REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION 218 OF 2020

In the Matter of Articles 1, 2, 3, 10, 19, 20(1)(4), 21, 22, 24, 25, 26(1), 28, 29, 35, 47, 165, 232(1), 258 and 259 of the Constitution of Kenya, 2010

and

In the Matter of Section 4, 9, 20, 25 and 28 of the Access to Information Act, 2016

and

In the Matter of Section 5, 6 and 10 of the Health Act, 2017

and

In the Matter of Section 3 and 4 of the Fair Administrative Action Act, 2015.

BETWEEN

ERICK OKIOMA.....1ST PETITIONER

ESTHER NELIMA.....2ND PETITIONER

CHRIS OWALLA.....3RD PETITIONER

CM.....4TH PETITIONER

FA.....5TH PETITIONER

KB.....6TH PETITIONER

MO.....7TH PETITIONER

EL.....8TH PETITIONER

KATIBA INSTITUTE.....9TH PETITIONER

KENYA LEGAL AND ETHICAL ISSUES NETWORK ON HIV/AIDS (KELIN.....10TH PETITIONER

THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA).....11TH PETITIONER

TRANSPARENCY INTERNATIONAL KENYA.....12TH PETITIONER

ACHIENG ORERO.....13TH PETITIONER

(9th to 13th Petitioners suing on behalf of health and human rights civil society and non-governmental organisations)

VERSUS

MUTAHI KAGWE, CABINET SECRETARY FOR HEALTH.....1st RESPONDENT

PATRICK AMOTH, AG DIRECTOR GENERAL,

MINISTRY OF HEALTH.....2nd RESPONDENT

CORNEL RASANGA, GOVERNOR OF SIAYA COUNTY.....3rd RESPONDENT

COUNCIL OF GOVERNORS .....4th RESPONDENT

FRED OKENGO MATIANGI, CS INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....5th RESPONDENT

HILARY NZIOKI MUTYAMBAI, INSPECTOR GENERAL OF THE POLICE, KENYA .....6th RESPONDENT

JOSEPH WAKABA MUCHERU, CABINET SECRETARY FOR INFORMATION AND COMMUNICATIONS.....7th RESPONDENT

THE COMMISSION ON ADMINISTRATIVE JUSTICE.....8th RESPONDENT

DANIEL YUMBYA, CHIEF EXECUTIVE OFFICER, KENYA MEDICAL PRACTITIONERS' AND DENTISTS COUNCIL.....9th RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR) ..... 1ST INTERESTED PARTY

11TH PETITIONERS WRITTEN SUBMISSIONS

Your Lordship the 11th petitioner fully associates itself with the submissions filed on behalf of the 1st -8th,10th,12th and 13th Petitioners and for this reason the 11th Petitioner will just highlight a few issues in support of this petition.

Your Lordship below are the submissions for the 11th Petitioners,

A BRIEF STATEMENT OF FACTS.

1. On 11th March 2021, the World Health Organization declared Corona Virus (COVID -19) a global pandemic.

2. Subsequently the 1st Respondent announced Kenya's first case of corona virus on the 12th March 2020.

3. On 22 March, the government announced the suspension of all international flights except cargo flights and directed that all travelers entering the country before the

suspension were to be quarantined in a government-designated facility. Further to this guidelines, the Government directed that anyone who violated the quarantine requirements would be forcefully quarantined at their own expense.

4. To curb the spread of the virus, Kenya developed regulation such as institution of the national curfews, reduction of the number of passengers carried in Public Service Vehicles to mitigate the risk of spreading the virus during commutes, prevention and control regulations which granted the 1st Respondent the authority to designate "any place" an infected area and to regulate activities within an infected area when deemed necessary. The guidelines also provided that the persons within the infected areas may be placed under 14 days observation.

5. The president further passed the COVID -19 Movement of Persons and Related Measures Rules 2020 and the Prevention, Control and Suppression of COVID-19 Rules 2020 both restricting movement, banning of public gathering, establishing a curfew and regulation on disposal of bodies of persons who have died from COVID-19.

6. In a memorandum issued on 3rd April ,2020, the 2nd Respondent announced that those in quarantine would be required to remain for an additional 14 days. The reasons provided included failure to: maintain optimal social distance between the persons; and the prescribed hygiene standards. A further memorandum on 7th April 2020, indicated that if any person tested positive for COVID-19 on the 8th day of their quarantine, all persons held in that facility will be held for another further 14 days.

7. Despite the notices and daily press briefings that were issued by the 1st Respondent on protocols regarding management of the virus, there was minimal information that was disseminated to the public and more so, the health care workers were unaware of how to access health services in the event they were infected with the virus such as where to get tested. In addition, the health care workers were unware of the steps the government committees were taking to manage the virus, funding set aside due to the virus, designated health facilities, the provision of Personal Protective equipment (PPE) and whether the health care workers were trained.

8. Thus due to the lack of adequate information, the Petitioners, concerned for their lives, wrote a series of letters requesting for information.

9. The 9th through the 13th Petitioner wrote the Letters dated 6th April,2020, 17th April,2020,22nd April 2020,27 April 2020 to the Respondent which elicited no response requesting for information on-
   a. The support that was being given to health care workers in COVID-19 response;
   b. On import and distribution of Personal Protective Equipment.
   c. On the use of Quarantine as a form of punishment and criminalization of COVID-19 response.

10. The Petitioners also wrote a letter to the 1st and 2nd Respondent, following the bizarre manner in which one James Oyugi was buried, following suspicions that he had succumbed to COVID-19 pandemic. The letter dated 15th May 2021 protested the undignified manner in which the deceased had been buried and requested for information from the Respondents.

11. The 3rd Petitioner received a response on 20th May,2021 from the county Secretary of the 3rd Respondent, providing that the questions raised in the letter will be answered after the taskforce conducted investigations and presented the findings. The petitioner did not receive any further communication or responses from the Respondents.

12. Following the failure by the Respondents to respond, which has continued to date, to the Petitioners they filed this constitutional petition on 1st July,2020.

B. PROCEDURAL HISTORY

13. This Petition was filed under certificate of urgency on 1st July 2020.It was certified urgent and came up for mention on 7th July 2020.At the mention directives were provided to the parties. It was scheduled for mention on 23rd July 2020, but it was unfortunately postponed to 31 July 2020 because Court was not in session. The 31 July 2020 mention was also postponed due to a public holiday.

14. The parties obtained a new date and the matter came up for mention on 2 December 2020.At this stage only the 3rd Respondent had responded to the petition.
    The court granted the remaining respondents extensions and the matter was scheduled for hearing on 19 January 2021.On the hearing date. (19 January 2021), the 4th and 9th Respondents filed their replies. The court granted the 1st ,2nd ,5th ,6th and 7th Respondents extensions to file their replies. The matter was scheduled for mention on 8 March 2021.At the mention date the 1st ,2nd ,5th ,6th and 7th Respondents had not complied and were provided an additional seven days to do so, further directions were provided for filling submissions and the matter was scheduled for hearing on 15 June 2020.On 15 June 2020, the 1st ,2nd,5th,6th and 7th Respondents failed to comply with directives and were given additional 10 days to do so, failing which they would be barred from proceedings. They failed to do so.

15. The 8th Respondent has to date neither responded to the Petitioner nor attended any of the proceedings.

C. LEGAL ISSUES

a. Whether the court has jurisdiction to determine this petition.

b. Whether the 1st to 6th Respondents violated the Petitioners right to access to information provided under Article 35(3) of the constitution by the failure to proactively publish and publicize information about the pandemic;
c. Whether the 1st and 4th Respondents failure to affirmatively provide information about COVID-19 pandemic and the government response violates the right to life as guaranteed under Article 26(1);
d. Whether the 1st -6th, and 9th Respondents violated the Petitioners Rights to health provided under Article 43(1) (a) and section 5(1) of the Health Act,2017 by the failure to proactively publish and publicize information about the pandemic
e. Whether the 1st to 6th and 9th Respondents failure to affirmatively provide information regarding the pandemic and the state's response violates Article 10 and 232 of the Constitution.
f. Whether the 1st to 6th and 9th Respondents failure to provide the information sought by the Petitioners violates their right of access to information as guaranteed under Article 35(1) and the Access to Information Act.
g. Whether the 1st and 4th Respondents' failure to provide the information sought by the petitioners violates their right to health as guaranteed under Article 43(1)(a) and the Health Act,2017.
h. Whether the 1st-6th, and 9th Respondents be held criminally liable in their individual capacities for breach of Sections 28(4)(b) of the Access to Information Act:
i. Whether the 1st and 2nd Respondents decisions to extend mandatory quarantine as communicated via circular by the 2nd Respondent violated the 7th and 8th Petitioners rights to fair administrative section as guaranteed in Article 47 and the Fair Administrative Action Act,2015; and
j. Whether the orders sought may be issued.

The 11th Petitioner shall address the court on the following issues: (a), (b), (f), (h) and (j)

D. ANALYSIS

I. JURISDICTION

16. My Lord, jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of **The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1.** [1] Where Nyarangi J.A. held as follows:

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law

[1] Civil Appeal No. 50 of 1989

downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

17. A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia Vs KCB & 2 Others, Civil Application No. 2 of 2011** stated thus:

"A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law"

18. The petitioners submit that this Court is well clothed with the jurisdiction to determine this Petition by virtue of the powers afforded to the High Court of Kenya, through Article 165(3)(b) of the constitution of Kenya,2010.

19. The 3rd and 9th Respondents have raised two points in their responses indicating that this court does not have jurisdiction on two grounds:
    a. Failure by the petitioner to exhaust an internal dispute resolution mechanism; and
    b. The principle of Res judicata as it pertains to the 3rd respondents.

Exhaustion of internal dispute mechanisms.

20. The 3rd Respondent is relying on the case of ***Charles Apudo Obare & Another Vs Clerk, County Assembly of Siaya & Another (2020) Eklr*** where the Honourable Judge Aburili in striking out the petition reiterated the principle laid out in Secretary, County Public Service Board and another vs Hulbhai Gedi Abdille:

" Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime"

21. My Lord, the circumstances in the above petition are distinct from this instant petition. The learned judge in the case of ***Charles Apudo Obare & Another Vs Clerk, County Assembly of Siaya & Another (2020) Eklr*** stated that the petitioners still had an alternative dispute resolution mechanism which was available under section 14 of the Access to Information Act hence finding that the court was devoid of original jurisdiction to hear and determine the petition as there was an alternative dispute resolution mechanism available in law which the petitioners had not exhausted.

22. The distinction is in regards to the fact that the internal remedy was not available to the petitioners and that the 8th Respondent is a party to this petition for the precise reason for its failure to exercise its mandate under the Access to Information Act,2016.

23. The Petitioners copied and dispatched to the 8th Respondent letters issued on:8 April 2020,15 April 2020,9 April 2020,17 April 2020 and 27 April 2020 which all the letters never received any response.

24. The letters sought a response on how the 8th Respondent would explicitly a response on how it planned to address the willful refusal to provide information, within the stipulated timelines in line with Part V of the Access to Information Act.

25. My Lord, despite consistent reminders and invitations, the 8th Respondents have blantaly refused and neglected to participate in this petition where both its conduct and mandate have been called into question. We submit that the failure of the 8th Respondent to exercise its mandate indicates that the internal remedies are neither available nor are they effective.

26. We ask this court to be guided by the decision of the African Commission on Human and Peoples' right in *Jawara vs the Gambia* where the commission found for the rule on exhausting local remedies or internal remedies to be applicable, the remedy must be available, effective and sufficient. Availability refers to such being pursed without any impediment and capable of redressing the complaint.

27. Further, Section 9(4) of the Fair Administrative Action Act 2011 (FAA ACT) recognizes that exceptional circumstances may exist that may warrant judicial intervention despite the failure to exhaust internal remedies and exemption is regarded to be in the interest of justice. We submit that this is the exceptional circumstance envisioned by Section 9(4) of the FAA.

Res Judicata

28. The 3rd Respondent submits that the questions surrounding the burial of the late James Oyugi has been dispensed with in the case of ***Joan Akoth Ajuang and another vs Michael Owour Osodo, the Chief of Ukwala Location and 3 others*** and that the same should not be litigated or interrogated any further particularly in a court with similar jurisdiction as the court of the first instance.

29. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the Civil Procedure Act which states:
"No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

30. My lord, for the defense of the doctrine of res judicata to be meritious the above conditions must be satisfied. We submit that the 3rd Respondents attempts to use

the defence of res judicata fails in this instance as to the instant petition as the matters in issues are not directly and substantially the same as the those in ***Joan Akoth Ajuang***.The main issues in *Joan Akoth Ajuang* were premised on disclosure of medical information which directly relates to the right of privacy whereas this petition is premised provision of information to the public necessary for the management of the pandemic which were never addressed in ***Joan Akoth Ajuang***

31. In addition, the petitioners were neither parties to the case of *Joan Akoth Ajuang* nor are they litigating under the same title.

II ACCESS TO INFORMATION

32. We submit that the Respondents violated the right to access information by failing to proactively publish and publicize information pertaining to the states management of the Covid-19 pandemic in Kenya by failure to respond to the Petitioners letters seeking information relating to the pandemic.

33. Article 35 of the Constitution provides:

1. Every citizen has the right of access to—

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

3. The State shall publish and publicize any important information affecting the nation.

34. The Constitution is clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay. Article 35 of the Constitution does not in any way place conditions for accessing information. The most important thing is that information be in possession of the state, state officer or public body.

35. For purposes of actualizing Article 35, parliament enacted Access to Information Act 2016. Section 4 of the Act which is material, to this petition provides for the procedure to access information. The section provides;

1) "Subject to this Act and any other written law, every citizen has the right of access to information held by--

a) the State; and

b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.

2) Subject to this Act, every citizen's right to access information is not affected by--

a) any reason the person gives for seeking access; or
b) the public entity's belief as to what are the person's reasons for seeking access.
3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information. (emphasis)

36. It is important to note that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information.

37. The right to Access to information is a critical governance, transparency and accountability tool. Without access to information, higher values of democracy, rule of law and social justice cannot be achieved. This position was succinctly captured in **Famy Care Ltd V Public Procurement Administrative Review Board and others, High Court Pet. 43 of 2012 [2013] eKLR** where it was held:

"The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble of the Constitution and Article 10 cannot be achieved unless the citizen has access to information."

38. Further to the above, the right to access information is a foundational human right upon which other rights must flow. And for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country.

39. In the instant petition, it is an undisputable that the information being sought is information held or supposed to be held by the Respondents who are state organs and state officers respectively and therefore qualifies as public information for purposes of Article 35 of the Constitution.

40. In line with the above provisions, the Respondents had and have an obligation to fulfill the right to access information by proactively providing and publicizing essential information and substantially responding to Access to information

requests that are crucial towards protection of rights under the constitution in particular right to life and health.

41. The petitioner in adherence to Section 8 of the Access to Information Act made requests in writing and clearly indicated the information being sought from the specific state agents and agencies and the Respondents deliberately failed to respond to Access to Information requests even after this petition was filed hence violating their rights and even neglecting to perform there required mandates under law.

42. Further the Respondents being state organs are bound by the constitution and section 5 of the Access to Information Act and the failure of the Respondents to publicize and provide information requested, the Respondents are in violation of not only the right to access to information but also the right to health, right to life and freedom of expression.

43. Up to date, the Respondents have failed to provide the information sought by the petitioners, contrary to the Access to Information Act which provides that the information pertaining to life and liberty must be provided within 48 hours.

III. CRIMINAL LIABILITY OF THE 1ST-6TH AND 9TH RESPONDENTS FOR BREACH OF TH E SECTION 28(4) OF THE ACCESS TO INFORMATION ACT

44. The actions of the 1st -6th ,8th and 9th Respondents to continuously fail to proactively publish and publicize information about the pandemic despite numerous requests from the petitioners constitutes an offence under section 28(4)(b) of the Access to information Act.

45. Section 28(4)(b) of the Access to Information Act is clear on the wording as follows:

"Any person who fails to respond to a request for information required for the exercise or protection of a right in accordance with the requirement of this Act commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or imprisonment for a term not exceeding six month or both. "

46. From the above provisions, it's clear that the section places individual responsibility on state officers holding positions in state offices in regards to response to a request for information and such failure amounts to a criminal offence.

47. Section 28(4)(b) lifts the veil of office cupability and that individuals holding the office and fail to carry out their mandate without any reasonable cause are not only in breach of the Access to information Act but also the constitutional right under Article 35.

IV. ORDERS SOUGHT

48. Your Lordship the Respondents have a constitutional duty to offer public services that are of high standards of professional ethics, responsive, prompt, effective, impartial and equitable. The 8th Respondent has a duty to promote the good governance in discharging its duties to provide oversight and ensure the enforcement of the Access to Information. Your Lordship the Petitioner and other Kenyans have a right to access to information directly linked to the protection of their health, safety, life, freedom of expression and economic interests and administrative action.

49. Your Lordship the only way to enforce the foregoing constitutional provisions is to make an order directing:

a. A declaration be issued that the 8th Respondent has failed to exercise its mandate to provide oversight and ensure the enforcement of the Access to information Act,2016 and therefore violating Article 35 of the constitution.

b. An order of mandamus compelling the 8th Respondent to exercise its statutory mandate under section 21(1)(a) of the Access to Information Act and investigate the alleged violations of the Act.

c. An order of mandamus compelling the 7th Respondent ,in consultation with the 8th Respondent, to draft and publish regulations within 90 days of this order on the manner in which applications under the Access to information Act,2016 may made, the form in which the information requested under the Access to Information Act,2016 may be supplied and the measures to be taken by public entities to facilitate the exercise of the right under Article 35 of the constitution and its implementation of the Access to Information Act 2016.

d. An order of mandamus compelling the 7th Respondent, in consultation with the 8th Respondent, to draft and publish regulations on the procedures for requesting and supplying information that concerns the life and liberty of a person within 90 days of this order as per section 9 of the Access to Information, Act,2016).

e. An order that the 1st Respondent pays general damages to the 4th -8th Petitioners for the emotional distress these Petitioners underwent as a result of the inadequate information received during the mandatory quarantine period.

f. Costs of this petition and any other just and expedient order the court may deem fit to make.

47. My Lordship we submit that the petition be allowed as prayed.

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IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Nyarangi, Masime & Kwach: JJ A)

CIVIL APPEAL NO 50 OF 1989

OWNERS OF THE MOTOR VESSEL "LILLIAN S"...APPELLANT

VERSUS

CALTEX OIL (KENYA) LTD.....RESPONDENT

(Appeal from an order of the High Court at Mombasa, Bosire J, in Admiralty Cause No 29 of 1988 dated 28th February, 1989)

JUDGMENT

Nyarangi JA.

The point raised by this appeal turns entirely on the correct interpretation of Section 20 (2) (m) of the Supreme Court Act 1981 of England (The 1981 Act) on the relevant facts of this matter. Two questions arise; first, if the plaintiff's action is within Section 20 (2) (m) of the Act; second, whether the action can be enforced by an action *in rem* in terms of Section 21 (4) of the 1981 Act.

The appeal raises questions as to the proper manner of invoking the Admiralty jurisdiction of the High Court. The Admiralty jurisdiction of the High Court is equal to that possessed by the High Court in England. The High Court applies the same law and procedure as applies in England.

It might make it clearer if I refer to Section 4 of the Judicature Act, cap. 8 which provides as follows:-

"4. (1) The High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.

(2) The admiralty jurisdiction of the High Court shall be exercisable–

(a) over and in respect of the same persons, things and matters, and in the same manner and to the same extent, and

(b) in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.

In the exercise of its admiralty jurisdiction, the High Court may exercise all the powers which it possesses for the purpose of its other civil jurisdiction.

(3) An appeal shall lie from any judgement, order or decision of the High Court in the exercise of its admiralty jurisdiction within the same time in the same manner as an appeal from a decree of the High Court under part VII of the Civil Procedure Act."

The Admiralty jurisdiction of the High Court is set out in Section 20 of

The 1981 Act.

Section 20 of the 1981 Act so far as material for present purpose provides:- "20. –

(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say-

(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);

(b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);

(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

(d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court.

(2) The question and claims referred to in subsection (1) (a) are -

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship or as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;

(d) any claim for damage received by a ship;

(e) any claim for damage done by a ship;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of-

(i) the owners, charterers or persons in possession or control of a ship; or

(ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship.

(g) any claim for loss of or damage to goods carried in a ship;

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

(j) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under section 51 of the Civil Aviation Act 1949, of the law relating to salvage to aircraft and their apparel and cargo);

(k) any claim in the nature of towage in respect of a ship or an aircraft;

(l) any claim in the nature of pilotage in respect of a ship or an aircraft;

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;

(o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);

(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(q) any claim arising out of an act which is or is claimed to be a general average act;

(r) any claim arising out of bottomry;

(s) any claim for the forteiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

It is thus to be noted that where a claim is based on Section 20 (1) (a), the claim must come within Section 20 (2) (a) to (s) otherwise the High Court would not have admiralty jurisdiction.

The next question is the mode of exercise of admiralty jurisdiction. Section 21 which illustrates the mode of that jurisdiction is in these terms; -

"21. (1) Subject to section 22, an action *in personam* may be brought in the High Court in all cases within Admiralty jurisdiction of that court.

(2) In the case of any such claim as is mentioned in Section 20 (2) (a), (c) or (s) or any such question as is mentioned in section 20 (2) (b), an action *in rem* may be brought in the High Court against the ship, or property in connection with which the claim or question arises.

(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action *in rem* may be brought in the High Court against that ship, aircraft or property.

(4) In the case of any such claim as is mentioned in Section 20 (e) to (r), where -

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action *in rem* may

(whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against –

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

(5) In the case of a claim in the nature of towage or pilotage in respect of an aircraft, an action *in rem* may be brought in the High Court against that aircraft if, at the time when the action is brought, it is beneficially owned by the person who would be liable on the claim in an action *in personam*.

(6) Where, in the exercise of its Admiralty jurisdiction, the High Court orders any ship, aircraft or other property to be sold, the court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale.

(7) In determining for the purposes of subsections (4) and (5) whether a person would be liable on a claim in an action *in personam* it shall be assumed that he has his habitual residence or a place of business within England or Wales.

(8) Where, as regards any such claim as is mentioned in section 20 (2) (e) to (r), a ship has been served with a writ or arrested in an action *in rem* brought to enforce that claim, no other snip may be served with a writ or arrested in that or any other action *in rem* brought to enforce that claim; but this subsection does not prevent the issue, in respect of any one such claim, of a writ naming more than one ship or of two or more writs each naming a different ship."

Paragraph (2), (3), (4) and (5) give instances in which an action *in rem* may be brought.

The next matter which I should here mention is that Order 75, (The Order),

The Supreme Court Practice, 1988 of England has provided for admiralty proceedings. Paragraph 75/1/3 of the Order is to the effect that an admiralty action *in rem* is in effect an action against a *res*, usually a ship but may in some cases be cargo or freight or aircraft. An action *in personam* is like

a normal action filed against a person. In *personam*, the procedure is the usual one of invoking the High Court jurisdiction: See the Shipbrokers Manual Vol. One, page 90, paragraph 3. Paragraph 4 on page 92 – 94 gives a distinction between an action *in rem* and *in personam*.

The object of an action *in rem* is therefore to procure the arrest of a *res*, almost always a ship.

The procedure for arrest is contained in rule 5 of order 75. Order 75 rule 5 states: -

"5. (1) In an action *in rem* the plaintiff or defendant, as the case may be, may after the issue of the writ in the action subject to the provisions of this rule issue a warrant in Form No. 3 in Appendix B for the arrest of the property against which the action or any counterclaim in the action is brought.

(2) Where an action *in rem* is proceeding in a district registry, a warrant of arrest in the action may be issued out of that registry but, except as aforesaid, a warrant of arrest shall not be issued out of a district registry.

(3) Before a warrant to arrest any property is issued the party intending to issue it must procure a search to be made

in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that property and, if the warrant is to issue out of a district registry, the registrar of that registry shall procure search to be made in the said book for that purpose.

(4) A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph (9); however, the Court may, if it thinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars.

(5) Except with the leave of the Court or where notice has been given under paragraph (7) a warrant of arrest shall not be issued in an action *in rem* against a foreign ship belonging to a port of a State having a consulate in London, being an action for possession of the ship or for wages, until notice that the action has been begun has been sent to a consult.

(6) A warrant of arrest may not be issued as of right in the case of property whose beneficial ownership has, since the issue of a writ; changed as a result of a sale or disposal by any court exercising Admiralty jurisdiction.

(7) Where, by any convention or treaty, the United Kingdom has undertaken to minimise the possibility of arrest of ships of another State no warrant of arrest shall be issued against a ship owned by that State until notice in Form No. 15 in Appendix B has been served on a consular office of that State in London or the port at which it is intended to cause the ship to be arrested.

(8) Issue of a warrant of arrest takes place upon its being sealed by an officer of the registry or district registry.

(9) An affidavit required by paragraph (4) must state -

(a) in every case:

(i) the nature of the claim or counterclaim and that it has not been satisfied and, if it arises in connection with a ship, the name of that ship; and

(ii) the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and

(b) in the case of a claim against a ship by virtue of ection 21 (4) of the Supreme Court Act 1981:

(i) the name of the person who would be liable on the claim in an action *in personam* ("the relevant person"); and

(ii) that the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and

(iii) that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise; and

(c) in the case of a claim for possession of a ship or for wages, the nationality of the ship in respect of which the warrant is required and that the notice (if any) required by paragraph 5) has been sent; and

(d) in the case of a claim where notice is required to be served on a consular officer under paragraph (7), that such notice has been served;

(e) in the case of a claim in respect of a liability incurred under s. 1 of the Merchant Shipping (Oil Pollution) Act 1971, the facts relied on as establishing that the Court is not prevented from entertaining the action by reason of section 13 (2) of that Act.

(10) The following documents shall, where appropriate, be exhibited to an affidavit required by paragraph (4) -

(a) a copy of any notice sent to a consult under paragraph

(5);

(b) a copy of any notice served on a consular officer under paragraph (7)."

Paragraphs 5, 6, 7, are not applicable. It is to be observed that the affidavit referred to in paragraph 4 must state *inter alia* in every case the nature of the claim, the name of the ship, the name of the person who would be liable on the claim in an action *in personam*, that the relevant person was when the cause of action arose the owner or charterer of or in possession or in control of, the ship in connection with which the claim arose and that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required.

I should now make a further reference to Section 20 of the Act. I ask the question if the plaintiff's action is within sub-section 2 of Section 20. If the action is, is the claim enforceable by an action *in rem* in terms of Section 21 (4) of the Act"

In the endorsement of claim is a claim for price of goods supplied by the plaintiffs to the defendant. So on the face of it, Section 20 (2) (m) applies. There can be no dispute that there were goods supplied to the Motor vessel "*Lilian S*". The affidavit by Kariuki for the immediate arrest of the motor tanker is proof of the supply of goods by the plaintiffs.

The second point on Section 20 (2) (m) is if the goods supplied to the ship were for her operation or maintenance. This much is clear, that if the goods were not for the ship's operation or maintenance, Section 21 (4) of the 1981 Act would not apply and hence the High Court would not have admiralty jurisdiction in the matter. So if this particular section applies, one result; if it does not, another.

I have necessarily been much preoccupied with the particular jurisdiction, the nature of an action *in rem* as well as an action *in personam* and the mode of the exercise of admiralty jurisdiction.

I turn to the proceedings before the High Court. Pausing there for a moment, I gratefully adopt Justice Bosire's statement of the background facts in his Ruling the subject matter of this appeal. It is not necessary for me to say very much about the facts at this stage.

It is plain as can be from the Ruling that the trial Judge held there was connection between supply and maintenance or operation by inference.

Also, that the plaintiffs had shown that the goods supplied were suitable for use and so could be used on the vessel. The Judge held the view that in the circumstances, setting aside the writ or the arrest would be a harsh measure.

The argument of the appellant which was urged, and urged most strongly, is that the Judge did not appreciate that he was being urged to decide a question of jurisdiction on the basis of the evidence before him. The second issue is whether the owners of the vessel "*Lilian S*" on their own showing were persons who would be liable in an action in *personam*.

In addition to these contentions, Mr. Inamdar for the appellant staked his case on decided cases. We had *The River Rima*, [1987] 3 All ER 1 (C.A.) cited to us. The facts in *Rima* are different but the jurisdictional question resembles the first question that is if this case falls within Section 20 (2) of the 1981 Act. It was held that in order to maintain an action under Section 20 (2) (m) of the 1981 Act, it is necessary to demonstrate a sufficiently direct connection between the agreement relied on and the operation of the ship. The issue in *Rima* was not whether the claims were not well founded but whether they could be maintained in an action *in rem*. That precisely is the issue here. Dealing with a similar issue in *I Congresso del Partido,* [1978] 1 QB 500, Golf, J. observed *inter alia* on page 535 as follows: -

"In my judgement, Mr. Alexander's submission that I should order that the question of Mambisa's title should be tried as an issue in the actions is one to which I cannot accede. The question raised by .. The motion is one of jurisdiction. Jurisdiction in Admiralty actions is statutory, and is defined by the Administration of Justice Act 1956. Section 3 of the Act lays down the circumstances in which an action *in rem* may be brought; if the case is not within the section then the court has no jurisdiction in respect of an action *in rem* and the writ and all subsequent proceedings should be set aside..."

The issue of jurisdiction was decided, "on the evidence" before Golf, J.

In the same context, we were referred to the decision of House of Lords in *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co & others*, [1985] AC 255. In that case, the respondent insurers raised an action against the appellants claiming payment of premiums on a policy of insurance which it was stated was effected with them by the appellants over a cargo of oil shipped from Iran to various destinations. In order to found jurisdiction over the appellants and also in order to obtain security for their claim, the respondents arrested the ship.

Neither that ship nor any other ship owned by the appellants had been concerned with the carriage of the oil cargo which was the subject of the insurance policy. In the course of his speech Lord Keith at pages 265 – 266 set out the requisite procedural steps and then had this to say on page 270 letter H,

"It is necessary to attribute due significance to the circumstances that the words of the relevant paragraphs speak of an agreement .. It would, on the other hand, be unreasonable to infer from the expressions that it is intended to be sufficient that the agreement in issue should be in some way connected, however remotely, with the carriage of goods in a ship ..."

On page 271, letter A –B, Lord Keith said,

"There must, in my opinion, be some reasonably direct connection with such activities. An agreement for the cancellation of a contract for the carriage of goods in a ship or for the use or hire of a ship would, I think, show a sufficiently direct connection .."

In *The Evpo Agnic* [1988] 1 WLR 1090, the view of their Lordship as expressed by Lord Donaldson of Lynington M.R. on page 1095, letter H appears in the following passage on page 1095, letter H:

"The first issue to be confronted and decided is therefore who is "the relevant person" for the purpose of Section 21 (4) (b).

As I have already indicated, the appellant's case is that it is a question of jurisdiction as to whether the defendant would on the facts of this case be liable to the plaintiff in action *in personam*. Mr. Inamdar cited a passage on page 526, B – C in *I Congresso del Partido* where in the course of his judgement Golf J. said,

"Invocation of the Admiralty jurisdiction by an action *in rem* presupposes the existence of a claim *in*

personam against the person who at the time when the action is brought is the owner of the ship."

We were invited to examine the entire evidence as the House of Lords did in *I Congresso del Partido*, [1981] 2 ALL E.R. 1064 (H.L.) and also as was done by the English Court of Appeal in *The Evpo Agnic*, [1988] WLR 1090 and to have proper regard to the requirements laid down by Order 75 rule 5. It was submitted that the affidavit in support of the arrest of the motor tanker does not satisfy Order 75 rule 5 subrules (5) and (9).

That the plaintiff failed to disclose information to prove that the defendants were persons who could be liable *in personam*, that the two telexes exhibited show that Southern Oil supply company (SOSCO) would be liable *in personam*, and the plaintiff has failed to bring the case within Section 21 (4) of the 1981 Act.

For the respondents it was urged that an appellate court should be slow to interfere with the exercise of discretion in an interlocutory order in first instance. It was submitted it could not be said that the Judge's exercise of discretion is plainly wrong. Mr. Satchu said in two affidavits sworn on behalf of the defendant, both the deponents referred to arrangements by the owners of the vessel with SOSCO. The conditions and terms were not, however, stated. Counsel for the respondents submitted that if the appellants had wanted the Judge to exercise his discretion in their favour the appellants should have set out in full the facts of the terms and conditions of the agreement as was done in *The River Rima*. It was however said that there are vital differences between the instant case and *The River Rima*. We were told that there is no doubt as to who received the goods in question – the goods were received by the vessel in its own right, not as agents or operators on behalf of SOSCO. On that basis, it was argued, one should distinguish between this case and *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co and others*, [1985] AC 255: in so far as the respondents have actually supplied the vessel with the goods for the claim. To the appellant's complaint of failure to make full and frank disclosure, Mr. Satchu replied that the Judge could exercise discretion on his own and order that a warrant of arrest to issue. In any case, it was argued, the failure to disclose must materially affect the decision on issue and even when such failure has been shown, the court can in its discretion continue the order previously made. Reliance was placed on the judgement in *Brink's Mat Ltd v Elcombe & Others*, [1988] 3 ALL E.R. 188 where on page 194, a-b, there is an observation that,

".. there must be a discretion in the courts to continue the injunctions, or to grant a fresh injunction in its place, notwithstanding that there may have been nondisclosure when the original *ex-parte* injunction was obtained .."

Per Balcombe L.J.

On that passage, Mr. Satchu argued that if the warrant of arrest is lifted, the vessel might sail away and if at the end of the day the respondents are successful, they will have lost an asset from which they could recoup the fruits of any judgment. Mr. Satchu based himself on passages in the judgements in "*Abidin Daver*" *The*, (1984) Llyod's L.R. 339; *Scwarz & Co. v St. Eleftherio*, (1957) Llyods L.R. 283; *The "Moscanthy"*, (1971) Llyods L.R. 37 and "*The Gulf Venture*", (1984) 2 Llyods L.R. 455 and

urged that in the four cases Judges of admiralty jurisdiction have refused to set aside a warrant of arrest unless it is shown that a continuation of the warrant of arrest is vexatious or frivolous and the defendant must show that the plaintiff's case is hopeless on the evidence. In *the Evpo Agnic*, the position was so clear as to deserve immediate discharge of the vessel.

In the "*Moscanthy*", like here, it was not.

With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis

for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

See *Words and Phrases Legally defined* – Volume 3: I – N Page 113

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.

In *I Congresso del Partido*, [1978] 1 QB 500, *the River Rima, Gatoi International Inc v Arkwright – Boston M. M. Insurance Co. & Others* and *The Evpo Agnic*, the respective courts analysed the evidence before the court and upon that evidence the question of jurisdiction was immediately decided.

Were the goods supplied to the vessel for her operation or maintenance" To find the answer to this question one must turn first to the affidavit of Mr. Kariuki in support of the immediate arrest of the motor tanker "*Lillian S*". The deponent is silent as to the purpose for which the gas oil and fuel were supplied. Next I turn to the affidavit of Saliarelis, the Secretary of Sea Guardian Company SA., the legal and beneficial owner of the motor vessel "*Lillian S*". The secretary states that the master of the vessel did not place any order with the plaintiffs for the supply of any fuel or gas oil to the vessel. The crunch turns on paragraph 7 of the affidavit wherein it is stated that the material fuel was ordered by and was the property of SOSCO and –

"Was only delivered to the vessel in consequence of separate arrangements made between the Master and Southern Oil supply company limited as a result of which the vessel was used as a base for the storage of the said fuel and oil pending its sale by SOSCO to other vessels."

That evidence is to the effect that the fuel was supplied for a purpose other than operation or maintenance. That view is supported by the account of Tsakiris, a director of SOSCO who in paragraph 5 of his affidavit states-

"That pursuant to arrangements made with the owners of the motor vessel "*Lillian S*" SOSCO Limited used the motor vessel ... as a base for storing the fuel oil pending the sale and supply of the same to other vessels in the port of Mombasa."

In the light of that evidence, I conclude that the motor vessel "*Lillian S*" was utilized as a base for storing the fuel

oil before it was sold to other vessels. There was therefore no reasonably direct connection between the storage of the fuel oil and the operation or maintenance of the vessel "*Lillian S*". I do not find in this case any evidence adduced by the plaintiff to show that the supply of the goods was for operation or maintenance of the vessel "*Lillian S*" or indeed a particular ship.

I therefore take the view that Section 20 (2) (m) of the 1981 Act was not satisfied and so the claim does not fall under Section 21 (4), the High Court did not have admiralty jurisdiction and so Caltex Oil (Kenya) Ltd is not entitled to invoke the local jurisdiction *in rem* against the vessel and to arrest her.

With all respect to the Judge, I do not feel that his ruling has any bearing with the issue of jurisdiction which is the matter he should have identified, wrestled with and determined on the evidence before him. On a proper analysis the Judge was bound to conclude that he had no jurisdiction to hear the Notice of Motion.

I pause here only to say in deference to Mr. Satchu's arguments that his submissions and the decisions which he cited did not touch on the real issue of jurisdiction.

That leaves the last point, whether or not the person who would be liable on the claim in an action *in personam* at the time when the action arose is SOSCO or Sea Guardian Company SA.

The issue is yet again one of jurisdiction to be properly and immediately decided on the evidence before the court. That is so, "because actions in *rem* and actions in *personam* cannot be conveniently segregated into separate compartments"-

I Congresso del Partido, [1978] 1 QB 500, at page 526, between A – B. It is clear that the fuel was supplied to the vessel, "in consequence of separate agreements made between the master and SOSCO "

There was a contract whereby the plaintiffs agreed to supply and SOSCO agreed to buy 550 metric tonnes of fuel oil and pursuant to that contract, the plaintiffs delivered 5,478.55 metric tonnes of fuel oil to the vessel "*Lillian S*" as requested by SOSCO. Pursuant to the arrangements SOSCO used the motor vessel as a base for storing the fuel pending the sale and supply of the fuel oil to other vessels.

There are two telexes which were exhibited and whose contents show beyond any grain of doubt that SOSCO purchased the fuel oil and would be liable in action *in personam*.

Page 11 of the record of appeal shows Caltex Oil (Kenya) Ltd's invoice indicating a sale on 20th September, 1988 of an amount of 5,478.55 m/ton. to SOSCO. SOSCO is shown to have received the fuel oil.

The statement of account for the month of October, 1988 is from Caltex Oil (Kenya) Ltd. to SOSCO. The owners of the vessel "*Lillian S*" are not mentioned on the statement of Account.

I must confess my inability to find any substance in the respondent's case on this score. The point is unanswerable. It is SOSCO who would be liable to the plaintiffs in an action *in personam*.

All the grounds of appeal have been covered.

The further matter arising on this appeal is in respect of a submission by Mr. Inamdar that the respondent as applicant in the High Court did not make a full and frank disclosure. The appellant claimed that it was left to it to furnish the information as to who could be liable on the claim in an action *in personam*.

I was not impressed with the rival contention by Mr. Satchu. The plaintiff's affidavit in support of the arrest of the

motor vessel does not satisfy Order 75 rule 5, paragraph (9). True, notwithstanding that the affidavit referred to in paragraph (4) does not contain all the particulars required by paragraph (9), the court has the discretion to issue the warrant. However, paragraph (9) is no warrant for deliberate failure to disclose fully and frankly all the facts in possession of the party who is applying for the issue of warrant of arrest. The necessity for full and frank disclosure is even greater in an *ex-parte* application.

In the Andria (Vasso), [1984] 1 QB 477 at page 491, letter Gili Robert Golf L.F. (as he then was) in the course of reading the judgement of the court observed as follows: -

"It is axiomatic that in *ex-parte* proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the *ex-parte* application, even though the facts were such that, with full disclosure, an order would have been justified."

In my judgement here there was not full disclosure by the applicant of the material facts to the High Court. Were the result of the appeal different, I would have been minded to penalize the respondent by ordering payment of extra costs.

I have endeavoured to give reasons for the order of this Court which was made on July 24th, 1989.

I would allow the appeal with costs here and below to the appellant and reiterate the terms of the court's order mentioned above. As Masime and Kwach JJ A also agree, it is so ordered.

Masime JA.

This appeal concerns the admiralty jurisdiction of the High Court and the occasions when it may be invoked. On the strength of a writ *in rem* taken out by Caltex Oil Kenya Ltd (the respondent to this appeal) the High Court in purported exercise of its admiralty jurisdiction issued a warrant for the arrest of the motor vessel '*Lillian S*' on 5th December, 1988 and that vessel was duly arrested the following day.

The owners of the motor vessel '*Lilian S*' (the present appellants) then filed an unconditional appearance in the suit. And on 19th January, 1989 they applied to the superior court by notice of motion under Order 75 of the rules of the Supreme Court of England and section 4 of the Judicature Act (Cap 8 of the Laws of Kenya) for orders to set aside the writ *in rem* and all consequential proceedings including the warrant of arrest. The respondent objected to the appellant's challenge of the superior court's jurisdiction to entertain the claim since the appellant had filed an unconditional appearance but the trial judge dismissed that objection. As the issue goes to jurisdiction it was again raised before us, *in limine*, and having heard counsel's arguments and submissions we upheld the learned trial Judge dismissed the objection to the appellant's right to challenge the court's jurisdiction and held that under Order 12 Rule 8 of the RSC of England, which apply, such appearance was proper and did not amount to the appellant submitting to the court's jurisdiction nor preclude it from challenging the courts' admiralty jurisdiction.

The superior court having heard full argument of the appellant's application held that the facts alleged in the writ, the request for the warrant of arrest and the affidavits filed in support thereof and the motion satisfied the statutory requirements for the invocation and exercise of the court's admiralty jurisdiction. The learned trial judge put it as follows:

"I quite agree with Mr. Inamdar that a claimant in action *in rem* has to make averments in the writ of summons or statements of claim or affidavit in support of a request for a warrant of arrest against the *res* linking the supply to the *res* for this court to assume jurisdiction. The question which, however, immediately comes into mind is whether of necessity, the averments must be expressly made. To my mind it is not imperative that such averments be expressly made. Those are matters which may be inferred from other facts averred "

The learned Judge then examined the affidavit evidence and continued: "From the facts averred an inference could be drawn that the gas oil and fuel was probably for use on the '*Lilian S*' It is not a remote inference setting aside a writ is a harsh measure. To my mind it should only be resorted to in the clearest of cases where it can be shown that the claim is either frivolous, vexatious or is otherwise an abuse of the process of the court. Also where from the averred facts no reasonable cause of action *in rem* is disclosed."

He therefore dismissed the appellants' application and ordered the costs thereof to abide the outcome of the trial of the suit. The appellant is aggrieved by that decision hence this appeal. After we heard the appeal the court was of the unanimous view that the appeal should be allowed and we did so reserving our reasons. I now give my reasons for judgement. It was submitted by the learned appellant's counsel that the reasoning of the learned judge shows that he misapprehended the nature and effect of the application before him. The application was brought on the grounds that:

(a) the owners of the motor vessel '*Lilian S*'. are not, and have never been, persons who would, in the circumstances of this case be liable to the plaintiffs in an action *in personam*;

(b) the person who would in the circumstances of this case, be liable in an action *in personam* to the plaintiff's is Southern Oil supply company Ltd., who were not the owners of the said motor vessel either at the time when the cause of action arose or at the time the writ in this action was issued.

Clearly the appellant was challenging the superior court's jurisdiction to entertain the respondent's claim *in rem*. And as this sole issue was decided against the appellant all the nine grounds of appeal deal with that issue. As the first four grounds of appeal deal with the construction of the statutory provisions as to jurisdiction I shall consider them first. The grounds of appeal are:

"The learned (trial) Judge erred:

1. in holding that the court has jurisdiction to entertain the claim *in rem* made (by the respondent ..) against the vessel "*Lilian S*".

2. ... in holding that the facts alleged in the writ and in the affidavit for the request of a warrant of arrest were sufficient to satisfy the requirements of sections 20 (2) (m) and 21 (4) of the Supreme Court Act as applied to Kenya.

3. ... in failing to appreciate that the question whether (the respondents') claim fell within the ambit of section 20 (2) (m) of the said Act was a question of jurisdiction which he was obliged to decide at once on the affidavit evidence before the court."

4. ...in failing to hold that the question whether, under section 21 (4) of the said Act, the person "who would be liable on the claim in an action *in personam*" at the time when the cause of action arose was Southern Oil Supply Company Ltd., (SOSCO) or Sea Guardian Co SA (the appellants herein) was likewise a question of jurisdiction requiring immediate decision on the affidavit evidence then before the court. "

The statutory provisions which vest the High Court of Kenya with jurisdiction in admiralty matters and the relevant provisions of the Supreme Court Act 1981 and the Rules of the Supreme Court Order 75 have been set out fully in the judgements of my brothers Nyarangi and Kwach JJ A.

which I have had the advantage of reading in draft and with which I respectfully agree. Section 4 of the Judicature Act (Cap 8 of the Laws of Kenya) applies the Law and procedure exercised by the High Court in England in its admiralty jurisdiction to Kenya. That law and procedure is contained in the Supreme Court Act 1981 and the Rules

of the Supreme Court (see 1988 Supreme Court Practice) Order 75. Section 20 (1) of the Act gives the High Court jurisdiction over admiralty matters set out therein in four groups (a) to (d). Each of these groups is expounded on in the succeeding subsections. A claimant must get his claim into one of the categories set out in the section.

The respondent's claim in the present appeal purported to be founded upon sections 20 (1) (a) as particularised in section 20 (2) (m). That is it claimed that the High Court had jurisdiction to hear and determine its claim as it was, in the language of section 20 (2) (m).

"A ... claim in respect of goods or materials supplied to a ship for her operation or maintenance."

If the claim so lay then the respondent was required to pursue it in accordance with the provisions set out in Section 21 (1) of the Act and Order 75 of the rules of the Supreme Court.

In the instant appeal the appellant questioned the court's jurisdiction at the first opportunity and in accordance with Order 12 Rule 8 of the Rules of the Supreme Court. This court has in an interlocutory ruling held that the appellant was entitled to so challenge the jurisdiction of the court.

That being so it was incumbent upon the superior court to dispose of that issue forthwith and before entertaining the claim further. A similar issue was raised in *The River Rima* [1987] 3 All ER 1 (CA) and (1988) 2 LG Rep 193 (HL), whether the plaintiff's claim fell within the jurisdiction of the Admiralty Court under section 20 (2) (m) of the Act. It was held that

it was necessary, to demonstrate a sufficiently direct connection between the agreement relied on and the operation of the ship in order to maintain an action under the section. In that case the plaintiff's claim did not come within the admiralty jurisdiction and consequently the writ *in rem* and the warrant of arrest were set aside and the ship ordered to be released from arrest. And in *I Congresso del Partido* [1978]1 Q. B 500 at 526, B it was stated by Golf J. (as he then was) that:

"Invocation of the Admiralty jurisdiction by an action *in rem* presupposes the existence of a claim *in personam* against the person, who, at the time when the action is brought is the owner, of the ship."

The learned Judge was there dealing with section 3 (4) of the Administration of Justice Act 1956 the substance of which is now comprised in Section 21 (4) of the Act as follows:-

"(4). In the case of any claim as is mentioned in Section 20 (2) (e) to (r), where

(a) the claim arises in connection with a ship; and,

(b) the person who would be liable on the claim in an action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against-

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship which at the time when the action is brought, the "relevant person is the beneficial owner as respects all the shares in it."

It was contended by the Appellant that it was not such a "relevant Person" and consequently that the action *in rem* was brought against it in error as in the circumstances the admiralty jurisdiction could not properly be invoked.

I turn to examine the nature of the respondent's claim and the mode in which the admiralty jurisdiction of the court was invoked in the light of my above statement of the law and principle. The endorsement of claim on the writ of summons was as follows:

"The plaintiff's claim against the defendant is for Kshs. 6,110,434/55 due and owing by the defendant to the plaintiff in respect of a quantity of gas oil, fuel and bunkers supplied by the plaintiffs to the defendant."

The Bunker Delivery Report dated 19.9.88 and the invoice number 67352 both annexed to the affidavit of Johnson Robert Kariuki dated 5th December, 1988 and sworn in support of the claim however showed that although the fuel was delivered to the motor vessel "*Lilian S*" it was for the account of Southern Oil Co. Ltd. It was the appellant's contention that this Southern Oil Supply Co. Ltd. was the person who would, in the circumstances, be liable in an action *in personam* to the plaintiffs. And that company was not and had never been the owner of the '*Lilian S*' which was, rather, owned by the Appellant, Sea Guardian Company SA of Panama – see the affidavit of Epaminondas Saliarelis, the secretary of the appellant: In that affidavit Mr. Saliarelis depones that:

"7 the said fuel was ordered by and was the property of Sourthern Oil Supply Company Ltd and was only delivered to the vessel in consequence of separate arrangements made between the master (of the "Lilian S") and Southern Oil Supply Co. Ltd as a result of which the vessel was used as a base for the storage of the said fuel and oil pending its sale by Southern Oil Supply Company Ltd and SOSCO Fishing Industries Ltd to other vessels."

"8 I am not aware and despite diligent enquiries have not found that my company has placed any order with the (respondents) for supply of the fuel oil referred to ..."

And Theodore George Tsakiris, a director of Southern Oil Supply Company Ltd deponed that that company carries on business of supplying bunkers to ships in Mombasa and had entered into the contract in issue in this case and arranged with the appellant for the motor vessel "*Lilian S*" to be used as "a base for storing the said fuel oil pending the sale and supply of the same to other vessels in the port of Mombasa." The documents annexed to Mr. Tsakiris' affidavit evidencing the contract and demands for payment show that the respondent looked to Southern Oil Supply Co. Ltd., and not the Appellants, for payment for the said fuel.

The evidence clearly showed that the respondent's claim could neither be founded on sections 20 (1) (a) and 20 (2) (m) of the Supreme Court Act nor be the basis for the invocation of the court's admiralty jurisdiction pursuant to section 21 (4) of the Act. In "*The Evpo Agnic* [1988] WLR 1090, it was held, *inter alia*, that where "the relevant person" for the purposes of section 21 (4) (h) of the Act was the owner of the ship, on a true construction of the section "owner" meant "registered owner" and not merely someone with an equitable property in the ship. In the present appeal the owners of the motor vessel '*Lilian S*' were sued on a claim which on the face of it lay against a third party and as the respondent adduced no evidence that the appellant was "the relevant person" the claim, in my view, fails to qualify for the invocation of the admiralty jurisdiction. For that reason alone I would respectfully hold that the learned trial Judge misapprehended the issue urged before him and consequently came to a wrong conclusion. It is for this reason, *inter alia* that I allowed the appeal.

But the appellant has urged other grounds in the appeal namely grounds 5, 6, 7, 8 and 9. These grounds are:

5. In considering the question whether the plaintiff had satisfied the requirements of S. 21 (4) of the said Act, the learned Judge erred in law

(a) in failing to pay any regard to the contents of the two telexes (marked TGT 1 and TGT 2 and attached to the affidavit of Theodore George Tsakiris filed on behalf of the defendant) and in failing to appreciate that the plaintiff should have disclosed the said two telexes in the affidavit filed in support of its request for the issue of a warrant of arrest but had failed to do so;

(b) in failing to pay any or any proper regard to the terms of the invoice dated 20th September, 1988 annexed to the affidavit of Johnson Robert Kariuki sworn on 5th December, 1988 and filed in support of the plaintiff's request for the issue of a warrant of arrest.

c) in paying undue regard to the contents of the Bunker Delivery Report dated 19th September 1988 annexed to the said affidavit of Johnson Robert Kariuki filed in support of the plaintiff's request for the issue of a warrant of arrest.

6. The learned Judge erred in law in holding that "this court has the jurisdiction to entertain this claim *in rem*" on the basis of assumptions or inferences in favour of the plaintiff when such assumptions or inferences were not only not canvassed before him on the hearing of the application but were also contrary to the affidavit evidence placed before him by both the parties.

7. The learned Judge erred in law and/or in principle in deciding the questions of jurisdiction on the wrong basis, namely that a claim which was not frivolous or vexatious and which disclosed a reasonable cause of action, should be allowed to proceed.

8. The learned Judge ought to have decided the question of jurisdiction regardless of the merits or demerits of the underlying claim.

9. The learned Judge erred in law in failing to set aside the writ and the warrant of arrest on the ground that the writ and the affidavit to lead to the arrest were manifestly defective.

It is clear that the appellant here complains of the learned trial judge's scrutiny, evaluation and appreciation of the pleadings and evidence placed before him and his process or reasoning which led to his erroneous decision in the matter. I have already analysed the evidence that was placed before the superior court and shown that it fell far short of satisfying the statutory requirements for the invocation of the admiralty jurisdiction of the court.

The appellant's complaints however go beyond that: it was contended that the respondent failed to meet the procedural standards set by Order 75 rule 5 of the Rules of the Supreme Court which I turn to consider.

Order 75 rule 5 (4) and 5(a) provide as follows so far as is relevant:

"5 (4). A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph (g); however, the court may, if it thinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars.

(9) An affidavit required by paragraph (4) must state

(a) in every case:

(i) the nature of the claim or counterclaim and that it has not been satisfied and, if it arises in connection with a ship, the name of that ship, and

(ii) the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and

(b) in the case of a claim against a ship by virtue of section 21 (4) of the Supreme Court Act 1981:

(i) the name of the person who would be liable on the claim in an action *in personam* ("the relevant person") and

(ii) that the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and

(iii) that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise; and

The evidence placed before the court in support of the claim as well as the motion has been analysed above and I have also, as I said before, had the advantage of reading in draft the comments and conclusions of my brothers Nyarangi and Kwach JJ A on it with which I respectfully agree.

That evidence so far as it was adduced by the respondent fell foul of the requirements of rule 5 of Order 75: it failed to establish that the appellant was "the relevant "person". The upshot of that is that the High Court did not have admiralty jurisdiction and the respondent was not entitled to invoke that jurisdiction.

It is for these reasons that I concurred in the order of the court whereby this appeal was allowed as well as the order for costs.

Kwach JA.

At the conclusion of arguments in this appeal, we allowed the appeal and made an order for the immediate release of the motor vessel "*Lilian S*". I now give my reasons for judgment.

On the 5th December, 1988, Caltex Oil Kenya Limited, the respondent in this appeal (hereinafter referred to as "Caltex") issued a writ *in rem* against the motor vessel "*Lilian S*" endorsed with a claim for Kshs 6,110,434/55, alleged to be due and owing from The Owners of the MV "*Lilian S*" (hereinafter called the "the appellants") to Caltex in respect of a quantity of gas oil, fuel and bunkers supplied by Caltex to the appellants. The writ was accompanied by a statement of claim and an affidavit to lead a warrant for the arrest of the motor vessel "*Lilian S*" (hereinafter called the ship.). This affidavit dated 5th December, 1988, was sworn by Mr John Robert Kariuki, an employee of Caltex.

Briefly, Caltex's claim as pleaded in the statement of claim is that it is owed some Kshs 6,110,434/55, by the appellants in respect of a quantity of gas oil, fuel and bunkers (goods) supplied to the ship by Caltex during the year 1988. According to the affidavit of Mr Kariuki, this amount was due and payable immediately upon supply of the goods to the ship but had not been paid in spite of demand being made. According to Mr Kariuki, delivery had been acknowledged and duly signified on the Bunkers Delivery Report (BDR). In the BDR a company called Southern Oil Supply Company Ltd (SOSCO) is named as the local agents of the owners of the ship. Also annexed to the affidavit is a copy of an invoice directed to SOSCO receipt of which was duly acknowledged by SOSCO in its own right as a customer. On the basis of these facts, the ship which was then berthed at the Port of Mombasa was, on the *ex parte* application of Caltex, ordered to be arrested and was indeed arrested. The order for the arrest of the ship was made by Githinji, J on 5th December, 1988, after a brief hearing in Chambers.

The appellants being aggrieved by the Order of Githinji J, took out a Notice of Motion under RSC Order 75 and Section 4 of the Judicature Act (cap 8) seeking an order that the writ of summons and all subsequent proceedings be set aside and the ship be released from arrest on the grounds that:

"(a) The owners of the motor vessel "*Lilian S*" namely Sea Guardian Company SA of Panama are not, and have never been, persons who would, in the circumstances of this case, be liable to the plaintiffs in an action *in personam*;

(b) the person who would, in the circumstances of this case, be liable in an action *in personam* to the plaintiffs is Southern Oil Supply Company Ltd who were not the owners of the said motor vessel either at the time when the cause of action arose or at the time the writ in the action was issued."

The application was supported by two affidavits sworn by Mr Epaminondas Saliarelis and Mr Theodore George Tsakiris. Mr Saliarelis is a Greek who lives in Piraeus and is the Secretary of the Sea Guardian Company SA, the legal and beneficial owners of the ship. I will come back to this affidavit later in this judgment. Mr George Tsakiris, lives in Mombasa and is a Director of SOSCO and claimed to be conversant with the facts of the case. More about this affidavit later.

The affidavit in reply to these two and in opposition to the application was sworn again by Mr Johnson Robert Kariuki who also expressed himself to be fully aware of the matters concerning the case.

The application got under way before Mr Justice Bosire on the 14th February, 1989, and on 28th February 1989, he delivered his ruling dismissing the appellants' application with costs in cause. It is against that decision that the appellants have now appealed.

In rejecting the submissions made on behalf of the appellants on the issue whether the goods were supplied for the maintenance or operation of the ship, the learned Judge said:

"In the instant matter the plaintiff averred that the gas oil, Fuel and bunkers were supplied to the vessel in question at the request of SOSCO. They tendered affidavit evidence to show SOSCO were local agents of the defendants. This last aspect was denied. Whether or not SOSCO were local agents of the defendants will be settled upon receipt of *viva voce* evidence. The oil and fuel supplied to the ship was suitable for use in motor vessels. Tsakiris deposed that the oil was intended for sale to and for use by motor vessels at the Port of Mombasa. In effect it could be used for the operation of the "*Lilian S*". Whether it was intended for use on the "Lilian S" or for resale is a matter of evidence. From the facts averred an inference could be drawn that the gas oil and fuel was properly for use on the "*Lilian S*". It is not a remote inference."

Right at the end of his ruling, dealing with the crucial issue of jurisdiction, the learned judge had this so say:

"In light of the foregoing I am satisfied that the facts alleged in the writ and affidavit for the request of a warrant of arrest sufficiently satisfy the requirements of sections 20 (2) (m) and 21 (4) of the Supreme Court Act, 1981, with the result that this Court has the jurisdiction to entertain this claim *in rem*."

In their memorandum of appeal, the appellants have listed 9 grounds of appeal against which they seek to impeach the decision of the learned Judge, namely –

"1. The learned Judge erred in holding that the Court has jurisdiction to entertain the claim *in rem* made by Caltex Oil (Kenya) Ltd against the vessel "*Lilian S*".

2. The learned Judge erred in holding that the facts alleged in the writ and in the affidavit for the request of a warrant of arrest were sufficient to satisfy the requirement of section 20 (2) (m) and 21 (4) of the Supreme Court Act 1981 of England as applied to Kenya.

3. The learned Judge erred in law in failing to appreciate that the question whether the plaintiff's claim fell within the ambit of Section 20 (2) (m) of the said Act was a question of jurisdiction which he was obliged to decide at once on the affidavit evidence then before the Court.

4. The learned Judge erred in law in failing to hold that the question whether, under section 21 (4) of the said Act,

the person "who would be liable on the claim in an action *in personam*" at the time when the cause of action arose was Southern Oil Supply Company Ltd (SOSCO) or Sea Guardian Company SA (the defendants herein) was likewise a question of jurisdiction requiring immediate decision on the affidavit evidence then before the Court.

5. In considering the question whether the plaintiff had satisfied the requirements of Section 21 (4) of the said Act, the learned Judge erred in law.

(a) In failing to pay any regard to the contents of the two telexes attached to the affidavit of Theodore George Tsakiris and in failing to appreciate that the plaintiff should have disclosed the said two telexes in the affidavit filed in support of its request for the issue of a warrant of arrest but had failed to do so;

(b) In failing to pay any or any proper regard to the terms of the invoice dated 20th September, 1988, annexed to the affidavit of Johnson Robert Kariuki sworn on 5th December 1988 and filed in support of the plaintiff's request for the issue of a warrant of arrest;

(c) In paying undue regard to the contents of BDR dated 19th September, 1988, annexed to the said affidavit of Johnson Robert Kariuki filed in support of the plaintiff's request for the issue of a warrant of arrest.

6. The learned Judge erred in law in holding that "this court has jurisdiction to entertain this claim *in rem*" on the basis of assumptions or inferences in favour of the plaintiff when such assumptions or inferences were not only not canvassed before him on the hearing of the application but were also contrary to the affidavit evidence placed before him by both the parties.

7. The learned judge erred in law and/or in principle in deciding the questions of jurisdiction on the wrong basis, namely that a claim which was not frivolous or vaxatious and which disclosed a reasonable cause of action, should be allowed to proceed.

8. The learned Judge ought to have decided the questions of jurisdiction regardless of the merits or demerits of the underlying claim.

9. The learned judge erred in law in failing to set aside the writ and the warrant of arrest on the ground that the writ and the affidavit to lead the arrest were manifestly defective."

As I understand these grounds of appeal, the appellant's contention and main issue in this appeal is that the special procedure in the Admiralty

jurisdiction required that Caltex should have satisfied the Court *in limine*

(on the threshold) on the issue of jurisdiction. The admiralty jurisdiction of the High Court of Kenya is conferred by Section 4 of the Judicature (Act (cap 8), the material parts of which provide as follows:

"4 (1) The High Court shall be a Court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the High seas, or in territorial waters or upon any lake or other navigable inland waters in Kenya.

(2) The admiralty jurisdiction of the High Court shall be exercisable:

(a) over and in respect of the same persons, things and matters and

(b) in the same manner and to the same extent, and

(c) in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations."

It is plain from the foregoing that in the exercise of its admiralty jurisdiction, the High Court has to apply the law of England. In order to discover what that law is one has to look at the Supreme Court Act, 1981, and more specifically Sections 20 and 21 of the said Act. The relevant provisions state:

"20 (1) The admiralty jurisdiction of the High Court shall be as follows, that is to say

(a) jurisdiction to hear and determine any of the questions and claims mentioned in sub-section (2);

(2) The questions and claims referred to in sub-section

(1) (a) are:

(a) ...

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance."

The mode of exercising the admiralty jurisdiction is covered by section 21 of the Act, the relevant parts of which provide:

"21) (1) Subject to section 22, an action *in personam* may be brought in the High Court in all cases within the admiralty jurisdiction of that Court.

(2) ...

(3) ...

"(4) In the case of any such claim as is mentioned in section 20 (2) (e) to (r)

(a) the claim arises in connection with a ship; and

(b) The person who would be liable on the claim in an action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, An action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against (i) that ship, if at the time when the action is brought ship as respects all the shares in it or the charterer of it under a charter by demise;"

Admiralty actions therefore may be either *in rem* or *in personam*. An admiralty action *in rem* is in effect an action against a *res*. A *res* is usually a ship but may in some cases be cargo or freight or an aircraft. In such an action the plaintiff may cause the *res* to be arrested if it is within jurisdiction.

The learned Judge held on the evidence before him that the claim by Caltex fell within the ambit of Sections 20 (2) (m) and 21 (4) of the Supreme Court Act, 1981. Starting first with Section 20(2) (m), the question to be decided is whether the goods in relation to which the claim was made by Caltex were supplied to the ship for her operation or maintenance. The Judge thought that the nature of the goods was such that it was probably intended for the operation of the ship. The quantity involved was in excess of 6,000 metric tons. Such a large quantity of fuel may or may not have been supplied to the ship for its operation. It is quite probable that it was supplied for some other purpose. Mr Epaminondas Saliarelis deponed in paragraph 7 of his affidavit that he was informed by the Master of

the ship that the said fuel was ordered by and was only delivered to the ship under an arrangement between the Master and SOSCO as a result of which the ship was used as a base for the storage of the said fuel and oil pending its sale by SOSCO and a company called SOSCO Fishing Industries Ltd to other vessels. He was categorical in his assertion that his company, Sea Guardian Company SA, the legal and beneficial owner of the ship, had not placed any order with Caltex for the supply of the fuel oil in question. This is supported by Mr Theodore George Tsakiris, a director of SOSCO, who confirmed in his affidavit that the order for supply of fuel oil was placed by SOSCO and that the ship was used only as a base for storing the fuel pending the sale and supply of the same to other vessels in the port of Mombasa.

Even assuming without deciding that the goods fell within the scope of sub-paragraph (m), were the mandatory requirements of Section 21(4) satisfied" It goes without saying that the claim arose in connection with a ship. What has to be determined is whether the appellants are the persons who would be liable on the claim in an action *in personam*. When the cause of action arose the appellants were certainly the owners of the ship and if they were liable *in personam* on the evidence then an action *in rem* could have been brought against them. But the decisive question is whether on the evidence the appellants were liable to Caltex *in personam*. Put slightly differently the appellants would not be liable in an action *in rem* unless they would also be liable in an action *in personam*. This linkage is important as it constitutes the basis upon which the court's jurisdiction is to be exercised. It was Mr Inamdar's submission that on the material before the judge there was no evidence that the appellants could be held liable in an action *in personam*. The contract for the sale and delivery of the goods was made by an exchange of two telexes which I consider to be important and which I will read in full. The first telex is dated 15th September, 1988, and is addressed to SOSCO marked for the attention of Mr Saliarelis and reads:

"FUEL OIL SUPPLY EX-KOT

We confirm sale of 5500MT OF F.O. 180 CST subject to following terms:

AA – Price USD converted to Kenya shillings at the selling rate of the U.S dollar quote by major commercial Banks on the date of invoice.

BB - Credit terms strictly thirty days from date of invoice subject to settlement of total amount in respect of 500 MT fuel oil lifted in late August 1988 ex kot.

CC - Payment of connection/disconnection charges, KPA overtime and Fire Brigade standby charges. Please confirm acceptance of above terms in order that we may make arrangements to supply.

CALTEX NAIROBI."

SOSCO'S replying telex also dated 15th September, 1988, addressed to Caltex (Nairobi) and copied to Caltex (Mombasa) states:

"FUEL OIL EX KOT

Thanks your telex 852 of today. We hereby confirm acceptance the purchase of 5000 MT FO L80 CST EX

KOT with usual terms. PLS be advised that we nominate

M/T "Lilian S" to lift the parcel. Best regards

T.G. TSAKIRIS."

It is plain beyond a peradventure looking at these two telexes, that the contract of sale was made between Caltex and SOSCO. It is to be noted that no reference is made to those important telexes in the affidavit to lead a warrant for the arrest of the ship sworn by Mr Johnson Robert Kariuki on behalf of Caltex on 5th December, 1988. On 2nd February, 1989, Mr Kariuki swore a second affidavit in reply to the affidavits of Mr Saliarelis and Mr Tsakaris in which he did not make even a passing reference to those telexes. He attached copies of a delivery note and an invoice. In the result, the averment contained in Mr Tsakaris' affidavit that the contract for sale of the fuel oil was made between SOSCO and Caltex remained unchallenged and must be accepted as true. The BDR dated 19th September, 1988, signed by the Captain of the ship is no more than an acknowledgment by the captain that the fuel oil was delivered to the ship in accordance with arrangements agreed upon between Caltex and SOSCO in the telexes exchanged between them. The delivery was made to the ship as the vessel nominated for delivery under contract of sale. It was not delivered to the ship either because it was required for its operation or because it had been bought by or sold, to the owners of the ship.

On this evidence, I have no difficulty in finding as a fact that the sale was made to SOSCO and only SOSCO, and no other party, could be liable in an action *in personam* for the value of the goods sold and delivered by Caltex. It is clear therefore that Caltex failed to bring its claim within the mandatory provisions of Section 21 (4) (b) and was consequently not entitled to bring an action in *rem* against the ship. In my view therefore, the learned Judge was plainly wrong when he found that those provisions had been satisfied.

In the case of *The River Rima* [1987] 3 All ER 1 (CA), the plaintiffs entered into an agreement with the defendant shipping line to lease to them containers for use on their cargo-carrying vessels. Under the terms of the agreement the containers were delivered direct to shippers at specified depots to be filled and were used interchangeably on a number of vessels which were either owned or chartered by the defendants. Subsequently, the plaintiffs issued a writ *in rem* claiming, inter alia, damages for breach of the agreement and one of the defendant ships were arrested. Under Section 20 (2) (m) of the Supreme Court Act, 1981, the Admiralty Court had jurisdiction regarding any claim in respect of goods "..supplied to a ship for her operation" and by Section 21(4) an action *in rem* could be brought against any other ship in the same entire beneficial ownership or chartered to the same person under a charter by demise, so long as that person would have been liable on the claim if the action had been brought *in personam*. The defendants applied for the writ to be struck out and the ship released from arrest, on the ground that the plaintiffs' claim did not lie within the jurisdiction of the Admiralty Court. The judge dismissed the application holding that the containers were goods supplied to a ship for her operation and that accordingly the plaintiffs' claim fell within S 20 (2) (m) of the 1981 Act. The defendants appealed to the Court of Appeal.

It was held that in order to maintain an action under Section 20 (2) (m) of the 1981 Act, it was necessary to demonstrate a sufficiently direct connection between the agreement relied on and the operation of the ship. Since the true purpose of the leasing agreement was to enable the defendants to meet the convenience of shippers in providing packaging for all their cargoes, the containers had not been shown to be sufficiently closely connected with the operation of the defendants' ships, or with any ships, as to bring the plaintiffs' claim within section 20 (2)(m). Furthermore, it had not been established, for the purposes of Section 21

(4) of the 1981 Act, that when the cause of action arose the defendants were the beneficial owners or charterers of a ship or ships to which the plaintiffs' claim related, and accordingly there was insufficient evidence to justify the ship's arrest under Section 21 (4). It followed that the plaintiff's claim did not come within the jurisdiction of the Admiralty Court. The appeal was allowed, the writ set aside and the ship released from arrest.

In the course of his judgment, with which both Nourse and Woolf LJJ agreed, Sir John Donaldson MR, in relation to the meaning of section 20

(2) (m) of the 1981 Act said at page 4-d:

"There is not doubt that the judge was much influenced by the decision of the District Court of Rotterdam in *The River Jimini* to which he referred and by the desirability of there being a common international approach to the admiralty jurisdiction of Courts. In this he was clearly right. The international convention relating to the arrest of Sea-going ships which has been ratified by Great Britain, was intended to have just this effect and the relevant sections of the Supreme Court Act 1981 and their predecessors in the Administration of Justice Act 1959 were intended to give effect to the convention. Nevertheless, it is not yet the case that there is any established body of law as to the meaning of art (1) (k) of the Brussels Convention, which is the equivalent of para (m)." (underlining mine).

The plaintiffs appealed to the House of Lords and their appeal was dismissed (See *The River Rima* (1988) 2 Lloyd's Rep 193).

Since I have arrived at the conclusion that Caltex failed to bring its claim within the ambit of section 21 (4) of the 1981 Act, it follows that the Court acted without jurisdiction in issuing a warrant for the arrest of the ship and the subsequent application by the appellants to set aside the writ of summons and all subsequent proceedings and for the release of the ship from arrest ought to have been allowed. It follows that grounds 1, 2, 3, 4, 5, 6, 7 and 8 of appeal relating to the issue of jurisdiction succeed and are allowed.

The conclusion I have arrived at on the issue of jurisdiction is sufficient to dispose of this appeal but as Counsel addressed this Court at some length on the sufficiency or otherwise of the affidavit to lead the arrest, I think I ought to deal with ground 9 of appeal as well.

The conditions prerequisite to the issue of a warrant for the arrest of a ship are set out under RSC 0.75 r. 5, and paragraphs 4 and 9 which are relevant stipulate that;

"5(4) A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph (9) ; however, the court may, if it thinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars.

(9) An affidavit required by paragraph 4 must state:

(a) in every case:

(i) the nature of the claim or counterclaim and that it has not been satisfied and, if it arises in connection with a ship, the name of the ship; and

(ii)the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and

(b) In the case of a claim against a ship by virtue of section 21 (4) of the Supreme Court Act 1981:

(i) The name of the person who would be liable on the claim in an action *in personam* ("the relevant person"); and

(ii) That the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and

(iii) That at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise; and

(c)(not relevant)

(d)(not relevant)

(e)(not relevant)".

It was Mr Inamdar's submission before us that the affidavit Mr Johnson Robert Kariuki sworn on 5th December, 1988, was manifestly defective for lack of compliance with the mandatory provisions of RSC 0.75 r 5 (4) and (9). In that affidavit, Kariuki deponed as follows:

"(1) I am employed by the plaintiff company herein and I am dully authorized to swear this affidavit. The contents of this my affidavit are within my own knowledge.

(2) In the month of September the plaintiff company supplied to the said motor tanker "LILIAN S" a quantity of gas oil, fuel and bunkers to the value of Kenya Shs 6,110/434/55. The amount of Shs 6,110,434/55 was due and payable immediately upon supply of gas oil, fuel and bunkers to the vessel but was not paid and we have been demanding payment of the same from the owner's agents at Mombasa. I annex hereto a delivery note signed on behalf of the defendants, acknowledging the amount of shs 6,110,434/55 as owing and the delivery of the gas oil, fuel and bunkers as having been made.

(3) The aid and processes of this honourable Court are requested to enforce payment of this amount and I make this application for the immediate arrest of the motor tanker "LILIAN S".

(4) What is stated hereinabove is true and correct to the best of my own knowledge and belief."

As can be seen from the contents of this affidavit, it applied only with paragraph 9(a) of rule 5 but did not include particulars required to be given under paragraph 9(b) of rule 5, in the case of a claim against a ship by virtue of section 21 (4) of the Supreme Court Act, 1981. The affidavit did not identify the appellants as the person who would be liable on the claim in an action *in personam* nor did it state that the appellants were either the owners or charterers or in possession or control of the ship when the cause of action arose. There was no averment that at the time of the issue of the writ the appellants were the beneficial owners of all the shares in the ship either.

As this affidavit did not comply with the mandatory provisions of RSC 0.75 r 5 paragraph 9 no reliance should have been placed on it unless the Court gave leave as required by the rule to dispense with those particulars. No leave having been obtained the affidavit should have been rejected outright. In this respect, the affidavit to a warrant of arrest was incurably defective.

Mr Inamdar also challenges the validity of this affidavit on another ground namely that it failed to disclose, and in fact concealed, material facts as a result of which the Court was misled into making an *ex parte* order gravely prejudicial to the appellants. He submits that if these material facts had been disclosed, the Court would not have made the order for the arrest of the ship. As I understand him Mr Inamdar's contention is that Caltex was guilty of lack of candour. The material facts which Mr Inamdar contends were concealed are contained in the two telexes to which I have already referred. The main plank of his argument is that if Caltex had disclosed either the existence or contents of these telexes it would have been readily apparent to the Judge who gave the order for the arrest of the ship that the agreement for the sale of the goods in question was concluded not between Caltex and the appellants, as Caltex had led the Court to believe, but between Caltex and SOSCO. On the basis the Judge would have seen straightway that the appellants could not have been held liable for the claim in an action *in personam* and in consequence would have declined to make the order sought.

This duty of candour has been dealt with in a number of decided cases. In *The Andria (vasso)* [1984] QB 477, the

plaintiffs, the owners of cargo carried on board the defendant's ship, wished to pursue a claim against the defendants for damage to that cargo. After the plaintiffs had commenced an action *in rem* in the Admiralty Court, the parties made an ad hoc agreement to arbitrate and the plaintiffs actively pursued their claim in the arbitration. The defendants subsequently sold the ship. The defendants refused to provide security for the plaintiffs' claim, and the plaintiffs applied to the Admiralty Court for an order to arrest the ship.

The application made no mention of the ad hoc agreement to arbitrate or of the fact that the plaintiffs were actively pursing their claim in the arbitration. The Court issued the necessary warrant and the ship was arrested. The ship was released against an undertaking and the defendants applied to the court for a declaration that the Court's jurisdiction to arrest the ship could not be invoked where its sole purpose was to provide security for arbitration proceedings, and an order discharging the undertaking. The Court made the declaration and order sought by the defendants.

On appeal by the plaintiffs, it was held, dismissing the appeal, *inter alia*, that the power to arrest a ship conferred on the Admiralty Court by RSC, 0.75 r 5 was discretionary; that in exercising that power the Court might take into account the manner in which and the purpose for which the plaintiff had invoked the Court's jurisdiction; that since the purpose of the power of arrest under RSC 0.75 r 5 was to provide security for the action *in rem* and not for any other proceedings and since it appeared that the plaintiffs when invoking that power had failed to disclose to the court the fact that their claim was being pursued by arbitration, it followed that the invocation of the power of arrest had been an abuse of the process of the court and that therefore the undertaking should be discharged. The Court of Appeal in its judgment which was read by Robert Goff LJ said at page 491 G:

"It is axiomatic that in *ex parte* proceedings there should be full and frank disclosure to the Court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the *ex parte* application, even though the facts were such that, with full disclosure, an order would have been justified; see *Reg v Kensington Income Tax Commisioners, Ex parte Princess Edmond de Polignac* (1971) 1 KB 486. Examples of this principle are to be found in the case of *ex parte* unjunctions, *ex parte* orders made for service of proceedings out of the jurisdiction under Order 11 of the Rules of the Supreme Court. In our judgment, exactly the same applies in the case of an *ex parte* application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the Court."

The same principle was dealt with in the case of *Brink's Mat Ltd v Elcombe* [1988] 3 All ER 188. It is not necessary to set the relevant facts here but I would like to refer to an important passage in the judgment of Ralph Gibson LJ, at page 192 (f) where he said:

"In considering whether there has been relevant non- disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

(i) the duty of the applicant is to make a full and fair disclosure of the material facts.

(ii) The material facts are those which it is material for the Judge to know in dealing with the application as made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.

(iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had such inquiries.

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including

(a) the nature of the case which the applicant is making when he makes the application

(b) the order for which application is made and the probable effect of the order on the defendant, and

(c) the degree of legitimate urgency and the time available for the making of inquiries.

(v) if material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an *ex parte* injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediatemdischarge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally, it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* (chance of repentance) may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms:

'. when the whole of the facts, including that of the original non-disclosure, are before it, (the Court) may well grant such a second injunction if the original non- disclosusre was innocent and if an injunction could properly be granted even had the facts been disclosed.'

See *Lloyds Bowmaker Ltd v Britannia Arrow Holdings p/c (larens, third party)* [1988] 3 All ER 178 at 183 per Glidewell LJ."

And Balcombe LJ had this to say on the same point in the same case at page 193 (h) :

"The Courts today are frequently asked to grant *ex parte* injunctions, either because the matter is too urgent to await a hearing on notice or because thc very fact of giving notice may precipitate the action which the application is designed to prevent. On any *ex parte* application, the fact that the Court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances.

The rule that an *ex parte* injunction will be discharged if it was obtained without full disclosure has a two fold purpose. It will deprive the wrongdoer of an advantage improperly obtained; and see *R v Kensignton Income Tax Comrs, e.p. Princess Edmond de Polignac* (1971) KB 486 at 509. But it also serves as a deterrent to ensure that persons who make *ex parte* applications realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge–made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the Court to continue the injunction , or to grant a fresh injunction in its place, notwithstanding that there may have been non disclosure when the original *ex parte* injunction was obtained."

All these cases make reference to the principle as stated in the well known case of *R v Kensington Income Tax Commissioner E.p. Princess Edmond De Polignac* [1917] 1 KB 486, and so for the sake of completeness, I think I ought to read two passages from the judgments delivered in the Court of Appeal in that case.

The first is to be found in the judgment of Warrington LJ at page 509, where he said;

" It is perfectly well settled that a person who makes an *ex parte* application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

The other passage is from the judgment of Scrutton LJ at pp 513-514 where he said:

"Now that rule giving a day to the Commissioners to show cause was obtained upon an *ex parte* application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement."

This rule applies with equal force in Kenya and looking at the substance of the two telexes, I entertain no doubt at all that Caltex failed in its duty to make a full and frank disclosure of material facts and the application by the appellants to set aside the writ and the warrant of arrest ought to have been allowed because quite clearly the original order made by Githinji J., for the arrest of the ship was improperly obtained. Mr Inamdar's complaint about the affidavit is well founded and I would uphold his submissions in his last ground of appeal as well.

It was for these reasons I was in favour of allowing the appeal, setting aside the writ and releasing the ship from arrest. I would give the appellants their costs of this appeal.

Dated and delivered at Mombasa this 17th day of Novemebr, 1989.

NYARANGI.

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JUDGE OF APPEAL

MASIME

.....

JUDGE OF APPEAL

KWACH

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JUDGE OF APPEAL

KENYA LAW
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REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: W.M. Mutunga,P.K. Tunoi J.B. Ojwang,S.C. Wanjala & N.S. Ndungu)

APPLICATION NO. 2 OF 2011

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 he 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. 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, amendments to 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 time frame 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. **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, learned counsel Dr. Kuria for the applicants, submits that the first applicant's interest in this matter is his share of surplus assets of the 2nd applicant. He submits that the first 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; 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 first applicant joined the second applicant to this matter without the authority of the official receiver because the official receiver has arbitrarily refused to discharge his duties; and that the official receiver works under the Attorney-General and he has been endeavoring in vain to get the official receiver to discharge his statutory obligations.

(19) Counsel urges 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, and 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 as directed by 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 directors object. The Court may allow the matter to stand over so that a company meeting is held to decide whether the action should proceed in the company's name. Nevertheless, proceedings may be brought by any member or members in his or their 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 up this matter. He further submits that the official receiver was acting in a similar manner as the Attorney-General, by the authority 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 unsuccessfully requested the Attorney-General to enjoin the official receiver in the application. When the applicants filed the application now before the

Court, they served the same upon the Attorney-General and the official receiver. This Court also served the Attorney-General and the official receiver with a notice of the mention scheduled for 28th June, 2012. However, neither of the parties appeared.

On the Threshold for Review under Section 14, Supreme Court Act, 2011

(21) The first and second respondents submit that although the title of theapplication 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 under section 21 of the Judges and Magistrates Vetting Act. Yet the special jurisdiction under section 14 of the Supreme Court Act can only be invoked where a judge has been removed, retired or has resigned as a result of a complaint. The third respondent concurs with the submissions of the first and second 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 first and second 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 Sixth Schedule to the Constitution requires those serving in the judiciary to conform to the new values of the Constitution; and that 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 the effective date of the Constitution, August 2010. He submits that, by Article 159 (2) (d) of the Constitution, the Courts in exercising judicial authority, shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities, and the purpose and principles of this Constitution shall be promoted. Dr. Kuria submits that the respondents have drawn no connection between Article 259 of the Constitution, section 23 of the Sixth Schedule (Transitional Provisions of the Constitution), the Vetting of Judges and Magistrates Act, 2011 and Section 14 of the Supreme Court Act, 2011 – all of which address the issue and vision of justice after the Constitution comes into operation.

On the Question of Jurisdiction

(23) Dr Kuria submits that the respondents 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.

Dr. Kuria submits that the Supreme Court must address the issues of jurisdiction when applications for leave are being argued. He submits that the respondents' submissions that the Court lacks jurisdiction 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 interpretation of the Constitution which are set out in Article 259 of the Constitution.

(24) In response, Mr. Oraro asserts that the jurisdiction of any Court is derived from the law. He relies on the Supreme Court\'s decision in, ***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."

On the Effect of Section 14 of the Supreme Court Act on Jurisdiction

(25) The first and second 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 first and second respondents have given the expression "appellate jurisdiction" in Article 163 (3) (b) an unduly narrow construction. He submits that they have ignored the fact that section 23 of Sixth Schedule on the transitional provisions, was inserted to cure a peculiar Kenyan mischief. Dr Kuria submits that 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; and section 23 of the Sixth Schedule was deliberately included in the Constitution.

(26) 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. While noting 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.

Whether sections 15 and 16 of the Supreme Court Act apply retrospectively

(27) The first and second respondents submit that the Constitution came into force on 27th August 2010 (Article 263 of the Constitution), and that Article 262 of the Constitution provides that the "Transitional and Consequential Provisions" under the Sixth Schedule shall take effect on the effective date; 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; and 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 first and second 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 July 2008*, over two years before the effective date, and three years before the Supreme Court was established. The first and secondrespondents 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 acquire any jurisdiction relating back to appeals which had been determined before the effective date, except on matters relating to vetting under section 14 of the Supreme Court Act.

(28) In agreement, the **third respondent** submits that the Supreme Court lacks jurisdiction to entertain the instant application under the provisions of the law cited by the applicants. It is urged that when judgment was delivered on 31st July 2008 by the Court of Appeal, the Supreme Court was not in existence. It is submitted 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; and 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 first and second 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; and 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.

(29) The first and second respondents submit that 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, and, 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, *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 occurred before the commencement of the Constitution.

(30) **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; and that it is the same with sections 15 and 16 of the Supreme Court Act. To support this submission, he also relies on section 9 of the ***Interpretation and General Provisions Act.*** 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 retrospectivity as a cardinal principal of legality, and on the case of ***West v Gwynne*** **[1911] 2 ch. 1.**

(31) Dr. Kuria responds that the assertions by the respondents predate the year 2009, when the principle of substantive justice was adopted, and that it 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 first and second respondents stated that Article 259 does not assist the applicants as regards the 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.

Application for Leave to Appeal: Does this Court have Jurisdiction"

(32) 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; and 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 seems to be the case 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 on 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 before the Court of Appeal.

(33) 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, and urges 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 in favour of the applicants. Counsel submitted that section 14 (1) of the Supreme Court Act would be *ultra* vires Article 163 (4)(b) of the Constitution if it purported to confer such jurisdiction.

"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

(34) 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 only gives Parliament the power to enact legislation to facilitate vetting. It does not spell out the way in which vetting 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 ethical standard than it had before. He relies on ***Marbury v Madison*** **1 Cranch 137 [1803]** 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 first applicant depones in his affidavit (para. 94), the Judges and Magistrates Vetting Board has interpreted section 23 and applied it to the case of the applicants.

ISSUES FOR DETERMINATION

(35) Having taken into account the pleadings, supporting affidavits and written and oral submissions by counsel, the Court is now in a position to more clearly formulate the issues for determination. The issues as follows:

(i) whether the first applicant needed to obtain leave of the Court before joining the second applicant in these proceedings and if so, whether failure to apply and obtain such leave is sofatal as to render this application untenable"

(ii) whether the facts as deponed in this application by the first applicant and all surrounding circumstances meet the threshold set out in Section 14 of the Supreme Court Act so 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"

(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"

MUST LEAVE BE GIVEN AS A BASIS FOR THE APPLICATION"

(36) It is the contention of counsel for the respondents that the first applicant ought to have sought and obtained leave of the Court before joining the second applicant to these proceedings. Failure to obtain the Court's sanction, they urge, is fatal to the application. 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."

(37) 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 Court, showing any attempt to leave been made to give notice to the liquidator to determine the necessity of the company in liquidation being joined in 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, urges however that the official receiver, who is the liquidator in this case, has refused to discharge his statutory obligations. 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 declined.

(38) 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, he 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 the liquidator commences or defends in Court must be for the objective of protecting the assets, or recovering the property of a company.

(39) Is the power to commence or defend proceedings in Court, which is vested in the liquidator, exclusive" What happens whereas 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 in this case, was instigated not by a debenture-holder or creditor but by minority shareholders on grounds of oppression" None of the counsel in these proceedings has addressed these questions, neither do the authorities cited give a hint. Yet it is clear to us that it is only by answering them that a fair resolution of the main issue may be illuminated.

(40) The question as to whether the receiver's power to commence or defend proceedings in the name of a company under receivership is exclusive has received judicial attention in foreign jurisdictions. 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 rests, 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 include: the preparation of annual accounts; the auditing of those accounts; calling the statutory meetings of shareholders; maintaining the share register and lodging returns. (see ***Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd*** (1969) 2 NSWR 782.

(41) 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 imperilling the assets which were the subject of the charge.** 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 case law suggesting 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.

(42) The ***Newhart Developments*** 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) the decision of the High Court which awarded the sum of Shillings 129 million to the applicants, was made in 2003, well 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 well before the winding up Order;

(v) there is no debenture over any of the assets of the second applicant.

(43) 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 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 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 an 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 the second applicant had been placed under receivership at their instance, the facts in this case are such that we would have been inclined to apply the principle in ***Newhart Development Ltd.***

(44) Considering all these facts, the Court is inclined to ask itself one pertinent question: *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 that this Court were to proceed 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 depreciated 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, 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.

(45) On the foregoing grounds, the opposition to this application on grounds that prior sanction of the Court has not been sought and received, in accordance with Section 241(1) of the Companies Act must fail.

THE REQUIREMENT UNDER SECTION 14, SUPREME COURT ACT, 2011

(46) Counsel for the respondents has 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 of the Act. 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, learned counsel, Dr. Kamau Kuria, does not specifically respond to this point by the respondents. His general arguments based on the Constitution, to justify the applicability of Section 14 of the Supreme Court Act, have been summarized in earlier paragraphs of this Ruling.

(47) 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."

(48) 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 applicants' 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 toappeal* as opposed to a *review of judgment.* We also take note of the fact that in his affidavit in support of this application, the first applicant persistently 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. Both counsel and the applicant have adopted the language of section 14.

(49) If the applicant is asking us to review the judgment of the Court of Appeal, on the basis of section 14 of the Act which grants special jurisdiction, there remains the question whether he has satisfied the threshold for review. 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.

SPECIAL JURISDICTION: IS IT APPELLATE IN NATURE"

(50) 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" to the Constitution grants Parliament the power to enact legislation for the purpose of

setting right the injustices of the past. But the question persists: 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. 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 statute. 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 typically 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, the 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 are better 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.

(h) Apart from the general power to review Court records and orders, the High Court has a broader and more robust power of "*review of administrative action*". This power is granted to the High Court by the Constitution and by legislation. An appeal lies from the High Court's review of administrative action decision to the Court of Appeal.

(51) The features highlighted above indicate that the words "review" and "appeal" cannot be used interchangeably at the litigant's election when seeking a higher Court's 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 bears the same meaning 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 are readily recognizable. The irresistible conclusion is that the application for leave to appeal cannot be grounded on Section 14 of the Supreme Court Act.

(52) In a recent ruling by a two judge-bench of this Court, ***Lawrence Nduttu & 6000 Others v. 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 (para. 20):

"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."

(53) This statement fortifies our conclusion 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.

THE APPELLATE JURISDICTION OF THE SUPREME COURT:

DOES IT OPERATE RETROSPECTIVELY"

(54) 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 donated by 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.

(55) 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. v. 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 [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 is based on the logic of Article 163 (5) of the Constitution, which 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.

(56) 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 accelerated 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. Inthe ***Lawrence Nduttu* case,** the two judge bench opined (para. 21) 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."*

(57) We therefore affirm the principle of good practice laid down in the ***"Sum Model case,*** 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. For the course of experience shows cases in which appeal to the Supreme Court has been sought on grounds other than of merit, the Court of Appeal has the case-management obligation to grant leave only for weighty cause.

(58) 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, there is a significant 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 this Court came into existence" Does the appellate jurisdiction of the Court stretch back to the time prior 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 confers jurisdiction and a right of appeal upon the applicants. Further, they urge that sections 15 and 16 of the Act cannot have retrospective effect, and that litigation must come to an end; and that end came on 31st July, 2008 with the decision of the Court of Appeal.

(59) Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. ***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."

(60) 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".

(61) As for non-criminal legislation, 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 under contracts;

(iii) divests vested rights; or

(iv) is constitutionally forbidden.

(62) 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 quest of its legitimate object of rendering political goods. 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 permits 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 still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.

(63) In the matter before us, the question is not whether the appellants seek to rely on a law that has retrospective effect. The sole issue 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. 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 cases that had been finalized by the Court of Appeal before the Commencement of the Constitution of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens.

(64) Relevant authority is to be found in the South African case, ***Du Plessis & Others versus De Klerk and Another* (1997) 1 LRC637,** which 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 Article 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 Chapter 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; and conduct that was unlawful before the Constitution came into force could not subsequently be deemed to be lawful.

The learned Judges (Chaskalson, P, Langa & O'Regan, JJ and Kentridge, Ag. J) pronounced themselves as follows:

"...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"

(65) In the instant case, we find that 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.

(66) This holding would have been enough to dispose of the application, save 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."

(67) Although counsel for the third respondent urged the issue of the constitutionality of section 14 only tangentially, the deposition on behalf of the first and second respondents brings the issue to the fore. The jurisdiction of the Supreme Court is provided for in Article 163 (3) (4) (5) (6) and (7) of the Constitution. This Article [163(8)] reads as follows:

"The Supreme Court shall make rules for the exercise of its jurisdiction."

And Article 163 (9) provides that:

"An Act of Parliament may make further provision for the operation of the Supreme Court".

(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission 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 entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, ***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 within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

(69) Article 163 of the Constitution provides for the jurisdiction of the Supreme Court in exhaustive terms, though leaving room for Parliament to prescribe further appellate jurisdiction in terms of Article 163 (3) (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 under 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 (3) (b) (ii) above.

(70) 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 upon the Supreme Court" 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 legislation within the meaning of Article 163 (3) (b) (ii). Such an Act was never intended to create and confer jurisdiction upon the Supreme Court beyond the limits set by the Constitution. The national legislation referred to in Article 163 (3) (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.

(71) Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer "special jurisdiction" upon the Supreme Court, contrary to the express terms of the Constitution. Although we have a perception of the good intentions that could have moved Parliament as it provided for the "extra" jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article 163 of the Constitution, or under Section 23 of the Sixth Schedule on "Transitional Provisions".

(72) ***We 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

I certify that this is a true copy of the original

Ag. REGISTRAR

SUPREME COURT OF KENYA

KENYA LAW
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 2A OF 2020

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20(1) –(4), 21, 22, 33, 35, 258 AND 259 OF THE CONSTITUTION

BETWEEN

CHARLES APUDO OBARE.....1ST PETITIONER

IRINE ADHIAMBO ODHIAMBO.....2ND PETITIONER

-VERSUS-

CLERK, COUNTY ASSEMBLY OF SIAYA.....1ST RESPONDENT

ERICK OGENGA.....2ND RESPONDENT

JUDGMENT

1. The Petitioners in this Petition are **CHARLES APUDO OBARE** and **IRENE ADHIAMBO ODHIAMBO.** They bring this petition demanding for access to information as stipulated in Article 35 of the Constitution, from the Respondents who are the **CLERK OF COUNTY ASSEMBLY OF SIAYA,** as First Respondent and **HONORABLE ERIC OGENGA**, the second Respondent. The information sought to be accessed relates to tenders for the construction of a County Assembly Complex Building.

2. The request for information was formally made to the Respondents by the Petitioners vide their letter dated 12th February, 2020, seeking to access the information held by the Respondents in respect to the tender, evaluation and award of the construction of an Assembly Complex Building, on account that there was apprehension that colossal sums of public money may be utilized for a project that is not warranted or genuine and where value for money will have been lost.

3. The Petitioners assert that they bring this Petition and the request dated 12th February, 2020, as citizens of the Republic of Kenya and in the public interest.

4. The Petitioners further allege that the Respondents resisted this demand to access the requested information prompting the Petitioners to institute this Petition pursuant to the provisions of Article 1, 2, 3, 10, 19, 20 (1) -(4), 21, 22, 33, 35, 258 and 259 of the Constitution.

5. The Petition which is supported by the Affidavit sworn by the second Petitioner **Irine Adhiambo Odhiambo** sworn on 22nd April 2020 at Nairobi seeks the following ORDERS:

(i) THAT a declaration be issued that the failure by the 1st and 2nd Respondents to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) on the basis of the Petitioners' request dated 12th February, 2020, is a violation of the right to access to information.

(ii) THAT a declaration be issued that the failure by the 1st Respondent to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) on the basis of the Petitioners' request dated 12th February, 2020, is a violation of Article 10 of the Constitution and specifically the value of the rule of law, participation of the people, human rights, good governance, transparency and accountability.

(iii) THAT a declaration be issued that the failure by the 1st and 2nd Respondents to provide information sought under Article 35 (1) (a) and also to publicize the information in accordance with Article 35 (3) is a violation of the obligations imposed on the said Respondents by Chapter six specifically Articles 73 (1) and 75 (1) of the Constitution and Section 3 of the Leadership and Integrity Act and Sections 8, 9 and 10 of the Public Officers Ethics Act.

(iv) THAT an Order be issued compelling the 1st and 2nd Respondents to forthwith provide, at the Respondents' cost, information sought by the Petitioner in their letter to the Respondents dated 12th February, 2020.

(v) THAT costs for this Petition, assessed at Kenya Shillings Five Hundred Thousand (Kshs. 500,000) be payable to the Petitioners by the Respondents.

(vi) THAT this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.

6. Opposing the Petition, the Respondents filed a Replying Affidavit sworn by **Eric Ogega**, the 2nd Respondent and with leave of Court, the Petitioners filed a Further Affidavit in rejoinder.

7. In opposing the Petition, the Respondents at paragraph 18 of the Replying Affidavit and in their written submissions respectively deposed and contended that the Petition is premature for failure to follow the dispute resolution mechanisms provided under the Access to Information Act.

8. In my humble view, that is a very crucial preliminary point of law which I must determine ***in limine*** as it goes to the jurisdiction of this court, notwithstanding the jurisdiction of this court as stipulated in Articles 22, 23, 35, 258 and 165 of the Constitution. Should I find that the petitioners had an alternative effective dispute resolution mechanism, then I need not delve into the merits of the Petition as I will be obligated to down my tools. This is because it is trite law that jurisdiction is everything without which a court of law acts in vain. See **Motor Vessel "Lilian S" v Caltex Oil (K) Limited** Further, jurisdiction cannot be conferred by consent of parties and neither can a court of law arrogate itself the jurisdiction that it is devoid of or which is expressly taken away by statute or by the constitution.

9. According to the Respondent, section 14 of the Access to Information Act provides that an applicant may apply in writing to the Commission on Administrative Justice (CAJ) requesting a review of the decisions of a public entity in relation to a request for access to information.

10. It was therefore submitted in contention that the petitioners have in filing this petition offended the doctrine of exhaustion which requires that a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court. Reliance was placed on several cases of ***Geoffrey Muthinja Kabiru v& 2 others v Samuel Munga Henry & 1756 others [2015]eKLR; Orie Rogo Manduli v Catherine Mukite Nabwala &3 others [2013]e KLR and Susan Kihika &2 others Exparte George Mwaura Njenga [2014] e KLR*** where the Courts in the respective cases found that they lacked jurisdiction to entertain the petitions since the petitioners had not exhausted the dispute resolution mechanisms provided for by legislation.

11. The Respondents maintained that without exhausting the alternative dispute resolution mechanism available as provided for in section 14 of the Access to Information Act, this Petition is premature and brought with *mala fides*.

12. In response to the deposition by the Respondents that the Petitioners had not exhausted the available dispute resolution mechanisms provided for in section 14 of the Freedom of Information Act, the 2nd Petitioner swore a further affidavit on 15th May 2020 and at paragraph 12 thereof, the Petitioners deposed that no dispute resolution mechanism is available outside this honourable court when a right or fundamental freedom is threatened, denied, violated or threatened, denied, violated or infringed in the manner the Respondents did.

13. The Petitioners assert that they came to court because the Respondents refused to respond to their request for information as

requested in the letter dated 12th February, 2020.

14. It is the Petitioners' case that the failure or refusal to release the information that was sought, the Respondents are in violation of the Petitioners' rights as guaranteed under Article 35 of the Constitution, which entitle them to access information such information held by the state.

15. The Petitioners assert that the failure to release the information sought and thereby violating the Petitioners' rights under Article 35 (1) (a), the Respondents are in further breach of Article 2 on the supremacy of the Constitution as well as Article 10 on the national values and principles of governance that includes good governance, integrity, transparency and accountability and are binding on all persons and all state organs.

16. Parliament in the year 2016, passed a legislation that was to give effect to this Article known as Access to Information Act No. 31 of 2016. This Act requires the state and its agencies to make official information more freely available and also to protect official information to the extent consistent with the public interest.

17. The basic principle of the Access to Information Act 2016 is that all information held by the state and its agencies shall be made available to the public, unless reasons exist for withholding it. The Act at Section 6 specifies the reasons that are appropriate for an agency to withhold the requested information. It further governs the handling of requests of information and sets the timeframe within which the request ought to be responded to.

18. Further, the Fair Administrative Action Act, 2015 obligates public officers to discharge their duties to the public in an expeditious, efficient, lawful, reasonable and procedurally fair manner.

19. The Petitioners therefore asserted that the Respondents violated the Petitioners rights by failing or refusing to provide the Petitioners with the information sought under Article 35(1) together with all the enabling laws, that is to say, Access to Information Act and Fair Administrative Action Act.

20. It was further submitted that **Article 35 (1) (a)** of the Constitution grants a citizen the right to seek and have information from a state or state organ. That the 1st Respondent as a public body is bound by **Article 35 (1) (a)** to disclose information sought in terms of **Section 4** of Access to Information Act, 2016.

21. The Petitioners further submitted that **Section 9** of the Access to Information Act gives a time line for **twenty-one (21) days** within which to give information sought, but that no information was ever supplied to the Petitioners or their Advocates despite the Respondent acknowledging receipts of the demand in their Replying Affidavit filed in these proceedings.

22. The question issue I must resolve is whether the petitioners are entitled to the orders sought in their Petition in view of the preliminary point of law raised by the Respondents that this court is devoid of jurisdiction by virtue of section 14 of the Access to Information Act which provides for an avenue for resolving such disputes where there is failure or refusal to provide information required as requested by the petitioner.

23. Article 35 of the Constitution provides:

1. Every citizen has the right of access to—

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

3. The State shall publish and publicize any important information affecting the nation.

24. The above Article has been operationalized by the enactment of **Access to Information Act**. Access to information is a critical

governance, transparency and accountability tool. Without access to information, higher values of democracy, rule of law and social justice cannot be achieved. This position was succinctly captured in **Famy Care Ltd v Public Procurement Administrative Review Board and others, High Court Pet. 43 of 2012 [2013] eKLR** where it was held:

"The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble of the Constitution and Article 10 cannot be achieved unless the citizen has access to information."

25. This position was further elaborated in **Nairobi Law Monthly Co. Ltd v Kenya Electricity Generating Company Limited & 2 Others [2013] eKLR** where the court stated:

"...in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.....A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information is under a Constitutional obligation to provide the information sought."

26. In the instant petition, it is an undisputable that the information being sought is information held or supposed to be held by the Petitioners who are state organ and state officer respectively and therefore qualifies as public information for purposes of Article 35 of the Constitution.

27. However, the right to access information is not absolute. Article 35 falls outside the absolute rights that are not limitable therefore the right can be limited subject to Article 24 of the Constitution. In addition, the petitioner must demonstrate that he has suffered injury as a result of non-disclosure of the information sought. The burden of proof that a right has been denied, violated, infringed or threatened to be infringed always lies with the petitioner.

28. However, given the provisions of sections 14 of the Freedom of Information Act and section 9(4) of the Fair Administrative Action Act, does this court have jurisdiction to hear and determine this petition at this point in time or is the petition premature"

29. **PART IV of the Access to Information Act provides for REVIEW OF DECISIONS BY THE COMMISSION. Section 14 of the Act, provides for** Review of decisions by the Commission. The Commission, under section 2 of the Act is the Commission on Administrative Justice. (CAJ).

30. It is important to note that the preamble to Access to Information Act stipulates that it is AN ACT of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes. The Act provides for an elaborate procedure for request for information and in the event that such request is not acceded to, section 14 thereof provides for the remedy in terms of review of the decision of the entity or person that has refused to provide access to the information that is requested.

31. The said section 14 provides:

(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

(a) a decision refusing to grant access to the information applied for;

(b) a decision granting access to information in edited form;

(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;

(d) a decision to defer providing the access to information;

(e) a decision relating to imposition of a fee or the amount of the fee;

(f) a decision relating to the remission of a prescribed application fee;

(g) a decision to grant access to information only to a specified person; or

(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.

(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.

32. Under section 3 of the Act, the object and purpose of Access to Information Act is to—

(a) Give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;

(b) Provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;

(c) Provide a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;

(d) Promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;

(e) Provide for the protection of persons who disclose information of public interest in good faith; and(f)provide a framework to facilitate public education on the right to access information under the Act.

33. Whereas the Respondents contend that there is an alternative dispute resolution mechanism under section 14 of the Access to Information Act such that if the Petitioner believes that his right and request to access Information as per their letter of 12.2.2020 is declined by the Respondent, then the remedy lay in section 14 of the Act, which involves filing of a review application to the Commission on Administrative Justice, a constitutional body established by Section 3 of the Commission on Administrative Justice Act, No.23 of 2011, which is one of the Chapter 15 Independent Commissions established under the Constitution.

34. The functions of the Commission as stipulated in section 8 of the Act shall be to—

(a) *investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;*

(b) Investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(c) Report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;

(d) Inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;

(e) Facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

(f) Work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;

(g) Recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;

(h) Provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;

(i) publish periodic reports on the status of administrative justice in Kenya;

(j) Promote public awareness of policies and administrative procedures on matters relating to administrative justice;

(k) Take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;

(l) Work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and

(m) Perform such other functions as may be prescribed by the Constitution and any other written law.

35. Under the said Act and Regulations made thereunder, there are elaborate procedures for determining any complaints referred to the Commission and the modes of resolution include Mediation and Conciliation.

36. In the instant Petition, the Petitioners requested for information from the Respondents but the Respondents are alleged to have refused to respond to the letter of request and that despite the filing of the Petition herein, the Respondents have declined to submit to the request claiming that most of the documents sought are on the website of the 1st Respondent and that the other documents were submitted to the Ethics and Anti-Corruption Commission (EACC) which is investigating certain activities of the 1st Respondent including the construction of the County Assembly Complex.

37. It is trite that where the Constitution or statute confers jurisdiction upon a court, tribunal, person or body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute. In ***Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] e KLR*** the Court of Appeal stated:

"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

38. The same Court of Appeal in ***Kenya Revenue Authority &2 others v Darasa Investments Ltd [2018] eKLR*** [Visram,Karanja and Koome JJA] stated as follows when it posed the following question:

"What then, ids the consequence, if any, of the respondent's failure to invoke the alternative remedies" As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial Review proceedings where such alternative remedies are not exhausted. Tis position is fortified by the decisions of this court in Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others[2017]e KLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No. 2 of 2008. Perhaps that why the legislature at section 9(4) of the Fair Administrative Action Act stipulates that:

"Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

"Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."

39. In ***Ndiara Enterprises Ltd v Nairobi City County Government [2018] eKLR*** the Court of Appeal in upholding the judgment of the High Court, Aburili J in ***Nairobi J.R Misc. Civil Application No. 91 of 2016) Ndiara enterprises Limited v Nairobi City County Government stated:***

"Though the High Court can exempt a party from following such clear laid down procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.

On the authority of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, which the Judge had in mind and cited, the High Court was bound to lay down its tools the moment it held that it lacked jurisdiction. We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings."

40. The above holding was informed by the provisions of section 9(1) (2),(3) and (4) of the Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution on the right to fair administrative action, and which clearly stipulate ***that an applicant must first exhaust the available internal dispute resolution mechanisms before resorting to court although in exceptional circumstances and on application, the court may exempt such party from resorting to alternative internal dispute resolution mechanisms.***

41. In the instant Petition, the Petitioners have stated that there is no available alternative dispute resolution mechanism where their rights and fundamental freedoms have been violated and that therefore this court has jurisdiction to hear and determine the petition. The petitioners did not make any reference to the import of section 14 of the Access to Information Act, which Act Implements Article 35 of the Constitution on the right to access information.

42. Moreover, even before the enactment of the above provisions of the Fair Administrative Action Act, and the Access to Information Act incorporating sections 9 and 14 thereof respectively, the Court of Appeal had earlier in the case of ***MUTANGA TEA & COFFEE COMPANY LTD v*** **SHIKARA LIMITED AND MUNICIPAL COUNCIL OF MOMBASA** determined the issue of whether a party aggrieved by a decision of the ***Director of Physical Planning*** under the ***Physical Planning Act, Cap 286 (PPA)*** or of the ***National Environment Management Authority (NEMA)*** under the ***Environmental Management and Co-ordination Act, Cap 387 (EMCA), may invoke the original jurisdiction of the High Court instead of the dispute resolution mechanisms prescribed under those Acts.***

43. By a ruling dated ***12th July 2012***, the subject of that appeal, ***Okwengu, J.*** (as she then was), sustained a preliminary objection raised by the 1st respondent, ***Shikara Ltd*** and supported by 2nd respondent, the former ***Municipal Council of Mombasa***, and held that under the two Acts, the jurisdiction of the High Court is appellate rather than original.

44. Accordingly, the learned judge struck out the suit by ***Mutanga Tea & Coffee Company Ltd. (the appellant)***, which had sought to challenge, by invoking the original jurisdiction of the High Court, the change of user and consent for development given to the 1st respondent by the relevant authorities under the PPA and the EMCA. The Court of Appeal held:

"Like under the PPA, any person aggrieved by a decision of the Director General, of NEMA or of any of its Committees has a

right of appeal to the National Environment Tribunal under section 129(2) of EMCA, which may confirm, set aside, or vary the impugned decision and make such order as it may deem fit. A decision of the Tribunal is, under section 130 appealable to the High Court.

The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance. This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:

"[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed." (See also KONES V. REPUBLIC & ANOTHER EX PARTE KIMANI WA NYOIKE & 4 OTHERS (2008) 3 KLR (ER) 296).

It is readily apparent that in those cases, the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.[Emphasis added].

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.[emphasis added].

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In RICH PRODUCTIONS LTD. V. KENYA PIPELINE COMPANY & ANOTHER, PETITION NO. 173 OF 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

"The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."[emphasis added].

45. Similarly, the Court of Appeal in ***REPUBLIC V. THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY, CA NO 84 OF 2010*** upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that ***where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted.***

46. **In VANIA INVESTMENT POOL LTD. V. CAPITAL MARKETS AUTHORITY & 8 OTHERS, CA NO 92 OF 2014** the Court of Appeal also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the **Capital Markets Appeals Tribunal**

47. The Court of Appeal differently constituted in all the above cases made it clear that it was satisfied that the learned judges did not err by striking out the applicants'/appellants suits and applications which sought to invoke the original jurisdiction of the High Court in circumstances where the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellants the right to access the High Court by way of appeal, which mechanisms the appellants had refused to invoke. The Court of Appeal

concluded that ***"to hold otherwise would, in the circumstances, be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d'etre of the mechanisms provided under the two Acts."***

48. Even where the appellant claimed that the High Court had failed to invoke its inherent jurisdiction or abdicated its jurisdiction, or that the failure to follow the prescribed dispute resolution mechanism was a mere technicality curable under **Article 159 (2) (d)** of the Constitution, the Court of Appeal held that where the constitutional principle under which the dispute resolution mechanisms provided by the relevant statutes like the Physical Planning Act and the Environment Management Coordination Act are underpinned, it cannot be claimed that lack of compliance with those mechanisms is a mere technicality.

49. In ***RAILA ODINGA & 5 OTHERS v IEBC & 3 OTHERS, PETITION NO. 5 OF 2013,*** the Supreme Court stated that in interpreting the Constitution, it must be read as one whole and that Article 159(2)(d) cannot be read or applied in a manner that ousts the provisions of other clear Articles of the Constitution.

50. Further in ***LEMANKEN ARAMAT v HARUN MAITAMEI LEMPAKA, Petition No. 5 of 2014,*** the same Supreme Court, while considering the provisions of Article 159(2) (d) of the Constitution, noted that where the issue at hand is one of mere procedural lapse which has no bearing on jurisdiction, the court can cure the same under Article 159(2)(d). ***However, that where the Constitution links certain vital conditions to the power of the court to adjudicate a matter, Article 159(2)(d) has no application. [Emphasis added].***

51. **In the Ndiara Enterprises Ltd v Nairobi City County Government (supra) case,** an appeal from my very own judgment where I declined jurisdiction on the ground that the exparte applicant in the judicial review application had not exhausted the available alternative remedy as stipulated in the Physical Planning Act, the Court of Appeal, agreeing with my decision stated:

"……..Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of The speaker of The National Assembly v Njenga Karume (2008) 1 KLR 425, Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor (2015) eKLR for that proposition.

The appellant also alleged that the respondent's refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section 9(2) of the Act from reviewing "an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted." The Act however gives the High Court power to exempt a person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows:

"In addition under Section 9(2) of the Fair Administrative Action Act No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "shall not" review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under section (1)

(4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice ...

From the above provisions of the law and decided cases, it is clear that even the Fair Administrative Action Act which the exparte applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.

In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary."

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent's refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It's clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue."

Ultimately, we agree with the findings of the learned Judge that the orders sought by the appellant were untenable in the circumstances.

This appeal must therefore fail as it is without merit. It is accordingly dismissed with costs to the respondent."[emphasis added].

52. Most recently in **Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR,** Weldon Korir J observed as follows, persuasively but authoritatively, and I have no reason to differ from the learned Judge's findings and holding:

"It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the Constitution to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.

The preamble of the Access to Information Act, 2016 clearly states that it is an **"Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes."**

"It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the Constitution. The legislators in their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice. Indeed Section 23(2) empowers the Commission on Administrative Justice as follows:-

"The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order-

a. **the release of any information withheld unlawfully;**

b. **a recommendation for the payment of compensation; or**

c. **any other lawful remedy or redress."**

Section 23(3) of the Act provides that:

"A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made."

"I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the Access to Information Act. Section 23(5) of the Act actually provides that an order of the Commission on Administrative Justice can be enforced as a decree. What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice."

53. I have quoted the decisions that I have relied on in extensor for reasons that they resolve several questions on the principle of exhaustion of remedies. In light of the binding case law cited and what I have stated in this judgement, it follows that the matters raised in the petition are not yet ripe for the determination by this Court. In view of that, I will not delve into the merits of the substantive issues raised in the petition. Doing so will prejudice the parties since they may want to revert to the statutory body mandated to deal with the issues raised in the petition.

54. In conclusion, and on the basis of the above plethora of authorities, I have no doubt in my mind that the Petitioners herein had and still have an alternative dispute resolution mechanism which is available under section 14 of the Access to Information Act, which Act Implements Article 35 of the Constitution. The Petitioners should therefore have first and foremost resorted to that alternative dispute resolution mechanism which is recognized by Article 159(2)(c) of the Constitution which obliges the courts in exercising judicial authority, to be guided by the principles among others- that alternative forms of dispute resolution including reconciliation, mediation, arbitration and reconciliation and traditional dispute resolution mechanisms shall be promoted.

55. It is therefore not correct for the Petitioners to depose and assert that there are no alternative dispute resolution mechanisms where there is an allegation of violation of fundamental rights and freedoms guaranteed by the Constitution.

56. For the above reasons, I find that this court is devoid of original jurisdiction to hear and determine this petition as there is an alternative dispute resolution mechanism available in law which the petitioner had not exhausted.

57. The petition is hereby struck out with no orders as to costs.

Orders accordingly

Dated, signed and delivered at Siaya this 17th Day of June, 2020 via Zoom in the presence of Mr. Osiemo Advocate for the Petitioners and Mr. Ogola Advocate for the Respondents.

R.E.ABURILI

JUDGE

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 43 of 2012

FAMY CARE LIMITED ..... PETITIONER

AND

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD..... 1ST RESPONDENT

KENYA MEDICAL SUPPLIES AGENCY..... 2ND RESPONDENT

AND

PHARMACY & POISONS BOARD ..... 1ST INTERESTED PARTY

ANGELICA MEDICAL SUPPLIES LTD ..... 2ND INTERESTED PARTY

PFIZER LABORATORIES LIMITED..... 3RD INTERESTED PARTY

PFIZER INC ..... 4TH INTERESTED PARTY

RULING

Introduction

1.The 2nd interested party is the applicant in the chamber summons application dated 29th November 2012 which is a reference under **Rule 11** of the ***Advocates (Remuneration) Order, 2009*** from the decision of the learned Deputy Registrar acting as the taxing master. The applicant is dissatisfied with the decision of the Deputy Registrar concerning the taxation of its party and party bill of costs dated 10th May 2012. The applicant challenges the decision of the Deputy Registrar reducing the instruction fee from Kshs 7,229,168/00 claimed to Kshs 200,000/00.

The arguments

2.The petitioner's case concerned an international tender floated by KEMSA for the supply of the drug known as *Depo Provera*. The petitioner duly submitted its proposal and after evaluating the tenders, KEMSA did not award the petitioner the contract for the supply of the drug. Aggrieved by this decision

the petitioner moved the Public Procurement Appeals Review Board ("PPARB") for review but its application was not successful. Thereafter the petition was lodged to challenge the PPARB decision. The petitioner prayed for the following orders;

(i) This matter be certified as urgent and service of the petition be dispensed with in the first instance;

(ii) The applicant be granted leave to commence judicial review proceedings herein and that cognizant of the provisions of Article 159(2)(d) the petition be deemed to be the pleadings in connection with the orders for judicial review sought herein and in particular-

(a) An order of prohibition directed at the Kenya Medical Supplies Agencies prohibiting it from implementing a decision made on 27th January 2012 by the Public Procurement Administrative Review Board.

(b) An Order of Certiorari to remove into the High Court and quash the aforesaid decision of the Public Procurement Administrative Review Board delivered on 27th January 2012 awarding the tender for supply of injectables to Angelica Medical Supplies Limited.

(c) An Order of Certiorari to remove into the High Court and quash the decision of the Kenya Medical Supplies Agency delivered on a date unknown to the petitioner but communicated to the petitioner by a letter dated 23rd December 2011 but delivered on 28th December 2011 to award the tender for supply to injectables in Tender No. KEMSA01T60/2011-2013 to Angelica medical Supplies Limited.

(d) An Order of Mandamus directed at Pharmacy and Poisons Board to compel it to discontinue the marketing, importation and/or distribution of the drug registered under certificate 0782 by the said Angelic Medical Supplies Limited for supply to the Kenyan market for so long as the said drug does not meet the requirements of the WHO with regard to storage conditions unstable for tropical areas;

And upon hearing of this petition, the said orders to issue;

(iii) An injunction do issue directed at the respondents, their agents, servants, employees or any person acting under their directions and or with their cooperation from executing implanting or getting into any contract within the Republic of Kenya involving the supply or provision of the drug offered by the 2nd interested party whether under said in Tender No. KEMSA01T60/2011-2013 or at all.

(iv) A declaration that the said drug supplied by the 2nd interested party branded "Depo Provera" or under any other name supplied pursuant to the 1st interested party's Registration No. 0782 or any subsequent registration issued under storage conditions of 25 degrees centigrade is unsuitable for the tropical conditions in Kenya as contained in the WHO classification for Zone IV/A and by reason of such non-conformity with the said classification condition is likely to breach the provisions of Article 43(a) as read with Articles 46(1) and 46(3) of the Constitution of Kenya.

(v) A permanent injunction prohibiting the importation, sale, marketing, distribution and/or otherwise offering to the public of "Depo Provera" or under any other name supplied pursuant to the 1st interested party's registration No. 0782 or any subsequent registration issued under storage conditions of 25 degrees centigrade in the Republic of Kenya.

(vi) A declaration that the award of Tender No. KEMSA01T60/2011-2013 by the respondents is a breach of the applicant's constitutional rights and that the said tender be awarded to the Applicant.

(vii)Costs of this petition and of the proceedings before the 1st respondent being public procurement Administrative Review Board Application No. 57 of 2011.

3.After hearing the matter, I dismissed the petition by a judgment dated 19th April 2012 as I found that the petitioner had not made out a case warranting relief under **Article 23** of the Constitution. I awarded costs of the petition to the 2nd, 3rd and 4th interested parties.

4.The applicant now seeks to review the award of the learned Deputy Registrar on the ground that she erred in principle as she proceeded to tax the bill of costs under the wrong schedule. According to the applicant, she ought to have proceeded under **Schedule VI 1(*b*)** of the ***Advocates (Remuneration) Order*** which provides that taxation shall be based on the value of the subject matter and which provides as follows; *"to sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defence or other denial of liability is filed; where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties."* Instead she applied **Schedule VI 1(*j*)** which provides a basis for determination of fees for applications for prerogative orders. It stipulates thus; *"Prerogative orders-To present or oppose an application for a Prerogative order; such sum as may be reasonable but not less than 28,000."*

5.The applicant contends that the petitioner was not only seeking prerogative orders but it also wanted the tender awarded to it and in the circumstances the matter was simply a commercial matter whose value was clear from the pleadings. Counsel for the applicant contended that the judgment of the court discounted the fact that the matter was one seeking orders of judicial review. The applicant relies on the part of the judgment where I stated as follows, ***"[120] .. but this is not a case where the petitioner has sought orders of judicial review, it has sought leave to commence judicial review proceedings .... an application for leave to commence judicial review proceedings is ordinarily made under Order 53 of the Civil Procedure Rules pursuant to the Civil Procedure Act ..... [124] It follows that the court cannot grant leave to commence judicial review proceedings."*** The applicant therefore submits that the matter could not be taxed under **Schedule VI(1)(j)** and that the decision of the learned Deputy Registrar ought to be set aside and the direction be given that the bill be taxed in accordance with the **Schedule VI(1)(b)**.

6.The petitioner, on its part, denied that there was any error in the decision which would entitle the court to set it aside. The petitioner contended that it was seeking prerogative orders against the respondents. Counsel submitted that the petitioner was challenging the procurement process and seeking to enforce their fundamental rights and freedoms and that the learned Deputy Registrar was correct to apply **Schedule VI(1)(j)** of the ***Advocates (Remuneration) Order***.

Determination

7.Whether the instruction fee ought to have been assessed under **Schedule VI(1)(b)** or **VI(j)** of the ***Advocates (Remuneration) Order*** is a matter I had the opportunity to consider in the case of ***Brampton Investment Limited v Attorney General & 2 others,*** **Nairobi Petition No. 228 of 2011 (Unreported).** In that casel observed that,*"this issue ought to be approached on the basis of substance rather than form. In my view, prerogative orders can now be sought in the form of a petition as provided in **Article 23** of the Constitution. A respondent should not be disadvantaged by costs merely because the petitioner chose to commence proceedings in a different form, in this case a constitutional petition when the orders sought could also have been granted through proceedings of judicial review under **Order 53** of the **Civil Procedure Rules**."*

8.In the case of ***Orion East Africa Limited v Permanent Secretary, Ministry of Agriculture and***

Another **Nairobi Petition No. 100 of 2012 (Unreported)** wherel once again considered the issue, I continued, *"My reasoning is fortified by the fact that the petitioner in this matter invoked the provisions of* ***Article 47(1)*** *of the Constitution which deals with the right to fair administrative action. It states that, "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." The effect of* ***Article 47(1)*** *is that judicial review of administrative action contemplated under* ***Order 53*** *of the* ***Civil Procedure Rules*** *is now placed on a constitutional footing and whether one invokes the* ***Order 53*** *procedure or the* ***Article 22*** *procedure, the same result is achieved. Indeed prerogative orders are expressly recognised as one of the reliefs the court is entitled to grant in an application to enforce fundamental rights and freedoms."*

9.Does this case fall within the principle I have elucidated in the two cases I have cited" I think so. The gravamen of the petitioner's case was one where the decision of the PPARB was challenged hence the petitioner applied for leave to commence judicial review proceedings in order to set aside the decision. Although I found that the petitioner could not apply for leave, the issue of whether the petitioner had made out a case for breach of **Article 47(1)** was considered at paragraphs 140 – 148 of the judgment and I held that it had not made out a case to warrant grant of the orders sought. At paragraph 158 of the judgment I stated that, *"For all intents and purposes, the proceedings were geared towards reversing the decision of the procuring entity and securing the tender. Furthermore, the application for leave was intended to secure the right to apply for judicial review under section 100 of the PPDA."*

10.My view is that the proceedings in the matter were, as I stated geared towards reversing the decision of the procuring entity and therefore in the nature of prerogative orders. Granting the prayers sought in the petition would be in effect granting prerogative orders. All the other reliefs were consequential upon a finding that the tender was flawed and had to be set aside. I have no reason to conclude that the learned Deputy Registrar erred in principle in proceeding on the course she adopted.

11.I now turn to the second issue that is whether the taxing master erred in principle in awarding the sum of Kshs. 200,000/00 as the instruction fee. In the case of ***Premchand Raichand Ltd v Quarry Services of East Africa Ltd (No. 3)*** **[1972]EA 162** the Court outlined theprinciples of taxation as follows;

(a) That costs should not be allowed to rise to a level as to confine access to justice as to the wealthy,

(b) that a successful litigant ought to be fairly reimbursed for the cost he has had to incur,

(c) that the general level of remuneration of Advocates must be such as to attract recruits to the profession and

*(d)*so far as practicable there should be consistency in the award made and

*(e)*The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party.

12.In the case of ***Joreth Limited v Kigano and Associates*** **[2002] E.A. 92** the court set out various factors that are to be considered in determining the instruction fee. These factors include the importance of the matter, general conduct of the case, the nature of the case, time taken for its dispatch and the impact of the case on the parties.

13.I have considered the decision and reasons for taxation dated 15th November 2012 issued by the

learned Deputy Registrar and although I find that she properly addressed herself to the principles governing taxation that I have alluded to above she did not apply those principles to the facts of the case. After citing the various decisions and the principles, the learned Deputy Registrar at the relevant part of the decision stated as follows;

I find that the 2nd interested party has not stated the complexity of the matter, the novelty of the same or responsibility or research undertaken in the matter.

It is the duty of this court to award a reasonable sum taking into account the principles stipulated in the cases referred to herein.

In my opinion, Kshs. 200,000/= will go a long way towards meeting the applicant's reasonable instruction fees considering there was no complexity in the brief.

14.In the case of ***Ochieng, Onyango, Kibet & Ohaga Advocates v Adopt a Light Limited*, Milimani HC Misc. Cause No. 729 of 2006 (Unreported),** Warsame J., stated as follows: "*The law gives the taxing master some leeway but like all discretions it must be exercised judicially and in reliance to the material presented before court. The taxing master must consider the case and labour required in the matter, the nature or importance of the matter. More so the amount or value of the subject matter involved, the interest of the client in sustaining or losing the benefit and the complexity of the dispute. In assessing an amount commensurate to the work undertaken, it is of fundamental importance to consider the value of the subject. And when the subject matter is unknown, the court is empowered to make what is available as a point of reference. In my view the point of reference is the figures proposed to and accepted by Mombasa Municipal Council. The law is that matters of quantum are regarded as matters with which the taxing master is particularly fitted to deal and the court sitting on appeal will intervene only in exceptional circumstances.*" (*See* also ***First American Bank of Kenya Ltd v Gulab P Shah & Others* [2002]1 E.A. 61** per Ringera J.).

15.I find and hold that the learned Deputy Registrar failed to explain how she took into account the various factors that led her to conclude that the sum of Kshs. 200,000/00 was reasonable in the circumstances.

16.For the reasons I have set out above, I set aside the amount awarded by the Deputy Registrar on account of the instruction fee. I direct that the instruction fee in the applicant's bill of costs be taxed before another Deputy Registrar.

17.As the applicant has partly succeeded, it shall have half the costs of the reference.

DATED and **DELIVERED** at **NAIROBI** this 30th day April 2013.

D.S. MAJANJA

JUDGE

Mr Ayisi instructed by Muthaura, Mugambi, Ayugi & Njonjo Advocates for the petitioner.

Mr Senteu instructed by Migos Ogamba and Company Advocates for the 2nd interested party