REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mutunga CJ and P; Ibrahim, Ojwang, Wanjala and Njoki, SCJJ)

CIVIL APPLICATION NO. 12 OF 2015

–BETWEEN–

1. DEYNES MURIITHI
2.ALEXANDER MUCHEMI
3. ANNA CHERONO KONUCHE } **.....APPLICANTS**
4. PAUL KARIBA KIBIKU
5. KIMANI WAWERU & 28 OTHERS

–AND–

1. THE LAW SOCIETY OF KENYA } **.....RESPONDENTS**
2. THE REGISTRAR OF THE HIGH COURT

(Being an application for stay pending the hearing and determination of an appeal from the Ruling and Order of the Court of Appeal sitting at Nairobi (Githinji, Nambuye & Ouko JJA) delivered on 29th May, 2015, in Nairobi Civil Application No. Nai. 11 of 2015)

RULING

A. INTRODUCTION

[1] The instant application contests a Ruling of the Court of Appeal dated 29th May, 2015 which granted stay Orders under Rule 5(2) (b) of the Court of Appeal Rules, in the following terms:

> "***that monies due from the respondents towards the intended construction of the Law Society of Kenya International***

Arbitration Centre be deposited in an interest-earning account in the joint names of learned counsel for all the parties herein, to be opened in any sound financial institution to be mutually agreed upon by learned counsel for all the parties herein within thirty (30) days of the date of the reading of this Ruling."

B. BACKGROUND

[2] This matter emanates from a Ruling of the High Court, in ***Deynes Muriithi & 3 Others (suing on their own behalf and on behalf of 1047 other Petitioners) v. Law Society of Kenya & Another,*** Petition No. 507 of 2014; [2015] eKLR. Two petitions were consolidated, and the Ruling was in respect of two applications for conservatory Orders, filed by the petitioners in their respective petitions.

[3] The applications were heard by *Mumbi, J.,* who considered two issues for determination: (i) whether the Court should grant the two related conservatory Orders sought by the petitioners – one restraining the 1st respondent from linking the issuance of the 2015 practising certificate to payment of prescribed amounts for the construction of LSK's International Arbitration Centre, and the other, barring the 1st respondent from enforcing the resolutions of the special general meeting held on 27th September, 2014, and in particular from seeking loans from any financial

institution pursuant to the aforesaid resolution; and (ii) whether to issue an Order for the release of certain information, as sought by the 5th-32nd petitioners.

[4] The learned Judge, by a Ruling dated 9th January, 2015, issued conservatory Orders in the following terms:

> ***"(a) that conservatory Orders be and are hereby issued staying all the resolutions made by the respondents in the Special General Meeting held at the Hilton Hotel on 27th September, 2014 pending the hearing and determination of this petition or further Orders of the Court;***
>
> ***(b) that a conservatory order be and is hereby issued restraining the 1st respondent by itself, its agents and servants from compelling the petitioners to pay any monies towards the Law Society of Kenya International Arbitration Centre or in any way pegging the issuance of the said amount pending hearing and determination of this petition or further orders of the Court; and***
>
> ***(c) that the 1st respondent does within 14 days of today, release to the petitioners all the said information requested in the letter dated 30th September, 2014 and in the prayer of the application dated 3rd October, 2014."***

[5] The learned Judge, at the same time, remarked that these Orders did not prevent any member of the Law Society of Kenya from making the payment voluntarily. She noted that counsel for the 1st respondent had asked the Court not to issue the Orders, but instead, to refer the matter to arbitration. She observed that it was prudent to refer the matter to arbitration, in accordance with the Law Society of Kenya (Arbitration) Regulations, 1997, and directed that arbitration be undertaken within 60 days, as from 9th January, 2015.

[6] Aggrieved by the High Court Ruling, the respondents filed a Notice of Appeal dated 12th January, 2015, lodged in that Court's registry on 13th January, 2015; and on the basis of that notice, they proceeded under Rules 5 (2) (b) and 42 of the Court of Appeal Rules. *They sought stay Orders against execution of the Ruling and Order of the High Court made on 9th January, 2015 – until final determination of the intended Appeal.*

[7] The Appellate Court, satisfied that its jurisdiction under Rule 5 (2) (b) had been properly invoked, held that the respondents' case fell within the ambit of the principles for the grant of relief; and it granted a stay Order, on the terms: *that monies due from the respondents towards the intended construction of the Law Society of Kenya International Arbitration Centre be deposited in an interest-earning account in the joint names of learned counsel for all the parties herein, to be opened in any sound financial institution to be mutually agreed upon by learned counsel for the parties, within thirty days of the date of the Ruling*.

