued before this Court on 8th May, 2018. The Appellants were represented by Prof. Tom Ojienda, SC and Okong'o Omogeni, SC while the Respondent was represented by State Counsel, Mr. Kepha Onyiso.

D. SUBMISSIONS

a) Petitioners'

(i) Jurisdiction

[25] It was submitted that the appeal is properly brought under Article 163(4)(a) of the Constitution. Omogeni SC in that regard cited the case of ***Hassan Ali joho & Another v. Suleiman Said Shahbal & 2 Others***, Petition No. 10 of 2013

[2014] eKLR in urging that the test for an appeal under this provision is *"whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal..."*. He also cited the case of ***The Kenya Section of the International Commission of Jurists v. Attorney General & 2 others***, Criminal Appeal No. 1 of 2012, [2012] eKLR in urging that the Supreme Court has the responsibility under section 3 of the Supreme Court Act, to provide authoritative and impartial interpretation of the Constitution, to settle the law on uncertain jural questions and to develop rich jurisprudence.

[26] Counsel further urged that in issue before this Court was the interpretation and application of Article 159(2)(c) of the Constitution, which issue had also been dealt with by the Court of Appeal. He urged in that context that Article 159 of the Constitution is geared towards promotion of Alternative Dispute Resolution and that the Court of Appeal erred in disregarding the consent filed by parties stating that it could not become a judgment of the Court. It was thus urged that this Court has jurisdiction to hear the Appeal.

(ii) Supremacy of the Constitution

[27] It was urged as regards this issue that the Court of Appeal erred in relying on technicalities, the Court of Appeal Rules, ignoring the principles in Article 159(2)(c), (d) & (e) of the Constitution, on the principles that bind Courts in determining disputes including Alternative Dispute Resolution and non-reliance on technicalities. It was in addition urged that all statutes are guided in their application by the Constitution. In this regard, counsel cited ***Zacharia Okoth Obado v. Edward Akong'o Oyugi and 2 others***, SC Appl. 7 of 2014; [2014] eKLR ("***Obando*** *case*") where this Court held:

> ***"[A]ll statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void."***

[28] It was furthermore submitted that the denial of the right to file a consent between parties was contrary to Article 152(2)(d) of the Constitution thus unconstitutional. Relying on the ***Obado*** case, it was urged therefore that a statute does not override the Constitution and the Rules on withdrawal of an appeal could not override the clear provision of Article 159 of the Constitution on promotion of Alternative Dispute Resolution.

[29] It was reiterated that Article 2(4) of the Constitution gives supremacy to Article 159 of the Constitution. Citing the case of ***Ferdinand Ndung'u Waititu v. Independent Electoral & Boundaries Commission & 8 others***, Civil Appeal No. 324 of 2013; [2014] eKLR, the Appellants submitted that the Court of Appeal in addressing the matter of hierarchy of laws held that "*it is not tenable to elevate the rules of procedure of the Court above a statutory provision, and in the same way, it can never be that a statutory provision can be elevated above the constitutional provision because the Constitution is the supreme law of the land*."

[30] Also cited was the case of ***Raila Odinga and 5 others v. Independent Electoral and Boundaries Commission and 3 others,*** Petition No. 5 of 2013; [2013] eKLR ("***Raila*** *case*"), in which this Court stated that Article 159 was meant to ensure that procedure and form do not trump on substantive justice. It was in that context that the Appellants contended that, by the Judges of Appeal adopting a technical approach on why the Court could not adopt the consent, they acted contrary to the precedent set by the ***Raila*** case. Also cited was the case of the ***National Land Commission v. the Attorney General & 6 Others*** Reference No. 2 of 2014; [2014] eKLR in urging that the Judiciary should at all

times, in resolving disputes, be guided by the Constitution. The Court held *inter alia* in that case:

> ***"Our perception of the matter before us is informed by the elaborate principles and values proclaimed in the Constitution, which though affirming independence on the part of separate governance entities, require common purpose in public service. In this context, the Judiciary as an organ of dispute resolution is to be guided (Article 159(2)(c)) by the principle of promoting 'alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution'."*** [Emphasis supplied.]

[31] Also cited was the case of ***Republic v. Mohamed Abdow Mohamed*** HC Criminal case No. 86 of 2011; [2013] eKLR in further urging that the application of Article 159(2)(c) has now been adopted even in criminal matters to promote Alternative Dispute Resolution.

(iii) Powers of the Court of Appeal under Section 3(2) of the Appellate Jurisdiction Act (the Act)

[32] The Appellants urged that under Section 3(2) of the Act, the Court of Appeal enjoys similar powers as the High Court in its appellate jurisdiction as provided for by Section 78 of the Civil Procedure Act. Section 3(2) of the Act aforesaid provides:

> ***"(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power,***

<u>authority and jurisdiction vested in the High Court</u>."
[Emphasis supplied.]

[33] It was further urged that the general powers of an appellate Court are also provided for under Section 78 of the Civil Procedure Act in the following terms:

> ***"(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—***
>
> ***(a) to determine a case finally;***
>
> ***...***
>
> ***(2) subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."***

[34] Both these Acts, it was submitted, are guided by the Oxygen Principles contained in Sections 1A and 1B of the Civil Procedure Act and the same provisions are encompassed under Sections 3A and 3B of the Act.

[35] Consequently, it was urged that the Appellate Judges should have appreciated that Section 3(2) of the Act confirms the position that all Courts are to be guided by the Overriding objectives in reaching their decisions. It was thus urged that the Appellate Court erred in holding that the consent could only be filed in the High Court. That this was a wrong approach because, once the High Court has given its Judgment, then it becomes *functus officio*. Counsel further urged that if this argument were to be sustained, only the High Court could record a consent, and as such, the Courts would be re-opening the doors of the long gone era of reliance on technicalities in Court proceedings.

[36] The Appellants further submitted that under the present Constitution, there is need to promote Alternative Dispute Resolution and referred to the various correspondences on record in urging that the Appellate Court was aware of the consent on record yet insisted on delivery of a Judgment which had been overtaken by events. For instance, Counsel for the Appellants submitted that the Court of Appeal took note of the consent when the Registrar wrote a letter to the parties withdrawing an earlier Judgment Notice yet, the Court later proceeded to misdirect itself by ignoring the Consent entirely.

(iv) Consent judgment voluntarily reached renders the Court functus officio

[37] It was submitted in the above regard that it was the Respondent who had made an offer of Kshs. 42,800,000 as settlement of the dispute which the Appellants had accepted. Then on 23rd September 2015, the Appellant's advocates wrote to the Deputy Registrar indicating that a consent had been reached and filed on 18th September, 2015. Reliance on this point was placed on the case of ***Edward Acholla v. Sogea Satom Kenya Branch & 2 others*** Cause No. 1518 of 2013; [2014] eKLR, where the Industrial Court held:

> **[A]"*Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out*."**

[38] It was urged therefore that this Court is enjoined under Article 159(2)(c) to promote Alternative Dispute Resolution and administer justice without undue regard to procedural technicalities and that it would be a miscarriage of justice if the Court were to overlook and override the settlement reached by the parties

herein. It was further contended that the Court of Appeal erred in finding that the consent cannot be adopted, yet Article 159(2)(c) of the Constitution as regards Alternative Dispute Resolution is coached in mandatory terms. In this regard, reference was made to ***Hausram Limited v. Nairobi City County*** Civil Case No. 421 of 2013; [2013] eKLR where the learned judge, Havelock J, held:

> "***Further, I am of the belief that Article 159(2)(c) of the Constitution, 2010 is expressed in mandatory terms and this Court is under a duty to promote alternative forms of dispute resolution. This is all the more so when the parties themselves have chosen the forum as is the case here. This Court, as the Defendant has pointed out in its submissions, cannot rewrite the Contracts already entered into between the parties…"***

[39] Furthermore, and citing ***Samuel Mbugua Ikumbu v. Barclays Bank of Kenya limited*** Civil Appl. No 1 of 2015; [2015] eKLR, it was submitted that a consent order is binding on the parties and cannot be set aside or varied unless it is proved that it was obtained by fraud or is contrary to the policy of the court, or that it was obtained without sufficient material facts.

[40] In addition, relying on the Nigerian case of ***Star Paper Mill Ltd & another v. Bashiru Adetunji & others***, Suit No. SC 292/2002, it was submitted that a judgment by consent is intended to put a stop to ligation effectively rendering the court *functus officio*. It was in conclusion the Appellants' case that the Court of Appeal had jurisdiction to adopt the consent and in not so doing, misdirected itself. The Appellants thus urged that the appeal be allowed with costs.

b) Respondent's

[41] Counsel Mr. Onyiso, urged the case of the Respondent, the Attorney General and framed six issues for determination viz:

(i) Whether the Supreme Court has jurisdiction to hear this appeal.
(ii) Whether the 1st Appellant had been unlawfully arrested.
(iii) Whether the 1st Appellant had been maliciously prosecuted.
(iv) Whether the Court of Appeal was right in holding that the 1st Appellant and the companies associated with him are different entities and hence could not be awarded damages for torts committed against the 1st Appellant.
(v) Whether the Court was right on the quantum of damages awarded to the 1st Appellant.
(vi) Whether the Court of Appeal was right to reject the consent.

[42] It is worth noting that issues *(ii)* to *(v)* deal with the content of the main Judgment of the Court of Appeal delivered on 13th November 2015, which as earlier stated, do not form part of the Appellants' case before this Court. Consequently, those issues, (ii) to (v), will not form part of our analysis and determination. Rightly so, the Respondent in his oral submissions did not even elaborate on them. This leaves only two issues, (i) and (vi), which the Respondent argued before us.

(i) Jurisdiction

[43] It was submitted on jurisdiction that the Appellant's claim before the High Court was for general damages for unlawful arrest, malicious prosecution, special, aggravated and exemplary damages. Such claims did not involve the interpretation or application of the Constitution and that the dispute was a personal matter and did not relate to the general public, hence it could not be the subject of appeal in

the Supreme Court. In this regard, the Respondent cited the case of ***Kenya Section of the International Commission of Jurists v. Attorney General and 2 others***, SC Criminal Appeal No. 1 of 2012; [2012] eKLR ("***ICJ***"). Further, citing ***Malcom Bell v. The Honourable Daniel Torotich Arap Moi & another***, SC Appl. No 1 of 2013; [2013] eKLR, it was submitted that the Appeal does not meet the threshold of certification and grant of leave to appeal to the Supreme Court as a matter of general public importance let alone qualifying as one of constitutional interpretation.

[44] In addition, the cases of ***Erad Suppliers and General Contractors Limited v. National cereals and Produce Board***, SC Petition No. 5 of 2012; [2012] eKLR ("***Erad Suppliers***") and ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others***, SC Petition No. 2 of 2012; [2012] eKLR ("***Peter Ngoge***") were cited to urge that there is need for determination of issues involving the interpretation of the Constitution in the superior Courts before the same is canvassed in the Supreme Court. The Respondent in a nutshell urged that the appeal before the Court has not met this test and should be dismissed.

(ii) Whether the Court of Appeal was right to reject the consent judgment

[45] It was submitted on this issue that the Court was right to reject the adoption of the consent since there is no provision under the Appellate Jurisdiction Act or the Court of Appeal Rules for adoption of a consent judgment. That the Court was therefore right in pointing out that parties ought to have filed the consent within the primary suit in the High Court, where Order 25, Rule 5(1) of the Civil Procedure Rules envisages those applications.

[46] In oral submissions, Mr. Onyiso reiterated the argument that the Respondent had no issue with the substance of the consent on record. However, that the Respondent subsequently saw a problem with the notion that the

Appellate Court should have adopted the consent as recorded by the Parties hence its present position.

[47] He further submitted that, on the judgment of the Court of Appeal, what was delivered on 13th November 2015 was not a judgment of the Court as the said judgment was not a true reflection of the opinion of the judges, and that there was an anomaly where only two judges out of three availed their judgments for delivery. Consequently, he urged that this Court can only act where there is a judgment of the Court of Appeal, and since there was none in this matter, there is *ab initio* no jurisdiction to determine the issues placed before it.

[48] Mr. Onyiso furthermore reiterated the point that the Learned Judges of the Court of Appeal only said they could not record the consent and urged parties do so at the High Court, which had the jurisdiction to record it. It was his case therefore that the Court of Appeal decision had nothing to do with the interpretation and/or application of the Constitution and therefore what is before this Court, is not an appeal within the meaning of Article 163(4)(a) of the Constitution.

[49] Curiously, counsel urged that should the Appellants return to the High Court and record the consent, the Respondent would support the said consent. In the alternative, it was submitted that as there is nothing constitutional in this appeal, the Appellants should have sought certification from the Court of Appeal first, so as to respect the chain of courts before coming to the Supreme Court. As that was not done, it was urged that the appeal as placed before this Court should be dismissed.

c) Appellants' Reply

[50] Prior to the reply to the above submissions, the Court (Wanjala, SCJ) asked the Appellants' Counsel how the Supreme Court could be clothed with jurisdiction

in the absence of a judgment from the Court of Appeal, as all parties were in agreement that what was delivered on 13th November 2015 could not amount to a judgment of that Court. Prof. Ojienda for the Appellant in answer, directed the Court to the case of ***Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others***, SC Petition No. 5 of 2014; [2014] eKLR ("***Aramat***") in urging that this Court could invoke its inherent powers to unlock the apparent jurisdictional impasse. He urged that the Supreme Court should not merely look at the Court of Appeal judgment, whether it was there or not, as a basis of jurisdiction, but look at the totality of the matter and do justice. That the Court should consider the question why the consent was not adopted and guide parties on what to do next.

[51] Prof. Ojienda nonetheless reiterated that once the consent was recorded, Article 159(2)(d) of the Constitution came into play and the Court should thus consider that the judgment of the Court of Appeal was incomplete and proceed to address that anomaly. That therefore it had jurisdiction to determine the Appeal one way or the other and that this case goes to the ultimate test of the powers of this Court in interpreting the Constitution and rendering justice to the Parties.

E. ISSUES FOR DETERMINATION

[52] From the above submissions, the following issues crystalizes for determination:

(i) *Whether this Court has jurisdiction to determine the Appeal.*

(ii) *Was there a judgment from the Court of Appeal?*

(iii) *Was the Court of Appeal right in declining to adopt the consent?*

(iv) *Appropriate reliefs.*

F. ANALYSIS

(i) Whether this Court has Jurisdiction to determine the Appeal

[53] The Appellants submitted that this Court has jurisdiction to hear and determine this matter as brought under Article 163(4)(a) of the Constitution. They cited previous cases of this Court in support of their case. In particular, they referred to the ***ICJ*** case, and urged that this Court has a responsibility under Section 3 of the Supreme Court Act to authoritatively and impartially interpret the Constitution. It was further urged that at the core of this case is the interpretation and application of Article 159(2)(c) of the Constitution which the Court of Appeal had disregarded.

[54] Further citing the ***Obado*** case, it was submitted that all statutes and laws flow from the Constitution and follow the Constitution. They thus argued that by the Court of Appeal relying on the Court of Appeal Rules, it elevated the Rules (Subsidiary legislation) above the Constitution, (Article 159(2)), contrary to Article 2(4) of the Constitution.

[55] The Respondent, the Attorney General on his part, was emphatic that this Court lacks jurisdiction to hear this matter and relied on this Court's jurisprudence in the ***Erad Suppliers*** and ***Peter Ngoge*** cases in submitting that the issue coming on appeal before the Supreme Court should have been first determined by the lower superior Courts which was not the case presently. In this regard, it was submitted that this case concerned purely a personal matter of wrongful prosecution and has no general public importance inclination. That there was also nothing on constitutional interpretation and/or application at the High Court, or Court of Appeal hence this Court lacks jurisdiction *ab initio*.

[56] We have considered the rival arguments placed before us and the question of the parameters of this Court's jurisdiction under Article 163(4)(a) of the Constitution has now been settled in cases that this Court has determined, some of

which have been cited by the parties. Firstly, it is trite that a matter coming on appeal to this Court must have first been the subject of litigation before the High Court and risen through the judicial hierarchy on appeal *(**See In Re the Matter of the Interim Independent Electoral Commission**,* Appl. No. 2 of 2011; [2011] eKLR; ***Peter Ngoge*** and ***Erad Suppliers***). On this ground alone, it would appear that if we were to accept the submissions of the Respondent, this Court should hold that it lacks jurisdiction in this matter.

[57] Before making such a decision however, it is worth noting that the crux of the appeal before this Court does not stream from the subject matter as was before the High Court: the claim for damages for wrongful prosecution. The Appellants grievance, as noted in the submissions, is on the mode of delivery of the Court of Appeal judgment, and not the substance of the judgment itself. This peculiarity calls for a pragmatic approach on determining whether this Court has jurisdiction or not.

[58] To determine jurisdiction in this peculiar and unique context, the Court is guided by the principle that each case has to be evaluated on its own facts. Whether this Court should assume jurisdiction or not is therefore a matter to be judiciously exercised by it. In determining whether to exercise jurisdiction under Article 163(4)(a), the Court in the ***Joho*** case, was categorical that, there are several facts that the Court will have to interrogate. At paragraph 37, the Court thus stated:

> ***"In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated***

under Article 163(4)(a) of the Constitution. Indeed, ordinarily, in our view, a question regarding the interpretation or application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it." [Emphasis added.]

[59] Hence, an inquiry as to whether this Court has jurisdiction under Article 163(4)(a) Constitution is a broad one involving a multiplicity of factors. In the matter before us, the Appellants' plea is that while the parties had entered a consent to settle the matter, the Court of Appeal disregarded that consent in breach of Article 159(2) of the Constitution.

[60] In that regard, Article 159 of the Constitution lies at the heart of the judicial authority that is derived from the people and vested in the courts and tribunals established under the Constitution. This Article also embodies constitutional principles that guide the exercise of judicial power. This Court, on the place of constitutional principles, ***In the Matter of the Principle of Gender Representation in the National Assembly and The Senate***, Reference No. 2 of 2012; [2012] eKLR ("***Gender Representation*** case") rendered itself thus:

"[54] Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express

safeguards **and** ***public commitment*****. But the** ***Kenyan Constitution fuses this approach with declarations of general principles and statements of policy*****.** *Such principles or policy declarations signify a* value system, *an* ethos, *a* culture, *or a* political environment *within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the* ***norm****."* [Emphasis added.]

[61] It thus emerges that a concise reading of the judicial principles in Article 159(2) of the Constitution would show that they are non-derogable and have to be adhered to by all courts and tribunals exercising judicial power/authority. Where there is therefore a *prima-facie* case of derogation, it behoves this Court to intervene so as to safeguard the Constitution within its jurisdiction under Article 163(4)(a). This was well stated in the ***Joho*** case [paragraphs 51 and 52] where the Court expressed itself thus:

"[51] In defending the Constitution and the aspirations of the Kenyan people, this Court must always be forward-looking, bearing in mind the consequences of legal uncertainty upon the enforcement of any provision of the

Constitution. <u>This aspect of defending the Constitution is replicated under Article 163 (4) (a), which allows appeals from the Court of Appeal to the Supreme Court as of right, in any case involving the interpretation or application of the Constitution.</u> Such is the approach that this Court in hearing this appeal must seek to apply.

[52] Applying a principled reading of the Constitution, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question. <u>However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court, in furtherance of the objects laid out under Section 3 of the Supreme Court Act, 2011 (Act No. 7 of 2011).</u> [Emphasis added.]

[62] In that context, the Appellants submitted that despite filing a consent which would have settled the matter in line with Article 159(2) on the constitutional principle of promotion of alternative forms of dispute resolution, the Court of Appeal disregarded it. We have no doubt that whereas the issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of this Court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates would necessitate that this Court should assume jurisdiction and interrogate those alleged wrongs. In stating so, we reiterate our holding in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others***, Petition No. 6 of 2014; [2017] eKLR ("***Outa*** case") that:

"The [Supreme] Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all."

[63] We further reiterate that this Court should only depart from the principle that issues of constitutional interpretation must rise through the Superior Courts to this Court in the clearest of cases and the exception to that principle should be carefully considered by the Court in the manner we have expressed herein. In that context, in the Court of Appeal's Ruling of 12th November 2015, on the application to arrest the delivery of the Judgment, the Learned Appellate Judges noted thus:

"[5] The application is supported by several grounds stated therein, and matters deposed to in the affidavit of Geoffrey Makana Asanyo sworn on 2nd November 2015. It is stated that under Article 159(c)(d) of the Constitution, all courts are enjoined to promote alternative dispute resolution including conciliation and arbitration, the parties in this appeal reached a settlement and a final consent settling the matter was filed in this Court on 18th September, 2015 before the notice of delivery of the judgment was served upon the parties.

...

[8] Also Article 159(2)(c) of the Constitution encourages parties to engage in alternative dispute resolution and it is submitted thus, that this Court should adopt the consent order as the order of the Court."

[64] Despite the Court therefore having captured the Appellants' submissions as regards the import of Article 159 of the Constitution to their case, a perusal of the entire Ruling reveals that the Court never interrogated its applicability, or otherwise rendered itself on that fundamental issue. This curious development with respect to the Appellate Court must therefore legitimately anchor this appeal within the ambit of Article 163(4)(a) of the Constitution.

[65] Another limb of the Appellants' case before us is that, while a Bench of three judges was constituted to hear the appeal in the Court of Appeal, only two judges availed their judgments for delivery. The third judge indicated, by way of an email to the President of the Court, that he could not avail his judgment for delivery as in his opinion, the Court had been rendered *functus officio* once the parties filed the consent. Before this Court, all parties are in agreement that whatever was henceforth delivered by the Court of Appeal on 13th November 2015 could not and cannot be considered as a judgment of the Court. This position raises the following fundamental questions: what then was delivered as a judgment of the Court on 13th November 2015? How is the appellate Court to proceed where one judge in a three judge bench declines or otherwise withholds the delivery of his/her judgment?

[66] These are serious factual and legal issues that call for settling by this Court in its status as the apex Court. In that context, in ***Aramat***, this Court considered the unique and enlarged nature of jurisdiction bestowed to it under the Constitution 2010. It stated [paragraph 88] thus:

> ***"[88] The context in which we must address the question of jurisdiction in the instant matter, however, imports special permutations, and a special juridical and historical context that calls for further profiling to the concept. By the Constitution of Kenya, 2010 (Article 163), a Supreme Court, with ultimate constitutional responsibility, and***

bearing binding authority in questions of law, over all other Courts, has been established…"

[67] The Court continued [paragraphs 101 and 111] thus:

"[101] We would make it clear in the instant case that, it is a responsibility vested in the Supreme Court to interpret the Constitution with finality: and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the Constitution. Besides, as the Supreme Court carries the overall responsibility [The Constitution of Kenya, 2010, Article 163(7)] for providing guidance on matters of* law *for the State's judicial branch, it follows that its jurisdiction is* an enlarged one, *enabling it in all situations in which it has been duly moved,* to *settle the law for the guidance of other Courts.

…

[111] From the principles thus stated, it is clear to us that this Court ought to maintain constant interest in the scheme and the quality of jurisprudence that it propounds over time, even where it is constrained to decline the jurisdiction to deal with any* particular questions. *Whatever option it takes, however, this Court ought always to undertake a methodical analysis of any issues it is seized of, and ought always to* draw *the whole dispute to a meaningful conclusion,

bearing directions and final orders, in the broad interests of both the parties, and of due guidance to the judicial process and to the Courts below." [Emphasis added.]

[68] The upshot is that, as we have stated elsewhere above, the issue before us is one in which to decline jurisdiction would leave the appeal and dispute before us in limbo, and we therefore find that this case warrants this Court's consideration given its importance. It is also important to note that this Court is obligated to consider and settle the issue of how the Court of Appeal delivers its Judgments specifically in the context of the present matter and generally. The case further raises an exceptional circumstance that warrants assumption of jurisdiction by the Supreme Court in exercise of its inherent jurisdiction. In any event, the fact that there has arisen a question regarding a Judgment of the Court of Appeal is sufficient reason to assume such jurisdiction. Hence, we hold and find that we have jurisdiction to admit and consider this matter.

(ii) Whether there was a judgment from the Court of Appeal?

[69] As stated above, it is common ground to all parties in their submissions that there was no judgment of the Court of Appeal. This was made notwithstanding the fact that on 13th November 2015 *Mwera, JA* delivered a 'judgment' on behalf of *Ouko* & *Murgor, JJA*. This situation warrants a determination of what amounts to that 'decision' which was delivered on 13th November 2015. What exactly was it?

[70] This Court has had an opportunity to make a determination as to what a judgment of a court is. In ***Richard Nyagaka Tong'i v. Chris Munga N. Bichage & 2 others*** SC Petition No. 17 of 2014; [2015] eKLR, the Court interrogated the existing legal regime: The Civil Procedure Act, the Appellate Jurisdiction Act and the Supreme Court Act as well as the prevailing caselaw from the Court of Appeal and concluded thus:

[45] From the foundation of current case law, we would hold that a 'Judgment' is a determination or decision of a

Court, that finally determines the rights and obligations of the parties to a case, and includes any decree, order, sentence, or essential direction for the execution of the intent of the Court."

[71] Having so determined, what a Judgment of the Court should be is not the crux of the current dispute before us but instead, the Court is invited to answer the question; how should a Judgment of the Court [of Appeal] be delivered? This is crucial because a 'Judgment' only becomes valid and binding when finally delivered in accordance with the law. It is also trite that for a Judgment of the Court to be valid, it must be dated signed and delivered in open Court. The High Court, *Makhandia, J*, (as he then was) aptly stated in ***South Nyanza Sugar Co. Ltd v. Elijah Ntabo Omoro*** Civil Appeal No. 60 of 2005; [2011] eKLR that, *"[i]t is a mandatory requirement that for a judgment of the court to be valid, it must be dated, signed and delivered in open court… Thus a judgment that is neither dated nor delivered in open court is a nullity*." We agree.

[72] In the matter before this Court, it is however neither alleged that the impugned judgment was not dated nor delivered in open Court. In issue is the fact that while two Judges availed their Judgments for delivery duly signed, one Judge did not avail his duly signed Judgment. This scenario must necessarily call for an evaluation of how a Judgment should be delivered. In that context, every Court has Rules guiding how Judgments are delivered. For instance, the Supreme Court Act at Section 26 provides for how a Judgment should be delivered while in the Court of Appeal, such delivery is governed by Rule 32 of the Court of Appeal Rules, 2010.

[73] Rule 32 aforesaid provides in relevant parts thus:

"32. Judgment
(1) Judgment may be given at the close of the hearing of an application or appeal or reserved for delivery

within 90 days unless the Court for reasons to be recorded orders otherwise.

...

(3) In civil applications (other than applications heard by a single judge) and civil appeals, separate judgments shall be given by the members of the Court unless, the decision being unanimous, the presiding judge otherwise directs, but where one judge delays, dies, ceases to hold office, or is unable to perform the functions of his office because of infirmity of mind or body, separate concurring judgments may be given by the remaining members of the court.

...

(7) Where judgment, or the reasons for a decision, has been reserved, the judgment of the Court, or a judgment of any judge, or such reasons, as the case may be, being in writing and signed, may be delivered by any judge, whether or not he sat at the hearing.

(8) A judgment shall be dated as of the day when it is delivered or, where a direction has been given under the proviso to sub-rule (4), as for the day when the decision was delivered.

(9) For the purposes of this rule, "presiding judge" includes the next senior judge, where the original presiding judge has died, ceased to hold office, or is unable to perform the functions of his office by reason of infirmity of mind or body." [Emphasis added.]

[74] It thus emerges that pursuant to Rule 32(3), which was applicable in this matter, for a collegial bench of the Court of Appeal, unless the decision is unanimous, the general rule is that each judge is to pen his/her separate judgment. Further, the rule also provides that separate Judgments may be delivered where one Judge is unable to pen his/her Judgment due to the following reasons, namely: *where he delays in doing so, dies, ceases to hold office, or is unable to perform the functions of his office because of infirmity of mind or body.*

[75] Consequently, for the two Learned Appellate Judges to be said to have validly delivered a judgment on 13th November 2015, there is need to demonstrate that the provisions of Rule 32(3) had been met. That is, this Court ought to be satisfied that the *Hon. Kiage, JA*, had delayed in preparation of his Judgment; or he had ceased to hold office of Judge of the Court of Appeal; or that he was unable to perform the functions of his office because of infirmity of mind or body. None of these factors has been submitted as prevailing in this matter.

[76] So, what caused *Hon Kiage, JA* not to avail his Judgment for delivery? The reasons are well documented in the email the Learned Judge sent to the President of the Court of Appeal on 30th October 2015. We reproduce that email for avoidance of doubt::

> ***"Subject: Re: Civil Appeal 260 of 2014- Attorney General vs Geoffrey Assanya***
>
> *Thank you, your Honour, Mr. President.*
>
> *Given the position I have consistently expressed herein and the law I have cited, my expectation is that a second bench, as such, would have to adopt the consent. The mere reading of a judgment would otherwise be by a single judge, which one of us even offered to do, pronto. Still, I cannot second guess them.*
>
> *In case that bench decides to read my colleagues' two judgments, I request that the following be placed on the record by the said bench:*

> *"Kiage JA declined to avail his judgment and to participate in the final disposal of this appeal out of conviction that the Court had no further adjudicative role once the parties filed the consent settlement herein."*

[77] This email was read out in Court by *Mwera, JA* when he delivered the other judges' opinions and was and is part of the record of the Court of Appeal regarding 'delivery of the Judgment'. From the email it also clearly emerges that the learned appellate Judge was not inhibited by any of the exceptions under Rule 32(3). He was clearly of very sound mind and able to rationalize that given his legal Judgment, in his opinion, a judgment should not be delivered as the Court was *functus officio*, the parties having filed a consent. Having made such a finding, could the other two Judges legitimately deliver a valid Judgment of the Court which was in fact stated as being unanimous? We hold that the answer is in the negative. A matter duly heard by a three Judge Bench cannot have a Judgment delivered by two Judges without the exception(s) in Rule 32(3) of the Court of Appeal Rules being established. Such a practice clearly violates the Constitution, particularly Article 10 on the principle of adherence to the Rule of Law. Such a pronouncement cannot also be a valid judgment of the Court. It is in fact, a nullity.

[78] We also note that from the email communication, it is clear that the Learned Judge neither agreed nor disagreed with his colleagues on the substantive matter before the Court. He thus neither concurred nor dissented with his colleagues. *Kiage JA* simply found no reason to express his legal opinion as he found the Court to be *functus officio* and opted to down his judicial tools. Unfortunately, the Judgment of his Brother, *Ouko, JA* suggests the contrary. *Ouko, JA* in closing his 'lead' judgment states:

> ***"The appellants shall have half of the costs of this appeal and those in the High Court. <u>As Kiage and Murgor, JJA also agree, these shall be the orders of the Court</u>."*** [Emphasis added.]

[79] This is with respect, an apparent misrepresentation of *Kiage, JA's* position. *Kiage, JA* did not avail his Judgment for delivery. That being the case, we are left wondering where the Learned *Ouko JA*, drew the conclusion that his Brother had agreed with him. Indeed in her Judgment, *Murgor JA*, while agreeing with *Ouko, JA*, stated thus:

> ***"Enough said, I concur with the reasoning and conclusions to be found in the Judgment of Ouko JA."***

[80] This misrepresentation of the positions taken by the Learned Judges further taints the Judgment to the extent that it cannot legitimately demonstrate the position of the Court. It cannot thus be said that the Court spoke in unanimity. This anomaly is grave and renders the 'Judgment' fatally defective. A judgment of the Court should not leave the litigants second guessing on what it is that the Court really said. Clarity is one of the cornerstones upon which a judgment of a Court is anchored.

[81] In addition to our conclusions above, we also note that *Mwera, JA* read out the email communication by Kiage JA to the parties when he delivered the other two judgments as if it was itself a 'judgment'. We note in that regard that Rule 32(7) provides:

> ***(7) Where judgment, or the reasons for a decision, has been reserved, the judgment of the Court, or a judgment of any judge, or such reasons, as the case may be, being in writing and signed, may be delivered by any judge, whether or not he sat at the hearing.***

[82] This Court is unable to find that the email communication, addressed to the President of the Court of Appeal in his administrative capacity, can amount to a judgment or reasons for a decision so as to be delivered by Mwera, JA on behalf of

Kiage JA. We find no legal foundation in the reading of the email communication during the 'delivery' of a judgment of the Court.

[83] The upshot is that the pronouncement made by *Mwera, JA* on 13th November 2015 does not amount to a judgment of the Court. It has no legal basis and infringes Rule 32(3) of the Court of Appeal Rules, 2010. It also amounts to a misrepresentation of the position of *Kiage JA*. Consequently, we find and hold that the decision of 13th November 2015 was not a judgment of the Court and the same is declared null and void *ab-initio*.

(iii) Was the Court of Appeal right in declining to adopt the consent?

[84] Before this Court, no party has questioned the validity or otherwise of the contents of the consent entered into by the parties. Indeed in his oral submissions, Mr. Onyiso was emphatic that the Attorney General had no issue with the consent on record. However, he further submitted that the only issue he had was the submission by the Appellants, calling on the Court of Appeal, to adopt the consent. He submitted in that regard that the Court of Appeal had no jurisdiction to adopt such a consent and argued that the Appellate Judges properly found that they could not record the consent as they found no law allowing its adoption. He also urged that the Appellants ought to return to the High Court for adoption of the consent and that in that case the Respondent would not be opposed to its adoption.

[85] The Appellants on the other hand have argued that in declining to record and adopt the consent as a judgment of the Court, the Court of Appeal infringed Article 159(2) of the Constitution which provides for embracing of alternative dispute resolution mechanisms. They thus urged that the consent was duly filed in Court and the Learned Judges were aware of its presence on record but chose to ignore it. It was in addition urged that the Learned Judges relied on Rule 96 of the Court of Appeal Rules and ignored Article 159 of the Constitution contrary to Article 2(4)

which subjects all laws to the Constitution. It was furthermore emphasized that under Section 3(2) of the Appellate Jurisdiction Act, the Court of Appeal has jurisdiction to adopt a consent between parties, as it has jurisdiction in the same manner as the High Court.

[86] These parallel submissions call for determination of the question whether the Court of Appeal can record a consent entered into between parties before it. In its Ruling of 12th November 2015, the Appellate Court specifically relied on its Rules in declining the application to adopt the consent. It thus cited Rule 96(1)(2) and (3) as providing how an appeal is to be withdrawn as opposed to whether a consent can properly be recorded before it. The Court indeed opined that the consent as filed by parties did not say that the Judgment should not be delivered. The Court in that regard stated as follows:

> ***"[13] As evidenced by submissions, and it is discernable from the said consent letter, <u>there is no indication from the consent that the judgment of this Court should not be delivered.</u> Parties were at liberty to withdraw the appeal, as provided for in the Rules and the Court has power to have it struck out or withdrawn. There is no provision in the Rules for withholding a judgment of the Court before delivery."*** [Emphasis added.]

[87] The Appellate Court then explained the nature of its appellate jurisdiction under Rule 31 of the Rules thus:

> ***"The Court of Appeal exercises appellate jurisdiction which entails correction of errors or affirmation of the orders appealed against... This explains why the rules are couched as they are; unlike the High Court, this Court does not have original jurisdiction. Its jurisdiction is appellate and a***

judgment of the Court contains a determination of an appeal; if an appeal is compromised, there can be no judgment of the Court. If the appeal is withdrawn, struck out or dismissed or if it is heard, a judgment of the Court is rendered.

[14] The only consent that disposes an appeal provided for by the rule is the consent to withdraw the appeal under Rule 96. But as Rule 96(1) provides, the consent to withdraw the appeal should be entered into before the appeal is called on for hearing. The appeal was fully heard and a judgment date fixed by the Court. The parties lost any opportunity to enter into any consent in the appeal and the Court became fully seized of the appeal. It's only remaining duty being the determination of the appeal and the delivery of the judgment."

[88] It stated further;

"[15] A consent order cannot be adopted in place of the judgment of the Court in its appellate jurisdiction. Such an order is filled in the High Court, and then the appeal is withdrawn or struck out. Indeed, if the said consent order was adopted in place of the judgment of the Court, that would be misleading, because there is an appeal that was heard according to the record of appeal, against the decision of the High Court. A consent order cannot become the judgment of the Court. That state of affairs is not provided for in the rules and we decline to substitute the consent by the parties for the judgment of the Court."

With that pronouncement, the Court of Appeal dismissed the application to adopt the consent and ordered for the delivery of the Judgment.

[89] In reaching its conclusion, it is evident that the Learned Appellate Judges placed more premium on the Rules of the Court but with due respect to them, the same Rules were not considered in light of the constitutional principles embodied in Article 159 of the Constitution. We have in that regard already alluded to the centrality of constitutional principles that this Court enunciated in the ***Gender Representation*** case. We buttress that point by stating that in applying a rule of procedure, the same should not be so applied and/or interpreted so as to derogate from the spirit of the constitutional principles it relates to.

[90] In the above context, we repeat that Article 159 of the Constitution is the foundation of the exercise of judicial authority as donated by the people. This Article outlines principles that guide any person/body who or which exercises that delegated judicial authority. Alternative Dispute Resolution is one such principle as provided by Article 159(2)(c). The High Court, *Mativo J* in ***Council of County Governors v. Lake Basin Development Authority & 6 others*** Petition No. 280 of 2017; [2017] eKLR stated as follows, and we agree, regarding Alternative Dispute Resolution:

> ***"44. I have no doubt that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution, the Court is obligated to promote these modes of alternative dispute resolution. A Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to purse the alternative remedy. I have no doubt that the place of alternative***

dispute resolution is respected by the courts and this court is no exception."

[91] Further, in ***Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 others*** SC Appl. No. 7 of 2014; [2014] eKLR this Court emphasized the need to abide by the constitutional principles in Article 159 by stating thus:

"[72] In addition, Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted."

[92] Furthermore, in the case of ***Council of Governors v. Senate & another*** Reference No. 1 of 2014; [2014] eKLR the Court emphasized the liberty of the parties to withdraw a matter so as to pursue out of court settlement. It stated thus:

"[26] Suffice it to say that indeed a party's liberty to withdraw a matter cannot be taken away. Courts have to facilitate pursuance of other means of dispute resolution. Hence, it is only in order that the law allows a party who has approached the Court to withdraw such a matter if he deems so fit to do. Barring parties from withdrawing matters once filed in courts of law will be contrary to the constitutional principle of alternative dispute resolution as provided in Article 159 of the Constitution …"

[93] Further to the above, we note that in ***Star Paper Mill Ltd & Anor V. Bashiru Adetunji & Ors*** (2009) 7 iLAW/SC.292/2002, the Supreme Court of Nigeria was called upon to determine whether the Court of Appeal was right in striking out an appeal when the parties had amicably resolved the dispute between them. The Respondents (Plaintiffs) before the Court of Appeal had moved the High Court seeking a declaration that a lease granted had been determined by reason of forfeiture for failure to pay rent, which order was granted. The defendants were adjudged trespassers and a perpetual injunction against issued. Aggrieved, the defendants appealed to the Court of Appeal. Before the Respondents could file their brief of argument, the parties agreed to resolve the matter amicably and as a result *'a terms of settlement'* (akin to a consent) was filed in the Court of Appeal.

[94] However, rather than adopt the terms of settlement on the day of hearing, the Court of Appeal struck out the appeal, hence the subsequent appeal to the Supreme Court. In its Judgment, the Supreme Court of Nigeria rendered itself as follows regarding the rationale for consent Judgments:

> ***"It must be pointed out that it is one of the cardinal principles of our judicial system to allow parties to amicably resolve the disputes between them. By doing so, the otherwise hostile relationship between the parties would be amicably resolved and cemented. It is this amicable resolution of disputes by the parties that is called settlement. When the terms of such settlements are reduced into writing, it is now called 'terms of settlement', when the terms of settlement are filed they are called, and made the judgment of the court. It is then crystalised into 'consent judgment'. When consent judgment is given, none of the parties has the right of appeal, except with the leave, of court. Hence, consent judgment, is a contract between the***

parties whereby rights are created between them in substitution for order of consideration of the abandonment of the claim or claims pending before the court. This is intended to put a stop to litigation between the parties just as such as a judgment which results from the decision of the court."

[95] The Supreme Court of Nigeria further observed that the Court has discretion in recording the 'terms of settlement' to ensure that the same is not vague. It also found that in the circumstances of the matter before it, the Court of Appeal was right in not recording the terms of settlement as they were vague, ambiguous and un-ascertainable. However, the Supreme Court noted that as the parties were inclined to settle the matter amicably, it referred the matter back to the Court of Appeal to adopt a new 'terms of settlement' to be filed by the parties and stated thus:

"However, since parties have shown their intention to resolve this matter amicably and in order to put an end to litigation I hereby order that this matter be sent back to the Court of Appeal, Lagos Division (court below) for hearing, and the parties shall put before that court terms of settlement that are capable of being enforced, with the acquired and abandoned rights clearly set out. Consequently, I set aside the court below order which struck out the appeal before it and in its place order that the appeal be retried before another panel of the lower court. Costs shall be in the cause."

[96] The above finding therefore fortifies our position (in a persuasive context), that appellate courts can also adopt duly entered into consents between parties and

it therefore emerges that there should be no rule of procedure that precludes a Court of law from allowing a withdrawal of a matter (as correctly stated by the Court of Appeal) or recording a consent between parties before delivery of Judgment and making the Judgment moot. It is also trite that Rules of Court are handmaidens of the Court in its delivery of justice. The epitome of justice between parties before a Court of law is when parties finally, voluntarily, come to an amicable settlement of the dispute between them. The Court only comes in as an impartial arbiter where parties have failed to agree amongst themselves. It is the parties that go to Court seeking it to arbitrate the matter between them and once the Court is so invited, it should not close the door for parties to continue negotiating to reach an amicable settlement. Parties must remain at liberty to withdraw or consent to terms of settlement of the matter before the Court, as was correctly stated by the Supreme Court of Nigeria and which position settles well with our constitutional imperatives.

[97] We hasten to add that we are alive to the fact that some parties may use the court, through filing of proceedings, as coercion for other parties to submit to negotiation. Where such an action is discerned, then it amounts to abuse of Court process and Article 159 (2)(e) cannot be a panacea to such a malpractice. Alternative Dispute Resolution should always be entered into without malice and with free will.

[98] In the matter before us, we thus note that neither before this Court nor any of the Superior Courts, was it argued or alleged that the Consent as filed by parties was entered into through coercion, misrepresentation and/or fraud. In essence, the elements/principles for setting aside such a consent were never alleged and/or proved. As a matter of fact, the validity of the consent has never been the issue in these proceedings. The matter turned on whether the Court of Appeal was right to decline its adoption.

[99] Another ground for not accepting the adoption of the consent was that the Court of Appeal found that the consent did not specifically provide for withdrawal of the matter. We disagree with this finding on the basis that the Court took a narrow interpretation of the content of the Consent. The Consent as evident from the Record stated in part thus:

> ***"We the Advocates for the parties herein would be obliged if you could record the following Order;***
>
> ***<u>BY CONSENT</u>***
>
> ***The Appeal herein be marked as settled on terms that:***
>
> 1. ***The Appellant do pay to the Respondents the sum of Kenya shillings Forty Two Million Eight Hundred Thousand (Kshs. 42, 800, 000/=) as inclusive in full and final settlement of all their claims.***
> 2. ***Each party do bear its costs."***

[100] Contrary to the Court of Appeal finding that this consent does not indicate that the judgment of the Court of Appeal should not be delivered, we find that a holistic appreciation of the letter and spirit of the consent is to render the subject matter before the Court 'settled'. Should a Court of law proceed to deliver a judgment in a matter that the parties have settled and have informed the Court so? The answer is in the negative. Courts of law are not academic institutions to engage in abstract deliberations. They resolve legal issues emanating from live disputes between parties. Where parties consent to the settlement of their dispute in light on Article 159(2)(c) of the Constitution, the court reserves no right to insist on determining the 'matter'.

[101] Consequently, it is our finding that the Court of Appeal should have paid due regard to the principle in Article 159 (2) (e) of the Constitution while interpreting its Rules. It should in that case have adopted the consent as filed in Court and thereafter if need be, it could have invoked its Rules, particularly Rule 96 and marked the appeal as withdrawn.

[102] In so holding we hasten to add that it is not lost to this Court that judicial time and resources are scarce and precious. Indeed, a lot of judicial work and industry goes into the preparation of a judgment. However, the fact that such a judgment in which a Court has invested heavily in, is ready for delivery, cannot be a reason of denying litigants an opportunity to explore Alternative Dispute Resolution under Article 159 of the Constitution. As frustrating as that may be, it is the price that we judges, occasionally, have to pay in our pursuit of safeguarding access to justice and the Rule of law. With tremendous respect to the Learned Judges of the Court of Appeal therefore, we disagree with their holding that *"once an appeal is heard and judgment reserved, parties lose their chance to withdraw the matter as the Court becomes fully seized of the matter"*. A party/litigant before the Court should not at any time feel that he is no longer in-charge of his matter even as the Court ultimately determines such a matter.

[103] The Upshot of our findings above is that the Court of Appeal erred in holding that it could not record a consent order voluntarily entered into between parties. It placed undue reliance on its Court Rules in breach of Article 159 of the Constitution. As had been directed on 5th October 2015, during a mention, by the Court (*Visram, Okwengu, J. Mohammed, JJA*), the file should have been taken back to the initial bench that heard the matter for adoption of the consent. This was not done. However, there is no legal fatality in having any bench of the Court of Appeal as shall be constituted in adopting the consent.

[104] Curiously, it was argued by the Respondent that the Court of Appeal has no jurisdiction to record consents and the matter should go back to the High Court for adoption of the consent. We shudder to fathom the implications of this line of submission. The matter was on appeal before the Court of Appeal. The High Court long became *functus officio*. How then could the matter be referred back to the High Court? Which file or motion would be placed before the High Court for adoption of the consent which consent was clearly marked as having been entered into pursuant to a matter before the Court of Appeal? We find that the matter could not and cannot be referred back to the High Court to record the consent. The Court of Appeal is and was the right forum for its adoption. We say so well aware that there are many other instances where the Court of Appeal and indeed this Court can properly remit a matter to the High Court. This is not one of those instances.

G. APPROPRIATE RELIEFS

[105] The next issue for consideration is the appropriate reliefs that this Court should grant in this matter. The Appellants prayed for the following orders:

(i) *The entire Ruling/orders of the Kenya Court of Appeal sitting at Nairobi (E.M. Githinji, M.K. Koome & G.B.M. Kariuki, JJA) dated 13th day of November 2015 in Nairobi Civil Appeal No. 260 of 2014 be set aside.*

(ii) *The entire judgment of W. Ouko & A.K. Murgor, in the absence of P. Kiage JJA dated 12th November 2015 be set aside and the same be substituted with the Consent judgment dated 11th September 2015 and filed on the 18th September 2015 hence the Appellant herein be awarded damages in the sum of Kshs. 42, 800, 000/- (Forty Two Million, Eight Hundred Thousand Only).*

(iii) *An Order that the Consent letter dated 11th September 2015 and filed on 18th September, 2015 be adopted as the judgment of the Court of Appeal and judgment be entered in favour of the Petitioners for the sum of Kshs. 42, 800, 000/-.*

(iv) *In the alternative, the judgment of Court of Appeal (Ouko & Murgor JJA) dated 13th November 2015 be set aside in its entirety and the same be substituted with the reinstatement of the High Court judgment of Onyancha J. dated 21st May 2014.*

(v) *That the costs of this Appeal and costs of proceedings in the Court of Appeal and in the High Court be awarded to the Petitioner herein.*

(vi) *Any other orders that this Court may deem fit in the circumstances.*

[106] In considering the appropriate remedies to give, this Court is well guided by its objectives as provided by Section 3 of the Supreme Court Act and Rule 3(5) of the Court Rules which provide thus:

> ***"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

[107] In that context, as regards prayer (i), we have found that the Court of Appeal erred in holding that it could not adopt the consent in issue. The upshot is that, the Ruling of the Court of Appeal dated 12th November 2015 should be set aside.

[108] As regards prayer (ii), we have found that what was delivered on 13th November 2015 cannot be deemed a Judgment of the Court of Appeal but a nullity. The same is hereby declared null and void *ab initio* hence there is nothing to be set aside. As regards the alternative prayer that this Court should adopt the consent, we hold that the justice of this matter is not for this Court to record the consent. As already stated, having found that the Court of Appeal should have recorded the consent, the matter should be remitted back to that Court to do that which it ought to have done in the first place. The Court of Appeal should therefore proceed to record the consent of the parties as filed on 18th September 2015, and if need be, pursuant to Rule 96 of its Rules, mark the appeal as withdrawn. This means that prayer (iv) cannot be granted as prayed.

[109] As regards costs, this Court is cognizant of the principle that costs follow the event. However, in the case of ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*** SC Pet. No. 4 of 2014; [2014] eKLR, it stated the jurisprudence guiding its award of costs thus:

> ***"[8] The law does not require the Supreme Court to adhere to the costs-follow-the-event principle. This is clear from certain provisions of Statute Law. The Supreme Court Act, 2011 (Act No. 7 of 2011), by Section 21(2) thus provides:***
>
> > *"In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs as it thinks fit to award."*
>
> ***And, consistent with that prescription, is Rule 3(5) of the Supreme Court Rules, 2012:***
>
> > *"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be*

necessary for the ends of justice or to prevent abuse of the process of the Court."

[9] From the foregoing provisions, it is clear that the Supreme Court, much like the other superior Courts, has an open-ended mandate of application of discretion to ensure the ends of justice....

...

[11] It emerges clearly that, whether in this Court or any other superior Court, costs are awarded at the discretion of the Court or Judge. Indeed, as for the Supreme Court, Rule 3(5) of the Supreme Court Rules is the most pertinent, especially as it constitutes the governing framework for costs – and costs fall under the "inherent powers of the Court."

[110] In conclusion, the Court summed up the issue thus:

***"[18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties*, prior-**

to, *during, and subsequent-to the actual process of litigation.”*

[111] Flowing from the above legal position, it behoves this Court to evaluate the peculiar circumstances in this case in reaching a determination on awarding costs. It is in that regard our considered opinion that the set of circumstances in this matter cannot be faulted on any of the parties before Court. The manner in which the decision of 13th November 2015 was delivered was solely a judicial activity while the Ruling of 12th November 2015 holding that a consent could not be adopted was purely a misdirection by the Learned Appellate Judges. In these circumstance, we find that the most pragmatic order to make as regards the award of costs is that no party be condemned to bear that burden. Consequently each party shall bear his/its costs.

H. ORDERS

[112] Consequent upon our findings above, make the following orders:

(1) The Petition of Appeal dated 21st December 2015 is hereby allowed in the following specific terms:

(a) A declaration is hereby made that the Court of Appeal judgement dated 13th November 2015 in Nairobi Civil Appeal No. 260 of 2014 is null and void.

(b) The Ruling of the Court of Appeal dated 12th November 2015 in Nairobi Civil Appeal No. 260 of 2014 is hereby set aside.

(c) An order do hereby issue that this matter be remitted back to the Court of Appeal for the

adoption of the consent filed by parties on 18th September 2015 on a priority basis.

(2) Each party shall bear its own costs.

[113] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **20th day** of November, **2018**

.....	.....
M. K. IBRAHIM **JUSTICE OF THE SUPREME COURT**	**J. B. OJWANG** **JUSTICE OF THE SUPREME COURT**
.....	.....
S.C. WANJALA **JUSTICE OF THE SUPREME COURT**	**N. S. NJOKI** **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA