IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & NYAMU, JJ.A)

CIVIL APPLICATION NO. NAI 327 OF 2009 (UR 225/2009)

BETWEEN

SAFARICOM LIMITED …….. APPLICANT

AND

OCEAN VIEW BEACH HOTEL LIMITED ……..…. 1ST RESPONDENT

SALIM SULTAN MOLOO ……..……. 2ND RESPONDENT

ALSAI (K) LIMITED …….....…… 3RD RESPONDENT

(Being an application for injunction pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Commercial & Tax Division) (Koome, J) delivered on the 6th day of November, 2009

In

H.C.C.C. No. 394 of 2009)

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RULING OF OMOLO, J.A

From the very outset, I must stress the fact that what we have before us is a notice on motion which this Court normally deals with under ***Rule 5 (2) (b)*** of the Court of Appeal Rules. The motion itself says specifically that it is brought under ***Rules 1 (2***), ***5 (2) (b)*** and ***42*** of the Court of Appeal Rules. Rule ***1 (2)*** merely states that the practice and procedure of the Court in connection with appeals and intended appeals from the superior court and the practice and procedure of the superior court in connection with appeals to the Court shall be set out in these Rules. That Rule has no real relevance to the issue or issues which were agitated before us. ***Rule 42*** merely sets out in detail the manner in which applications are to be made to the Court. The motion before us was made in accordance with the provisions of ***Rule 42***. It is really under ***Rule 5 (2) (b)*** that the Court has to determine the issue or issues raised before it. That Rule provides:-

"5(2): Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to

suspend any sentence or to stay execution but the Court may

(a) ----------.

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or a stay of a further proceedings on such terms as the Court may think just."

Sub-section (1) to which the provisions of ***sub-section (2)*** are subject, merely provides that no sentence of death or corporal punishment shall be carried out until the time for giving notice of appeal has expired or, where notice of appeal has been given, until the appeal has been determined.

It is clear from all the provisions of ***Rule 5*** that their basic aim is to provide an interim relief where the superior court has determined a matter and the party against whom the determination is made has either appealed or intends to appeal. If there is no appeal or no intention to appeal, this Court would have no jurisdiction to meddle in a decision made by the superior court. That logically follows from the provisions of ***section 64 (1)*** of the Constitution which creates the Court of Appeal and from ***section 3*** of the Appellate Jurisdiction Act, **Chapter 9** of the Laws of Kenya. ***Section 64 (1)*** of the Constitution provides:

"64 (1). There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers IN RELATION TO APPEALS from the High Court as may be conferred on it by law."

Whatever jurisdiction and powers the Court of Appeal may have, that jurisdiction and those powers can only be exercised in relation to appeals from the High Court. Compare that to the provisions of ***section 60 (1)*** of the Constitution which creates and then confers jurisdiction and powers on the High Court. That section as it stands now provides:-

"There shall be a High Court, which shall be a superior court of record, and which shall, subject to section 60A, have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

This Court extensively dealt with the difference in jurisdiction and powers of the High Court and the Court of Appeal in the Court's decision in **JASBIR SINGH RAI & THREE OTHERS VS. TARLOCHAN SINGH RAI & 4 OTHERS**, Civil Application No. NAI. 307 of 2003 (unreported) and there is no occasion for me to repeat what was said in that case in the motion before us. The Court concluded in that case that the jurisdiction and powers of the Court of Appeal can only be exercised where there is an appeal to it from the High Court. The jurisdiction and powers of the High Court are original and unlimited, though since the passing of Act **No. 10 of 2008**, which introduced ***section 60A***, the jurisdiction and powers of the High Court would also appear to be limited in matters to be handled by the Interim Independent Constitutional Dispute Resolution Court which has exclusive original jurisdiction to hear and determine all and only matters from the constitutional review process and which is not a division of the High Court. Whatever may be the current position, there is no gainsaying that the jurisdiction and powers of the High Court are far wider and more extensive than those of the Court of Appeal.

Next are the provisions of ***section 3*** of the Appellate Jurisdiction Act. That section is in these terms:-

"3(1). The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.

(2)For all purposes of and incidental to the hearing of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3)In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act the law to be

applied shall be the law applicable to the case in the High Court."

Once again in the **RAI Case**, the Court fully went into all these provisions and concluded that the jurisdiction and powers of the Court of Appeal can only be exercised when hearing an appeal. The High Court, on the other hand, has original jurisdiction to hear the meanest of claims in civil matters and to try even the simplest charges in criminal matters. The Court of Appeal would have no jurisdiction and power to conduct a first instance trial. The Court of Appeal can only hear appeals and only appeals from the High Court.

I opened this ruling by stating that what we have before us is not an appeal; it is a notice on motion seeking the preservation of the status quo pending the lodgment, hearing and determination of an appeal. Under ***Rule 5 (2) (b)*** the Court is entitled to give a preservative order where a notice of appeal has been lodged. It has been said time without number that in an application under ***Rule 5 (2) (b)*** what gives the Court the jurisdiction to hear and determine the motion is the filing of the notice of appeal. But is not automatic that once a notice of appeal is filed the Court must give a preservative order. The Court has, over the years, developed certain well known guidelines on which it will grant or refuse to grant the preservative order sought. The appeal or the intended appeal must be one which is arguable, i.e. one which is not frivolous. If an appeal or the intended appeal is a frivolous one, the Court will refuse to grant an order preserving the status quo. Again the party seeking the preservative order must show to the Court that if an order is not granted and his appeal or the intended appeal were to succeed in the end, that success would have been rendered nugatory by the earlier refusal to grant the preservative order.

These propositions are now old hat and I need not cite any authority for them. The late Nyarangi, J.A. sitting with Gicheru and Kwach, JJ.A, as they then were, put it thus in **RUBEN & 9 OTHERS VS. NDERITO & ANOTHER**, **[1989] KLR 459**:-

"1. In dealing with applications under rule 5 (2) (b) of the Court of Appeal Rules the Court of Appeal exercises original jurisdiction.

2. Once the applicant is properly before the Court, the Court has jurisdiction to grant an injunction or make an order for stay on such terms as the Court may think just.

3. This exercise does not constitute an appeal from the trial judge's discretion to the Court of Appeal."

The exercise of original jurisdiction mentioned in paragraph 1 above must refer to the fact that even where the superior court has refused to grant an injunction or an order of stay, the Court of Appeal can still grant them as preservative orders when waiting to hear and determine the appeal . An applicant is properly before the Court when he or she has lodged a notice of appeal under ***Rule 74***. The learned Judges of Appeal put it thus in **REUBEN'S Case**:-

"The plaintiffs have lodged a notice of appeal in accordance with rule 74 of the Rules of this Court and have bespoken proceedings to prepare the necessary record of appeal for filing. And so it is they who have come here in an attempt to stop the defendants from going ahead with the construction of the college pending the hearing and determination of their intended appeal."

At the stage of determining an application under ***Rule 5 (2) (b)*** there may or there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under ***Rule 5 (2) (b)*** because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court. Accordingly, the hearing of the motion under ***Rule 5 (2) (b)*** cannot constitute the hearing of the appeal itself which may not even have been filed. Due to that position, no conclusive findings can be made when hearing a motion under the Rule and even if the Court were to find and hold that an applicant has not shown an arguable appeal, such a finding cannot stop an appellant or an

intending appellant from pressing on with the appeal. It has been repeatedly said that an arguable appeal does not connote an appeal that will or must succeed.

With that background, I can now briefly deal with the issues involved in the dispute. Safaricom Ltd., the applicant before us, entered into some leasing agreement with Ocean View Beach Hotel Ltd., the 1st respondent. The lease, which was apparently not registered, was over land known as L.R. No. 4709 Section 1 Mainland North, Mombasa. The lease, according to the amended plaint dated 28th July, 2009 was for a period of 9 years and 11 months. The purpose of the leasing was apparently to enable the applicant to erect on the leased land towers antennae, a dish antennae and other equipment or apparatus to enable the applicant conduct what I might call its telecommunications business. The applicant has in fact erected those items on the land. It appears the applicant is saying in its plaint that it thought the 1st respondent was the owner of the land. According to the applicant, the 1st respondent in the end refused to sign the lease because one Salim Sultan Moloo, the 2nd respondent, was a chargee over the same land and refused to give his consent to the lease. The 1st respondent has, consequently given a notice to the applicant to vacate the land. The applicant has also received a notice from Alsai (K) Ltd., the 3rd respondent, indicating that the 3rd respondent has a registered lease over the same land and demanding that the applicant removes its communications tower and other apparatus, from the suit premises.

The agreement between the applicant and the 1st respondent contained an arbitration clause and it appears the applicant has invoked that clause. Pending the arbitration the applicant went before the superior court and sought various orders as follows:-

" (i) An injunction restraining the 1st respondent from breaching the lease agreement dated 27th June, 2005;

(ii) An injunction restraining the respondents, whether by themselves, their servants, agents, advocates or otherwise howsoever from removing the applicant's towers antennae, dish antennae or any other equipment or apparatus that has been set up by the applicant on the suit premises or interfering with the applicant's quiet possession and enjoyment of the premises."

These prayers were repeated in the applicant's notice of motion lodged in the superior court under ***section 3A*** of the Civil Procedure Act and under ***Order 50 Rule 3*** of the Civil Procedure Rules and also under the inherent powers of the superior court. Koome, J heard the motion and by her order dated and signed on 6th November, 2009, the learned Judge rejected the motion with costs. The applicant is dissatisfied with the learned Judge's order and it has filed a notice of appeal and has written to the Registrar of the High Court asking for proceedings. On its face, therefore, the motion appears to be proper. None of the respondents, by the time we heard the motion, had applied to the Court to strike out the notice of appeal on the basis that no appeal lies to this Court.

I must not, however, lose sight of the fact that the dispute between the applicant and the 1st respondent, at the very least, is to be determined though the process of arbitration under and in accordance with the Arbitration Act, No. 5 of 1995. As the question is one under the Arbitration Act, the Court will have to deal with the issue of whether it has jurisdiction to deal with the proposed or intended appeal. Unfortunately we did not directly ask counsel to argue the issue before us. One way or the other the Court will have to directly deal with that issue, either through an application to strike out the notice of appeal or the appeal itself or as an issue in the appeal itself. For my part I am satisfied that the issue of whether we do or do not have jurisdiction to hear the appeal itself is an arguable point in the intended appeal, bearing in mind what I have already pointed out, namely that we did not insist during the hearing of the motion that we be addressed on the issue of jurisdiction.

I had the advantage of reading in draft form, the very detailed ruling of Nyamu, J.A. I note from the ruling that the learned Judge is prepared to and has in fact struck out the ruling of Koome, J on the basis that she exceeded her jurisdiction under ***section 7*** of the Arbitration Act and in fact proceeded to resolve matters which only the arbitrator could resolve and that the excess of jurisdiction rendered

the ruling of Koome, J a nullity which the Court can only strike out and thus leave parties to proceed to arbitration. Of course Koome, J had initial jurisdiction to give or decline giving preservatory orders under ***section 7*** of the Arbitration Act pending the process of arbitration. I am not quite convinced at this stage that the learned trial Judge's decision is a nullity; that may well be one of the arguable points in the proposed appeal. I am not equally quite convinced at this stage that under the new ***section 3A*** of the Appellate Jurisdiction Act, this Court can order a decision of the superior court struck out when dealing with a motion under ***Rule 5 (2) (b)*** and that it is, therefore, no longer necessary to wait for the appeal itself to be filed, heard and dismissed. As I have pointed out and as was said in **REUBEN'S Case** which I have set out herein, a motion under ***Rule 5 (2) (b)*** does not involve the hearing and determination of the appeal itself. In the matter before us, no appeal had been filed by the time we heard the motion. If one had been filed, perhaps we would have invited the parties to argue the appeal itself rather than the motion under ***Rule 5 (2)*** (***b).***

For my part, I would hold that the applicant has satisfied me that it has an arguable and not a frivolous appeal and I would repeat the caution that an arguable appeal does not mean an appeal that will or must succeed.

Will that appeal be rendered nugatory if we do not grant to the applicant the injunction it seeks? The respondents have asked the applicant to vacate the premises and not only vacate but also remove or demolish the equipment erected by the applicant on the premises. On the available material, if the applicant does not comply with the respondents' demands, the applicant may well be evicted and its equipment removed. That, in my view, would render the applicant's intended appeal nugatory. The same position would apply if eviction of the applicant and the demolition of its equipment were to go on when the arbitral process is underway.

Accordingly I would allow the notice on motion dated and lodged in Court on 16th November, 2009 and grant prayer No. 2 in the said motion. The grant of the injunction is limited to restraining the respondents from evicting the applicant from the premises and from demolishing its equipment on the premises. The injunction, however, does not extend to barring the parties from proceeding with the process of arbitration, should they wish to do so. The parties must remember that their dispute will in the end be resolved through the arbitral procedure chosen by the applicant and the 1st respondent and that being the position, I would respectfully agree with my brothers, Waki and Nyamu, JJ.A that the injunction be limited to a period of 28 days as proposed by them. The 2nd and 3rd respondents got entangled in the dispute between the applicant and the first respondent and the 2nd and 3rd respondents must either wait for the dispute to be resolved or get involved in the resolution of the dispute. Accordingly the final orders of the Court shall be that an injunction is granted to the applicant to last for 28 days from the date of the order to enable the process of arbitration to commence. The costs of the motion shall be in the intended arbitration.

Dated and delivered at Nairobi this 16th day of April, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & NYAMU, JJ.A)

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(An application for injunction pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Koome, J.) dated 6th November, 2009

in

H.C.C.C. NO. 394 OF 2009)

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RULING OF WAKI, J.A

I have had the advantage of reading in draft the ruling of my two brothers; the Presiding Judge, Omolo JA, and Nyamu JA, and I am grateful for that opportunity. I agree with both of them that an interim measure of protection should issue in terms of prayer 2 of the motion before us, limited to restraining the respondents from evicting the applicant from the premises and/or demolishing the telecommunication equipment. In view of the nature of the dispute and the need to egg on the parties towards the arbitral process which will resolve their dispute with finality, I agree with Nyamu JA that the period of the interim measure of protection shall last for 28 days from the date of the orders of this Court.

There are obviously divergent views expressed by my brothers before arriving at their respective final orders. I particularly salute my brother Nyamu JA for the considerable learning expressed on arbitral provisions and their application; the gallant articulation of the inherent powers of this Court; and the additional building blocks on the merging jurisprudence in relation to the new ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act (the Act) which is aptly baptized as the *"oxygen (0_2)"* or *"double O principle"*. This Court has, of course, embraced the new sections positively and will continue to apply them for the attainment of the goals envisaged by Parliament. The Court has, however, sounded a timely caution in all its decisions so far that the new provisions are not a panacea for all ills in civil litigation. Other cautions have been couched in different forms, for example, in **City Chemist (NBI) & Another vs. Oriental Commercial Bank Ltd**, **Civil Appl. No. NAI. 302/2008 (UR)** where, after appreciating the gravity of the requirements of the new provisions and the court's duty to give them operational effect, the court stated:

"That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in

determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."

The objective is to guard against *"railway ticket judgments"*- good for that day and train only.

The powers of this Court and the manner in which it may exercise its inherent jurisdiction was articulated in the ***RAI Case*** and I subscribe to that decision as I was part of it. It has, of course, since its pronouncement been enriched by ***sections 3A*** and ***3B*** of the Act and in appropriate cases this Court will seize the opportunity to make orders and issue declarations to meet the ends of justice.

With respect however, I do not agree that the case before us is appropriate for a final pronouncement on the issue of jurisdiction and therefore the summary nullification of the proceedings and decision of the superior court. As Omolo JA correctly observes, the matter before us was an application under ***rule 5 (2) (b)*** of the rules of this Court and there are established principles upon which applications are decided under that rule. More importantly, I do not have the benefit of full arguments by counsel on such an important legal issue and I am afraid I cannot say with my brother Nyamu JA, that it is clear as day light that the uncontested fact is that no appeal lies to this Court or that the superior court engaged in illegalities and ended up with a nullity. In that regard I would throw my lot with my brother Omolo JA in stating that the issues raised by the applicant are, at least, arguable and therefore entitle the applicant to an order of stay.

I also agree that the costs shall be in the intended arbitration.

Dated and delivered at Nairobi this 16th day of April, 2010.

P.N. WAKI

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, WAKI & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 327 OF 2009 (UR 225/2009)

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H.C.C.C.NO.394 OF 2009)

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RULING OF NYAMU, J.A.

The application dated 13th November, 2009 and expressed to be under Rules 1(3), 5(2)(b) and 42 of this Court's Rules, the applicant ***Messrs Safaricom Ltd*** seeks the following substantive order:-

"Pending the hearing and determination of the intended appeal, an injunction do issue restraining (sic) in the respondents, whether by themselves, their servants, agents, advocates, or otherwise, howsoever from demolishing the plaintiff's telecommunication structure, towers, antennae, generator room or any other equipment or apparatus that has been set up by the applicant in that portion of the suit property occupied by it or otherwise interfering with the applicant's quiet and peaceful enjoyment and or access to the said portion of the property known as L.R. 4709 section 1 Mainland North situate in Mombasa."

The application is based on the following grounds:-

i. **A *valid Notice of Appeal has already been filed and served on the respondents.***

ii. ***The applicant has an arguable appeal with good chances of success and if the injunction is not granted it stands to suffer substantial loss and irreparable damage which will render the appeal nugatory."***

The facts giving rise to the matter before us was that the applicant moved the superior court under ***section 7*** of the Arbitration Act 1995 and ***rule 2*** of the Arbitration rules 1997 seeking an interim measure of protection of its telecommunications structure erected on a portion of the property known as L.R. No.4707 ***section 1*** Mainland North situated in Mombasa which includes a base transcaner station, telecommunications apparatus and a generator room, pending arbitration. The applicant claims that the respondents had threatened to demolish the equipment. The land on which the telecommunications apparatus is located forms part of a portion of a beach hotel which is managed by the third respondent.

The disputes or differences between the parties sprang up from an agreement to lease dated 27th June, 2005 entered into between the applicant and the 1st respondent over a portion of land known as L.R. No. 4709 section Mainland North Mombasa. Under the agreement the 1st respondent was to grant the applicant a lease for an initial period of 9 years and 11 months subject to renewal for a further term. It was a term of the agreement that the lease would be prepared by the applicant's advocates and that the applicant would take possession of the suit premises which it did by putting up the structure described earlier in this ruling. According to the averments in the plaint filed in the superior court, the applicant contends that their advocate prepared the lease and sent it to 1st respondent for execution in September 2007 and following failure on the part of the 1st respondent to execute the lease, the applicant sent a further set of the same lease to the 1st respondent on 1st August 2008, which was similarly not executed and to the applicant's surprise, on 13th February 2009, the 1st respondent served the applicant with a notice giving it 3 months within which to vacate the suit premises. In the plaint, the applicant further avers that the reason why the notice to vacate the premises was given was that the 1st respondent had executed a charge in favour of the 2nd respondent over the suit property (which includes the portion agreed to be leased) and the 2nd respondent, as a registered chargee of the suit premises, was entitled to exercise its statutory power of sale of the property since the 1st respondent was in breach of the charge by inter-alia purporting to lease a portion of the land to the applicant without the consent of the chargee contrary to the provisions of the charge. The exercise of the power of sale would include the leased portion where the telecommunication equipment had been erected. The applicant claims that the 1st

respondent had warranted under the agreement to lease that it had a legal title to the suit premises and that under the agreement it was supposed to obtain the necessary consents pursuant to the provisions of the agreement. Finally the applicant claims to have paid rent to the 1st respondent pursuant to the agreement.

The agreement to lease provides for arbitration of any dispute arising between the parties hence the applicant's invocation of ***section 7*** of the Arbitration Act for interim relief pending arbitration.

The 1st and 2nd respondents as registered leasee and chargee respectively argued that since the agreement for lease was not registered, the registered charge overrides any unregistered agreement to lease and in addition the 2nd and 3rd respondents respectively were not parties to the agreement for lease and could not be compelled to go for arbitration being strangers to the arbitration agreement.

Mr Masika advocate, appeared for the applicant. The 1st respondent was represented by ***Mr Kariba Mbabu*** while the 2nd and 3rd respondents were represented by ***Mr Kamundi*** advocate. In brief the applicant contended that it had an arguable appeal and if an injunction as sought was not granted the appeal if successful would be rendered nugatory. The main submission on behalf of the 1st respondent is that the agreement for lease had been properly terminated but it had not itself issued any threats to demolish the applicants' telecommunication equipment. For the 2nd and 3rd respondents, it was submitted that the rights of the 2nd respondent chargee and the third respondent's right as beach hotel managers respectively, took priority over the unregistered agreement to lease and that in any event they were not parties to the agreement to lease which contained the arbitration clause and would not therefore be parties to the contemplated arbitration and that as regards the third respondent, the telecommunication equipment constituted an environmental hazard to the hotel users. In addition it was submitted on their behalf that the Court should take a broad view of the matter in line with ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act and in the interest of justice refuse to grant the injunction sought on the ground that as per affidavit evidence in opposition to the application, the equipment was an environmental hazard and the grant of an injunction would perpetuate such a hazard.

I have considered rival submissions including the authorities cited by counsel, but as so aptly put by ***Nyarangi, J.A.*** in the celebrated case of ***Lilian S vs Caltex Oil (Kenya) Limited KLR 1989 1.*** "***Jurisdiction is everything***". I therefore find it expedient to first avoid making any pronouncements on merit concerning any issue raised and second examine the issue of jurisdiction in extenso in the special circumstances of this matter as outlined. In the special circumstances of this matter, perhaps it is appropriate for me to add one little block to the first block as laid down by Nyarangi, J.A. and state that if jurisdiction is everything then this Court has the sole power to rule on its own jurisdiction and to define the limits of its jurisdiction always bearing in mind that its jurisdiction is derived from the Constitution and the relevant Acts of Parliament.

The jurisdiction of this Court is set out in ***section 3*** of the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya as follows:-

"3(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law (emphasis is ours)

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

(3) In the hearing an appeal in the exercise of the jurisdiction conferred by the Act the law to be applied shall be the law applicable to the case in the High Court."

In view of the genesis of the matter before us outlined earlier it is the refusal by the High Court to grant an interim measure of protection by way of an injunction which triggered off the intended appeal to this Court and the application before us, which as stated earlier, is grounded on ***Rule 5(2)(b)*** of this Court's

Rules.

Section 7 of the Arbitration Act No. 4 of 1995 on interim measures by court states:-

"7(1) It is not incompatible with an arbitration agreement for a party, to request from the High Court, before or during arbitral proceedings, an interim measure of protection for the high court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to this application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application."

Concerning the extent of any court's jurisdiction to intervene with matters governed by the Arbitration Act ***section 10*** of the Arbitration Act provides:-

"Except as provided in this Act no court shall intervene in matters governed by this Act."

From the above provisions one of the permitted interventions under the
Arbitration Act by the High Court is an intervention by the court to give an interim measure of protection under ***section 7***. The power of intervention is clearly vested in the High Court. What then does the Arbitration Act state concerning appeals from the High Court to the Court of Appeal in arbitration matters? On this point, ***section 39*** of the Arbitration Act on appeals provides:-

"**Where in the case of a domestic arbitration, the parties have agreed that –**

a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or

b) an appeal by any party may be made to a court on any question of law arising out of the award; such an application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under *subsection (1)* ***the High Court may, as appropriate –***

a)determine the question of law arising;

b)confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed to that arbitral tribunal for consideration.

(3) Notwithstanding *sections 10* ***and*** *35,* ***an appeal shall lie to the Court of Appeal against a decision of the High Court under*** *subsection (2)* ***–***

a)if the parties have so agreed that an appeal shall lie; and

b)the High Court grants leave to appeal, or failing leave by the High Court, the Court of Appeal grants special leave to appeal; and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under *subsection (2).*

(4) An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.

(5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.

It is clear that the prerequisites of an appeal to this Court are:-

a) there must be a prior agreement between the parties to an appeal being filed and since an appeal is restricted to question of law arising. The implication here is that the agreement to appeal must be contained in the arbitration agreement itself ; and

b) the High Court must grant leave for such an appeal to be filed, or the Court of Appeal itself should have given such leave within the periods stipulated in the Court of Appeal rules. No leave has been given by the High Court. The period of 14 days stipulated under ***Rule 39*** has already expired since the decision appealed from was made on 6th November, 2009 and in any event, no such application for leave has been made either in the superior court or in this Court.

In brief, this is the essence of ***section 39(2)*** as set out above.

As there was no proof of any prior agreement by the parties to appeal in this matter to the High Court, whether by way of application or by way of a challenge to any award, the High Court and this Court, have no jurisdiction under the Arbitration Act to entertain this matter under any of the provisions invoked by the applicant namely ***Rules 1(3), 5(2)(b)*** and ***42*** of this Court's rules and the High Court in particular had no jurisdiction in law to take up the matter outside the provisions of section 7 of the Arbitration Act, and to adjudicate as it did, since such an intervention also violated ***sections 10 and 39(2)*** of the Arbitration Act and the issuance of a notice of appeal contrary to ***section 39*** of the Arbitration Act does not per se, give this Court jurisdiction. In addition, the right of appeal to this Court is confined only to the matters of law specified in section 39(2) of the Arbitration and only where the High Court has jurisdiction in the first place.

Although the applicant has invoked ***Rule 1(3)*** of this Court's Rules it is clear to us on the basis of the law as set out above, this Court has no jurisdiction. Under ***section 7*** of the Arbitration Act the matter had been brought before the commencement of the intended arbitration and it only sought an interim measure of protection during the intervening period. Strictly, on the basis of statute law as analysed above, there is no suit pending in the High Court. For this reason, the High Court ruling went beyond the confines of ***section 7*** and therefore, the subject matter of the notice of appeal is a nullity for want of jurisdiction by the High Court. The big question which springs from the situation as analysed above is – should the highest Court in the land fold its hands and do nothing. In my view, there are two valid reasons for intervention.

The first reason why this Court cannot fold its hands and decline to intervene in the face of a plain nullity perpetrated by the High Court staring at it, is that as the final Court it does in my opinion, retain a "residual" "***or inherent jurisdiction***" in respect of jurisdictional issues and nullities. By virtue of its position, I hold that this Court has jurisdiction to deal with jurisdictional issues including nullities as and when raised in the interest of the enforcement of the rule of law because, if this role is not undertaken by the highest court, the rule of law is likely to be undermined as aggrieved parties are unlikely to find any other avenue of redress in the courts hierarchy. Thus, ***I.H. Jacob, The Inherent Jurisdiction of the Court (1770) Current Legal Problems*** had this to say concerning the juridical basis of inherent jurisdiction:-

"On what basis did the superior courts exercise their powers to punish for contempt and to prevent abuse of process by summary proceedings instead of by ordinary course of trial and verdict? The answer is, that the jurisdiction to exercise these powers was derived not from statute or rule of law but from the very nature of the court as a superior court of law, and for this reason, such jurisdiction has been called "inherent." This description has been criticized as being "metaphysical" but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a

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

In my view, this Court would lose both form and substance if it were to shy away from enforcing the rule of law. It is the highest Court in the land and since the Constitution itself turns on the axis of the rule of law it would be serious abdication to decline to intervene.

In the circumstances of the matter before the Court, it is quite clear that the superior court has stepped out of its jurisdiction and unless such a step is stopped, this Court's process is likely to be bogged down with matters which ought not to have come to it in the first place under any of this Court's rules. We therefore have a responsibility to make declarations on nullities either sue moto or as and when moved by an aggrieved party as in this case. In my view, the High Court should have confined itself to the issue of either granting the interim measure or refusing to grant it without delving into the merits. The usurpation of the arbitrator's jurisdiction by the superior court also contravened ***section 17*** of the Arbitration Act and for these reasons, this Court cannot in our view, condone this state of affairs as the final Court in the land because it we did not do so, who would? Moreover, the superior court's plainly illegal decision was likely in turn lead to the filing of unmerited appeals to this Court thereby resulting in abuse of this Court's process because I have in this ruling also stated that, in arbitration matters all courts including this Court's intervention is restricted to a facilitative role as specifically provided under the Act. Any other intervention outside the provisions of the Act is, with respect, unnecessary baggage on this Court as well and for this reason, this Court has the inherent power to reject the extra baggage and re-order things as provided in the applicable law. This explains why I must not fail to invoke this power to strike out the application and to set aside the superior court ruling and in its place give the interim measure of protection in terms of ***section 7*** of the Arbitration Act and at the same time direct the parties to have recourse to the Arbitral process within a reasonable time as contemplated in ***sections 7*** and ***17*** of the Arbitration Act. By dealing with the matter contrary to ***sections 7*** and ***17*** of the Arbitration Act the superior court clearly lacked jurisdiction and therefore its decision constituted a nullity.

The second reason for this Court's intervention is that the above analysis represents the law up to July 2009. However, on 23rd July 2009, both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate ***sections 1A*** and ***1B*** and ***3A*** and ***3B*** respectively, providing for an overriding objective of the two Acts. ***Sections 3A*** and ***3B*** of the Appellate Jurisdiction Act provide:

3A.

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious proportionate and affordable resolutions of the appeals governed by the Act.

(2)The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in *subsection (1)***.**

(3)An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

3B.

(1)For the purpose of furthering the overriding objective specified in *section 3A***, the Court shall handle all matters presented before it for the purpose of attaining the following aims –***

a) the just determination of the proceedings;

b) the efficient use of the available judicial and administrative resources;

c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost

affordable by the respective parties; and

d) the use of suitable technology.

In my view the two sections have expanded the powers of this Court in terms of interpreting the Civil Procedure Act, the rules made under the Act, together with the Appellate Jurisdiction Act, and the rules made pursuant to the Act, and also in exercising any of the powers in the specified legislations. Thus, the Court has the duty to interpret the Acts and exercise the powers under the Act and the rules made pursuant to the Acts so as to attain the overriding objective. Both provisions are aimed at inter-alia making case management principles the central tool in attaining and furthering the overriding objective. It must be remembered that the core business of the courts is to do justice and the principal aim of the overriding objective is to enable the court to act justly. Taking a broad view of the matter before the court, I have no doubt that it is a novel one. Firstly, the applicant had as stated above moved the High Court under ***section 7*** of the Arbitration Act for an interim measure of protection to protect the subject matter of the arbitration pending the institution of arbitral proceedings between the parties because the agreement to lease contained an arbitration clause in the event of any dispute or difference arising as between the parties, and secondly, arbitration was intended to operate as a viable alternative to litigation and the Arbitration Act makes it clear that courts of law can only be entitled to intervene in the manner expressed in the Act.

With great respect to the superior court, although the right of intervention was specified in ***section 7*** and the limit of intervention defined in the section, what happened is that the court misapprehended its role, declined to grant the interim measure by applying line, hook and sinker the civil procedure preconditions for the grant of interlocutory injunctions as laid down in the celebrated case of ***Giulla vs Cassman Brown [1973] EA 358*** and also delved into the rights of parties whereas under the provisions of ***section 7***, there was no suit pending before it for determination because the interim measure of protection was being sought before the commencement of an intended arbitration.

By determining the matters on the basis of the ***GUILLA*** principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. In the case of Kenya, the Arbitration Act is modeled on the Model Law and the UNCITRAL Rules and this is the reason they are known as “interim measures of protection” under ***section 7*** of the Arbitration Act. On the other hand, in the English version of the ICC Rules for example, they are known as “interim conservatory measures”. Whatever their description however, they are intended in principle to operate as “holding” orders, pending the outcome of the arbitral proceedings. The making of interim measures was never intended to anticipate litigation.

The Arbitral tribunal itself may in some cases have power to give interim measures of protection. Thus, Article 17 of the Model law provides:-

“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

However, where the arbitral tribunal has the power, it cannot issue interim measures until the tribunal itself has been established. On the facts before us, no arbitral tribunal had been established hence the invocation of ***section 7*** of the Arbitration Act by one of the parties. It takes time to establish an arbitral tribunal, and during the time between the arising of the dispute and the tribunal’s establishment vital evidence or assets may disappear unless a national court (in our case, the High Court) is urgently asked to intervene. Moreover even where an arbitral tribunal has the power to issue interim measures such powers are generally restricted to the parties involved in the arbitration itself. Thus, under the Model Law system an arbitral tribunal may only order any party to take such interim measures of protection as the arbitral

tribunal may consider necessary. On the other hand a national court would not necessarily be restricted to the parties when giving relief for example a temporary order attaching a debt due from a third party. An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under ***section 7*** in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.

To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-

"A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement."

Section 7 of the Arbitration Act is modeled on this. However, in the matter before us and with due respect, the Commercial Court (***Koome, J.)*** contravened the above principles by firstly either declining to issue any measure of protection or granting such a measure. The Court also failed to correctly address the principles for the issue of any such measures and worse still, the supreme court took over the subject matter altogether and ruled on the merits of the subject matter of the arbitration thereby prejudicing the outcome of the arbitration. This explains why in the special circumstances of this matter, this Court must take extraordinary measures to rectify an extraordinary illegality. Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.

2. Whether the subject matter of arbitration is under threat.

3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?

4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?

In the matter before us, the court went on to make orders which undermined the arbitration and the outcome of the arbitration contrary to ***section 17*** of the Arbitration Act. A court of law when asked to issue interim measures of protection must always be reluctant to make a decision that would risk prejudicing the outcome of the arbitration. This point came up in the famous English arbitration case of ***CHANNEL TUNNEL GROUP LIMITED vs BALFOUR BEATTY CONSTRUCTION LTD (1993) AC 334*** where the English Court rendered itself as follows:-

"There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made and not to take out of the hands of the arbitrators (or other decision makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter considerations must prevail… If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide."

Although the English Arbitration Act 1996 is not exactly modeled on the Model law unlike our Act, I fully endorse the principles as outlined in the ***CHANNEL CASE*** (supra) because they are in line with the arbitral tribunal's jurisdiction as set out in ***section 17*** of the Arbitration Act of Kenya. The section gives

an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under ***section 17(6)*** of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of ***section 17*** and in particular violated the principle known as "Competence/Competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is ***"Competence to decide upon its competence"*** and as expressed elsewhere in this ruling in German it is "***Kompetenz/Kompetenz***" and in French it is "***Competence de la Competence***". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrongly but within jurisdiction."

For the above reasons, because extraordinary wrongs call for extraordinary remedies, in my opinion, it would be unjust not to invoke ***section 3A*** to strike out a ruling which has so openly subverted the arbitral process which is intended to act as an alternative to litigation so as to ease pressure on the court system and to assist in the fight against backlog of cases and appeals. The act of usurpation of the arbitral jurisdiction by the High Court has resulted in the improper use of court resources both in the High Court and this Court and has further made the parties incur extra cost and unnecessary delay contrary to the overriding objective.

Worse still the court went on to usurp the intended arbitrators or arbitral tribunal's role of adjudicating on the merits of the dispute which was intended to be the subject matter of the intended arbitration.

Section 17 of the Arbitration Act states:-

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose –

a) an arbitration clause which forms part of a contract shall be treated as an independent agreement of the other terms of the contract; and

b) a decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party is not precluded from raising such a plea because he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in *subsection (2)* ***or*** *(3)* ***admit a later plea if it considers the delay justified.***

(5) The arbitral tribunal may rule on a plea referred to in *subsections (2)* ***and*** *(3)* ***either as a preliminary question or in an arbitral award on the merits.***

(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.

(7) The decision of the High Court shall be final and shall not be subject to appeal.

(8) While an application under *subsection (6)* ***is pending before the High Court, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award.***

Under the doctrine of Kompetez/Kompetez a tribunal can rule on both the validity of the arbitral clause

and the underlying contract. In the circumstances of the matter before us, once appointed it would for example be entitled to rule on who are the parties to the arbitration agreement and on the validity of the agreement to lease and whether it has jurisdiction over the other two respondents who contend that they are not parties to the agreement to lease. The Commercial Court has no business acting against an Act of Parliament and ruling on a matter it was not competent to rule on in law. Such a ruling is a nullity period.

The big question is, does this Court have jurisdiction to intervene pursuant to the overriding objective provision. I give a positive answer to this question firstly because going by the above provisions, the superior court misapplied the applicable law and also usurped the jurisdiction of the intended arbitrator or arbitral tribunal. By so doing, the superior court usurped a role that was not vested in it in law and misapplied its resources; and abused its process. By extension, failure by this Court to intervene could lead to further unnecessary appeals, further costs and delay by the parties to reach finality in a matter which demands immediate resolution taking into account the allegation concerning environmental issues. Moreover, entertaining unmeritious applications or appeals where it is patently clear from the statute law that the superior court had no jurisdiction in the first place constitutes a violation of the overriding objective because it would result in the misuse of this Court's resources which in terms of the objective should be directed to undertaking only the work vested in it by law.

As analysed above in addition to the Court's inherent powers to deal with nullities, the court having stepped out of its jurisdiction under ***section 7*** the Court has power and the duty to ensure that the overriding objective of the Appellate Jurisdiction Act is met. As expressed in the ***section 3A*** of the Act, the overriding objective of the Act and the rules made under the Act is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. The overriding objective is attained by the Court firstly by exercising its powers and secondly by interpreting of the Act in a manner that furthers its principal aims.

To sum up, the superior court violated the objective by inter-alia usurping the jurisdiction of an arbitral tribunal; undermining the principle of a party autonomy; misinterpreting its role concerning its powers to give interim measures of protection in relation to the subject matter of the intended arbitration. The effect of the superior court's intervention has resulted in the parties seeking this Court's intervention where it would not have been necessary thereby congesting this Court's process in a situation where arbitration was intended to ease and supplement that process; causing the parties to incur extra cost and engaging the resources (time) of the court in a manner not conducive to good management of its resources. In my opinion, this Court has the duty to intervene in any of these situations so as to give effect to the overriding objective.

As clearly illustrated by the marginal note in ***section 3A***, the overriding objective constitutes the objective of the entire Appellate Jurisdiction Act and the rules. It is the hub upon which the Act, the exercise of the powers under its provisions and the rules including its interpretation must turn. So as to prevent abuse of this Court's process and satisfy the wider interests of the overriding objective, I have a duty to immediately ensure that the usurpation of the jurisdiction is stopped and an appropriate interim measure of protection given pursuant to ***section 7*** of the Arbitration Act because this is the only reason why the parties came to court in the first place. ***Sections 3A*** and ***3B*** do not contemplate the postponement of the exercise of the power or a postponement of the interpretation of any of the provisions or rules because this would result in poor management of the appeals and the Court's resources. If we were to look the other way, unnecessary time and costs would be expended by the courts and the parties thereby defeating the overriding objective.

In the special circumstances of this case, the superior court could not be said to have acted justly by ursuping the jurisdiction of the intended arbitral tribunal and by misdirecting itself on the essentials of the interim measures of protection and the limits of its jurisdiction and further failing to capture the importance of giving recognition to arbitration as an alternative to litigation, a role I consider critical in terms of furthering the overriding objective under ***sections 3A*** and ***3B***. All these lapses would in my view justify this Court's intervention under the "O_2" that is the "oxygen principle."

This Court has elsewhere in the case of ***MRADULA SURESH KANTARIA vs SURESH***

NANALAL KANTARIA C.A. NO. 277 of 2005 also baptized the overriding objective as "double "OO" principle" when it observed:-

"Expressed differently, the purpose of the "double OO principle" in its application to civil proceedings is to facilitate the just, quick and cheap resolution of the real issues in the proceedings …"

In a differently constituted bench in the case of ***HUNKER TRADING COMPANY LIMITED vs ELF OIL KENYA LIMITED CIVIL APPLICATION NO. NAI 6 OF 2010*** the overriding objective was aptly baptized the "O_2" ("the Oxygen principle") because like oxygen, the principle has the potential to re-energise the civil system of justice and give the courts the freedom to attain justice in each case in a manner that is just, quick and cheap and above all in a manner which takes into account the special circumstances of each case or appeal and the best way of handling it. Given the novel circumstances of this matter, I believe my endeavour towards this goal has not been in vain. I must however, be quick to add that while it is possible that I could have broken new ground in the area of law covered, the ratio of this ruling is deliberately designed and given with the special circumstances of this particular case in view. The ruling is certainly not intended to open the floodgates or serve as a magic potion intended to cure all ills. It is therefore apt to throw in a word of caution concerning the "O_2" principle". In my view, it should be regarded as a double edged sword in that it is a powerful enemy of those litigants bent on frustrating the course of justice because it has the potential of stopping them at the earliest opportunity and it will also be a powerful ally of those litigants who want to attain justice in a manner that is just, quick and cheap. The "O_2" principle has not in my opinion come to us as a packaged product for application to all situations. Instead, its application and management will depend on the circumstances of each case. At this stage, in the development of the principle I know that, it will demand our skills, energy, will and commitment to innovate in all deserving cases and appeals so as to address its principal aims.

As analysed above, no appeal lies to this Court as a matter of law pursuant to ***section 39*** of the Arbitration Act and therefore the suggestion elsewhere that this Court should not strike out the ruling at this stage but should wait for an appeal is with respect a misapplication of the relevant arbitration law. Rule 5(2)(b) cannot overrule ***section 39(2)*** of the Arbitration Act.

In addition, after the grant or failure to grant an interim measure under ***section 7*** of the Arbitration, there is no pending suit because the substance of the suit under ***section 7*** is grant or refusal interim measure itself.

The suggestion that in the circumstances of this particular case, we should deal with the application under ***Rule 5(2)(b)*** in contemplation of a possible further appeal flies in the face of ***section 39*** of the Arbitration Act. With respect, postponing a final decision contravenes the overriding objective because in the circumstances, the demands of justice are that this Court acts in accordance with the Arbitration law to give effect to the intention of the parties when they entered into an arbitration agreement. ***Section 3A*** and ***3B*** of the Appellate Jurisdiction Act gives us the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow.

To my mind, this Court has the power to strike out the ruling. It would be futile to await an appeal which does not and would not lie to this Court either now or in the future. The provisions of the cited law above clearly brings this out. Wavering in the face of clear statutory provisions of the law would in my view violate the O_2 principle. Indeed, I would adopt fully the apt comments of Lord Blackburn in ***METROPOLITAN BANK LTD vs POOLEY*** (1885) 10 App cases 210 at p 221 where he said:-

"a stay or even dismissal of proceedings may often be regained by the very essence of justice to be done. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackles will fall to the ground the moment the uncontested facts appear."

The uncontested facts here are that no appeal lies to this Court at all.

In the result, in order to give recognition to arbitration as an alternative to litigation and also to give effect to the overriding objective and in exercise of this Court's inherent jurisdiction, I hereby strike out the ruling dated 6th November, 2009 by Koome, J and grant an interim measure of protection in terms of prayer 2 of the application dated 15th November, 2009. The interim measure of protection in respect of the telecommunications equipment is granted for a period of 28 days only to enable the parties to institute the necessary arbitral proceedings failing which the order shall automatically cease to operate. Costs in the intended arbitration.

I would so order.

DATED and delivered at Nairobi this 16th Day of April, 2010.

J.G. NYAMU

……..……..…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR