REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram; Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

PETITION NO. 7 (E009) of 2021

-BETWEEN-

ELLY OKONG'O INGANG'A……………………………….1ST PETITIONER

LUCAS ONDUSO OMOKE……………………………….2ND PETITIONER

VITALIS OTIENO MUGA……………………………….3RD PETITIONER

REBECCA OKENYURI NYAKONDO…………………4TH PETITIONER

JOICE MONGARE OCHOI……………………………….5TH PETITIONER

CHRISTOPHER OMWAMBA CHUMA……………….6TH PETITIONER

GETUNA MASELA IDINGA……………………………….7TH PETITIONER

-AND-

JAMES FINLAY (KENYA) LIMITED…………………… RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal (Nambuye, Karanja and Kantai JJ. A) at Nairobi Civil Appeal No. 297 of 2019 delivered on 21st May 2021)

Representation

Mr. Isaac E. N. Okero for the Petitioners
(Behan & Okero Advocates)

Mr. Geoffrey Orao Obura for the Respondent
(Obura Mbeche & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Appellants moved this Court vide Petition of Appeal dated **12th August 2021** and lodged on **13th August 2021** pursuant to Article 163 (4) (a) of the Constitution and Rule 33 of the Supreme Court Rules, 2020. They are challenging the Judgment of the Court of Appeal (*Nambuye, Karanja and Kantai JJ. A*) in Civil Appeal No. 297 of 2019 delivered on 21st May 2021.

B. BACKGROUND

[2] The Appellants were either serving or former employees of the Respondent, who owned and managed tea estates including Tiluet–Chomogonday factory, Marinyn, Kaproret and Kapsongoi Kitumbe factory all situated in Kericho County. The Respondent is a company incorporated under the Companies Act of Scotland with its registered office at Swire House, Souter Head Road Altens, Aberdeen, Scotland.

[3] The Appellants filed seven suits at the **All-Scotland Sheriff Personal Injury Court (**hereinafter referred to as the *"Scottish Court"*) at Edinburgh in Scotland, Court Ref. No. PLC PN 1055, 1056, 1057, 1058, 1052, 1053 and 1051 in respect of each Appellant. The Appellants were claiming to have suffered work related injuries while at work in the Respondent's various tea estates and factories in Kericho, Kenya. They alleged breach of duty to provide a safe working environment on account of negligence on the Respondent's part.

[4] The Scottish court was asked, *inter alia*, to issue locus inspections orders (hereinafter referred to as "locus inspection orders") for a site visit of the Respondent's tea estates and factories in Kericho for the purpose of observing the following activities: tea pickers picking tea manually and with equipment, taking measurements of the tea plants and areas where workers were required to work, including distance workers are required to walk to weigh tea; photocopying and videoing work undertaken by the workers; considering

Personal Protective Equipment (PPE) available to the workers; weighing the tea baskets when full of tea; observing and videoing picking, transporting and weighing of the tea; observing medical facilities available to the workers, and, weighing mechanical harvesting equipment for one, two and three users.

[5] In an Order dated 22nd November 2018 and amended on 18th December, 2018, the Scottish Court granted the locus inspection orders, in respect of the seven Appellants for the Respondent's premises in Tiluet Chomogonday Factory, Marinyn, Kaproret and Kapsongoi Kitumbe Factory in Kericho County. It is those orders that the Respondent sought to halt their execution.

C. LITIGATION HISTORY

i. At the Employment and Labour Relations Court

[6] Aggrieved, the Respondent, filed ***Constitutional Petition No. 30 of 2019*** via an Amended Originating Notice of Motion dated 31st January 2019 at the Employment and Labour Relations Court (ELRC) at Nairobi.

[7] In allowing the Amended Originating Notice of Motion, the Court (*Radido J.)* found that the purpose and objective of the locus inspection orders was to help sustain the actions commenced by the Appellants before the Scottish court. The report by the experts would be presented as evidence for consideration at the trial. He found that once a competent court had issued orders for discovery, the same became self-executing and failure by a party to comply would attract further orders such as stay and/or debarment from defending. He however pointed out that difficulties arose where discovery was ordered outside the jurisdiction of the trial court, as was the case. He elaborated that these difficulties were traceable to the theory of sovereignty and territoriality as well as the doctrine of comity, which necessitated the need for codification in the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 Laws of Kenya and the High Court (Practice & Procedure) Rules. These provisions broadly required domestication of foreign judgments before execution. He noted that the Foreign

Judgments (Reciprocal Enforcement) Act was silent on enforcement of interlocutory orders.

[8] The Court was of the view that interlocutory orders required judicial aid to ensure that the orders of a foreign court were not inconsistent with public policies of Kenya such as the *need for legal certainty*, *avoidance of re-litigation in domestic courts* and *reciprocity*. The Court added that procedural concerns were also factors to be considered and these included *reciprocity*, *personal jurisdiction, subject matter jurisdiction* and *forum conveniens*.

[9] The Court held that without judicial assistance, it would not be possible to discern whether due process followed before the issuance of the locus inspection orders was in consonance with the rights guaranteed under the Constitution of Kenya. The Court found that the locus inspection orders directly impacted the right to fair hearing in **Article 50 (1)** as well as the sovereign and territorial integrity of Kenya. It was for these reasons that the Court concluded that the experts listed could not travel to Kenya to enforce the orders without the consent of the Kenyan authorities, judicial or executive. The Court further held that it was the location of the conduct of the locus inspections and not the ultimate purpose of the inspections that would implicate the involvement of the court in the exercise of its delegated sovereign mandate.

[10] The Court noted that our procedural laws contemplated judicial assistance in suits involving foreign jurisdiction before final judgment. The Learned Trial Judge pointed out several such provisions including Section 54 of the Civil Procedure Act empowering the High Court to issue commissions (letter of request) for the examination of witness outside Kenya; Section 55 requiring the imprimatur (authorization) of the High Court before commissions (letter of request) issued by the foreign courts are executed; Order 5 of the Civil Procedure Rules envisaging grant of leave of Court before service of summons/process outside the jurisdiction of court; Order 5 Rule 29, requiring the involvement of the Ministry of Foreign Affairs in the service of notice of summons; Order 5 Rule 30 providing for the need for assistance of the High

Court in respect of service of the public legal process in Kenya; Order 28 set out similar provisions in respect of commissions by foreign courts.

[11] It was the court's conclusion that judicial assistance would not be a merit re-examination of the litigation processes in the Scottish Court. In allowing the amended originating notice of motion, the learned judge proceeded to issue the following orders:

1. ***THAT*** *the orders issued by the* ***ALL SCOTLAND SHERIFF PERSONAL INJURY COURT*** *(hereinafter referred to as the "Scottish Court") dated 22nd November 2018 as amended on 18th December 2018 and more particularly listed herein below have to be adopted and recognized as orders of this court before being executed as required by* ***Article 159 (1)*** *of the Constitution and the provisions of the* ***Foreign Judgments (Reciprocal Enforcement) Act Chapter 43*** *of the Laws of Kenya:*

   (a) *The* ***ORDER*** *for Inspection Reference No. PIC PG 10 -18 dated 22nd November 2018 as amended by a subsequent* ***ORDER*** *dated 18th December 2018 issued by the Scottish Court in the* ***ELLY OKONGO INGANGA*** *against* ***JAMES FINLAY (KENYA) LIMITED*** *filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN1055 – 17 dated NINTH day of May 2017.*

   (b) *The* ***ORDER*** *for Inspection Reference No. PIC PG 6 -18 dated 22nd November 2018 as amended by a subsequent* ***ORDER*** *dated 18th December 2018 issued by the Scottish Court in the* ***LUCAS ONDUSO OMOKE*** *against* ***JAMES FINLAY (KENYA) LIMITED*** *filed at Edinburgh in the Scottish Court under Court Ref. No. PIC PN1056 – 17 dated NINTH day of May 2017.*

(c) *The* ***ORDER*** *for Inspection Reference No. PIC PG 7 -18 dated 22nd November 2018 as amended by a subsequent* ***ORDER*** *dated 18th December 2018 issued by the Scottish Court in the* ***VITALIS MUGA*** *against* ***JAMES FINLAY (KENYA) LIMITED*** *filed at Edinburgh in the Scottish Court under Court Ref. No. PIC PN1057 – 17 dated NINTH day of May 2017.*

(d) *The* ***ORDER*** *for Inspection Reference No. PIC PG8 -18 dated 22nd November 2018 as amended by a subsequent* ***ORDER*** *dated 18th December 2018 issued by the Scottish Court in the* ***REBECCA OKENYURI NYAKONDI*** *against* ***JAMES FINLAY (KENYA) LIMITED*** *filed at Edinburgh in the Scottish Court under Court Ref. No. PIC PN1058 – 17 dated NINTH day of May 2017.*

(e) *The* ***ORDER*** *for Inspection Reference No. PIC PG5 -18 dated 22nd November 2018 as amended by a subsequent* ***ORDER*** *dated 18th December 2018 issued by the Scottish Court in the* ***JOICE MONGARE OCHOI*** *against* ***JAMES FINLAY (KENYA) LIMITED*** *filed at Edinburgh in the Scottish Court under Court Ref. No. PIC PN1052 – 17 dated NINTH day of May 2017.*

(f) *The* ***ORDER*** *for Inspection Reference No. PIC PG11 -18 dated 22nd November 2018 as amended by a subsequent* ***ORDER*** *dated 18th December 2018 issued by the Scottish Court in the* ***CHRISTOPHER OMWAMBA CHUMA*** *against* ***JAMES FINLAY (KENYA) LIMITED*** *filed at Edinburgh in the Scottish Court under Court Ref. No. PIC PN1053 – 17 dated NINTH day of May 2017.*

(g) *The **ORDER** for Inspection Reference No. PIC – PG9 -18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the **GETUNA MASELA IDINGA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN1051 – 17 dated NINTH day of May 2017.*

2. ***THAT** the Respondents their agents and or servants must abide by and observe the provisions of the High Court (Practice and Procedure) Rules PART VII being part of the written laws of England applicable to Kenya by virtue of Section 3(1)(b) of the Judicature Act, Cap 8 of the Laws of Kenya before conducting any locus inspection as ordered by the Scottish Court such as locus inspection having the sole purpose of collecting evidence to be used in the Scottish Court.*

3. ***THAT** failure by the Respondents, their agents and or servants to observe the provisions set out in PART VII of the High Court (Practice and Procedure) Rules will be in breach of the sovereignty of Kenya and an abuse of protocol as between the two sovereign states of United Kingdom and Kenya.*

4. ***THAT** any execution of the Scottish Court orders before being adopted by this Honourable Court will be contrary to the legal spirit set out in the provisions of Foreign Judgments (Reciprocal Enforcement) Act Chapter 43 Laws of Kenya.*

ii. At the Court of Appeal

[12] Aggrieved by the decision of the Employment and Labour Relations Court, the Appellants filed an appeal, **Civil Appeal No. 297 of 2019** wherein they faulted the learned Judge for *inter alia:* finding that the locus inspection orders issued by the Scottish Court required judicial aid as a matter of public policy, without specifying the public policy considerations; invoking Sections 54

and 55 of the Civil Procedure Act (Cap 21), Orders 5 and 28 of the Civil Procedure Rules as bases for the justification of judicial assistance in relation to the locus inspection orders; invoking the Foreign Judgments (Reciprocal Enforcement) Act (Cap.43) against the locus inspection orders on the basis of 'antecedents in sovereignty and territorial concerns'; using the need of judicial assistance as a means for scrutinizing adherence of the Appellants rights under the Constitution without any allegation of breach of said rights while conversely ignoring the Appellants' rights under Article 50 which were invoked; misapprehending the status of the experts authorized by the locus inspection; and failing to appreciate that the Respondent sought to clothe its breach of the locus inspection orders and to frustrate the Appellant's suit before the Scottish Court in violation of their rights to access to justice and fair trial. The Appellants prayed for setting aside of the Judgment of the trial court as well as the dismissal of the Petition with costs.

[13] The Court of Appeal determined that the main issue calling for their consideration was *whether the locus inspection orders issued by the Scottish Court could be executed in Kenya without intervention by Kenyan authorities*.

[14] The learned Judges of Appeal agreed with the trial judge. They found that a reading of Articles 1, 2 and 159 of the Constitution showed that sovereign power belonged to the people of Kenya and they exercised this power themselves and through their representatives. Further, that power could be delegated to State organs such as the Judiciary, and that the Scottish Court was not one of the Courts established in the Constitution. The Court of Appeal found that though there was no provision in statute or procedure on how interlocutory orders issued by foreign courts could be enforced in Kenya, a broad reading of the statutes dictated that foreign courts are required to seek assistance either from the Kenyan Judiciary or other Kenyan authorities before enforcing Court orders.

[15] The learned Judges of Appeal agreed with the trial Court that there were public policy issues involved, necessitating judicial aid to ensure that the orders

of the foreign court were not inconsistent with the public policies of Kenya. They added that the Kenyan court whose assistance was sought would examine the case from the foreign court and ascertain whether the proper judicial process had been followed in obtaining such orders, whether that process was consistent with Kenyan laws and policy and whether the experts were qualified under Kenyan law to undertake such exercise, amongst other considerations.

[16] Consequently, in their Judgment delivered on 21st May 2021, they dismissed the appeal with costs to the Respondent.

iii. Before the Supreme Court

[17] Aggrieved by the Judgment of the Court of Appeal, the Appellants have preferred the present Petition of Appeal, whereby they set out seven grounds of appeal, that:

1. *The learned judges of appeal erred in upholding the determination of the superior court that interlocutory orders such as the locus inspection orders issued by the Scottish court require judicial aid as a matter of public policy, without stipulating specifically what public policy considerations dictate this requirement in relation to the locus inspection orders.*
2. *The learned judges of appeal erred in law by determining that compliance by the respondent with the locus inspection orders of the Scottish court which are self-executing and interlocutory in nature, are orders to be executed by a Kenyan court in the exercise of the delegated sovereign power of the people of Kenya under Articles 2, 5 and 159 of the Constitution.*
3. *The learned judges erred in law and in fact by questioning with no basis whatsoever whether* ***'a sovereign State, and Kenya is one, allows (s) foreigners to walk into its territory and undertake such and related activities without supervision or assistance'*** *given that the 'such and related activities' concerned the [**making of**] **certain observations – of tea pickers***

picking tea; [the taking of] certain measurements of the tea estates and factories, [the taking of] videos of various activities at the estates and factories and even photocopying of various documents and equipment *all at the private premises in Kenya of a Scottish company that had willingly submitted to the jurisdiction of the Scottish Court and was not of any state, government of military facilities whose access is restricted by Kenyan Law.*

4. *The learned judges of appeal misdirected themselves by holding that* ***'The Kenyan court whose assistance is sought would examine the case from the foreign court and ascertain whether proper judicial process has been followed in obtaining such orders, whether that process is consistent with Kenyan laws and policy and whether the experts were qualified under Kenyan law to undertake such exercise, amongst other considerations'*** *and yet this would invite violation of the* ***lis alibi pendens*** *doctrine.*
5. *The learned judges of appeal misdirected themselves by invoking the Foreign Judgments (Reciprocal Enforcement) Act (Cap.43) and the Civil Procedure Act (Cap. 21) against the locus inspection orders on the basis that* ***'a broad reading of the statutes would dictate that the foreign court, like the Scottish court here, be moved to seek assistance of the Kenyan Judiciary and other Kenyan authorities for enforcing orders issued by such a Court'.***
6. *The learned judges of appeal erred in failing to appreciate that the respondent's petition before the superior court sought to invoke the court's authority with which to clothe its breach of the locus inspection orders and to frustrate the petitioners' actions before the Scottish Court in violation of their rights to access justice and to fair trials.*

7. *The learned judges of appeal erred in penalizing the appellants with the costs of the appeal given the emerging practice that where a petition involves interpretation of constitutional provisions the courts are reluctant to penalize any party with costs.*

[18] As a result, the Appellants seek the following reliefs:

a) *This appeal be allowed.*
b) *The Judgment of the Court of Appeal in Civil Appeal No. 297 of 2019 be aside.*
c) *The order for costs made against the Appellants by the Court of Appeal be set aside.*
d) *The Judgment of the Employment and Labour Relations Court, Nairobi in Nairobi ELRC Petition No. 30 of 2019 be set aside and be substituted with a dismissal of the Respondent's petition.*

[19] The Petition of Appeal is opposed by the Respondent, which filed three documents in opposition. First is a Notice of Grounds dated 21st July 2021 affirming the decision of the Court of Appeal on several additional grounds. Firstly, where there is a clear procedure for redress prescribed either in the Constitution or in statute, such as the procedures set out in Part VII of the High Court (Practice Procedure) Rule on modalities of collection of evidence for use in a foreign court, the same ought to be strictly followed. The Respondent also adds that the orders granted by the trial court were discretionary and the Appellants have failed to demonstrate how the Court misdirected itself, or if the decision was manifestly wrong so as to occasion injustice, therefore this Court should not interfere with that exercise of discretion.

[20] Second, the Respondent filed Grounds of Objection dated 21st July 2021 raising ten (10) grounds of objection. In summary, the Respondent was contending that: the appeal was tantamount to asking the Court to compromise on its major role of asserting the Supremacy of the Constitution and sovereignty of the people while exercising its judicial authority; the Orders by the trial court did not misapply Article 159 or infringe on the Appellants' rights to access justice or fair trial before the Scottish Courts, rather the Court of Appeal merely

reminded the Appellants that if they wanted to seek justice in the Scottish Courts with some actions being performed in Kenya, then the actions that needed to be performed within the country had to adhere to the Constitutional and statutory provisions in Kenya. The Respondent contended that both the trial court and the Court of Appeal did not merely invoke public policy but proceeded to set out the public policy parameters that a Kenyan Court had to examine and evaluate before allowing the intended locus inspection.

[21] The Respondent was further opposed to the Petition of Appeal on the ground that the locus inspections were not self-executing orders but rather required several steps to be followed including; agreeing on a translator, the Respondent admitting persons to its private property and further granting permission to carry out certain activities such as observing, taking measurements, photography, weighing. The Respondent added that the examination of the foreign court order against the public policy considerations enumerated by the Court of Appeal did not amount to a substantive evaluation of the suit and therefore there was no violation of the doctrine of *lis alibi pendens*. For context *lis alibi pendens* arises from international comity and it permits a court to refuse to exercise jurisdiction when there is parallel litigation pending in another jurisdiction.

[22] Relying on the sovereignty doctrine of international law, the Respondent added that all states are equal and no state can exercise jurisdiction within the territory of another, without judicial authority of a Kenyan court or the intervention of any other branch of the government, failure to do so is considered an affront to the sovereignty of the Republic of Kenya. Additionally, that the superior courts did not invoke the Foreign Judgments (Reciprocal Enforcement) Act or the Civil Procedure Act as the guiding precedents, rather found that a broad reading dictated that the foreign court ought to seek assistance from the Kenyan Judiciary. Finally, that there is no evidence that the superior courts misdirected themselves in law or fact or considered or failed to

consider any relevant issue or committed any other error or misapprehension and there was thus no basis whatsoever for interfering with their decision.

[23] Third, the Respondent filed a Replying Affidavit sworn on 21st July 2021 by Simon Hutchinson, the Respondent's Managing Director. He deponed that contemporaneously with the Notice of Appeal against the decision of the trial Court, the Appellants through their counsel, wrote two letters to the Respondent demanding release of the information which was the subject of the ***ELRC Petition No. 30 of 2019***. To wit, the Respondent's counsel responded vide letter dated 25th July 2021 citing the pending appeal in ***Civil Appeal No. 297 of 2019*** and reiterating that the issues raised were *sub judice*. He further deponed that despite the pendency of ***Civil Appeal No. 297 of 2019***, the Appellants instituted ***Kericho Petition No. 7 & 8 of 2019*** in which they sought *inter alia* the release of information held by the Respondent on the working conditions of the tea workers at its operations in Kericho and Bomet counties pursuant to Article 35(1) (b) of the Constitution. He further deponed that that was for the purpose of using the said information before the Scottish Court to prosecute their work injury claims. In the Petition before the High Court in Kericho, the Respondent raised a preliminary objection which was dismissed. However, while on appeal in Civil Appeal No. 297 of 2019, the Court of Appeal directed counsel on record to inform the High Court (*Mbaru J.*) in Kericho of the proceedings and cease her decision until the final outcome of the appeal. The Judgment in Kericho was deferred to 23rd September 2021. He averred that the suit in Kericho represented an attempt by the Appellants to execute the locus inspection orders without proper judicial authority being sought and granted. He added that this was evidence that the locus inspection orders were not self-executing.

Rejoinder

[24] The Appellants filed a rejoinder to the Grounds of Objection dated 27th July 2021 specifically contending first, that the translator was to be part of the inspection team and would act as translator between the Appellants, their

counsel and the inspection experts, thus the Respondent would not play a part in the selection of the translator. Second, that the Respondent's admission of the inspection team into its private property would be an act of compliance with self-executing locus inspection orders and thereafter playing no other role in the specific exercises of the inspection team. Further, that the Respondent granting access to its private property of persons lawfully in the territory of Kenya, was not a matter either in the control of, or concerning the affairs of the Government requiring intervention by any branch of government or the protection of the courts. Finally, that Part VII of the High Court (Practice and Procedure) Rules under the Judicature Act was not relevant as the inspection team was collecting evidence for the Appellants to use before the Scottish Court and not as agents of the Scottish Court.

[25] The Appellants also rely on an Affidavit of Rejoinder sworn by the 1st Appellant on 26th July 2021. Referring to exchange of letters between the Appellants and the Respondent's reply dated 25th July, 2021, he deponed that in order to provide the Court with a full context of the correspondence, he annexed the Appellants' response

[26] He further deponed that it was inaccurate that the Court of Appeal directed their counsel on record to inform the Judge in the Kericho Petitions to arrest her judgment. He clarified that the Court of Appeal requested counsel to notify the Judge of their imminent delivery of their Judgment in the appeal on 7th May 2021, which was eventually delivered on 21st May 2021. He further asserted that *Mbaru J.* in the Kericho Petitions was correct in dismissing the Respondent's preliminary objection as the Appellants' enforcing their constitutional right to information under Article 35 was a separate and distinct matter from the locus inspection orders. Further, that the same cannot amount to an abuse of court process as this was unrelated to the issues in Petition 30 of 2019, the stay orders or the appeal before the Court of Appeal in Civil Appeal No. 297 of 2019.

D. THE PARTIES RESPECTIVE CASES

[27] When the matter came up before us for virtual hearing on 16th June 2022, learned counsel **Mr. Isaac E. N. Okero** appeared for Appellants while **Mr. Geoffrey Orao Obura** appeared for the Respondent.

a. *Appellants Case*

Submissions

[28] The Appellants rely on their submissions dated and filed on 30th November 2021 as well as their Submissions in final Reply dated 21st January 2022 and filed on 25th January 2021. They submit that there are two fundamental issues raised in the petition: the constitutional rights under Article 50 (1) of the Constitution of the Appellants, ordinary Kenyan citizens, to a fair trial before a foreign court; and whether compliance in Kenya by a private person in regard to its private property with a self-executing discovery order issued by a foreign court in a valid ongoing litigation proceeding, is a matter affecting the sovereignty and national security of Kenya as expressed in Articles 1 and 238 of the Constitution and concerning the judicial authority of Kenyan courts as prescribed by Article 159 (1) of the Constitution.

[29] It is the Appellants' argument that the superior courts erred in finding that public policy required the involvement of Kenyan authorities without disclosing which public policies were the subject of the test of consistency. It was contended that the examples of public policies given by the superior courts, *whether proper judicial process had been followed in obtaining the orders, and whether that process is consistent with Kenyan laws and policies*, were problematic as the courts cannot take positions that put them in breach of the *lis alibi pendens* doctrine.

[30] It is their submission that the principles of law upon which public policy may be deemed a justiciable issue are well established in the House of Lords decision of ***McLoughlin v O'Brian [1982] UKHL 3***, Supreme Court of

Ireland in ***H.A.H v. S.A.A & ors [2017] IESC 40*** and Constitutional Court of South Africa in ***Paulsen and Another v Slip Knot Investments 777 (Pty) Limited [2015] ZACC***. They assert that these decisions demonstrate that public policy, unless its nature and existence is properly established, must not be used to interfere to any unnecessary extent with the orderly application of rules or to deprive a litigant of their manifest legal rights. They urge that the invocation of public policy by the superior courts in their impugned decisions has resulted in breach of the *lis alibi pendens* doctrine requiring an unnecessary and additional proceedings before a Kenyan Court. Further, it has resulted in an unjustified expansion of the application of the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 far beyond the scope of words of the statute.