[8] Aggrieved by the said Ruling, the applicants filed a petition of appeal and a Notice of Motion (Application No. 12 of 2015) on 3rd July, 2015 in this Court. The application is based on Article 163 (4) (a) of the Constitution, and on Sections 21 (2) and 24 (1) of the Supreme Court Act (No. 7 of 2011), as well as Rules 23 and 33 (5) of the Supreme Court Rules, 2012 and other applicable provisions of the law. It seeks Orders that:

(i) there be a stay of execution of the whole Ruling and Order of the Court of Appeal of 29th May, 2015, pending the hearing and determination of the appeal herein;

(ii) there be stay of proceedings of any appeal and/or intended appeal filed pursuant to the 1st respondent's notice of appeal dated 10th June, 2015 and filed in the Court of Appeal, pending the hearing and determination of the petition herein;

(iii) the appellants be granted leave to file the petition without the certified copy of the Order and certified proceedings at the Court of Appeal in the first instance;

(iv) costs be on the cause.

[9] On 15th July, 2015, *Ibrahim SCJ* certified the application urgent, and held that it would be in the interest of justice that conservatory Orders be granted. He remarked that on the face of it, the application and the petition raised constitutional issues that merited a hearing *inter partes*.

[10] Before the matter could be heard *inter partes*, the 1st respondent filed grounds of opposition, as well as an application: ***Law Society of Kenya v. Deynes Muriithi and 5 Others,*** Civil Application No. 12(2) dated 5th October, 2015. In this new application, the applicants in ***Deynes Muriithi and Others v. Law Society of Kenya,*** Civil Application No. 12 (1) of 2015 were the respondents. The 1st respondent, by Application 12(2), sought Orders as follows:

(i) the Court be pleased to vacate, vary and/or set aside the Orders issued on the 15th July, 2015 whereby the petitioners were granted a stay of execution;

(ii) the Court be pleased to strike out the Notice of Motion, Supreme Court Application No. 12 of 2015 for want of jurisdiction;

(iii) the applicant be at liberty to apply for further Orders and/or directions as the Court may deem fit and just to grant;

(iv) costs be granted.

[11] The 2nd respondent did not take part in this matter, in which the two applications were heard together. Learned counsel Mr. Anzala, and learned counsel Mr. Masika appeared for the applicants; while learned Senior Counsel Mr. Ahmednasir and learned counsel Mr. Amanya, appeared for the 1st respondent.

C. THE PARTIES' RESPECTIVE CASES

(i) Applicants

[12] Counsel for the applicants relied on their written submissions dated 16th November, 2015; and Mr. Anzala urged that this Court's jurisdiction to hear the

matter is derived from Article 163 (4) of the Constitution, as read with Section 21 of the Supreme Court Act, 2011. He submitted that the High Court had made a finding that a *prima facie* case had been made, showing a threat to their constitutional rights (Articles 23, 43, 47 and 50), by the 1st respondent. Counsel urged that the Ruling by the Court of Appeal was contrary to certain constitutional provisions. He urged that it was in the interest of justice and fairness, that the appeal be fully heard and determined, so as to settle the law on the jurisdiction of the Court of Appeal, in relation to applications made under Rule 5 (2) (b) of the Court of Appeal – application which related to the constitutional rights of parties.

[13] Counsel for the applicants urged the Court to depart, on the basis of Article 163 (7) of the Constitution, from the decision in ***Teachers Service Commission v. Kenya National Union of Teachers & 3 Others,*** Sup. Ct. Civil Application No. 16 of 2015, which held that this Court has no jurisdiction to interfere with the exercise of the Court of Appeal's discretion on an application made under Rule 5 (2) (b) of the Court of Appeal Rules.

[14] It was submitted that neither the Constitution nor the Supreme Court Act expressly prescribes a dichotomy between a final, and an interlocutory decision of the Court of Appeal, for the purpose of the exercise of the Supreme Court's appellate jurisdiction. Relying on a Nigerian Supreme Court decision, ***Chief (Dr) Pere Ajuwa v. The Shell Petroleum Development Company of Nigeria,*** SC 290 of 2007, counsel contended that the Appellate Court had purported to

compromise the fundamental rights of citizens, and that, on that account, this Court should intervene. He also invoked a decision of the Supreme Court of India, ***Delhi Judicial Service Association Tis Hazari Court, Delhi v. State of Gujarat & Others*** (1991) INSC 229.

[15] The applicant contended that the Court of Appeal had departed from its conventional mode of exercising its discretion in cases of stay of an Order of execution – at the expense of the appellants, without any reason assigned for such an approach to its task. Counsel submitted that the Appellate Court had erred in finding that there was money due from the appellants, and it improperly exercised its power under Rule 5(2)(b) of the Court of Appeal Rules, with the effect of prejudicing the hearing of the Petitions at the High Court. He urged that the Appellate Court had exceeded its jurisdiction, by granting Orders that were neither prayed for nor pleaded.

[16] Counsel for the applicants contended that Rule 5 (2)(b) of the Court of Appeal Rules did not extend to constitutional petitions, as they are neither criminal nor civil proceedings. They relied on a conference paper by Senior Counsel Mr. Ahmednassir, *'Limits of prescriptive change; challenges to judicial reforms'*. The paper contended that a decision of the High Court on a constitutional issue is final, with no right of appeal. On that basis, Mr. Anzala argued that the Court of Appeal had acted without jurisdiction in issuing an Order of stay of execution on a suit premised on the Constitution, as the effect of the Order would be to expose them to

a violation of their constitutional rights. He submitted that the jurisdiction of the Appellate Court did not extend to matters at inchoate stages.

[17] Learned counsel drew this Court's attention to Rule 33 (5) of the Supreme Court Rules, which provides that, in the interest of justice, the Court may allow a party to file a petition without the primary documents specified in Rule 33 (3). He submitted that at the time of filing, the proceedings in the Appellate Court had not been typed, and so they were unable to file the petition in time, but filed it together with the Notice Motion.

(ii) 1st Respondent

[18] Mr. Ahmednasir for the 1st respondent contested the application, and also made submissions on the 1st respondent's application 12 (2) of 2015. He urged that the applicants' motion, though premised on Article 163 (4) (a), did not demonstrate how the appeal was one "as of right", and that the application was incompetent. In the circumstances, he urged, this Court could not intervene. He relied on this Court's decision in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another,*** Sup.Ct. Petition No. 3 of 2012;[2012] eKLR.

[19] Learned Counsel submitted that the Supreme Court lacked jurisdiction to grant interim Orders, and that applicants had not been granted leave to appeal, and neither was the matter certified as one of general public importance.

[20] It was the 1st respondent's submission that the applicants had not demonstrated how the issues before the High Court and Court of Appeal became matters of general public importance. He contended that the applicants had not particularised any constitutional rights violated by the 1st respondent, that warranted invoking Sections 15, 21 (1) and 24 (1) of the Supreme Court Act, and Rules 23 and 24 of the Supreme Court Rules. It was urged to be in error that, while certification was still outstanding, the Supreme Court had issued conservatory Orders staying the entire Ruling that granted the initial stay. Counsel relied on an earlier decision of this Court, ***Sum Model Industries Limited v Industrial and Commercial Development Corporation,*** Nairobi Sup. Ct. Civil Application No. 1 of 2011; [2011] eKLR. He urged that the application be dismissed with costs.

[21] It was submitted that this Court has residual power to correct an error committed by itself, and that the learned Judge, *Ibrahim SCJ,* had no jurisdiction to issue the Orders of stay granted in the first place, as this was an appeal from an interlocutory application. Counsel urged that this application was not sustainable as an appeal, within the meaning of Article 163 (4) (a) of the Constitution. He relied on the decision in ***Daniel Kimani Njihia v. Francis Mwangi Kimani & Another,*** Sup. Ct. Civil Application No.13 of 2014[2015] eKLR.

[22] Counsel submitted that Rule 5 (2) (b) is derived from Article 164 (3) of the Constitution, and is essentially a device of preservation and maintenance of the

status quo; that it reflects the Appellate Court's inherent discretionary jurisdiction to preserve and safeguard the substratum of an appeal, or intended appeal. He relied on *Githinji's JA* determination in ***Equity Bank Limited v West Link Mbo Limited*** [2013] eKLR (at page 5, paragraph 14), and ***Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others,*** Civil Application No. Nai 31/2012 (at page 4). Counsel submitted that this Court lacks jurisdiction to hear matters arising out of a "Rule 5(2)(b) application", in the light of the decision in ***Teachers Service Commission v. Kenya National Union of Teachers and 3 Others,*** Civil Application No. 16 of 2015.

[23] Senior counsel was concerned with the effect of Articles 10 and 20(3) of the Constitution on the jurisdiction of this Court, in relation to *interlocutory applications* framed as a major constitutional question. He submitted that the applicants' assertions were not supported by the terms of the Constitution.

[24] Learned counsel submitted that the Supreme Court had not, in this matter, analysed or interpreted the terms of the Constitution; nor had it considered any competing interpretations of the Constitution. He submitted that the essence of constitutional interpretation, and the duty of the Court in that regard, was properly stated in ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR. He submitted that Article 163 (4) (a) of the Constitution is clear and unambiguous in its wording; posed no challenge to the Court; and required no interpretation: all it required was application to a certain set of facts.

[25] Counsel for the 1st respondent contended that the Court in its Ruling, had strayed into 'policy making,' and had made a constitutional interpretation that conforms to the personal preferences of its members. The Court had in effect, counsel urged, "amended the Constitution," and re-written it – an illegitimate exercise of the Supreme Court's judicial power.

[26] Counsel urged that this Court should in future exercise caution in granting temporary Orders; for such Orders cause delays.

[27] Counsel submitted that the Court had no jurisdiction under Article 163 (3) (4), (5) and (6) of the Constitution to hear the application, and so it should be struck out with costs. He urged that, by Section 15 of the Supreme Court Act, appeals to the Supreme Court are to be heard only with the leave of the Court; and that the Court's jurisdiction was circumscribed, and could not be enlarged. To this end, he relied on the decision in ***Samuel Kamau Macharia & Another v. KCB Ltd & 2 Others*** Sup. Ct. Application No. 2 of 2011 [2012] eKLR (paragraph 68).

(iii) Applicant's Rejoinder

[28] In a brief rejoinder, learned counsel Mr. Masika submitted that this Court has the jurisdiction to interpret the Constitution. He urged that the Orders of the Appellate Court had the effect of placing the applicants in the very position of prejudice that led them to institute proceedings in the High Court, in the first place.

He submitted that this was a *sui generis* matter, warranting the intervention of the Supreme Court, and that a grave injustice had been occasioned to the applicants.

D. ISSUES FOR DETERMINATION

[29] From the pleadings, supporting affidavits, written and oral submissions by the parties, it is plain that the following issues arise for determination:

(i) whether this Court has jurisdiction;

(ii) whether the Appellate Court's Order *was in violation of the Constitutional rights of the applicants.*

Does the Supreme Court have jurisdiction, by virtue of Article 163(4)(a) of the Constitution, to determine applications arising from Rule 5 (2) (b) of the Court of Appeal Rules?

[30] Three sub-issues arise under this issue: *(a) the nature of applications under Rule 5(2)(b) of the Court of Appeal Rules; (b) whether this Court has the jurisdiction under Article 163(4)(a) of the Constitution to determine matters arising from an application under Rule 5(2)(b); and (c) whether this Court will depart from its decision in* ***Teachers Service Commission v. Kenya National Union of Teachers and 3 Others,*** Sup. Ct. Application No. 16 of 2015; [2015] eKLR.

(a) Applications under Rule 5(2)(b) of the Court of Appeal Rules

[31] In summary, counsel for the applicants submitted that Rule 5 (2)(b) has a limited application, and extends only to *civil proceedings*. However, it was urged,

the proceedings before the Court of Appeal were "constitutional" and *sui generis,* being neither civil nor criminal in nature. Counsel urged that the Appellate Court lacked jurisdiction to grant a stay of execution of the Orders, pursuant to Rule 5 (2)(b); and that, consequently, the Supreme Court has the jurisdiction to interfere with the Court of Appeal's decision. But in a contrasting approach, counsel for the 1st respondent urged that the issue to be determined is whether the Supreme Court has the jurisdiction to hear appeals arising from *interlocutory Orders,* under Rule 5 (2)(b); he submitted that this Court has no jurisdiction to hear the matter.

[32] Rule 5 (2)(b) of the Court of Appeal Rules thus provides:

> ***"Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—***
>
> > ***(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."***

[33] This Court has had occasion to deal with applications that fall under this Rule. In ***Teachers Service Commission,*** this Court considered the nature and scope of the jurisdiction under this provision, thus pronouncing itself:

"[23] *It is clear to us that Rule 5 (2)(b) is* ***essentially a tool of preservation. It safeguards the substratum of an appeal,*** *if invoked by an intending appellant, in consonance with principles developed by that Court over the years.*

...

"[27] Rule 5 (2) (b) of the Court of Appeal Rules of 2010 is derived from Article 164 (3) of the Constitution. It illuminates the Court of Appeal's inherent discretionary jurisdiction to preserve the substratum of an appeal, or an intended appeal. Although we would not go as far as describing such discretionary jurisdiction as 'original' (the term 'inherent' more accurately in our view captures the nature of that jurisdiction), the Court of Appeal has nonetheless defined the contours of this discretion succinctly and consistently and has employed it effectively to aid the conduct of its appellate jurisdiction" [emphasis supplied].

[34] In the same case we also cited with approval (at paragraph 24), the Court of Appeal decision in Stanley ***Kang'ethe Kinyanjui v. Tony Ketter & 5 Others***, Civil Application No. NAI 31/2012. The Court of Appeal in that case, examined the manner in which it exercises its jurisdiction in relation to applications brought under Article 5 (2)(b), and remarked as follows:

"[I]n dealing with Rule (5) (2) (b), the Court exercises original

and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge's discretion to this Court".

[35] These cases show that Rule (5)(2)(b) applications arise at an *interlocutory stage,* and Orders issued thereunder are for the purpose of *protecting the subject-matter of the appeal.* In addition, the Court of Appeal exercises its original and discretionary jurisdiction, when issuing Orders under that provision.

[36] It is thus, not the case, that the Court of Appeal lacked jurisdiction to issue Orders in the Rule 5(2)(b) application, just because the matter is *sui generis,* and is constitutional in nature, and neither civil nor criminal. The High Court has already, quite properly, taken the position that it is unnecessary to bring such special matters under a wholly novel regime of procedural law. The High Court at Kisii, in ***Peter Ochara Anam & 3 Others v. Constituencies Development Fund Board & 4 Others,*** Constitutional Petition No. 3 of 2010; [2011] eKLR, found that the particular issue, though occurring in a constitutional petition, was *civil in nature.* It thus held:

> ***"In as much as the Constitutional petition is a special jurisdiction, it is in the nature of civil proceedings.*** *In the absence of rules made thereunder, the procedure of handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence for instance should not apply, be ignored nor*

*witnesses should not be sworn, pleadings should not be signed and questions in cross-examination should not be asked. That will be a direct invitation to judicial chaos and legal absurdity***.** ***I do not therefore wholly agree or subscribe to the submissions of the petitioners that the petition being neither a criminal nor civil proceedings, it must be conducted in vacuum"*** [emphasis supplied].

[37] It is evident to us that appeals dealing with constitutional issues, may in substance be *civil* in nature. Accordingly, the Court of Appeal has the power to exercise its original and discretionary jurisdiction to entertain interlocutory applications to preserve the subject matter of any appeals.

(b) Does the Supreme Court have jurisdiction under Article 163(4)(a) of the Constitution, to determine matters arising from applications under Rule 5(2)(b)?

[38] Counsel for the applicants submitted that neither Article 163(4)(a) of the Constitution nor Section 21 of the Supreme Court Act makes reference to a dichotomy between a *final* and *an interlocutory* decision of the Court of Appeal. Counsel urged further, that although this Court, in ***Teachers Service Commission,*** imposed restrictions on the type of matters to entertain, it did not abdicate its powers to hear and determine any appeals, be these interlocutory or final, which bear upon the interpretation of the Constitution. However, counsel for

the 1st respondent submitted that the application raises no point of law such as should move this Court to exercise its jurisdiction under Article 163(4)(a) of the Constitution.

[39] The content of Article 163(4)(a) of the Constitution may be set out:

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court—***
>
> ***(a) as of right in any case involving the interpretation or application of this Constitution….. "***

Section 21 (1) and (2) of the Supreme Court Act then provides as follows:

> ***"(1) On an appeal in proceedings heard in any court or tribunal, the Supreme Court—***
>
> ***(a) may make any order, or grant any relief, that could have been made or granted by that court or tribunal; and***
>
> ***(b) may exercise the appellate jurisdiction of the Court of Appeal according to Article 163(4) (b) of the Constitution.***
>
> ***"(2) In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs that it thinks fit to award."***

[40] The terms of Article 163 (4)(a) of the Constitution show that this Court shall determine "appeals". However, the Constitution does not state whether such

are appeals from interlocutory, or final Orders of the Appellate Court. We refer to our decision in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd and Another,*** Sup. Ct. Application No. 4 of 2012; [2012] eKLR, where we considered the jurisdictional span under Article 163(4)(a) (paragraph 28):

> *"The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution****. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation.*** *Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)"* [emphasis supplied].

[41] This Court also examined its jurisdiction under Article 163(4)(a) in ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, Sup Ct. Petition No. 10 of 2013; [2013] eKLR (paragraph 37). We thus remarked:

> ***"****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…"* [emphasis supplied].

[42] Furthermore, in ***Teachers Service Commission***, we cited with approval our earlier decision in ***Joho,*** finding as follows (paragraph 34):

> ***"In the*** *Joho* ***case, we heard and determined an appeal emanating from a substantive determination by the Court of Appeal of a constitutional question. The appeal had originated from an interlocutory application filed within the Election Petition before the High Court, challenging the constitutionality of Section 76(1)(a) of the Elections Act, 2011 (Act No. 24 of 2011). This application triggered the appellate jurisdiction of this Court; not only had it sought to contest a substantive determination of a constitutional question by the Court of Appeal, but the issue in dispute had been canvassed right through from the High Court to the Court of Appeal, even though the substantive appeal on the election-petition outcome was still pending before the Court of Appeal."***

[43] Court of Appeal decisions have also given guidance in the interpretation of issues arising on appeal, in relation to the terms of Rule 5 (2)(b). In ***Equity Bank***

Limited v. West Link MBO Limited, Civil Application No. 78 of 2011 (UR 53/2011), the Appellate Court categorically observed that applications under Rule 5(2)(b) are not appeals, *Githinji JA* making the following remark (paragraph 9):

> ***"For purposes of judicial proceedings an appeal is broadly speaking a substantive proceedings instituted in accordance with the practice and procedure of the court by an aggrieved party against a decision of a court to a hierarchically superior court with appellate jurisdiction seeking a reconsideration and review of the decision in his favour.***

[44] In light of the foregoing, the main purpose of Rule 5(2)(b) applications, is that the Orders issued therein are for *preserving the substratum of the appeal.* This means that the Court of Appeal, at that stage, has not yet determined and disposed of the appeal; it is yet to set out its reasoning, in interpretation and application of the Constitution. The Appellate Court has yet to determine the main appeal which must have been heard at the High Court, moving on to the Court of Appeal, and then to this Court. (See ***In Re the Matter of the Independent Electoral and Boundaries Commission*** [2011] eKLR, where we held (paragraph 45) that: *"[i]n principle, the Supreme Court commits itself to order and efficacy in the administration of justice, and to that end it may require that the process of litigation commenced in the High Court, and entailing constitutional interpretation, be exhausted and, if need be, followed by appellate*

procedures;" and ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** *Sup. Ct. Petition No 2 of 2012; [2012] eKLR,* where this Court held (paragraph 30): *"[i]n the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."*

[45] This Court, in the ***Teachers Service Commission*** case, also gave guidance on the question whether applications under Rule 5(2)(b) can be determined under the terms of Article 163(4)(a). The Court thus held (paragraphs 34, 35, 36):

> ***"The application before us relates to the exercise of the Court of Appeal's inherent discretion under Rule (5) (2) (b), and is to be distinguished from instances when this Court has dealt with appeals arising from interlocutory applications originating from the High Court, through to the Court of Appeal and finally to this Court. In the*** *Joho* ***case, we heard and determined an appeal emanating from a substantive determination by the Court of Appeal, of a constitutional question. The appeal had originated from an interlocutory***

application filed within the Election Petition before the High Court, challenging the constitutionality of Section 76(1)(a) of the Elections Act, 2011 (Act No. 24 of 2011). This application triggered the appellate jurisdiction of this Court; not only had it sought to contest a substantive determination of a constitutional question by the Court of Appeal, but the issue in dispute had been canvassed right through from the High Court to the Court of Appeal, even though the substantive appeal on the election-petition outcome was still pending before the Court of Appeal.

"The application before us contests the exercise of discretion by the Appellate Court, when there is neither an appeal, nor an intended appeal pending before this Court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of Article 163 (4) (a) of the Constitution. Any square involvement of this Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, and for which the priority date of 22nd September, 2015 has already been assigned. Such an early involvement of this Court, in our opinion, would expose one of the parties

to prejudice, with the danger of leading to an unjust outcome.

"In these circumstances, we find that this Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under Rule 5 (2) (b) of that Court's Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court."

[46] Against this background, we note that the Court of Appeal exercised its original and discretionary powers in issuing Orders under Rule 5(2)(b) of the Court of Appeal Rules, and is yet to determine the main appeal where it will ordinarily hear the submissions of the parties, and arrive at a reasoning on the relevant issues on appeal. This would then prompt a party aggrieved with the Appellate Court's decision to appeal against it to this Court. Until then, this Court lacks the jurisdiction to interfere with the Court of Appeal's inherent and supervisory jurisdiction.

(c) What is the status of this Court's decision in ***Teachers Service Commission v. Kenya National Union of Teachers****, Sup. Ct. Appl. No. 16 of 2015?*

[47] Counsel for the applicants asked this Court to depart from its decision in ***Teachers Service Commission***. He placed reliance on Article 163 (7) of the Constitution, which stipulates that this Court is *not bound by its previous decisions*.

The 1st respondent asked this Court to vacate the Orders granted by *Ibrahim SCJ* on 15th July, 2015, on the basis that the learned Judge lacked jurisdiction to grant them. It had been held by a five-Judge Bench of the Supreme Court, in ***Teachers Service Commission*** on 24th August 2015, that this Court lacked jurisdiction to issue Orders in relation to Rule 5(2)(b) applications in the Court of Appeal. This principle is essentially to be sustained, in the interests of certainty and predictability in the judicial process, as this Court has held, for instance, in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai and 4 Others,*** Sup. Ct. Petition No. 4 of 2012; [2012] eKLR.

(d) Is there an Injustice apparent on the face of the stay Order of the Court of Appeal?

[48] The Supreme Court's stand, in relation to the discharge of judicial work by other Courts, has been stated in ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 other,*** Sup. Ct. Civil Application No. 35 of 2014 [2014] eKLR (paragraph 65) as follows:

> ***"Subject to the obligation on the part of all Courts to ensure efficiency and dispatch in proceedings before them, as required under the Constitution, it is an important principle guiding the judicial function, that the Courts are independent, and are committed to the judicious and conscientious discharge of their mandate. Upon this***

premise, this Court will in general, keep faith in the other Courts, in the absence of any plain situation to the contrary, that merits judicial notice."

[49] However, the foregoing principle does not limit this Court's mandate if it is convinced that fundamental freedoms, as beckoned in Article 20(3)(a) and (b) of the Constitution, are compromised by the exercise of the discretion aforesaid; or convinced that values of the Constitution including human rights, equity, equality and integrity are departed from; or that grave injustice is occasioned by the decision in question; or that the decision in question is inconsistent with the same Court's earlier decisions. In such instances, the Supreme Court takes into account such objective criteria as it may determine, or formulate on the basis of comparative jurisprudential perspectives, being constantly guided by the object of averting any grave injustice.

[50] The applicants urge that the same factor of grievance which occasioned their motion in the High Court, is the one that the Appellate Court by its Orders, has sustained. Has the Court of Appeal, by its Orders, only preserved the substratum of the appeal, or done something different? Has the Appellate Court made such Orders as will *conduce to the just and effective determination of the appeal before it?*

[51] It forms an integral element in the concept of jurisdiction, that whenever it becomes plain that the Orders made by other Courts are destined to occasion grave

injustice, and this is apparent on the fact of the decision in question, this Court, as ultimate custodian of constitutional integrity, may not turn a blind eye to such a decision, where it stands in conflict with express provisions of the Constitution.

[52] It is not in contention that upon hearing the application for stay of execution of the High Court's interim Orders, the Court of Appeal, on 29th May, 2015, made the following Order:

> ***"That the monies due from the respondents towards the intended construction of the Law Society of Kenya International Arbitration Centre be deposited in an interest earning account in the joint names of learned counsel for all the parties herein to be opened in any sound financial institution to be mutually agreed upon by learned counsel for all the parties herein within thirty (30) days of the date of the reading of this Ruling"*** [emphasis supplied].

[53] A perusal of the petitions pending before the Constitutional Division of the High Court at Nairobi and at Mombasa, in relation to the matter before us, reveals that the issue as to whether the constitutional rights of the applicants were breached by the respondents, by their various acts (which resulted in the proposal that the applicants pay certain sums of money), *is* the gravamen of the consolidated petitions. The High Court is, therefore, expected to determine the question whether the sums complained of are due from the applicants, or not. *The High Court has*

made no such determination. In effect then, the justice of the matter is yet to be resolved, in substance.

[54] We are concerned about *the justice of the case*, with the Appellate Court ordering that *"the monies due from the respondents* [applicants herein] *be deposited in an interest-earning account."* The effect of this Order is to *require the applicants to pay up the sums which are in contention, and which form the subject-matter of the petitions before the High Court.* It cannot be gainsaid, that the Order of the Court of Appeal has a pre-emptive effect on the petitions pending before the High Court, where the applicants hope to be accorded a fair hearing. Such a right is secured for all, by virtue of Article 50(1) of the Constitution, which thus provides:

> ***"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

[55] It is regrettable that the Order of the Appellate Court had the effect of *predetermining the two petitions at the High Court*, without the applicants having been heard on the merits, contrary to the terms of Article 50 of the Constitution. It is to be noted that the right to a fair hearing lies at the heart of the dispute-resolution process applied by any Court or tribunal.

[56] It is clear to us that the Appellate Court, when called upon to hear and determine an application for stay of execution of *an interim decision and Order of the High Court,* should have taken caution against disposing of the substantive cause before the High Court. Considerable numbers of the Court of Appeal's past decisions have set out meritorious guiding principles, all geared towards fair dispute-settlement, in relation to the substratum of appeal causes.

(e) Rule 5 (2) (b) of the Court of Appeal Rules: Its application

[57] In ***Damji Pragji Mandavia v . Sara Lee Household & Bodycare (K) Ltd,*** Civil Application No. NAI 345 of 2004 the Appellate Court, quite properly observed:

> ***"In considering an application brought under rule 5(2) (b), the Court must not make definitive or final findings of either fact or law at that stage, as doing so may embarrass the ultimate hearing of the main appeal."***

[58] The decision in ***Equity Bank Limited v. West Link Mbo Limited,*** Civil Application 78 of 2011 (UR. 53/2011) [2013] eKLR is also noteworthy. The Ruling therein was in respect of a preliminary objection raised by the respondent, to the jurisdiction of the Court to entertain an application under Rule 5(2) (b) of the Court of Appeal Rules, for interim reliefs pending appeal. *Githinji JA* thus observed:

> ***"It is evident that it is clear that Rule 5 (2) (b) is a procedural***

innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals".

The learned Judge further remarked as follows (paragraph 56):

> *" I do not think that it was the intention of the drafters of the Constitution to fling open the doors of this Court to all manner of decisions from the High Court. That would unnecessarily clog the Court system".* ***A filtering mechanism to control matters that go to an appellate Court is necessary"*** [emphasis supplied].

Musinga JA, in that case, observed (paragraphs 59, 61):

> ***"To my mind, the answer to the above question must be in the affirmative. Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met…***
>
> ***"In*** *M. Mwenesi v. Shirley Luckhurst & Another,* Civil Application No. NAI 170 of 2000, ***this Court held that a Court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent, a stay of execution is***

irresistible. I may add that a court of law is under a duty to exercise its inherent power to prevent injustice. See Section 3A of the Civil Procedure Act and rule 1(2) of the Court of Appeal Rules".

[59] As the Court of Appeal exercises its discretion under Rule 5(2) (b) of the Court of Appeal Rules, 2010 it needs to be mindful of the parameters set by Article 164(3) of the Constitution, and to ensure that the Orders it grants do not have the effect of predetermining the substantive cause pending before the Court below it.

[60] We would affirm our decision in ***Re the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Const. Appl. No.2 of 2011 [2011] eKLR, with its holding that a Court can only exercise such jurisdiction as is conferred by the Constitution or statute; it cannot arrogate to itself jurisdiction that it does not have. (See also ***Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd. and Another,*** Sup. Ct. Petition 3 of 2012, [2012] eKLR).

[61] This Court has the inherent jurisdiction to forestall an instance of injustice. Justice, in this context, requires that all parties are heard freely and fairly, before a matter is concluded. Such a jurisdiction is aptly depicted by I.H. Jacob, "The Inherent Jurisdiction of the Court" (1770) *Current Legal Problems,* as follows:

".....The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The

juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner."

[62] Falling within the spirit thus depicted, in this Court's decision in ***Hon. Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others,*** Sup. Ct. Petition 5 of 2014, [2014] eKLR, in which we perceived the jurisdictional issue as follows (paragraph 103):

"Besides the special jurisdictional competence of the Supreme Court, arising directly from the Constitution, we would illuminate such span of jurisdiction from comparative judicial experience. We take note of the United States Supreme Court decision, *Bender v. Williamsport Area School District,* ***475 U.S. 534, 541 (1986), in which it was held that a superior appellate Court carried both the substantive jurisdiction and a residual jurisdiction. The relevant passage thus reads:***

> *'...every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review; even though the parties are prepared to concede it....*

> *'And if the record discloses that the lower court was without jurisdiction, this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] [lacks] jurisdiction, we have jurisdiction on appeal**, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit'"*** [emphasis supplied].

[63] The basic principle regarding jurisdiction, is clear. And so, where there is such a palpable injustice as in the instant case, this Court has jurisdiction, not as to the merits, *but for the purpose of correcting the injustice occasioned by a contravention of the Constitution.*

[64] The extent of jurisdiction exercisable by this Court is clearly elaborated in ***Anami Silverse Lisamula v. The Independent Electoral and Boundaries Commission and Two Others,*** Sup. Ct. Petition No. 9 of 2014 [2014] eKLR, in which *Ojwang SCJ,* in his concurring opinion, stated (paragraph 151) that:

> ***"By Article 163(8), the Constitution empowers the Supreme Court to 'make rules for the exercise of its jurisdiction'; and by Article 163(9), Parliament is empowered to 'make further provision for the operation of the Supreme Court.' By the latter provision, the Supreme Court Act, 2011 (Act No. 7 of***

2011) has been enacted, and it consecrates the Supreme Court as the formal custodian of the interpretive process of the Constitution itself. By the unlimited scope of such a remit, it is clear that the Supreme Court's latitude, in the course of hearing any case or determining any question, or examining 'matters arising' – whether these be constitutional, or bearing upon the public interest – is of a profound nature."

[65] In that case the learned Judge cited ***Cohens v. Virginia,*** 19 U.S. 264 (1821), which takes a position as follows:

> ***"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The***

one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."

[66] The Judge concluded with remarks (paragraph 155) that invoke the provisions of Article 20(3)(a) and (b) of the Constitution, as follows:

"It is my task to demonstrate, in this concurring opinion, that this Supreme Court is not to sidestep meritorious occasions for a decision, by invoking obsolescent concepts: for the Supreme Court is the fundamental plank of the constitutional order, bearing the mandate to 'develop the law to the extent that it does not give effect to a right or fundamental freedom', and to 'adopt the interpretation that most favours the enforcement of a right or fundamental freedom" [the Constitution of Kenya, 2010, Article 20(3)].

[67] The merits of the matter, as we have observed, rest at their proper *locus,* in the High Court; and the learned Judge*, Mumbi, J* in her clear mandate had already observed that the prudent course was to refer the matter to arbitration, in accordance with the Law Society of Kenya (Arbitration) Regulations, 1997. She had taken requisite action by directing that the matter be the subject of arbitration

within 60 days, as from 9th January, 2015. Such a direction, in this Court's perception, makes eminent good sense, especially as it is the proper course under Article 159(2)(c) of the Constitution. It is notable, in this regard, that the litigants in the matter are members of the Law Society of Kenya, and the subject of contention is the setting up of the Arbitration Centre.

E. FINAL DETERMINATION

[68] We have asked ourselves, what was left for the High Court to determine, as to whether the monies said to be payable were truly due or not. It is clear that nothing now remained outstanding. Our perception is that, the impugned Order of the Court of Appeal has the effect of *disposing of the substratum of the substantive matter before the High Court*. It also has the effect of denying the parties a *fair hearing*, and this contravenes the prescriptions of the Constitution. The Appellate Court had, with respect, overstepped its mandate, and encroached on that of the High Court, by determining a matter that was not before it but rather, before the High Court. This unsatisfactory state of affairs has to be remedied by this Court.

F. ORDERS

[69] We make the following Orders:

- ***Application No. 12 of 2015 (dated 3rd July, 2015) is allowed, in the following particulars:***

(i) the Conservatory Orders issued by this Court on 15th July, 2015 are hereby vacated;

(ii) the Ruling and Order of the Court of Appeal, delivered on 29th May, 2015 is hereby set aside;

(iii) the substantive cause before the trial Court shall be disposed of appropriately on the basis of the directions of that Court;

(iv) the costs shall be in the cause.

DATED and **DELIVERED** at **NAIROBI** this **16th** day of March, **2016.**

.....	.....
W. M. MUTUNGA **CHIEF JUSTICE &** **PRESIDENT OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
J.B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**

.....

S.N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a
true copy of the original

REGISTRAR, SUPREME COURT