

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: W.M. Mutunga, CJ, Tunoi, Ojwang, Wanjala, Ndungu, SCJJ.)

APPLICATION NO. 2 OF 2012

SAMUEL KAMAU MACHARIA.....1ST APPLICANT

**THE OFFICIAL RECEIVER,
MADHUPAPER INTERNATIONAL LIMITED
(IN LIQUIDATION).....2ND APPLICANT**

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

**KENYA COMMERCIAL FINANCE
CO. LTD.....2ND RESPONDENT**

**KENYA NATIONAL CAPITAL
CORPORATION LTD.....3RD RESPONDENT**

RULING

- (1) This is an application for leave to appeal against the judgment of the Court of Appeal at Nairobi in Civil Appeal No. 181 of 2004, Kenya Commercial Bank Limited & Kenya Commercial Finance Co. Ltd v. Samuel Kamau Macharia, Madhupaper International Ltd & Kenya National Capital Corporation Ltd delivered on 31st July 2008, and the decree therein. The application is brought under Article 163 of the

Constitution, as read together with Sections 14 to 16 of the Supreme Court Act, 2011 and Rule 21 of the Supreme Court Rules. The Application is based on grounds that:

- a) a matter of general public importance is involved;
- b) substantial miscarriage of justice may occur unless the appeal is heard and determined;
- c) the intended appeal is arguable;
- d) the intended appeal raises major constitutional issues.

(2) In support of the ground that “a matter of great public importance is involved”, the first applicant raises the following issues which, in his view, arise from the cases that have led to the application.

- (i) *the Government of the Republic of Kenya is a shareholder in the respondents, from which many individuals and companies have borrowed money and continue to borrow as the applicants had done, in the above-mentioned appeal, and the intended appeal raises the question as to whether the executive power of the state will or can be, enlisted by the respondents in the recovery of actual or purported debts from borrowers;*

- (ii) *if the answer to (i) above, is in the negative, whether such use of executive power amounts to duress **colore officii** entitling the borrower to recover from the respondents any money paid by them under duress;*
- (iii) *as an alternative to (ii) above, if the answer to (i) is in the negative, whether the use of executive power amounts to economic duress entitling the borrower to recover from the respondents any money paid by them under duress;*
- (iv) *the appeal sought to be filed raises a matter of great commercial interest in that it is the first decision of the Court of Appeal which has considered the rights to recover in restitution, monies paid by a customer of a bank in which the is a shareholder and uses the executive power to recover a purported debt;*
- (v) *the appeal sought to be filed raises the issue as to the way to resolve conflicts between the interests of the government of Kenya, as a general regulator of investments undertaken by investors like the applicants, and a shareholder in commercial banks from which borrowers like the applicants borrow money;*

- (vi) *the appeal sought to be filed raises the issue as to when Kenyan Courts will intervene in, or lift the veil of incorporation of Banks in which the government holds shares, to prevent the executive power from being used to oppress citizens;*
- (vii) *the appeal sought to be filed raises the issue as to when and whether the President of the Republic of Kenya or any of his agents, specifically, the Head of Civil Service, can assist a bank to recover a purported loan and if that (is) so, whether that can amount to duress **colore officii** entitling the borrower to recover from the bank any money paid by them under such duress;*
- (viii) *the appeal sought to be filed raises the issue as to whether any litigant in Kenya can rely on the doctrine of unjust enrichment to recover money paid to a bank or any other person through duress.*

(3) In support of the ground that substantial injustice may occur if the intended appeal is not heard and determined, the first applicant cites

the observations of the Judges and Magistrates Vetting Board on 25th April 2012. And in support of the ground that the intended appeal is arguable, the first applicant highlights the averments which he would make, were the leave he seeks be granted. The Applicant presents no argument in furtherance of the ground that the intended appeal “raises major constitutional issues...”

- (4) This Application is supported by a 108-paragraph affidavit sworn by the first applicant on the 23rd of May 2012. The affidavit, as read together with the pleadings and other documents filed in support of the Application, sheds some light on the genesis of this matter.

THE BACKGROUND

- (5) This application is a continuation of one of the most protracted disputes between a citizen and a commercial bank in Kenya’s recent court history. It all started when, between 1981 and 1983, the second applicant, then a thriving manufacturer of tissue paper, borrowed 30 million Kenya Shillings from the respondents. The loan was to enable the second applicant to conduct a feasibility study to determine whether to expand its business. The loan was secured by debentures

over the assets of the second applicant. The first applicant was the principal shareholder and chairman of the board of directors of the second applicant. At the time of this transaction, the Government of Kenya was the sole shareholder in each of the respondents. According to the first applicant, the feasibility study confirmed the viability of the intended project expansion pursuant to which he sought and secured the requisite financing to the tune of 1.2 billion Kenya Shillings, from international lenders. The financing agreement was signed on 30th July 1985 and was extensively covered by both print and local media. According to the first applicant, and for reasons not apparent from his affidavit, the then President of Kenya, Daniel Arap Moi ordered the cancellation of the expansion project, the basis upon which the financing Agreement had just been signed. The applicant learned of the cancellation through a news bulletin on national television. Thus began the economic and legal odyssey that the applicants have had to endure to this day. It is a story of negotiations, settlements, suits, withdrawals, applications, amendmentsto pleadings, appeals and counter- appeals.

(6) The cancellation of the project had the immediate effect of disrupting the loan-repayment plans of the applicants. It would appear that part of the proceeds from the international lender was to go towards the repayment of the 30 million shilling loan that had been secured from the respondents. On 25th October 1985, the respondents, apparently taking cue from the action by the President, demanded the immediate repayment of the loan, with interest, and proceeded to place the second applicant under receivership. By the time the respondents moved to realize their securities over the second applicant's assets, the loan then owing had escalated from 30 million Shillings to 54 million Shillings. Between 1985 and 1988, the first applicant filed three successive suits in the High Court in a bid to rescue the company. The details of these suits are a matter of record. What followed were protracted negotiations between the parties, culminating in the first applicant agreeing to repay 54 million shillings to the respondents, and to withdraw the cases that had been filed against the respondents. This was in an effort to prevent the sale of the assets of the second applicant by the receivers.

(7) According to the first applicant's account as recorded in affidavits and pleadings, both at the High Court and Court of Appeal, the agreement to repay (followed by the actual payment of) 54 million Shillings did not offer him any relief from harassment by the government which was determined to divest him of the company at all costs. His plight is partly attributed to the order by Mr. Moi (which order was communicated to the first applicant through the then Head of Public Service, a Mr. Leting), to the effect that the company's assets be disposed of by the receivers unless the first applicant paid a total of 110 million Shillings (which included an additional 56 million shillings). The first applicant was then ordered to vacate the premises of the second applicant. In submission to the power of the Government, the first applicant, in a desperate bid to hold on to the second applicant, finally paid 110 million Kenya shillings to the respondents, on 17th July 1989.

(8) The dispute would have ended in 1989, but the first applicant, in his belief that there had been a coercive and oppressive settlement, sought redress from the High Court. In *Madhupaper International Ltd & Samuel K. Macharia v. Kenya Commercial Bank Ltd & 2 others*,

HCCC No. 1263 of 1992, the applicants claimed by way of restitution the sum of Kenya shillings 56 million with interest, from the respondents. The respondents on their part filed an equally robust defence against the applicants' claim. In the meantime, a petition seeking the winding up of the second applicant was filed in the High Court by three minority shareholders, in 1995.

- (9) On 23rd January 2003, the High Court (Kuloba, J.) delivered judgment in favour of the plaintiffs (applicants herein) against the defendants (respondents herein), for the restitution of the sum of Kenya Shillings 56 million with interest, which sum the Court held had been unjustly extracted from the applicants by the respondents through duress and coercion. The total amount payable pursuant to the Court's orders was 129 million Shillings. The respondents almost immediately filed an appeal (Civil Appeal No. 181 of 2004) against the High Court's judgment. By a judgment dated 31st July 2008, the Court of Appeal (Tunoi, Githinji and Onyango Otieno JJA) allowed the appeal, reversed the judgment and set aside the orders of the High Court. In the meantime, the High Court in Winding up Cause No.12 of

1995, in a judgment dated 6th March, 2006 (Kasango J) had ordered that the second applicant be wound up.

(10) The decision by the Court of Appeal in 2008, aggrieved the first applicant. Then came the Constitution of Kenya, 2010; and the case of ***Samuel K. Macharia v. Kenya Commercial Bank***, has been resurrected. Like Cherub, energized by the covenant (the new Constitution), the first applicant now comes to this Court still in search of that elusive justice. Section 23 (1) of the Sixth Schedule to the Constitution of Kenya, 2010 provides as follows:

“Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.”

(11) Pursuant to the Vetting of Judges and Magistrates Act, 2011 all the three Court of Appeal Judges who had presided over the Appeal Case

No. 181 of 2004 had to go through the vetting process to determine their suitability to continue serving as decreed by the Constitution. This provided an opportunity for the first applicant to try and get his just deserts. Having been deeply aggrieved by the Court of Appeal's decision that had deprived him of the fruits of judgment by the High Court, the first applicant promptly filed a complaint against the three judges to the Judges and Magistrates Vetting Board. In his complaint, the first applicant contended that the three judges were unsuitable to continue serving because of what he believed was the manifestly biased manner in which they had disposed of the appeal against the High Court decision. In considering the complaint, the Vetting Board concluded that much of the information placed before it in support of the complaint was all novel and was not part of the trial record.

- (12) The Vetting Board noted that one of the judges "stated that if he had had knowledge of all the information now placed before him, he would in all probability have given a different decision." ***"This Judge proposed that the matter be referred to the Supreme Court, which could hear it if it could be shown that a grave miscarriage of justice was involved and it was in the public***

interest for the appeal to be heard.”The Vetting Board was, however, careful not to make any determination on the issues of coercion that had been raised by the complainant (the first applicant herein). The Vetting Board finally concluded the issue in the following words:

“In the circumstances, the Board expressly leaves open the question of either the correctness or the propriety of the decision supported by the three judges. This is a matter that can be dealt with if application is made to the Supreme Court, where the full panoply of evidence can be considered and argument from the side of the Bank can also enter the reckoning.”

(13) No doubt encouraged by the proposition by the Judge (Tunoi, SCJ) and the opinion of the Vetting Board, the first applicant has now moved to this Court seeking leave to appeal against the Court of Appeal’s decision.

(14) The Respondents, as is to be expected oppose the Application for leave to appeal by the Applicants. Both Counsel for the first and second respondents and the third respondent have raised a preliminary

objection to the application and filed grounds of opposition in support of the objection. The preliminary objection is basically to the effect that this Court lacks jurisdiction to entertain the Application for leave. The objection is supported by extensive written and oral submissions by both Counsel. On his part, Counsel for the applicants, Dr. Kamau Kuria, has also filed extensive written submissions in support of the application. He has buttressed these submissions by robust oral argument in open Court just as his counterparts for the respondents, Messrs. Oraro and Murugara respectively, have done. For the sake of completeness of record, we now advert to these submissions in *extenso*.

SUBMISSIONS

- (15) In their submissions, the parties addressed the issues for determination in the format set out below.

On Joinder of Second Applicant

- (16) The 1st and 2nd respondents' counsel, Mr. Oraro submits that there was a fatal error in the joinder of the second applicant; the second

applicant is the principal subject of this suit, and cannot be a party to any suit unless an application for leave is made, and granted by the Court. This is the statutory requirement of section 241 of the **Companies Act (Cap. 486, Laws of Kenya)**. The purpose for this requirement is for the Court to oversee and ensure that the operation of a company in liquidation is for the benefit of the creditors and contributories, and to obviate waste of the estate through frivolous litigation. They submit that the requirement of the sanction of the Court is not a matter of procedural technicality, as it affects the rights of all who are affected by liquidation. In support of this submission they rely on the case of ***Simba Airlines Limited v Heritage Bank Limited***[2002] 1 EA 302; and ***Deposit Protection Fund Board v Kamau & Anor*** [1999] 2 EA 67.

- (17) They submit that this is not a case where a derivative action can arise. The common law allows a minority shareholder to bring an action on his own behalf and on behalf of the company where fraud has been committed by those in control of the company. This does not apply where the company is in the hands of a liquidator. To support this submission, the 1st and 2nd respondents rely on

Halsbury's Laws of England 4th Ed. Vol. 7 (1) para 1012 at page 330. They further submit that no evidence has been adduced before this Court to show that the liquidator has been given notice to determine the necessity of joining the company in liquidation to these proceedings. As such, this application fails entirely. **The 3rd respondent's** counsel Mr. Gitonga Murugara also submits that the joinder of the 2nd applicant contravenes section 241 of the Companies Act.

- (18) In response, Dr. Kuria, for the applicants submits that the 1st applicant's interest in this matter, is his share of surplus assets of the 2nd applicant. He submits that the 1st applicant holds over 95% of the shares allotted in the 2nd applicant. He was also interested in the 2nd applicant's business as an investor before the winding up order was issued. That under section 236 of the Companies Act, the Official Receiver becomes the liquidator of the company upon the making of a winding up order. Dr Kuria submits that the 1st applicant joined the 2nd applicant to this matter without the authority of the official receiver because the Official Receiver has arbitrarily refused to discharge his duties. Further, that the official receiver works under the

Attorney General and that he has been endeavoring in vain to get the Official Receiver to discharge his statutory obligations.

- (19) Further, that the first applicant in joining the second applicant to this matter relies on the company law doctrine which entitles shareholders to use the name of the company to file a suit where the directors have declined to do so. He supports this assertion by citing Halsbury's Laws of England, 4th Edition Vol. 7(1). In an action to redress a wrong done to a Company to recover money or damages alleged to be due to it, the Company is the only proper plaintiff but its name should be used as plaintiff only by direction of the Company or its directors. Where the members complaining represent the majority of the Company, the action may be brought in the Company's name even though the director's object. The court may allow the matter to stand so that a Company meeting may be held to decide whether the action should proceed in the Company's name... Nevertheless, proceedings may be brought by any member of members in his or her own names where such authority cannot be obtained and the act complained of is of a fraudulent character or oppressive or is *ultra vires* the company or is criminal or where the wrong doers control the majority of votes. He

submits that the Official Receiver's action is arbitrary, illegal, null and void and that the first applicant is entitled in law to use the name of the company to bring this matter. He further submits that the Official Receiver is acting in a similar manner as the Attorney General in the matter of ***Githunguri v R 1985 KLR 91***. In this matter, the Attorney General was forbidden from acting arbitrarily, oppressively or contrary to public policy.

- (20) Dr Kuria further submits that in preparing the application for filing, he requested the Attorney General to enjoin the Official Receiver in the application. However he did not do so. When the applicants filed the application now before the court, they served the same upon the Attorney General and the Official Receiver. This honourable court also served the Attorney General and the Official Receiver with a notice of the mention slated for 28th June, 2012. However, neither of the parties appeared.

A. On the Threshold in Section 14

- (21) The 1st and 2nd respondents submit that although the title of the application refers to 'Special jurisdiction conferred by section 14 of

the Supreme Court Act', little else connects this title with the rest of the application. The respondents contend that none of the judges who presided over the appeal (Tunoi (as he then was), Githinji and Onyango Otieno JJA) have been found unsuitable for office per section 21 of the Judges and Magistrates Vetting Act. Further, that the special jurisdiction under section 14 of the Supreme Court Act can only be invoked where a judge has been removed, retired or resigned as a result of a complaint. The 3rd respondent concurs with the submissions of the 1st and 2nd respondents. All the respondents are of the view that the circumstances contemplated by section 14 of the Supreme Court Act do not exist in this particular instance. The 1st and 2nd respondents further submit that if it was the intention of the applicants to rely on the findings of the vetting board as a basis for this application, the relief granted by the Supreme Court Act is that of review and not of an application for leave to appeal. Rule 41(1) of the Supreme Court Rules provides that an application made under section 14 must be in Form D. They submit that the application before the court is not a petition for review. As such, there is no application before the court under the special jurisdiction of the court granted by section 14.

(22) Dr. Kuria submits that section 23 of the transitional provisions required that those serving in the judiciary conform to the new values of the Constitution. Further, section 14 of the Supreme Court Act was enacted to give effect to the vision of a reformed judiciary and to correct the injustices occasioned by the judiciary before August 2010. He submits that Article 159 (2) (d) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities and that the purpose and principles of this Constitution shall be promoted. He further submits that the respondents have ignored the provisions of Article 259(1) of the Constitution. Dr Kuria submits that the respondents have failed to interpret the Constitution as one document. He further submits that the respondents do not appear to see the connection between Article 259 of the Constitution, section 23 of the Transitional Provisions of the Constitution, the Vetting of Judges and Magistrates Act 2011 and Section 14 of the Supreme Court Act. He submits that all these address the issue and the vision of justice after the Constitution comes into operation. He argues that the respondents have wholly ignored this

provision which does away with construing statutes narrowly.

- (23) He submits that Section 23 of the Sixth Schedule was inserted to contribute to good governance and to benefit those makers of the Constitution who had suffered injustice before it came into existence. He submits that the applicants are such persons. He submits that the old legal culture existing before 2009 ignored substantive justice and attached importance to procedural technicalities. He submits that following the 2009 amendments of the Civil Procedure Act and Appellate jurisdiction Act the overriding objective is to do substantive justice to litigants. He relies on *African Safari Club v Safe Rentals Ltd, Court of Appeal at Nairobi, Civil Appeal No. 52 of 2010* to support this submission. Dr. Kuria compares the situation of the Supreme Court of Kenya to that of New Zealand as explained by the Hon. Justice Blanchard. Justice Blanchard explains that the Supreme Court of New Zealand was established in 2004 and spent a part of that year “**gaining an understanding of the Act and in particular its jurisdictional requirements**”. Similarly, this is the task before the Kenyan Supreme Court. In addition, this is the task it set for both itself and the parties on 28th June 2012.

(24) The Kenyan position is however made more complex by Article 163 of the Constitution. The interpretation of Article 163 and all other provisions in the Constitution must bear in mind the fact that the Constitution was promulgated by the Kenyan people to overhaul the previous constitutional order. He refers to Prof. Walter Murphy's Article in the American Journal of Jurisprudence. Prof Murphy observes that "*a Constitution embraces far more than a particular document..... a Constitution includes a set of developing traditions that embraces as ideals general values as well as practices.*" Dr Kuria also submits that the issue of jurisdiction raised in this application requires a consideration what Kenyans wanted, what they want to be and what was the concept of justice they envisioned in adopting the new Constitution. In response to this, Mr. Oraro stated that neither Article 159 or Article 259 of the Constitution assist the Applicants on the issue of jurisdiction as they only come into operation where there is jurisdiction.

B. On When to Address the Question of Jurisdiction

(25) Dr Kuria submits that the respondent's have confused the three

jurisdictions exercisable at different stages, namely:

- (a) Existence of the jurisdiction of the Supreme Court
- (b) The manner of exercise of that jurisdiction when hearing an application for leave; and
- (c) The manner of exercising that jurisdiction when hearing the appeal after leave is granted.

(26) Dr. Kuria therefore submits that the Supreme Court must address the issue of jurisdiction whenever it is raised. He submits that the better practice in matters of jurisdiction would be for the issues of jurisdiction to be taken up when applications for leave are being argued because then the court is seized of all the facts including those pertaining to jurisdiction. Dr. Kuria submits that the respondents' submissions that the court lacks jurisdiction to entertain the application dated 23rd May 2012 are based on:

- (i) *a misapprehension of the purposes and principles of the Constitution which are referred to in both Article 159(2) (d) of the Constitution and article 23 of the Transitional provisions;*
- (ii) *a misapprehension of the principles of interpreting the*

Constitution which are set out in section 259 of the Constitution. That an acceptance of respondents submissions would subvert the Constitution completely.

- (27) In response to this, Mr. Oraro asserts that this is contrary to the basic understanding informed by the fact that the jurisdiction of any court is derived from the law. He relies on the Supreme Court's decision ***In the Matter of Advisory Opinions of the Court under Article 163 of the Constitution (Constitutional Application No. 2 of 2011 at para. 30)***. , where the Court stated:

“...a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”

C. On the Nature of Section 14 Jurisdiction

- (28) The 1st and 2nd respondents submit that the Supreme Court Act is established under Article 163 of the Constitution. The relevant provision to the instant application is Article 163 (4) (b). This provision allows the Supreme Court to entertain appeals from the

Court of Appeal in matters which have been certified to be of general public importance. This is subject to the Supreme Court affirming, varying or overturning such certification. Dr Kuria submits that the 1st and 2nd respondents have given the expression “appellate jurisdiction” in Article 163 (3) (b) a narrow construction. He submits that they have ignored the fact that section 23 of the Transitional provisions exists and was inserted to cure a peculiar Kenyan mischief. Dr Kuria however, submits that in the instant application under Article 163 of the Constitution, the word “appeal” was designed to cover reviews analogous to appeals necessitated by the peculiar circumstances of the country. Thus, section 23 of the Transition Provisions was included in the Constitution. He submits that according to the **Black’s Law Dictionary**, the word ‘review’ is defined as follows:

‘Consideration, inspection or re examination of a subject or a thing’

Administrative review

1. Judicial review of an administrative proceeding

2. Review of an administrative proceeding within the agency itself

Appellate review examination of a lower court's decision by a higher court which can affirm, reverse or modify the decision.

The word 'appeal' is defined as follows at page 94,

'Appeal: A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority.'

He also submits that in A Dictionary of Modern Legal Usage, 2nd Edition, Bryan A. Garner, the word 'review' is defined as follows,

'The word review denoted a genus of which appeal and certiorari are species. In reference to all types of appellate scrutiny – however, cases must have arrived in the appellate court – review is the most accurate term.'

The same book defines the word 'appeal' this way,

'A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority especially the submission of a lower court.'

(29) He submits that it is therefore clear that section 23 of the Transitional provisions gives Parliament power to pass legislation to right the injustices which had occurred. He contends that it is clear

from the Vetting of Judges and Magistrates Act, 2011 that that task is not given to the Supreme Court. The Supreme Court is given the task of dealing with the consequences of the vetting. It was pursuant to the above provisions that the Supreme Court Act (2011) was enacted. Further, the relevant provisions of the Act to this application are sections 14-16 of the Supreme Court Act. Dr Kuria submits that section 14 of the Supreme Court Act does not define the expression “review”. The section envisages a situation where judgments and decisions of the Court of Appeal and the High Court are reviewed by the Supreme Court. In reviewing the judgments and decisions of those courts, the Supreme Court will be exercising an appellate jurisdiction. Consequently, when section 23 of the transitional provisions and Article 163 are read together, it becomes clear that the word “appeal” includes review. He submits that this review jurisdiction is clearly an appellate jurisdiction within the meaning of Article 163(3) of the Constitution. He argues that any other construction would amount to extending the original jurisdiction which is now limited to hearing and determining disputes relating to the elections to the office of President arising under Article 140 of the Constitution. The applicants submit that they have demonstrated that their intended appeal raises issues

of public importance. They however note that the respondents have highlighted the merits of the appeal intended by the appellants. The applicants contend that this is not the task before the court at this stage.

D. Whether section 15&16 of the Supreme Court Act apply retrospectively

(30) The 1st and 2nd respondents submit that the Constitution came into force on 27th August 2012 per Article 263 of the Constitution. Article 262 of the Constitution provides that the Transitional and Consequential Provisions under the Sixth Schedule shall take effect on the effective date. That Section 21(1) and (2) of the Transitional and Consequential Provisions provide that the Supreme Court was to be established within one year of the effective date. Pending its establishment, the Court of Appeal would hear matters assigned to the Supreme Court. The respondents submit that the powers of the Supreme Court only relate back to the date of its establishment and upon appointment of judges to the Supreme Court. The 1st and 2nd respondents submit that the applicants are purporting to invoke the jurisdiction of the Supreme Court in respect of a decision made by

the Court of Appeal on the 31st day of July 2008, over two years before the effective date, and 3 years before the Supreme Court was established. The 1st and 2nd respondents submit that section 22 of the Transitional and Consequential provisions expressly saved the pending proceedings but did not save the proceedings which had been finalized. As a result of the foregoing, the jurisdiction of the Supreme Court commenced from the effective date, whether through the Court of Appeal sitting as the Supreme Court or after the establishment of the Supreme Court. Consequently, the Supreme Court did not confer any jurisdiction relating back to appeals which had been determined before the effective date except on matters relating to vetting under section 14.

- (31) In agreement, the **3rd respondent** submits that the Supreme Court lacks jurisdiction to entertain the instant application under the provisions of the law cited by the applicants. They submit that when judgment was delivered on 31st July 2008 by the Court of Appeal, the Supreme Court was not in existence. It submit that the promulgation of the new Constitution on 27th August 2010 could not confer jurisdiction on the Supreme Court to review cases which had

been finalized by the Court of Appeal. Further, that the people of Kenya could not have intended to confer such jurisdiction on the Supreme Court. Otherwise they would have expressly provided for such jurisdiction in the new Constitution. The 1st and 2nd respondents submit that neither the Constitution nor the Supreme Court Act provides time within which leave to appeal to the Supreme Court may be sought. They submit that rule 30 of the Supreme Court Rules gives that discretion to the Court. That rule 30 also provides that in cases where an appeal is as of right, the notice of appeal has to be filed within fourteen days. They submit that while that period is discretionary, the court would probably lend necessary credence to the provision made for time within which to file the Notice of Appeal.

- (32) The 1st and 2nd respondents submit that the same cannot apply to appeals which were determined before the commencement of the Act. This is because there is no provision, neither in the Constitution nor in the Supreme Court Act, incorporating retrospectivity into the provisions under section 16 and part IV of the Supreme Court Act. To support this submission, they rely on the Interpretation and General Provisions Act (cap 2) Laws of Kenya which provides that: **“9 (1)**

subject to the provisions of subsection (3) an Act shall come into operation on the day of which it was published in the Gazette.(3) If it is enacted in the Act, or in any other written law, that the Act or any provisions, thereof shall come or to be deemed to have come into operation on some other day the Act or as the case may be, that provision shall come or be deemed to have come into operation accordingly". Mr. Oraro submits that the provision encapsulates the presumption against retrospectivity which is that; unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation. Further, that in light of the foregoing, Section 16 of the Supreme Court Act was not enacted to come or be deemed to come into operation on a date other than the date of commencement which was 23rd June 2011. As such, it cannot relate back to the appeals determined before that date. Mr. Oraro relies on the decision of ***Du Plessis & Others vs De Klerk & Another (1997) 1 ICLR 637***. The judges of the Constitutional Court of South Africa held that a constitutional provision could not be invoked in respect of matters which are before the commencement of the Constitution.

(33) **Mr. Gitonga for the 3rd respondent** submits that Article 163, of the Constitution which confers jurisdiction on the Supreme Court, does not have retrospective application. The same applies to section 15 and section 16 of the Supreme Court Act. To support this submission, he also relies on section 9 of the ***Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya***. In addition, he refers the court to the definition of retrospective/retroactive Law in Black's Law Dictionary. Mr. Gitonga also relies on Halsbury's Laws of England which deals with the presumption against retrospective as a cardinal principal of legality and on the case of ***West v Gwynne [1911] 2 ch. 1.***

(34) Dr. Kuria responds that the assertions by the respondents predate the year 2009 when the principle that substantive justice must be done was enacted. It also predates the enactment of Article 159(2)(d) of the Constitution. He also adds that the Interpretation and General Provisions Act does not apply to the Interpretation of the Constitution. The interpretation of the Constitution should be guided by Article 259. In response to this, Mr. Oraro for the 1st and 2nd

Respondents stated that Article 259 does not assist the Applicants with interpretation of the provisions of the Constitution. It is of no assistance save to the extent that this Court is bound by Article 159 on any matter appearing before it and by Article 259 in interpreting the provisions of the Constitution. It is of no retrospective application in proceedings which have already been concluded.

E. Whether this honourable court has jurisdiction to hear the application for leave to appeal

- (35) On leave to appeal, Mr. Oraro submits that in cases involving the interpretation or application of the Constitution or where the Supreme Court has original jurisdiction, there is no need for leave to appeal. He submits that under Article 163 4 (b) of the Constitution, appeals to the Supreme Court only lie in matters which are certified by the Supreme Court or the Court of Appeal to be matters of general public importance. That under Article 163 (5), the Supreme Court has the right to affirm, vary or overturn a certificate by the Court of Appeal. He also submits that the Supreme Court in ***Sum Model Industries Limited v Industrial and Commercial Development Corporation (Unreported Supreme Court Civil Application no.1 of 2011)*** determined

that in circumstances where there is concurrent jurisdiction with the Court of Appeal as it seems under the said provision, it would be good practice to originate the application for leave from the Court of Appeal. He further submits that the court went ahead to hold that it would be an abuse of process to commence an application for leave in the Supreme Court without making an initial application to the Court of Appeal. He classifies this as 'the qualifying proceedings'.

- (36) Mr. Gitonga submits that the Court of Appeal's decision delivered on 31st July 2008 was a final judgment from the highest court of the land at the time. Thus, that judgment conferred absolute rights on the respondents which have already accrued and are vested. He submits that these rights cannot be taken away in the absence of express provisions of the law. He relies on Article 40 of the Constitution in making this assertion. Further, that neither Article 163 (4) (b) of the Constitution nor section 15 (1) of the Supreme Court Act confers jurisdiction and a right of appeal to the applicants. That section 14 (1) of the Supreme Court Act would be *ultra vires* Article 163 4(b) of the Constitution if it purports to confer such jurisdiction.

F. Whether there is a conflict between section 23 of the Transitional and Consequential Provisions under the Constitution and section 14 of the Supreme Court Act

(37) Mr. Gitonga submits that the decision of the Judges and Magistrates Vetting Board was just a mere report and cannot purport to confer jurisdiction on the Supreme Court in any manner or as contemplated by the applicants. Dr Kuria on the other hand, responds that section 23 of the transitional provisions just gives Parliament power to enact legislation to facilitate vetting. It does not spell out the way in which it was to be done, or the institution which was to do it or the scope of the power of that institution. It was legislation to enable the country to have a judiciary of a higher standard than it had before. He relies on **Marbury v Madison** where the U.S Supreme Court held that in construing the Constitution, the court must give effect to every provision and that it cannot be presumed that any clause in the Constitution is intended to be without effect. He submits that the respondents in essence are asking the court not to attach any importance to Section 23 of the transitional provisions. As the 1st applicant has demonstrated at paragraph 94 of his affidavit, the Judges & Magistrates Vetting Board

has interpreted section 23 and applied it to the case of the applicants.

2. ISSUES FOR DETERMINATION

(38) Having taken into account the pleadings, supporting affidavits and the rich and insightful written and oral submissions by Counsel for the parties, the Court is now in a position to more clearly formulate the issues for determination. We proceed to formulate the issues as follows:

(i) Whether the First Applicant needed to obtain leave of court before joining the Second Applicant to these proceedings and if so, whether failure to apply and obtain such leave is so fatal as to render this Application untenable?

(ii) Whether the facts as deposed to in this Application by the First Applicant and all surrounding circumstances meet the threshold set out in Section 14 of the Supreme Court Act as to bring the application within the ambit of the Court's Special Jurisdiction?

(iii) Whether the Special jurisdiction under Section 14 is appellate in nature and therefore one of the categories of appeal contemplated by Article 163 (4) of the Constitution?

(iv) Whether the Supreme Court has jurisdiction to entertain Appeals from cases that were determined and finalized by the Court of Appeal before the promulgation of the Constitution of Kenya 2010 (effective date)?

(v) Are Sections 15 and 16 of the Supreme Court Act intended to operate retrospectively?

(vi) Whether the Supreme Court has jurisdiction to hear applications for leave to appeal?

(vii) Whether Section 14 of the Supreme Court Act is unconstitutional.

(39) A detailed consideration of each of these issues will enable the Court to arrive at authoritative and reasoned conclusions for the fair and

just disposal of the matter at hand. It is to this solemn duty that we now turn.

3. *THE NEED TO OBTAIN LEAVE OF COURT UPFRONT*

(40) It is the contention of Counsel for the Respondents that the First Applicant ought to have sought and obtained leave of court before joining the second applicant to these proceedings. Failure to obtain the court's sanction, they urge, is fatal to the application and that the Court should at this stage dismiss it. Their argument is based on Section 241 (1) of Companies Act Cap 486 of the Laws, of Kenya. The section provides inter alia, that:

“The liquidator in a winding up by the Court shall have power, with the sanction either of the Court or of the committee of inspection:

- a. To bring or defend any action or other legal proceedings in the name and on behalf of the company.
- b. To carry on the business of the company so far as may be necessary for the beneficial winding up thereof;
- c. To appoint an advocate to assist him in the performance of his duties

(41) Placing reliance on this section of the Companies Act and on the authority of ***Simba Airlines Limited v Heritage Bank Limited*** (2002) 1 EA 302 and ***Deposit Protection Fund Board v Kamau and Anor*** (1999) 2 EA 67; both being decisions of the Court of Appeal, Counsel have urged that the Second Applicant cannot be a party to any action unless the application for leave is made and granted by the Court. They submit that there is no evidence adduced before this Honourable Court that any attempt has been made to give notice to the liquidator to enable him determine the necessity of the company (2nd Applicant) in liquidation being joined to these proceedings. In our understanding, Counsel is suggesting that any proceedings in which the second applicant (being a company in liquidation) has to be a party can only be commenced with the authority of the liquidator to be followed by sanction of the court. Dr. Kuria, Counsel for the Applicants apparently in agreement with this position, however urges that the Official Receiver, who is the liquidator in this case, has refused to discharge his statutory obligations despite efforts to get him to do so. He has submitted that while preparing to file this application, he had requested the

Attorney General to enjoin the Official Receiver in the proceedings but his request was never acted upon.

- (42) Where does this leave the Court? Should the Application for leave be dismissed due to failure to adhere to the provisions of the Companies Act? In answering this question it is important to determine the scope and purpose of section 241(1) of the Companies Act. A plain reading of the section clearly shows that its main purpose is to establish the frontiers of the liquidator's powers in a Winding Up of a company by the Court. One of those powers is to bring or defend any action or other legal proceeding in the name and on behalf of the company. However, before the liquidator commences proceedings or participates in proceedings on behalf of the company, it must obtain the sanction or leave of the court. The requirement of sanction of the court is directed at the liquidator. It is true that the purpose of this requirement is for the court to oversee and ensure that the operation of the company in liquidation is for the benefit of the creditors and contributories and to obviate waste of the estate through frivolous litigation. The main responsibility of a liquidator is to protect the assets of a company for the benefit of creditors and contributories.

Any action it commences or defends in court must be for the objective of protecting the assets or recovering the property of a company. That is the rationale of section 241 (1) (a) of the Companies Act.

- (43) Thus far the legal position is clear. But is the power to commence or defend proceedings in court which is vested in the liquidator exclusive? In other words does the liquidator usurp all the functions of the company's directors? What happens where as in this case, it is not the liquidator but the principal shareholder of a company in liquidation, who is seeking not to commence but to continue proceedings against a person which proceedings he had commenced before the company was placed in liquidation? What if in fact the respondent as in this case was once a debenture holder over the company's assets but is no longer such a holder? What is the position where the winding up of a company as is in this case was instigated not by a debenture holder or creditor but by minority shareholders on grounds of oppression? None of the Counsels in these proceedings has addressed these questions neither do the authorities

cited by them. Yet it is clear to us that it is only by answering them that a fair resolution of the main issue may be found.

- (44) The question as to whether the receiver's power to commence or defend proceedings in the name of a company under receivership is exclusive and all-embracing has received judicial attention in jurisdictions from afar. While it remains the position that a receiver and manager supplants the board of directors in the control, management and disposition of the assets over which the security exists, it is also acknowledged that the receiver and manager does not usurp all the functions of the company's board of directors. The extent to which the powers of the directors are supplanted will vary with the scope of the receivership and management vested in the appointee. Directors have continuing powers and duties. Their statutory duties in relation to the preparation of annual accounts, the auditing of those accounts, calling the statutory meetings of shareholders, maintaining the share register and lodging returns remain. (see the ***Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd*** (1969) 2 NSW 782.

(45) In the case of *Newhart Developments Ltd v Co-operative Commercial Bank Ltd*, (1978) 2 All ER 896, CA, it was held that the power given to the receiver to bring proceedings was an enabling provision so that he could realize the company's assets and carry on business for the benefit of the debenture holders. **The provision did not divest the directors of the company of their power to pursue a right of action if it was in the company's interest and did not in any way impinge prejudicially upon the position of the debenture holders by threatening or imperiling the assets which were the subject of the charge.** (emphasis ours). The Court further opined that if in the exercise of his discretion, the receiver chooses to ignore some asset such as a right of action, or decides that it would be unprofitable from the point of view of the debenture holders, to pursue it, there is nothing in the authorities which suggests that it is not then open to the directors of the company to pursue that right of action if they think that it would be in the interests of the company.

(46) This case although not on all fours with the proceedings at hand in terms of the facts, is instructive as to how this Court must proceed in

deciding whether the application must be dismissed on grounds of failure by the applicant to obtain the consent of the liquidator and consequent sanction of the Court before commencing proceedings.

In the instant case, it is critical to take note of the following facts:

- (i) The First Applicant is the Principal shareholder of the second applicant company in whose name he seeks leave to appeal against the decision of the Court of Appeal*
- (ii) The Second Applicant is in liquidation following a Winding Up Order issued by the High Court following a petition not by any debenture holders but by minority shareholders on grounds of oppression*
- (iii) That the decision of the High Court which awarded the sum of Kenya shillings 129 million to the Applicants was made in 2003 way before the High Court Winding up Order was made in 2006*
- (iv) The Appeal against the High Court's decision was commenced by the Respondents in 2004 again way before the Winding up Order.*

(v) There is no debenture over any of the assets of the Second Applicant.

(47) In the matter before us, the Court takes note of the fact that the first applicant does not seek leave to commence proceedings in the name of the company within the wording of Section 241(1) of the Companies Act. The Application before us is a continuation of proceedings that began in the 1990's in the High Court long before the Order to wind up the second applicant was made by the High Court in 2006. The First Applicant is continuing to assert his "right of action" that crystallized when he and the second applicant instituted proceedings to recover what they thought was due to them from the respondents herein. The respondents were at one time debenture holders over the second applicant's assets, at that time; they could have been justified to question any action by the applicant to commence action in the company's name if the latter had been placed under receivership. They are no longer debenture holders. Their only interest in this matter is to maintain the status quo following the Court of Appeal's decision pursuant to which they were relieved of paying a huge sum of money to the applicants. To say the

least, they have no interest whatsoever in the affairs of the second applicant. Neither are they affected in any way by the liquidation of the second applicant. Their opposition to the application for leave on the basis of Section 241(1) of the Companies Act is a cynical attempt to frustrate the first applicant's pursuit of what he believes either rightly or wrongly belongs to him. The first applicant in our view is seeking to vindicate the High Court's decision which would enable him to enjoy the fruits of judgment. But even if the respondents were debenture holders and that the second applicant had been placed under receivership at their instance, the facts in this case are such that we would likely have been inclined to apply the principle in ***Newhart Development Ltd.***

- (48) Considering all these facts, the Court is inclined to ask itself one pertinent question and that is, "how prejudicial would the application for leave to appeal herein if granted be to the interests of the minority shareholders of the company?" Let us assume for purposes of argument that this Court proceeds to grant leave to appeal as prayed by the applicants, and the latter proceed to file their appeal, would the minority shareholders be prejudiced in any way? We don't think so. At any rate the issue does not arise since the said

shareholders have not opposed this application. Counsel for the respondents contends that the requirement of the sanction of court is not a matter of procedural technicality as it affects the rights of all who are affected by the liquidation. That may be so in other situations, but in the circumstances of this case, it indeed is a procedural technicality the likes of which are frowned upon by Article 159 (2) (d) of the Constitution. This is an application for leave to file an appeal against the judgment of the Court of Appeal. It is not the substantive appeal. This being so, to subject the applicants to the provisions of Section 241(1) of the Companies Act would require them to apply for leave so as to then apply for leave to appeal; an oppressive if not ridiculous outcome to which this Court would never be a party.

- (49) From the foregoing reasons, the opposition to this application on grounds that prior sanction of the Court has not been sought and received as per the provisions of Section 241(1) of the Companies Act must fail.

4. THE THRESHOLD OF SECTION 14 OF THE SUPREME COURT ACT

(50) Counsel for the respondents has strongly urged that the application does not seek the relief envisaged under Section 14 of the Supreme Court Act. All the application does is to state that it has been brought under Sections 14 to 16. Although the title of the application refers to “Special Jurisdiction conferred by Section 14 of the Supreme Court Act”, little else connects this title with the rest of the application. But even if the application seeks the relief under section 14, it does not satisfy the threshold under that Section which requires that a judgment or decision must have been the basis for the removal, resignation or retirement of a Judge in consequence of a complaint of misconduct or misbehavior. As none of the three judges (Tunoi JA, as he then was, Githinji and Onyango, JJA) who presided over the Appeal has resigned, been removed or retired as a result of the complaint; Section 14 of the Supreme Court Act cannot apply. Rather curiously, Dr. Kamau Kuria, Counsel for the applicants does not specifically respond to this argument by the respondents. His general arguments based on the Constitution to justify the applicability of Section 14 of the Supreme Court Act have been adequately summarized in earlier paragraphs of this Ruling.

(51) The sub-title under which Section 14 appears reads **“Special Jurisdiction”**. The entire body is reproduced here below:

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

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

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

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

- a. Conduct a preliminary enquiry to determine the admissibility of the matter; and
 - b. Have all the necessary powers to determine the review under this section, including calling for evidence.
- (4) An application for review in respect of a judgment or decision made before the commencement of this Act shall not be entertained two years after the commencement of this Act.
- (5) Nothing in this section shall be construed as limiting or otherwise affecting the inherent power of the Court, either on its own motion or the application of a party, to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the due process of the Court.

(52) In the matter before us, the applicants seek leave from this Court to appeal against the judgment of the Court of Appeal. We agree with Counsel for the first and second applicant's contention that on the face of it, the application is not one for review as envisaged under Section 14 of the Supreme Court Act. The title of the application leaves no doubt that what is being sought is leave to

appeal as opposed to a review of judgment. However, the title also seems to indicate that the application is somehow brought under section 14. We also take note of the fact that in his sworn affidavit in support of this application, the first applicant persistently and relentlessly decries what he believes were acts of injustice and oppression visited upon him by the respondents. He resents the failure by the judges of the Court of Appeal to heed his cry in their judgments. It is this sense of wrong that animated him in the first place to file a complaint against the three judges at the Vetting Board. Counsel for the first applicant also made reference to the import of section 14 in his oral submissions. So both counsel and the applicant have adopted the language of section 14. These set of conclusions leads us not to close the door of special jurisdiction against the applicant.

- (53) If then the applicant is asking us to review the judgment of the Court of Appeal on the basis of section 14 special jurisdiction, there still remains the question as to whether he has satisfied the threshold for review set out in that section. The language of that section as to what qualifies for review is clear and unambiguous.

Only the judgment of a judge who has been removed, resigned or retired from office can be reviewed under section 14. While the judgment of the Court of Appeal was the basis of the complaint against the three judges, none of them was removed, retired or opted to resign from office following their vetting by the Vetting Board. No other meaning can be imported into section 14. The applicant cannot avail himself of the promise for justice embedded in that section.

5. *SPECIAL JURISDICTION: IS IT APPELLATE IN NATURE?*

- (54) If the applicant cannot move this Court to review the judgment of the Court of Appeal on the basis of section 14 of the Supreme Court Act for reasons already stated, can he still ask this Court to grant him leave to appeal against the said judgment on grounds that the jurisdiction to review is appellate in nature? Indeed this is what Counsel for the applicants appeared to suggest in his oral submissions. In his view, section 23 of the Transitional Provisions of the Constitution Parliament power to pass legislation so as to right the injustices of the past. But the questions persist; is a review the same as an appeal? is the review contemplated in section 14 a category of appeal under Article 163 (4) of the Constitution? The

definitional works cited by Counsel for the applicant do not give a clear cut answer to these questions. In our view, the correct approach to these questions is not to resort to works of definition as such; rather, one has to consider the practical utility for which the devices of “review” and “appeal” have been deployed by litigants in our legal system. Such an approach yields the following results:

- a. An appeal is granted in specific terms by the constitution or a law to a court of law. The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A court of law cannot assume appellate jurisdiction where none has been specifically granted by the constitution or statute.
- b. An appeal usually lies from a lower to a higher court and entails a reconsideration of a decision by the higher court with a view to reversing it either in part or in toto, or affirming it either in part or in toto.
- c. Depending on the structure of the courts, appeals can lie in succession from the lowest court to the highest.

- d. An appeal against a decision of a lower court is always commenced by a party who is aggrieved by that decision.
- e. In our legal system, review jurisdiction usually vests in the High Court. Section 14 of the Supreme Court Act however vests some limited review jurisdiction in the Supreme Court.
- f. The High Court can review its orders, to correct an irregularity or error apparent on the face of the record. The High Court can also review the records of a subordinate court or tribunal to correct irregularities or errors apparent on the face of the record so that the interests of justice can better be served. In undertaking such reviews, the High Court does so upon application by an aggrieved party or on its own motion (SUO MOTU). The High Court exercises some discretionary latitude in reviewing its own orders or the records of subordinate courts.
- g. The Vetting of Judges and Magistrates Act confers upon the Vetting Board the power to review its own decisions (check the grounds from the Act).

h. Apart from the general power to review court records and orders, the High Court has a more broad and robust power of “review of administrative action”. This power is granted to the High Court by the Constitution and legislation. An appeal lies from the High Court’s review of administrative action decision to the Court of Appeal.

(55) The features highlighted above indicate that the words “review” and “appeal” cannot be used interchangeably within the context of a litigant’s choice of a device when seeking a higher courts intervention in a matter already decided by a lower court. Neither section 23 of the Transitional provisions to the Constitution nor Article 163 (3) and (4) of the Constitution gives the impression that an appeal means the same as a review. While an appeal entails some form of review of a lower court’s decision in terms of assessing that court’s interpretation and application of the law, it is not the same as a “review” in the technical sense. In this regard, Section 14 of the Supreme Court Act confers powers of review upon the Supreme Court through a special jurisdictional regime. **The Supreme Court can even act on its own motion and**

review judgments that fall within the ambit of that section. It has powers to conduct preliminary enquiries and call for evidence. This kind of jurisdiction is inconsistent with an appellate jurisdiction whose features we have addressed in the foregoing comments. The irresistible conclusion is that the application for leave to appeal cannot be grounded on Section 14 of the Supreme Court Act.

- (56) In a recent ruling by a two judge-bench of this Court, ***Lawrence Nduttu & 6000 Others versus Kenya Breweries Ltd and J. Harrison Kinyanjui & Co. Advocates*** SC Petition No. 3 of 2012; it was firmly laid down that “only two types of appeal lie from the Court of Appeal to the Supreme Court under the Constitution. We consider it appropriate to quote with affirmation the principle laid down by the Court, at paragraph 20, the Court stated and we quote:

“At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right if it is a case involving the interpretation or application of the Constitution. In such a

case, no prior leave is required from this Court or Court of Appeal. (At Para 21) The second type of appeal lies to the Supreme Court not as of right but only if it has been certified as involving a matter of general public importance. It is the certification by either Court which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court.....then such intending appellant must convince the Court that the case is one involving a matter of general public importance.”

- (57) This statement fortifies our conclusion to the effect that the appellants cannot base their application for leave to appeal against the decision of the Court of Appeal on section 14 of the Supreme Court Act.

6. THE APPELLATE JURISDICTION OF THE SUPREME COURT: HOW FAR BACK IN HISTORY?

- (58) The establishment, composition and jurisdiction of the Supreme Court are provided for in Article 163 of the Constitution. The Supreme Court has Original and Exclusive Jurisdiction, Appellate Jurisdiction and Advisory Jurisdiction. The appellate jurisdiction of the Court is stipulated in Article 163 (4) which provides that appeals shall lie from the Court of Appeal to the Supreme Court-

- a. As of right in any case involving the interpretation or application of this constitution; and
- b. In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved.

(59) Having ruled that the applicants cannot base their application for leave to appeal on section 14 of the Supreme Court Act, it must be assumed that the application is based on Article 163 (4) (b). Indeed paragraph (a) of the Notice of Motion clearly states that “a matter of general public importance is involved in the intended appeal. In the case of Sum Model Industries Ltd. Versus Industrial and Commercial Development Corporation; a two judge bench of this Court opined as follows at page 3:

“This being an application for leave to appeal against a decision of the Court of Appeal (we add “under Article 163 (4) (b) of the Constitution,”), it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved.....If the Applicant

should be dissatisfied with the Court of Appeal's decision, in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163 (5) of the Constitution. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave would lead to Abuse of the Process of Court"

This statement by the two judge bench is based on the logic of Article 163 (5) of the Constitution. It provides that:

"A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."

- (60) This provision clearly intended to give the Court of Appeal the first option to consider an application for certification. It also intended to give the "would be respondent" the earliest opportunity to challenge an intended appeal to the Supreme Court. Such a party would be expected to argue that the case does not qualify to be escalated to this Court because it is "not one involving a matter of general public importance." Another feature of Article 163 (5) is that it affords the "intending appellant" a

second chance to seek certification to appeal to the Supreme Court. **In the Lawrence Nduttu case**, the two judge bench (at paragraph 21) opined that “the question as to what constitutes a matter of general public importance is one that is bound to be addressed ...in the foreseeable future as litigants seek certification to lodge appeals on this basis.”

- (61) We therefore affirm the principle of good practice laid down in the “Sum Model case to the effect that those seeking certification to appeal from the Court of Appeal on the basis of Article 163 (4) (b) have to originate their applications in that Court. The Court of Appeal when faced with such an application must entertain it notwithstanding the fact that there is no rule of procedure providing for how the said application is to be made. The right to seek certification stems from the Constitution and it is on that basis that it is exercised.
- (62) Notwithstanding the foregoing observations, we do not consider it necessary at this stage to order that the applicants go back to the Court of Appeal. This is due to the fact that before us is a formidable question regarding the appellate jurisdiction of this

Court. The issue has been raised by the respondents. Can the Supreme Court entertain appeals from cases that had already been heard and determined by the Court of Appeal before it came into existence? Does the appellate jurisdiction of the Court stretch far back to the time before the promulgation of the Constitution? The respondents have urged that the judgment of the Court of Appeal of 31st July 2008 was a final judgment from the highest court in the land at that time. The judgment conferred absolute rights on the respondents. Those rights have now accrued and vested. The rights cannot be taken away in the absence of express provisions of the law. They contend that neither Article 163 (4) (b) of the Constitution nor section 15(1) of the Supreme Court Act confer jurisdiction and a right of appeal to the applicants. Further they urge that sections 15 and 16 cannot have retrospective effect and that litigation must come to an end. That end came on 31st July with the decision of the Court of Appeal.

- (63) Before confronting this question, it is important to revisit the issue of retrospective or retroactive legislation. The Black's Law

Dictionary (6th Edition) to which we have been referred, defines retrospective law as:

“A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred.”

- (64) Most constitutions in Common Law jurisdictions almost invariably frown upon retroactive or retrospective criminal statutes. This general prohibition finds expression in Article 50 (2) (n) of the Constitution. That article provides that

“Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law”.

(65) As for non-criminal legislations, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:

- (i) *is in the nature of a bill of attainder,*
- (ii) *impairs the obligation of contracts*
- (iii) *divests vested rights or*
- (iv) *is constitutionally forbidden.*

(66) Applying these legal principles to the matter before us, it is clear that what is in question is not the seeming retroactive elements (if any) of section 15(1) of the Supreme Court Act; but whether, Article 163 (4) (b) of the Constitution was intended to confer appellate jurisdiction upon the Supreme Court the exercise of which would have retrospective effect upon the vested rights of individuals. At the outset, it is important to note that a

constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order. In this way, a constitution may and does embody retrospective provisions or provisions with retrospective ingredients. However, in interpreting the constitution to determine whether it countenances retrospective application of any of its provisions, a court of law must pay due regard to the language of the constitution. If the words used in a particular provision are forward looking and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the constitution. Such caution is even more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights which had legitimately become vested before the commencement of the constitution.

- (67) In the matter before us, the question is not whether the appellants seek to rely on a law that has retrospective effect. The issue for us to consider is whether the applicants can reopen a case that was finalized by the Court of Appeal (by then the highest court in the

land) before the commencement of the Constitution of 2010. The Supreme Court is a creature of the new Constitution. Before then, decisions of the Court of Appeal were final. The parties to the appeal derived rights and incurred obligations from the judgments of that Court. If this Court were to allow appeals from the cases that had been finalized by the Court of Appeal before the Commencement of the Constitution of 2010, it would trigger a turbulence of unmanageable proportions in the private legal relations of the citizens of this country. Every party against whom the Court of Appeal delivered judgment in the past, however far in history, would be entitled to approach the Supreme Court and seek a reversal of the same.

- (68) The vertical and horizontal application of a constitution is an issue that has exercised judicial and scholastic minds alike. It fell for consideration by the Constitutional Court of South Africa in the case of **Du Plessis & Others versus De Klerk and Another (1997) 1 LRC 637**. This case has been cited as persuasive authority by Counsel for the first and second respondents. Prior to the coming into operation of the

Constitution of the Republic of South Africa, 1993 the plaintiffs brought an action against the defendant newspaper claiming damages for defamation. The defendants denied that the articles were defamatory. After the Constitution came into force, the newspaper applied to court to amend their defence by adding a defence based on the right to freedom of expression under s. 15 of the Constitution. The application to amend the plea having been dismissed, and following an application for leave to appeal against the decision, the matter was referred to the Constitutional Court. The Court held that the defendants could not invoke the provisions of Ch.3 of the Constitution as a defence to a claim arising from facts which had occurred before the commencement of the Constitution. Chapter 3 did not operate retroactively in that conduct which was unlawful before the Constitution came into force could subsequently be deemed to be lawful by reason of Ch.3. Indeed, all the textual indications were to the contrary. Per Kentridge Ag J, Chaskalson P, Langa and O'Regan JJ Page 655:

“...A right of action was a form of incorporeal property and there was no warrant in the Constitution for depriving a person of property which he lawfully held before the

Constitution came into force by invoking against him a right which did not exist at the time when the right of property vested in him. The citation of well –known authorities on the need for a generous rather than a legalistic interpretation of the constitution hardly supported an argument directed to depriving and individual of an existing right”

(69) We find favour with the propositions of the Constitutional Court but only where the language in our Constitution is clearly forward looking for as we have already observed, ours is a multi-directional Constitution. A final judgment by the highest court in the land at the time vested certain property rights in and imposed certain obligations upon the parties to the dispute We hold that Article 163 (4) (b) is forward looking and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution.

(70) This holding would have been enough to dispose of the Application were it not for the fact that there remains the question

as to whether Section 14 of the Supreme Court Act is unconstitutional. In paragraph 10 of his Replying Affidavit David Kiprop Malakwen avers as follows:

“THAT with respect to section 14 of the Supreme Court Act, 2001, I am advised by the said Advocates, which advice I verily believe to be true, that this provision has no application to the matters presently before this Tribunal (sic). There is compelling argument that this section is unconstitutional as it is not anchored in Article 163 of the Constitution.”

- (71) Although Counsel for the third respondent only urged the issue of the constitutionality of section 14 tangentially, the quoted paragraph in the Affidavit sworn on behalf of the 1st and 2nd Respondents squarely brings the issue to the fore. We begin by restating the fact the jurisdiction of the Supreme Court is provided for in Article 163 (3) (4) (5) (6) and (7) of the Constitution. We hereby reproduce this Article to enable us consider whether section 14 is unconstitutional or not. (quote the provisions).

Article 163 (8) provides that:

“The Supreme Court shall make rules for the exercise of its jurisdiction”

While Article 163 (9) provides that:

“An Act of Parliament may make **further provision for the operation of the Supreme Court**” (emphasis ours).

(72) We begin by restating the principle that a court’s jurisdiction flows from either the Constitution or legislation or both. As such a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction that goes beyond that which is conferred upon it by law. We agree with Counsel for the 1st and 2nd respondents in his submission to the effect that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot do anything. This Court dealt with the question of jurisdiction extensively in the **Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011**. Where the Constitution exhaustively provides for the

jurisdiction of a court of law, the court must operate strictly within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction to a court of law beyond the scope contemplated by the Constitution. Where the Constitution gives power to Parliament to determine the jurisdiction of a court of law or tribunal, the latter would be within its authority to prescribe the jurisdiction of such a court or tribunal through legislation.

- (73) Article 163 of the Constitution provides for the jurisdiction of the Supreme Court in very exhaustive terms. It however leaves room for Parliament to prescribe further appellate jurisdiction of the Court in terms of Article 163 (4) (b) (ii), which stipulates that the Supreme Court shall have appellate jurisdiction to hear and determine appeals “from any other court or tribunal as prescribed by national legislation.” The Constitution also confers jurisdiction upon the Supreme Court to hear and determine an appeal from a judge who has been recommended for removal vide Article 168 (8). As far as we are aware, Parliament has yet to confer any

further appellate jurisdiction upon the Supreme Court in terms of Article 163 (4) (b) (ii) above.

- (74) We have already held that the “special jurisdiction” conferred upon the Supreme Court by section 14 of the Supreme Court Act is not appellate in nature. The Supreme Court Act was enacted pursuant to the provisions of Article 163 (9) of the Constitution. Indeed the Preamble to the Act states that it **is AN ACT of Parliament to make further provision with respect to the operation of the Supreme Court pursuant to Article 163(9) of the Constitution.** What is the proper province of Article 163 (9) of the Constitution? Does the Article contemplate a situation where Parliament can confer further jurisdiction to the Supreme Court through it? We hold that it doesn’t. The Act contemplated by Article 163(9) is operational in nature. Such an Act was intended to augment the Rules made by the Supreme Court for the purpose of regulating the exercise of its jurisdiction. It is an Act that must confine itself to the administrative aspects of the Court. It is a law that addresses the manner in which the Supreme Court exercises its jurisdiction as conferred by the

Constitution or any other national legislation within the meaning of Article 163 (4) (b) (ii). Such an Act was never intended to create and confer jurisdiction upon the Supreme Court beyond the limits of the Constitution. The national legislation referred to in Article 163 (4) (b) (ii) is not the same as the one referred to in Article 163 (9). The former is capable of conferring jurisdiction upon the Supreme Court. The latter is not.

- (75) Flowing from the foregoing we hold that Section 14 of the Supreme Court Act is unconstitutional to the extent to which it purports to confer “special jurisdiction” upon the Supreme Court contrary to and beyond the dictates of the Constitution. We are alive to the noble intentions that might have informed Parliament while conferring this “extra” jurisdiction upon the Supreme Court. Section 14 flows from the spirit of the Transitional Provisions to the Constitution more specifically Section 23 of the Constitution. If only Parliament had anchored Section 14 in the Constitution under Article 163 (4) thereto, or as sub-section (3) of Section 23 of the Transitional Provisions, the cries for justice by aggrieved litigants such as the first applicant herein would have found

succor in this Court. But in deference to the supreme authority of the Constitution, this Court cannot exercise jurisdiction that is tainted by unconstitutionality.

(76) Before we sign off, we consider it necessary to address ourselves to the comments made by the Vetting Board and to some extent Judge Tunoi. In the course of its ruling as reported, the Vetting Board made reference to the matter now before us in terms of language quoted at Paragraph – of this ruling. Judge Tunoi is reported as having suggested that the matter could be

(77) brought to the Supreme Court for final determination. What value if any can we attach to the observations by the Board and Judge? This Court will not frown upon a profound statement of law that may be made by a lower court or tribunal in the course of delivering a judgment or ruling. There is no doubt that the applicants were encouraged by the Vetting Board's pronouncement and the opinion of the Judge to file this application. The respondents contend that the Vetting Board's statement cannot confer jurisdiction to the Supreme Court where none exists. We did not understand the statements by the Board as purporting to confer jurisdiction to this Court. At best the

comments by the Board can be treated as an opinion expressed in the course of duty. As for the Judge, all we can observe is that when he said what he is reported to have said, the Judge was not making a statement of law. Here was a judge facing in an environment of adversity having to offer an opinion in the course of defending himself against accusations of bias. If the comments by the Board and Judge were meant to state the validity of section 14 of the Supreme Court Act then as must now be clear, both were speaking PER INCURIAM.

Taking into account all the reasons advanced, we hereby dismiss this Application and order that each party shall bear its own costs.

DATED and DELIVERED at NAIROBI this 23RD DAY OF OCTOBER, 2012.

.....
**W.M. MUTUNGA
CHIEF JUSTICE AND PRESIDENT
OF THE SUPREME COURT**

.....
**P.K. TUNOI
JUDGE OF THE SUPREME
COURT**

.....

J.B. OJWANG

JUDGE OF THE SUPREME COURT

.....

S.C. WANJALA

JUDGE OF THE SUPREME COURT

.....

N.S. NDUNGU

JUDGE OF THE SUPREME COURT