[31] Regarding Articles 1, 2 and 159 of the Constitution, the Appellants are of the view that the inspection orders which were recognized as self-executing by the trial court, do not require a process of execution. All they require is compliance by the parties.

[32] They submit that the inference that compliance by the Respondent is a matter of sovereignty of the people, national security to the Republic of Kenya, and a threat to the judicial authority of Kenya's courts is a *reductio ad absurdum* (a method of proving the falsity of a premise by showing that its logical consequence is absurd or contradictory). There is nothing in the activities that the Appellants together with their counsel and experts are to carry out on the private property of the Respondent that may be construed as touching on or affecting the national security of Kenya. Hence, there is no legal justification that the Appellants rights to fair trial are eroded. They drew inference that thousands of foreigners enter into Kenya, upon their compliance with the relevant immigration laws and engage in private business with private persons, on private property without the same being construed as threats to national security and without requiring judicial assistance.

[33] It is further contended that the superior courts, without legal justification, created an impediment to the inspection ordered by the Scottish Court, thereby eroding their rights to fair trial.

[34] Furthermore, it is posited that it is illogical that an expert witness of a foreign court, designated and identified for the purposes of proceedings in that court, must be found by a Kenyan court to have suitable qualifications under Kenyan law simply because they are undertaking an inspection exercise in Kenya on private property for the foreign case. Such a position again invites breach of the *lis alibi pendens* doctrine and therefore cannot be framed as Kenyan public policy.

[35] As to costs, the Appellants urge this Court to follow the principle set out in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2016] eKLR*** and to take into account that this matter involves the interpretation of constitutional provisions and/or protection of constitutional rights. They submit that the interest of justice will be served by a decision that each party bears their own costs. They seek their petition be allowed setting aside the decision of the Court of Appeal and substituting it with a judgment allowing the Appellants' petition of appeal with the consequence of dismissing the Respondent's petition before the Employment and Labour Relations Court.

a. Respondent's Case

Submissions

[36] The Respondent relies on its submissions dated 8th August 2021 and filed on 14th December 2021. The Respondent submits that the issue for determination before this Court is whether the experts identified by the Scottish Court should be allowed to travel to Kenya and conduct locus inspection assignments without consent and supervision of Kenyan authorities.

[37] The Respondent submits that the issues framed by the Appellants are flawed because: (a) Article 50 would only be applicable to proceedings commenced in Kenya as proceedings commenced in a foreign country are

conducted by different set of laws which Kenyan courts have no control over; and (b) this Court being a judicial authority created under Chapter 10 of the Constitution can only issue orders within the confines of its constitutional and statutory mandate and cannot be seen to be aiding and abetting a trial before a foreign court unless its participation is sought. Moreover, it is important to determine whether any act by a foreign body is a risk to the sovereignty of Kenya and that can only be done by subjecting such acts to scrutiny through established legal procedures like judicial intervention.

[38] The Respondent affirms that the Learned Judges of the superior courts did identify the public policy they based their decisions on. Since there is no provision in our legislations on enforcement of interlocutory orders, the trial Judge was persuaded to adopt the spirit enunciated in the Foreign Judgments (Reciprocal) Enforcement Act in concluding that judicial assistance is needed. The mere fact that the Scottish court is not one of the courts clothed with judicial authority over the people of Kenya as required by Article 159 is a matter of public policy that the judicial authorities need to intervene to ascertain such orders are in the interest of the people of Kenya. Furthermore, legislative enactments like Part VII of the High Court (Practice and Procedure) Rules, the Civil Procedure Act, Order 5 Rule (29) and Order 28 of the Civil Procedure Rules are themselves embodiment of public concern in dealing with foreign judicial orders.

[39] Additionally, in the case of ***Central Inland Water Transport Corporation Limited & Another v Brojo Nath Ganguly & Another (1986) SCC 156*** quoted in ***Kenya National Examination Council [2017] eKLR*** confirms that public policy is not necessarily the policy of a particular government but *"it connotes some matter which concerns the public good and public interest*". The Respondent further emphasizes that in the case of ***Christ for all National v Apollo Insurance Company Limited [2002] 2EA 366*** *Ringera J* (as he then was) defined public policy to be an issue: which is inconsistent with the Constitution or other laws of Kenya

whether written or unwritten; inimical to the national interests of Kenya; or contrary to justice and morality. Consequently, public policy can be considered by courts as a matter of discretion to refer to ideas which, for the time being are prevailing in a country and the conditions necessary for the country's welfare. See also ***Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR***.

[40] Subsequently, Article 1 and 2 as well as Article 159 of the Constitution delegates supremacy and sovereignty to be exercised by Kenyan judicial system as opposed to Scottish court. The Respondent submits that any judicial order issued by the latter court is null and void unless first sanitized by Kenyan judicial authorities before being executed. It is added that this sanitizing is not restricted to cases involving government, and/or security issues. The Respondent contends that determination by a judicial authority in Kenya would not violate the doctrine of *lis alibi pendens* and the appellants argument in this regard is misplaced considering Section 6 of the Civil Procedure Act is categorical that pendency of a suit in a foreign court shall not preclude a court in Kenya from trying a suit in which the same matters or any of them are in issue in such a foreign court.

[41] The Respondent submits that the reluctance of the Appellants to adhere to established legal procedures of obtaining the required information through official means of *Letters of Rogatoire* is merely meant to circumvent the legal checks and balances which such letters would guarantee in the interest of both parties.

[42] With regard to the award of costs, the Respondent asserts that the Appellants have failed to point out the arguments against the award of costs which they tabled before the judges of appeal and was ignored by them. It is asserted that mere assumption that in constitutional cases, costs should not be awarded is not enough. Ultimately, the Respondent prays for the Petition of Appeal to be dismissed and costs awarded to it.

D. ANALYSIS AND DETERMINATION

[43] The following issues emerge for the Court to determine

i. *Whether this Court is clothed with the requisite jurisdiction to determine this appeal?*

ii. *Whether the locus inspection orders issued by the Scottish Court could be executed in Kenya without intervention by Kenyan authorities*

iii. *Who should bear the costs of the appeal?*

i. Does this Court have the requisite jurisdiction to determine this appeal?

[44] Before embarking on determining the merits of any appeal, the Court must assess whether its jurisdiction is properly invoked. As was held in the celebrated case of ***Owners of the Motor Vessel "Lillians" v. Caltex Oil Kenya Limited*** [1989] KLR 1, without jurisdiction a court has no power and must down tools in respect of the matter in question. Equally, as this Court held in ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR*** where the Constitution exhaustively provides for the jurisdiction of a court, the court must operate within those limits. It cannot expand its jurisdiction through judicial craft or innovation.

[45] In ***Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*** Sup Ct Petition No 3 of 2012; (2012) eKLR, we delineated this Court's jurisdiction under Article 163 (4) (a) of the Constitution that it must be demonstrated that the issues of contestation revolved around the interpretation or application of the Constitution. It is the interpretation or application of the Constitution by the Court of Appeal that forms the basis of a challenge to this court. So that, where the dispute has nothing or little to do with the interpretation or application of the Constitution, this Court under Article 163(4)(a) will have no jurisdiction to entertain the appeal.

[46] These principles are reiterated in the cases ***Hassan Ali Joho & another Vs. Suleiman Said Shahbal & 2 Others***, SC Pet No 10 of 2013 [2014] eKLR and ***Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others***, SC App No. 5 of 2014 [2014] e KLR, ***Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone*** [2013]eKLR, ***Daniel Kimani Njehia v. Francis Mwangi Kimani & Another*** [2015] eKLR***, Suleiman Mwamlole Warrakah & 2 others v. Mwamlole Tchappu Mbwana & 4 others*** [2018] eKLR, ***Nasra Ibrahim Ibren v Independent Electoral Boundaries & 2 others*** [2018] eKLR and ***National Rainbow Coalition Kenya (NARC Kenya) v. Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party),*** SC Petition 1 of 2021; [2022] KESC 6 (KLR) (Civ) (17 February 2022). It is against this background that we examine whether the Petition raises issues of Constitutional interpretation and application.

[47] The Appellants' have filed the present Petition of Appeal pursuant to Article 163 (4) (a) of the Constitution and Rule 33 of the Supreme Court Rules, 2020. The Appellants contend that there are two main issues for this Court to determine; whether their right to fair trial under Article 50 was infringed by the trial court and Court of Appeal and whether execution of the orders from the Scottish Court is a matter affecting the sovereignty and national security of Kenya as expressed in Articles 1 and 238 of the Constitution and concerning the judicial authority of Kenyan courts as prescribed by Article 159 (1) of the Constitution.

[48] Having perused the record, we note that it is the manner of enforcement, application or compliance of the orders from the Scottish Court that has been in contention right from the trial Court and progressed by way of appeal to ultimately reach this Court. We also take note that it is Articles 1, 50, 159 and 238 of the Constitution that have been the subject of construction and interpretation. Accordingly, we arrive at the conclusion that the appeal falls

squarely within the ambit of Article 163(4)(a) of the Constitution. We therefore find that we have jurisdiction to consider it.

ii. Can the locus inspection orders issued by the Scottish Court be executed in Kenya without intervention by Kenyan authorities?

[49] The Appellants submit that the locus inspection orders which they assert as self-executing by the trial court do not require a process of execution. All they require is compliance by the parties. They take the position that the enforcement of the orders did not touch on the sovereignty of the people, national security to the Republic of Kenya, or threatened the judicial authority of Kenya's courts. They base this argument on the submission that there was nothing in their activities together with their legal counsel or the work the experts intended to carry out on the Respondent's private property that could be construed as touching or affecting the national security of Kenyans. They also faulted the trial Court and the Court of Appeal for invoking public policy consideration as a basis for declining to allow them enforce the orders while they failed to disclose the specific public policies they were relying on.

[50] The Respondent argues that it is only through subjecting foreign decisions to scrutiny through the established procedures like judicial intervention that these decisions can be ascertained not to be a risk to the sovereignty of the people. It is further urged that superior courts identified the public policies they based their decisions on. It is argued that the mere fact that the Scottish court is not one of the courts clothed with judicial authority over the people of Kenya as required by Article 159 is a matter of public policy that the judicial authorities need to intervene to ascertain such orders are in the interest of the people of Kenya. Furthermore, legislative enactments like Part VII of the High Court (Practice and Procedure) Rules, the Civil Procedure Act, Order 5 Rule (29) and Order 28 of the Civil Procedure Rules are themselves embodiment of public concern in dealing with foreign judicial orders. The

Respondent also pointed out that pursuant to Articles 1 and 2 of the Constitution and by virtue of Article 159, supremacy and sovereignty was donated to the Kenyan judicial system as opposed to the Scottish Court. Therefore, any judicial order by the Scottish Court was void unless sanitized by Kenyan authorities before execution.

[51] One of the cornerstones of international law is the principle of territoriality, under which, sovereign states have sole authority over their own territory. As this Court found in the case of ***Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** (Petition 3 of 2018) [2021] KESC 34 (KLR), Article 2(5) and (6) of the Constitution, recognizes international law (both customary and treaty law) as a source of law in Kenya. It is why Kenya being as a member of the international community is bound by the provisions of the UN Charter. The centerpiece of the United Nations is the sovereign equality of the Member States as enshrined under Article 2 (1) to (4) of the United Nations Charter provides:

> *1. The Organization is based on the principle of the sovereign equality of all its Members.*
>
> *2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.*
>
> *3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*
>
> *4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

[52] Due to the territorial nature of jurisdiction, laws of one state do not apply to other states. And rightly so, as different states have different laws in place depending on the state's history, culture and priorities. Sovereignty and the principle of territoriality prevents foreign judgments from having direct operation in other countries. The effect of this principle is ultimately, no judgment of a court of one country can be executed *proprio vigore (*of or by its own force independently) in another country.

[53] This has been the subject of interpretation and application, more so by the English Courts and within the Commonwealth countries, that dates as far back as the 19th Century. One such decision is that of ***Raja of Faridkot vs Gurdyal Singh*** (1895) ILR 22 Cal 222 by the High Court in Calcutta. Here the Court firmly reinforced the concept of territorial jurisdiction of nations and stated as follows:

> *"6. ....All jurisdiction is properly territorial, and "extra territorium jus dicenti, impune non paretur." Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country.* ***It exists always as to land within the territory, and it may be exercised over moveables within the territory****.*
>
> .....
>
> *7. In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the forum by which it was pronounced."*

[54] To allow universal recognition and enforcement of foreign decisions would result in recognizing that foreign courts are superior to the national courts, thereby infringing on the sovereignty of a country. Further, due to the diversity of laws, automatic recognition may result in enforcement of decisions that go against the laws or public policies of the enforcing country. It is for this reason that there must be adequate safeguards in place. The citizens or residents of the country where the decision is sought to be enforced should not be left without protection in respect to arbitrary measures which might be taken against them in foreign countries.

[55] How then do foreign decisions gain recognition and force of law? Which government office or agency is tasked with scrutinizing foreign decisions?

[56] It is our considered opinion that Parliament enacted various statutes to deal with different scenarios. For instance, in Extradition proceedings, we have the Extradition (Commonwealth Countries) Act (CAP. 77) and Extradition (Contiguous and Foreign Countries) Act (CAP. 76). In the case of ***Director of Public Prosecutions v Okemo & 4 others*** (Petition 14 of 2020) [2021] KESC 13 (KLR) where the Court found that extradition cases, being criminal in nature the appropriate office to initiate extradition proceedings was the Director of Public Prosecutions. The Attorney General however retains the Executive Authority to receive Requests for Extradition and to transmit the same to the Director of Public Prosecutions for necessary action before a Magistrates Courts in Kenya. In the case of foreign judgments, Parliament enacted the Foreign Judgments (Reciprocal Enforcement) Act (CAP. 43) for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya. We shall be shortly be unravelling the conundrum of how judicial assistance is accorded to interlocutory decisions. However, what is evident, is that the Courts have an active role to play where foreign decisions are concerned.

[57] Under the Constitution, it is in the Courts and Tribunals established in Kenya through Article 159, that the people of Kenya vested judicial authority.

This is what informs our considered view that, of the three arms of government, the Judiciary is the better suited authority to scrutinize the decisions of a foreign court. It is also at the juncture of such scrutiny that the Courts of an enforcing country examine a decision by the foreign court or tribunal to determine if the same adheres to the Constitution and laws of the country. It is here that the Country's public policy becomes crucial, as decisions that go against the enforcing country's public policy considerations would not gain recognition.

[58] Castel, Jean-Gabriel in *"Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada"* (1971), 17 McGill L.J. 11 writes that the concept of recognizing foreign decisions developed around the 18th century due to growth in English colonies world-over as well as the growth of English foreign trade. Kenya being a former colony and now a member of the Commonwealth, our history is intricately tied to the United Kingdom. This need for recognizing and enforcing decisions by foreign courts or tribunals was anchored upon the doctrine of comity. The Black's Law Dictionary, 9th Edition defines comity as follows:

> *"A practice among political entities (as nations, states, or courts of different jurisdictions) involving esp. mutual recognition of legislative, executive and judicial acts."*

[59] The application of the doctrine of comity means that the recognition of foreign decision is not out of obligation, but rather out of convenience and utility. One of the more influential statements of the doctrine of comity still applicable today was made in ***Hilton v Guyot, 159 U.S. 113, 143 (1895)*** where Justice Gray of the Supreme Court defined comity as follows:

> *"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent of which the law of one nation... shall be allowed to operate within the dominion of another nation, depends upon... the "comity of nations"... "*

Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and goodwill, on the other; it is the recognition which one allows within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws*…"*

[60] This approach prioritizes citizen protection while taking into account the legitimate interests of foreign claimants. This approach is consistent with the adaptability of international comity as a principle of informed prioritizing national interests rather than absolute obligation, as well as the practical differences between the international and national contexts.

[61] The Supreme Court of Canada in the case of ***Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077*** highlighted the fact that the meaning and tenor of the doctrine of comity has evolved over the years to facilitate the flow of wealth, skills and people across boundaries. This has become ever more crucial with the globalization trend in which the world's economies, cultures, and populations are highly interdependent due to cross-border trade in goods and services, technology, and flows of investment, people, and information. Mehren and Trautman have observed in *"Recognition of Foreign Adjudications: A Survey and A Suggested Approach"* ***(1968), 81 Harv. L. Rev. 1601, at p. 1603****: "The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted."* The Supreme Court of Canada in the of ***Morguard Investments Ltd. v. De Savoye, [supra]*** held as follows:

"Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment in rem, such as a decree of divorce granted by the courts

of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.

But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so, we saw, even of actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century, this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.

For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the Unites States in Hilton v. Guyot, 159 U.S. 113 (1895).”

[62] Turning back to the dispute before the Court, these principles of territoriality and sovereignty are reflected in various articles of the Constitution of Kenya. Pursuant to Article 2 (1), the Constitution of Kenya is the supreme law of the land and binds all persons and all State organs at both levels of government. Pursuant to Article 2 (4) of the Constitution, any law that is inconsistent with the Constitution is void, and any act or omission in contravention of the Constitution is invalid. It goes without saying, that any foreign decision that is not consistent with the Constitution is void and would not be recognised.

[63] Article 1 of the Constitution of Kenya lays out the expression of sovereignty of the people of Kenya as follows:

> *"Sovereignty of the people*
>
> *(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.*
>
> *(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.*
>
> *(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—*
>
> > *(a) Parliament and the legislative assemblies in the county governments;*
> >
> > *(b) the national executive and the executive structures in the county governments; and*
> >
> > *(c) the Judiciary and independent tribunals.*
> >
> > *(4) The sovereign power of the people is exercised at—*
> >
> > *(a) the national level; and*
> >
> > *(b) the county level."*

[64] Article 4(1) declares Kenya to be a sovereign republic. The people of Kenya exercise this sovereign power themselves and through the delegated state organs such as the Judicial arm of government. Article 159(1) provides that judicial authority of the Courts '*is derived from the people and vests in, and*

shall be exercised by, the courts and tribunals established by or under this Constitution.' While Article 160(1) provides that '*in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.'*

[65] This Court in ***Peter Odiwuor Ngoge t/a O P Ngoge & Associates Advocates & 5379 others v J Namada Simoni t/a Namada & Co Advocates & 725 others,*** S.C. Petition No. 13 of 2013 stated that judicial authority in Kenya derives from and is exercised pursuant to the Constitution. The domestic courts therefore exercise donated power that the people democratically consented to. The legal philosopher Martin Loughlin in '*The Idea of Public Law*' (Oxford University Press, 2003) at pages 84-85 argues that sovereignty as power is an essential precondition of any legal order. This is based on the fact that it is the people who are the '*repository of sovereignty in those regimes that adopt formal constitutions and allocate legal authority to designated organs of government*'. Democratic self-rule will therefore be threatened where foreign courts, to whom the people have not donated judicial authority, can directly exercise influence within the polity without intermediation with domestic bodies.

[66] We have no difficulty finding that decisions by foreign courts and tribunals are not automatically recognized or enforceable in Kenya. They must be examined by the Courts in Kenya for them to gain recognition and to be enforced. Consequently, it is also our finding that Kenya as a sovereign state cannot automatically allow citizens, individuals or officers of a foreign state to carry out upon its own territory the decisions of a foreign court, without authorization from the Kenyan Government upon recognition of the decision of the foreign court or tribunal. Such an action would violate the principle of sovereignty enshrined in our Constitution. It is therefore our finding that the Appellants' experts/examiners cannot enter the country to execute the locus inspection orders without authorization.

[67] It is for the aforementioned reasons that one of the avenues Kenya has for the recognition and enforcement of decisions from foreign courts and tribunals is the **Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 Laws of Kenya.** This is our first port of call. This preamble of the statute provides that the Act serves '*to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith*'.

[68] Section 3 (1) of this Act stipulates which judgments the act applies to and lists the following:

> *"(a) a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;*
>
> *(b) a judgment or order of a designated court in civil proceedings under which movable property is ordered to be delivered to any person, including an order for the delivery of movable property as part of a scheme for the provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;*
>
> *(c) a judgment or order of a designated court in criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to an injured person;*
>
> *(d) a judgment given in any court on appeal against a judgment or order of a designated court referred to in paragraphs (a) to (c);*
>
> *(e) a judgment of a designated superior court for the costs of an appeal from a subordinate court, whether or not a designated court, or from an award referred to in paragraph (f); and*
>
> *(f) an award in arbitration proceedings, if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country."*

[69] Section 3(2) complements (1) aforesaid as it stipulates the two conditions that the judgments above must meet. It provides as follows:

> *"2) This Act applies to a judgment referred to in subsection (1) if it—*
>
> *(a) requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor; or*
>
> *(b) is final and conclusive as between the parties thereto,*
>
> *but a judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court."*

[70] Section 3(3) lists out the nature of judgments that the Act does not apply to. These are the following:

> *"This Act does not apply to a judgment or order—*
>
> *(a) whereby a sum of money is payable or an item of movable property is deliverable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty;*
>
> *(b) to the extent to which it provides for the payment of a sum of money by way of exemplary, punitive or multiple damages;*
>
> *(c) for the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of the person against whom the order was made;*
>
> *(d) in a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, not being a judgment referred to in paragraph (a) or (b) of subsection (1), whereby a sum of money is payable or item of movable property deliverable;*
>
> *(e) in proceedings in connection with the custody or guardianship of children;*
>
> *(f) in proceedings concerning the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs;*
>
> *(g) in a matter of succession to, or administration of, estates of deceased persons whereby a sum of money is payable or movable property is deliverable;*

(h) in a matter of social security or public assistance whereby a sum of money is payable by or to a public authority or fund;

(i) in bankruptcy proceedings or in proceedings for the winding-up or re-organization of a corporation or in proceedings for judicial arrangements, compositions or similar matters;

(j) in proceedings relating to damage, death or injury caused by occurrences involving nuclear matter or the emission of ionising radiation;

(k) of a designated court in any proceedings if—

(i) the bringing of those proceedings in that court was contrary to an agreement, or to an instrument in respect of which the proceedings were instituted, whereby the dispute, or the proceedings, were to be settled otherwise than in the courts of the reciprocating country; and

(ii) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given;

(iii) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court;

(l) which is regarded for the purposes of its enforcement as a judgment of a designated country but which was given in another country;

(m) given by a designated court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of the latter judgment."

[71] Scotland is one of the constituent countries of United Kingdom, and therefore is one of the reciprocating countries under the Foreign Judgments (Reciprocal Enforcement) Act. However, as is already evident from the aforementioned provisions, interlocutory orders such as the impugned locus inspection orders issued by the Court in Scotland do not fall within the parameters of the statute for two reasons. First, they are not on the list of decisions that the Act applies to and second, the locus inspection orders are not final and conclusive.

[72] The need for decisions to be final and conclusive is founded on two principles, the conclusiveness rule and *res judicata*. These two concepts are interlinked and are consistent with two maxims *interest reipublicae ut sit finis litium* meaning it is interest of the state that there should be a limit to litigation and *nemo debet bis vexari pro eadem causa* meaning no person should be punished twice for the same offence. Marussia Borm-Reid in her article '***Recognition and Enforcement of Foreign Judgments'*** International and Comparative Law Quarterly, Vol. 3 No. 1 (1954) pp 49-92 cited Smith's ***Leading Cases*****,** (1929) 13th ed, ii 717-18 where one of the justifications for the need for conclusiveness was that *'facts can never be enquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them'*.

[73] The conclusive judgment reached by the foreign court or tribunal creates an indefeasible right in favour of the judgment debtor and is to be exercised against the judgment creditor. It is not the judgment but the right vested under that judgment which is recognized and enforced. This position is reiterated by Jean Gabriel Castel's article where she quotes H.E. Read's ***Recognition and Enforcement of Foreign Judgments in the Common Law Unity of the British Commonwealth*** (1934), pp. 52-53, 125**.** Dr. Read stated as follows:

> *"a foreign judgment is recognized because it establishes the existence of a foreign judicially-created substantive fight. A right which has been duly acquired under the law of any civilized country by virtue of the judgment is to be recognized and enforced by the forum. He states that the true basis of the recognition of a foreign judgment, lies in the fact that:*
>
> ***... a vested right has been created through the judicial process by the law of a foreign law district. This basis not only supports and explains the finality requirement and conclusiveness rule; it is implicit in the doctrine of territoriality of law.*** *This however, is not to say that the Anglo-Dominion common law of foreign judgments*

gives effect to the so-called vested rights doctrine of conflict of laws to the extent of recognizing every right created by a foreign-territorial law through the judicial process.

To be recognized as an operative fact the right must have been created by the law of a district which had judicial jurisdiction in the international sense and have satisfied other requirements." (Emphasis added)

[74] In the Canadian case of ***Laferriere Vs. Gariepy (1920) 62 Can S.C.R. 557***, the Supreme Court held that the doctrine of res judicata is based on a presumption that the conclusion reached by a judge is true and having become absolute can longer be questioned and is a bar to any further action between the same parties regarding the same matter. It therefore follows that as a matter of law and international comity, the receiving state should allow a foreign judgment its full effect, without trying the merits of the case afresh, as on a new trial or appeal.

[75] The test of finality was settled in the old English case of ***Re Henderson, Nouvion Vs. Freeman (1889) L.R. 15 A.C 1*** where the Court of Appeal, Lindley L.J. held that

"The test of finality and conclusiveness of any judgment is to be found in the view taken of it by the tribunals of the country in which it is pronounced and ***if a judgment leaves the rights of the parties uninvestigated and undetermined and avowedly leaves those rights to be determined in some other proceedings the judgment cannot be treated here as imposing some obligations which our tribunals ought to enforce."***

On appeal to the House of Lords, Lord Herschell held as follows:

"In order to establish that a (final) judgment has been pronounced ***it must be shown that in the court by which it was pronounced it conclusively, finally and forever established the existence of***

<u>the debt of which it sought to be made conclusive evidence in this country,</u> *so as to make it res judicata between the parties."*

[76] The principle of *res judicata* resonates with our Kenyan laws as it is codified under Section 7 of the Civil Procedure Act which provides as follows:

> *"No court shall, try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

[77] It has also been the subject of interpretation and application by the Courts including by this Court in the case of ***Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another,*** SC Motion No 42 & 43 of 2014 Consolidated [2016] eKLR held as follows regarding the doctrine of res judicata:

> *"Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights."*

[78] This is not to say that when a Court is presented with a foreign judgment for recognition and enforcement it proceeds to rehear the same on merits or as an appeal on the correctness or otherwise of the judgment. The issues for considerations for the Courts in Kenya when examining a foreign decision are outlined in Section 9 of the Civil Procedure Act, Cap 21 Laws of Kenya and include the following:

> *9. When foreign judgment not conclusive*
>
> *A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—*

(a) where it has not been pronounced by a court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in Kenya.

Additional considerations on the jurisdiction of the foreign court are set out in Sections 4 and 5 of the Foreign Judgments (Reciprocal Enforcement) Act. Broadly they are considerations on whether there was opportunity for full and fair trial, whether the court was competent to hear and determine the matter, whether the defendant had notice of the trial, whether the legal system was one that ensured impartial justice and was devoid of fraud in procuring the judgment.

[79] From the foregoing, it is manifestly clear that the locus inspection orders issued by the Court in Scotland do not meet the finality test and therefore do not fall within the ambit of the Foreign Judgments (Reciprocal Enforcement) Act.

[80] Be that as it may, we take note of the fact that the superior courts found that our procedural laws contemplated judicial assistance. The superior courts made reference to various sections of the Civil Procedure Act, Cap 21 Laws of Kenya and Rules, 2010, as well as provisions of the Judicature Act.

[81] As rightly noted by the trial Court, the locus inspection orders are part of the discovery process in litigation. Discovery at the very basic level entails a pre-

trial procedure to ascertain facts to be presented at the trial, and as noted by the High Court (*Gikonyo J.*) in ***Eliud Muturi Mwangi (practicing in the name and style of Muturi & Co. Advocates) v LSG Lufthansa Services Europa/Africa GMBH & Another, HC Civil Case No. 154 of 2014 [2015] eKLR,*** it has constitutional underpinning in the right to access information enshrined in Article 35.

[82] Section 22 of the Civil Procedure Act, Cap 21, empowers a court, either on its own motion or application by the parties, to make any orders as may be necessary for discovery. Section 22 provides as follows:

> *"22. Power to order discovery and the like*
>
> *Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—*
>
> *(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;*
>
> *(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;*
>
> *(c) order any fact to be proved by affidavit.*

[83] Some of the provisions the trial Court referred to were Sections 54 and 55 of the Civil Procedure Act. These fall under Part IV of the Civil Procedure Act which deals with '*Incidental Proceedings*', more specifically commissions. Section 52 therein makes provision for the power of the court to issue commission. It provides as follows:

> *"52. Power of court to issue commission*

Subject to such conditions and limitations as may be prescribed, the court may issue a commission—

(a) to examine any person;

(b) to make a local investigation;

(c) to examine or adjust accounts; or

(d) to make a partition."

[84] The word 'commission' is not defined in the Civil Procedure Act or Rules. In the ***Black's Law Dictionary, 9th edition*** it is defined as follows:

> *"1. A warrant or authority from the government or a court, that empowers the person named to execute official acts. 2. The authority under which a person transacts business for another. 3. A body of persons acting lawful authority to perform certain public services."*

[85] Sections 54 and 55 of the Civil Procedure Act are pertinent to the present appeal as they empower the High Court to issue commissions for the examination of witnesses outside Kenya and require the commissions from foreign courts for examination of witnesses be approved by the High Court before execution respectively.

[86] For us this is a demonstration that the trial Court was correct in its supposition that the procedural provisions are a demonstration that judicial assistance is a prerequisite in enforcing interlocutory orders. In tandem with this, there is a procedure to be followed when a foreign court or tribunal issues orders geared towards discovery of evidence.

[87] Order 28 of the Civil Procedure Rules, 2010 on '*Commissions and references*' further activates Sections 52 to 55 of the Civil Procedure Act. We take note that Order 28 Rule 4 makes provision for the Courts in Kenya to make a request for commission of taking evidence of a witness outside Kenya. While conversely, Order 28 Rule 5 is on the Courts in Kenya receiving commissions

from foreign Courts and tribunals for the examination of a witness. These provisions, provide as follows:

"4. Request to examine witness abroad [Order 28, rule 4.]

Where any court to which application is made for the issue of a commission for the examination of a person residing at any place not in Kenya is satisfied that the evidence of such person is necessary, the court may issue such commission or a letter of request.

5. Court to examine witness pursuant to commission [Order 28, rule 5.]

Every court in Kenya receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

[88] Order 28 Rule 17 provides as follows:

"17. Commissions issued by foreign courts [Order 28, rule 17.]

*The provisions as to the execution and return of **commissions for the examination of witnesses** shall apply to commissions issued by—*

(a) courts situated in any part of the Commonwealth other than Kenya; or

(b) courts of any foreign country for the time being in alliance with Kenya."

[89] The High Court (Practice and Procedure) Rules made pursuant to Section 10 of the Judicature Act, Cap 8 Laws of Kenya are also instructive. Part V provides a standard form of a letter of request to a Foreign Tribunal to Examine Witness Abroad. Part VII – Evidence for Foreign Tribunal, Regulation 1, provides as follows:

"1. Application to court

Where, under the Foreign Tribunals Evidence Act, 1856, a civil or commercial matter or a criminal matter, is pending before a court or tribunal of a foreign country and it is made to appear to the Court or a

*judge, by **commission rogatoire, or letter of request**, or other evidence as hereinafter provided, that that **court or tribunal is desirous of obtaining the testimony in relation to the matter of any witness or witnesses within the jurisdiction**, the Court or a judge may on the ex parte application of any person shown to be duly authorized to make the application on behalf of the foreign court or tribunal, and on production of the commission rogatoire, or letter of request, or of a certificate signed in the manner and certifying to the effect mentioned in section 2 of the Foreign Tribunals Evidence Act, 1856, or such other evidence as the Court or a judge may require, make such order or orders as may be necessary to give effect to the intention of the Acts above-mentioned in conformity with section 1 of the Foreign Tribunals Evidence Act, 1856.*

[90] Regulation 7 of the High Court (Practice and Procedure) Rules made pursuant to Section 10 of the Judicature Act, provides as follows:

7. Application of rules to British Tribunals

*This Part applies, so far as may be, to applications under the Evidence by Commission Act, 1859 **for the purpose of giving effect to a commission or letter of request from a Commonwealth Tribunal out of the jurisdiction**, but in those cases the duly certified depositions and letter of request, if any, shall be returned to the authority which forwarded the commission or letter of request, unless they are returned under the provisions of rule 9.*

[91] Regulations 8 and 9 therein provide as follows:

8. Application to court by Attorney-General

Where a commission rogatoire or letter of request mentioned in rule 9 is transmitted to the High Court by the Minister with an intimation that it is desirable that effect should be given to it without requiring an

application to be made to the Court by the agents in Kenya of any of the parties to the action or matter in the foreign country, the Registrar of the High Court shall transmit it to the Attorney-General, who may thereupon make such applications and take such steps as may be necessary to give effect to the commission rogatoire or letter of request in accordance with rules 1 to 6.

9. Return of commission direct to Court or Foreign Tribunal

Where a commission rogatoire or letter of request has been received from a Foreign Court or Tribunal direct, without having been transmitted through the Minister, then, notwithstanding anything contained in rule 4, the Registrar may, after the commission rogatoire or letter of request has been complied with, if in his opinion the course would tend to avoid undue inconvenience and delay, return the depositions duly certified direct to the Court or Foreign Tribunal from which the commission rogatoire or letter of request emanated.

[92] We therefore find, the import of Sections 54 and 55 of the Civil Procedure Act, Order 28 of the Civil Procedure Rules, as well as the High Court (Practice and Procedure) Rules made pursuant to Section 10 of the Judicature Act, is that the appropriate method of seeking judicial assistance is through the issuance of commission *rogatoire* or letter of request to the High Court in Kenya seeking assistance.

[93] As we have highlighted these provisions are specific for the examination of witnesses. However, we note that Section 52 of the Civil Procedure Act lists the various types of commissions that the Court has the power to issue and these are not limited to examination of witnesses. Rather, it includes the power to *'make a local investigation; to examine or adjust accounts; or to make a partition'*.

[94] The nature of these orders is useful in discovery, whose purpose, as stated in the often-cited case of ***Oracle Productions Ltd Vs Decapture Limited***

& 3 others, HCCC No. 567 of 2011 [2014] eKLR *"....is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial."* These orders may also be issued in the course of trial when the court observes the need for them in order to better discern the root of the controversy and arrive a fair and just determination. It is our considered opinion, that this is why Order 28 is elaborate on commissions as evinced in the Rules and includes the following:

> ***"6. Return of commission with deposition of witness [Order 28, rule 6.]***
>
> *Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall form part of the record of the suit.*
>
> ***7. Commissions to make investigations [Order 28, rule 7.]***
>
> *On the application of any party or of its own motion in any suit, the court may issue a commission to any person to make an investigation and report to the court for the purpose of ascertaining—*
>
> *(a) any matter in dispute in the suit, whether or not the matter is substantially the whole matter in dispute between the parties; or*
>
> *b) the value of any property or the extent of any damage thereto, or the amount of returns, profits, damages or mesne profits.*
>
> ***8. Procedure of commissioner [Order 28, rule 8.]***
>
> *(1) The commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the court.*

(2) The report of the commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the court, or, with the permission of the court, any of the parties to the suit, may examine the commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the court is for any reason dissatisfied with the proceeding of the commissioner, it may direct such further inquiry to be made as it shall think fit."

[95] It also includes Order 28 Rule 14 on the powers of the commissioner:

"14. Powers of commissioner [Order 28, rule 14.]

Any person appointed under this Order may, unless otherwise directed by the order of appointment—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the person appointed thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of the inquiry; or

(c) at any reasonable time enter upon or into any land or building mentioned in the order."

[96] It is for the foregoing reasons, that this Court is of the view that the same procedure of foreign courts seeking judicial assistance in Kenya for examination of witnesses is the same procedure to be followed for carrying out local investigations, examination or adjustment accounts; or to make a partition. It bears repeating that this procedure is through the issuance of commission *rogatoire* or letter of request to the High Court in Kenya seeking assistance.

[97] Be that as it may, we take cognizance of the fact that this procedure is not immediately apparent. Even the High Court and Court of Appeal were not able to promptly identify with precision the relevant applicable laws. The High Court and Court of Appeal were wrong for extending the spirit of the Foreign Judgments (Reciprocal Enforcement) Act beyond its application as this was not the appropriate statute that was applicable to the present case.

[98] Needless to say, ignorance of the law is not a defence. However, where the law is not easily discernible or the proper course of action to follow is not easily perceptible by both Courts and litigants, then that speaks to the clarity of the law or lack thereof, rather than the fault of the litigant. For this reason, we cannot fault the Appellants for stumbling through the complexity of ambiguous and obstruse statutes, and failing to find a solution.

[99] Even now, the procedural steps to be undertaken as set out under *Part VII – Evidence For Foreign Tribunal* of the High Court Practice and Procedure Rules made pursuant to Section 10 of the Judicature Act, are not clear. It is not explicitly clear whether the letter of request is to be sent to the Attorney General, the Minister (now Cabinet Secretary) or directly to the Registrar of the High Court. However, for procedural propriety, we direct the Appellants to pursue having the Court in Scotland channel a commission *rogatoire* or letter of request to the Registrar of the High Court in Kenya for assistance. This would then activate or trigger the High Court in Kenya to implement the Rules as contained in Order 28 of the Civil Procedure Rules, 2010 in executing the request.

[100] For the forestated reasons and for the avoidance of doubt, we find no merit in the appeal and dismiss the same.

[101] We have taken keen note that the laws currently in place regarding this issue, require updating in order to be brought in line with the Constitution. There is also need to harmonize these laws with the other existing laws such as the Civil Procedure Act, Rules, 2010 any other relevant laws. The High Court

(Practice and Procedure) Rules in the Judicature Act are stuck in time warp! We are surprised that the law in this regard is yet to be updated. These procedures in their current state remain a hindrance to Kenyans realizing their right to access to justice as guaranteed by Article 48 of the Constitution.

[102] The United Kingdom has since repealed the Foreign Tribunals Evidence Act, 1856 and now have the Evidence (Proceedings in other Jurisdictions), Act, 1975 as read together with Part 34 (II) of the Civil Procedure Rules, 1998 for assistance in proceedings in Foreign Courts. The assistance relates to the examination of witnesses, either orally or in writing; for the production of documents, the inspection, photographing, preservation, custody or detention of any property, the taking of samples of any property and the carrying out of any experiments on or with any property, the medical examination of any person or even for the taking and testing of samples of blood from any person. We see no reason why our own laws should not be brought up to date and include the advancements both in technology and case management systems.

[103] In order to achieve compliance with this judgement, we direct that Attorney General, Kenya Law Reform and Parliament do commence an enquiry and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.

Who should bear the costs of the Appeal?

[104] According to this Court's finding in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***, Sc. Petition No 4 of 2012; [2014] eKLR, 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. This Court also observed that 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.

[105] As we have found hereinabove, we cannot fault the Appellants for the lack explicitness of the appropriate procedure they should have followed to enforce the locus inspection orders. Indeed, it would therefore be unjust and undeserved to condemn them to pay costs.

[106] Accordingly, we order that each party bear their own costs of this appeal.

E. ORDERS

[107] Consequent upon our conclusion above, we finally order that;

a) ***The Petition of Appeal dated 12th August 2021 and lodged on 13th August 2021 is hereby dismissed.***

b) ***Each party shall bear their own costs of the Appeal.***

c) ***We direct that this Judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law, to give effect to this judgment and develop the legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **March** 2023.

....

P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE-PRESIDENT OF THE SUPREME COURT

....
M.K. IBRAHIM S.C. WANJALA
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

.... **...**
NJOKI NDUNGU **I. LENAOLA**
JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA