REPUBLIC OF KENYA
Court of Appeal at Nairobi
Civil Application 78 of 2011 (UR. 53/2011)

BETWEEN

EQUITY BANK LIMITED.....APPLICANT

AND

WEST LINK MBO LIMITED.....RESPONDENT

(Application under Rule 5(2)(b) of the Court of Appeal Rules for stay of execution of the Ruling

and Order of the High Court of Kenya at Nairobi (Muga Apondi, J) dated 4th February, 2010

In

H.C.C.C. No. 142 of 2009)

****

RULING OF GITHINJI, J.A.:

[1] This Ruling relates to a preliminary objection raised by the Respondent to the jurisdiction of this Court to entertain an application under **Rule 5(2) (b)** of the Court of Appeal Rules for interim reliefs pending appeal.

The applicant Equity Bank Limited intends to appeal against the Ruling of the High Court (Muga Apondi J) delivered on **4th February 2010** whereby the High Court struck out the applicant\\\'s defence on the ground that it disclosed no reasonable cause of action and thereby entered Judgement in favour of the Respondent for **shs. 39,720,000**. The applicant has manifested an intention to appeal by lodging a Notice of Appeal in the High Court on 9th February 2010 in compliance with **Rule 75 (1)** of the Court of Appeal Rule (Rules).

[2] Meanwhile, the applicant has filed an application by way of **Notice of Motion** dated **30th March, 2011** under **Rule 5(2) (b)** of the Rules seeking a stay of execution of the decision of the High Court pending the lodging, hearing and determination of the intended appeal. The applicant *avers* in the application among other things, that, the applicant has an arguable appeal with good prospects of success and that unless execution is stayed the intended appeal, if successful, will be merely academic and would thereby be rendered *nugatory* for reasons, *inter alia*, that the respondent has no attachable assets and also has no financial capacity to reimburse the colossal sum if the appeal is successful.

[3] **Rule 5 (2) (b)** under which the application is brought provides:-

5(2):

" *Subject to* ***sub-rule (1)****, the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may*

(a) ….....

(b) In any Civil Proceedings where notice of appeal has been lodged in accordance with ***Rule 75,*** *Order a stay of execution, an injunction or stay any further proceedings on such terms as court may think just."*

[4] The Rules are a subsidiary Legislation made by the Rules Committee under **Section 5(1)** of the Appellate Jurisdiction Act (Cap 9) which Act was enacted in 1977 after the establishment of the Kenya Court of Appeal by Section 64(1) of the 1963 Constitution which provided:-

" 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"

The Court of Appeal was the apex Court until the 1963 Constitution was repealed by the Constitution of Kenya, 2010 which created three superior courts namely, the Supreme Court as the apex court; the Court of Appeal and the High Court. The Court of Appeal was established by **Article 164 (1)** which provides:-

There is established the Court of Appeal, which.....

(2) .....

(3) The Court of Appeal shall have jurisdiction to hear appeals from

(a) the High Court, and

(b) any other court or tribunal as prescribed by an Act of Parliament."

[5] Mr. Ahmednassir Abdullahi the learned Senior Counsel for the respondent, submitted broadly in support of the preliminary objection, among other things, to the effect that:-

(i) **Article 164 (3)** of Constitution of Kenya **2010** clothes this Court with jurisdiction to hear appeals only and the Court has no jurisdiction to hear an application under Rule **5(2) (b)** as such an application is not an appeal.

(ii) The jurisdiction under **5 (2) (b)** is an original jurisdiction as opposed to exclusive appellate jurisdiction under Article 164 (3).

(iii) **Article 164 (3)** is a major departure from section 64(1) of the 1963 Constitution and the jurisdiction of the Court of Appeal under the two provisions is different.

(iv) While **Article 164 (3)** delimits the jurisdiction of the Court it expands the right of appeal to the extent that the right to appeal from the decision of High Court is now as of right, unlimited and no leave to appeal is required.

(v) **Section 3(1)** of Appellate Jurisdiction Act which limits right of appeal to the Court and the statues which limit right of appeal such as the Civil Procedure Act and Arbitration Act are unconstitutional

(vi) By limiting the jurisdiction of the Court to hear appeals only the drafters of the constitution were informed by the fact that after 1990s the Court was pre-occupied with hearing **5(2) (b)** applications instead of appeals as was the practice before 1990s.

(vii) The provisions of **Article 164 (3)** has no ambiguity and should be interpreted in their ordinary and natural sense as held in **Republic Versus Elmann [1969] EA 357.**

[6] On his part, Mr.Waweru Gatonye learned counsel for the applicant opposed the preliminary objection and submitted, in essence, *inter alia*, that:-

* The jurisdiction of the Court under **Rule 5 (2) (b)** is of great antiquity and an integral part of the administration of justice in the appellate Court and would require express constitutional or statutory provision to abolish it.

* The jurisdiction of the Court as provided by **Article 164 (3)** of **2010** Constitution and **Section 64 (1)** of **1963** Constitution is not different and the exclusion of last portion of **section 64 (1)** does not amount to a limit of jurisdiction.

* There is no express or implied prohibition in **Article 164 (3)** that the Court cannot grant interim orders pending appeal nor does the mere exclusion of the last words of **Section 64(I)** mean that the intention of the draftsman was to limit the jurisdiction to administer justice.

* Once a Notice of Appeal is filed an appeal is deemed to be in existence as **Rule 2** defines an appeal as including an intended appeal and an application under **Rule 5 (2) (b)** is an interlocutory application within the appeal.

* **Article 164 (1)** has left matters pertaining to substantive and administrative procedures of the Court to legislation which includes the Appellant Jurisdiction Act, the Court of Appeal Rules and the Civil Procedure Rules.

* **Article 164** must not be construed in a narrow or pedantic manner and a liberal and broad approach should be adopted.

* Power to grant stay is not entirety dependent on Constitution or Rules, since, in the absence of express prohibition or limitation by the law, the Court can invoke its inherent jurisdiction in order to foster the administration of justice by ordering interim arrangements as under **Rule 5(2) (b).**

[7] In raising the preliminary objection, the respondent\\\'s counsel fully appreciates that the preliminary objection, if allowed, would have profound effect in this Court. Indeed, if the objection is allowed the effect would be that a party aggrieved by the Judgment of the High Court or other court with equivalent jurisdiction to the High Court and who intends to appeal, or has indeed filed an appeal to this Court cannot move the Court by an independent application for stay of the execution of the impugned judgment, or seek a temporary injunction or apply for stay of impugned proceedings pending the filing, hearing and determination of the appeal. Yet, as Mr Waweru Gatonye submitted, the jurisdiction of the Court to order interim arrangements is so fundamental to the administration of justice and without it the Court would lose its effectiveness as appeals may be rendered nugatory. Mr. Ahmednassir, however, suggests that any resultant crisis may be resolved by the High Court or by amendment of rules relating to the filing of appeals to allow instant finding of appeals or by a policy decision of the Chief Justice. According to him, the High Court and other similar courts can deal with applications for stay of execution. Indeed, the High Court and other similar courts have jurisdiction under **Order 42 Rule 6(1)** C.P.Rules to grant stay of execution for sufficient reason, pending appeal from their decisions to this Court. His view is that inspite of any problems which might arise the Court should show fidelity to the Constitution.

[8] This Court is a creature of **Article 164(1)** of the Constitution which establishes the Court and can only exercise the jurisdiction given to it by **Article 164 (3)** – that is,

* *"to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament."*

The Court has no Supervisory role over the judicial process and can exercise only the powers given to it

by the Constitution. There is no right of appeal by implication or inference. **(Anarita Karimi Njeru Versus The Republic (1976-1980) KLR 1283; Jasbir Singh Rai and, three others Versus Tartcochan Singh Rai and four others,** Court of Appeal Civil Application NAI 307 of 2003. (unreported).

[9] The source and extent of jurisdiction conferred to a court was succinctly stated by the Supreme Court at Paragraph 68 in **Samuel Kamau Macharia & Another Versus Kenya Commercial Bank and 2 others** – **Supreme Court of Kenya Civil Application No. 2 of 2011** (unreported) 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.

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 the court of law or tribunal the legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law."

I would at the outset respectively agree with the submission of the Mr. Ahmednassir, that an application under **Rule 5(2) (b)** is not an appeal as envisaged by **Article 164(3)**. For purposes of judicial proceedings an appeal is broadly speaking a substantive proceedings instituted in accordance with the practice and procedure of the court by an aggrieved party against a decision of a court to a hierarchically superior court with appellate jurisdiction seeking a reconsideration and review of the decision in his favour.

[10] The prerequisite for mounting an appeal to this Court in civil cases and related matters is the lodging a Notice of Appeal within the prescribed time followed by lodging in the Court\\\'s Registry within the prescribed time the memorandum of appeal, the record of appeal, prescribed fees and security for costs. {**Rules 75 (1)** and **82 (1)}**. However, in criminal appeals and related matters, a Notice of Appeal institutes the appeal and the only document that the appellant is required to file thereafter is a petition or a memorandum of appeal {**Rules 59(1); 64 (1)}**.

[11] As a general principle of law an appeal being a totally distinct proceeding from the original or appellate proceedings appealed from, the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree, in civil matters unless otherwise expressly so provided. **Order 42 Rule 6 (1) C.P. Rules** restates that principle and proceeds to give the court appealed from jurisdiction to grant a stay of execution in case of an appeal That Rule provides in part:-

6 (1)

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused, by the court appealed from, the court to which, such an appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just „….."

Rule 6 (4) of **Order 42** provides:

"For the purposes of this Rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court Notice of Appeal has been given."

Rule 5(2) (b) is the counterpart of **Rule 6(1)** of **Order 42** C.P.Rules.

[12] In **Safaricom Limited -Versus- Ocean View Beach Hotel Limited and two others** Civil Application **No. 327 of 2009 [2010] e KLR Omolo JA** explained the application of **Rule 5 (2) (b)** in very

simple terms thus:-

*"At the stage of determining an application under **Rule 5(2) (b)** there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be 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."*

Indeed, by **Rule 2**, an appeal in relation to the Court includes an intended appeal.

[13] It is trite law that in dealing with **5 (2) (b)** applications the Court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under **Rule 6(1) of order 42** C.P. Rules and refused, the Court in dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction **(Githunguri Versus Jimba Credit Corporation Ltd. (No. 2) [1988] KLR 838).**

[14] From the foregoing, it is clear that **Rule 5 (2) (b)** is a procedural innovation designed to empower the Court to entertain an interlocutory application for preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.

The procedure recognises that the Court has only jurisdiction to hear appeals but deems an intention to appeal as manifested by a Notice of Appeal as an appeal. Thus, the true nature of **5(2) (b)** application, as Mr. Waweru Gatonye, quite correctly characterised it, is for all intents and purposes, an interlocutory application in the appeal.

[15] Mr.Ahmednassir appreciated that the Court would have jurisdiction to entertain an interlocutory application filed with the appeal and after the appeal has infact been lodged.

He only questions, the jurisdiction of the Court to entertain a **5 (2) (b)** application before the appeal is infact lodged. Since Rule 4 of order 42 C.P. Rules and Rule 2 of Court of Appeal Rules deem an be appeal as filed upon filing of the Notice of Appeal, there is, in my view, no practical difference as in both cases the application is filed and heard within the appeal.

[16] Mr. Ahmednassir contended that Article 164 (3) is a major departure from section 64 of the 1963 Constitution. He faulted the finding of this Court, in the **Interim Independent Electoral Commission & Another -Versus- Paul Waweru Mwangi Civil Application No. Nai 130 of 2011 – [2011] e KLR to the effect** that the jurisdiction in **Article 164 (3)** is not different from its jurisdiction under section **64 (1)** of the former Constitution.

It is true that there are at least two major differences between the two provisions;

Firstly, section 64(1) of 1963 Constitution merely established the Court of Appeal without jurisdiction and left it to parliament to enact a legislation to confer jurisdiction to the Court. The Appellate jurisdiction Act [Section 3(1)] is such a legislation. In contrast, Article 164 both establishes the Court of Appeal and confers jurisdiction to it {**Article 164 (1) and 164 (3)}.**

Secondly, section 64 (1) gives jurisdiction to the Court to hear appeals from the High Court whereas Article 164 gives jurisdiction to hear appeals from the High Court and also from any other court or tribunal as prescribed by an Act of Parliament. While conferring jurisdiction to the Court of Appeal section 3(1) of the Appellate jurisdiction Act restricts such appeal *"to cases in which an appeal lies to the Court of Appeal under any law"*, meaning that a right of appeal has in turn to be conferred by a statute.

[17] I have already recorded the submissions of Mr. Ahmednassir relating to the unlimited access to the Court of Appeal and the alleged unconstitutionality of **section 3 (1)** and **3(2)** of the Appellate jurisdiction

Act.

In my view, the that fact that the appellate jurisdiction is now conferred by the Constitution instead of by statute does not in itself amount to a major departure as long as the jurisdiction conferred is appellate and not otherwise.

Both the 1963 Constitution and the 2010 Constitution give the Court purely appellate jurisdiction and to that extent, the character of the Court remains the same, namely, to hear appeals.

Logically therefore, the argument that the Court has now no jurisdiction to hear applications under Rule **5(2)(b)** because the Court can now only hear appeals lacks substance. The Court was established as an appellate court and remains so todate.

[18] Further, the jurisdiction to entertain an application under **5(2)(b)** in the narrow context that the filing of a notice of appeal is deemed by the procedural law to institute an appeal is not incompatible with the appellate jurisdiction of the Court. On the contrary, such jurisdiction is complimentary to the appellate jurisdiction as procedural law is intended to facilitate the performance of the court of its function as a court of justice.

[19] The contention that the intention of the drafters of the constitution intended particularly to take away the jurisdiction of this Court to entertain 5 (2) (b) applications is not supported by any working document or any other document. It, at best remains the counsel\\\'s opinion. Even if that was the intention, the Constitution does not expressly or by necessary implication prohibit the Court from hearing any interlocutory application within an appeal.

[20] On my part, I would decline the invitation to make a finding on the scope of the right of appeal or on the unconstitutionally of section **3 (1)** and 3**(2)** of the Appellate jurisdiction Act for two reasons.

Firstly, the submission by Mr.Ahmednassir that Article **164 (1)** confers unlimited right of appeal which cannot be restricted by any statute is not only very broad but also has far reaching consequences. It affects the administration of justice and the function of the Court. The issue was not directly before the Court in these proceedings. It is raised merely to emphasize the submissions that the jurisdiction of the Court under Article 164 is different from what it was under the 1963 Constitution. The issue is not necessary for the determination of the preliminary objection and any finding on it would be obiter.

In my view, the issue should be decided in appropriate proceedings where a question arises concerning the jurisdiction of the Court to entertain any specific appeal.

Secondly, the question of the unconstitutionality of **section 3 (1)** and **3(2)** of the Appellate Jurisdiction Act is similarly important.

The Court has been asked to strike out the two provisions. **Article 7 (1)** of the Sixth Schedule to the Constitution 2010, preserves all existing laws but requires the courts to interpret them in a manner that will bring them in conformity with the Constitution.

The issue is not necessary for the determination of the preliminary objection and any decision on the issue would also be obiter.

In my view, the question should be decided in appropriate proceeding where the issue is brought for determination by the Court.

[21] In the light of foregoing, I would dismiss the preliminary objection. As the preliminary objection was highly contentious requiring the commendable industry of both counsel, the applicant deserves costs.

[22] As Musinga, Kiage, M\\\'inoti, Sichale JJA agree, the order of the Court is that the preliminary objection is dismissed with costs to the applicant, that is, Equity Bank Ltd.

Dated and delivered at Nairobi this 31st day of May, 2013.

E.M.GITHINJI
.....
JUDGE OF APPEAL

RULING OF MUSINGA, J.A.

A. INTRODUCTION

1. It is unusual for this Court to hear a preliminary objection regarding its jurisdiction for a period exceeding six hours as was the case in respect of an objection raised by the respondent that:

"In view of the express provisions of Article 164 (3) of the Constitution of Kenya, 2010, this Honourable Court lacks the jurisdictional power or authority to hear the application before it which is grounded on Rule 5 (2) (b) of the Court of Appeal Rules."

That length of time was, however, deemed necessary, considering the weight of the application and the ramifications of the court's decision, either way. There is no gainsaying that the lion's share of this Court's time is spent on applications under **rule 5 (2) (b)** of the **Court of Appeal Rules** and when the respondent challenged the Court's jurisdiction to entertain such applications it was necessary that counsel be accorded sufficient time to address the Court.

2. The preliminary objection was raised in opposition to the applicant's application brought under **rule 5 (2) (b)** of this **Court's Rules** seeking stay of execution of a decision of the High Court, (Apondi, J.), made on 4th February, 2010 pending hearing and determination of an intended appeal.

3. The High Court granted summary judgment against the applicant and two others in the sum of **Kshs.39,720,000/=.** The said sum was alleged to have been paid by the respondent to the bank but was not credited to the respondent's account held with the applicant.

4. On 5th March, 2010 the applicant filed an application for stay of execution of the said judgment in the High Court but the application was rejected. The applicant then moved to this Court and filed the present application, referred to in paragraph 2 above.

5. When the application came up for hearing on 11th April, 2011, **Mr. Gatonye,** learned counsel for the applicant, applied for an adjournment on grounds that he had been served with a lengthy replying affidavit on the morning of the hearing and needed time to take further instructions and possibly file a further affidavit. He also sought interim stay orders until the next hearing date.

6. Although the application for adjournment was opposed, the Court allowed it and directed that the next hearing date be fixed on priority basis. The Court further granted interim stay order until the next hearing date.

7. After several other adjournments of the application due to one reason or another, on 19th March, 2012 **Mr. Abdullahi**, learned Senior Counsel for the respondent, urged the Court to constitute a bench of five judges to hear and determine the application, in view of the preliminary objection that he had raised. He added that **subsections 3(1)** and **3(2)** of the **Appellate Jurisdiction Act** are unconstitutional.

8. Responding to the aforesaid request, Mr. Gatonye observed that the bulk of civil applications handled by this Court are premised on **rule 5 (2) (b)** of the **Court of Appeal Rules** and since it was now being alleged that the Court had no jurisdiction to hear such applications, it was in the interest of justice that a

five judge bench be set up to determine the preliminary objections raised. The Court acceded to the respondent's counsel's request.

B. THE RESPONDENT'S COUNSEL'S ARGUMENTS

9. **Mr. Abdullahi**, submitted that the jurisdiction has evolved over the years, right from the 1963 Constitution of Kenya upto the enactment of the **Constitution of Kenya, 2010**, commonly referred to as "**the new Constitution**".

10. The 1963 Constitution gave parliament power to enact legislation to regulate the Court of Appeal. **Section 177 (1)** of that **Constitution** stated as follows:

"Parliament may, if it thinks fit, establish a Court of Appeal for Kenya which, subject to the provisions of this Constitution, shall have such jurisdiction and powers as may be conferred on it by any law."

11. The 1969 Constitution also gave parliament power to enact legislation which would define the jurisdiction of the Court of Appeal. The appropriate legislation is the **Appellate Jurisdiction Act**. **Section 64 (1)** thereof stated as follows:

"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."

12. The **Constitution of Kenya, 2010**, in respect of the Court of Appeal states as follows:

"164 (1) There is established the Court of Appeal, which –

(a) shall consist of the number of judges, being not fewer than twelve, as may be prescribed by an Act of Parliament; and

(b) shall be organized and administered in the manner prescribed by an Act of Parliament.

(2) ……..

(3) The Court of Appeal has jurisdiction to hear appeals from –

(a) the High Court; and

(b) any other court or tribunal as prescribed by an Act of Parliament."

13. Counsel's submission was that **Article 164 (3)** of the new **Constitution** gives this Court **power to hear appeals only** but not applications for stay of execution pending appeal, injunctions or such other applications which have had the effect of slowing down disposal of appeals. He emphasized that the Constitution did not empower parliament to make any law to prescribe the Court's jurisdiction. Parliament was however empowered to enact law to prescribe the number of judges of that Court as well as the organizational and administrative aspects of the Court.

14. **Subsection 3(1)** of the **Appellate Jurisdiction Act** is therefore ultra vires **Article 164 (3)** of the new **Constitution** as it purports to limit the power of this Court to hear and determine appeals from the High Court, counsel submitted.

15. Mr. Abdullahi emphasized that the power of the Court of Appeal under **rule 5 (2) (b)** is original, not appellate. He cited this Court's decision in **SAFARICOM LIMITED vs. OCEAN VIEW BEACH HOTEL LIMITED & 2 OTHERS [2010] eKLR** where Omolo, J.A, cited an earlier decision of the Court, **RUBEN & 9 OTHERS vs. NDERITU & ANOTHER [1989] KLR 459**, where it was held that:

"In dealing with rule 5(2) (b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds *de novo* (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the Court that he has an arguable appeal. Secondly, it must be shown that the appeal, if successful, would be rendered nugatory: see Stanley Munga Githunguri vs. Jimba Credit Corporation Limited Civil Application No. Nai 161 of 1988."

16. Counsel reiterated that the position as stated in the aforesaid case could only obtain under the repealed Constitution because under the new Constitution the original jurisdiction of this Court to grant stay in terms of **rule 5 (2) (b)** has been taken away. He added that jurisdiction is derived from the Constitution and no statute can confer jurisdiction which is outside the mandate of the Constitution.

17. Mr. Abdullahi criticized the position taken by this Court on the issue of its jurisdiction to hear applications under **rule 5 (2) (b)** in the case of the **THE INTERIM INDEPENDENT ELECTORAL COMMISSION & ANOTHER vs. PAUL WAWERU MWANGI [2011] eKLR**, where the Court held:

"The jurisdiction of the Court of Appeal as provided in Section 164 (3) of the Constitution is not different from its jurisdiction under Section 64 (a) (sic) of the former Constitution. It is a limited jurisdiction to "hear appeals from the High Court" and any other courts which parliament may prescribe. The manner in which those appeals may be heard is also governed by an Act of Parliament, the Appellate Jurisdiction Act, Cap 9 and the Rules thereunder. The extent of the jurisdiction and manner of exercise of it, has indeed been discussed in many decisions of this Court and we need only refer to JASBIR SINGH RAI & 3 OTHERS vs. TARLOCHAN SINGH RAI & 4 OTHERS, Civil Application No. NAI. 307/2003 (UR)."

Counsel's position was that **Article 164 (3)** of the new **Constitution** is a major departure from **Section 64 (1)** of the old **Constitution** since under the new constitution the Article now creates an automatic right of appeal from any decision of the High Court or any other court or tribunal as prescribed by an Act of Parliament.

18. Similarly, **Section 3 (1)** of the **Appellate Jurisdiction Act** limits the right of appeal to this Court by stating that:

"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 rule." (emphasis supplied).

It is the latter part of the subsection which counsel submitted unnecessarily restricts the right of appeal to this Court contrary to the intention of **Article 164 (3)** of the new **Constitution**. He added that the drafters of the Constitution intended to define the jurisdiction of this Court specifically in view of the grave historical background and injustice occasioned to litigants because of the Court's abuse of its powers in granting stay of execution for inordinately long periods of time.

19. Similar submissions were made regarding the provisions of **Section 3(2)** of the **Appellate Jurisdiction Act** which counsel stated is also unconstitutional. The section states as follows:

"3(2) For all purposes of and incidental to the hearing and determination 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."

The reason for submitting that the said subsection is unconstitutional is that it purports to give the Court of Appeal more powers than the Constitution gives, counsel submitted. That is because of the words: **"for**

all purposes of and incidental to".

20. Counsel went as far as submitting that the **Appellate Jurisdiction Act** has no place in the context of the new Constitution and added that the Act that is contemplated under **Article 164 (1) (b)** is yet to be enacted. That being the case, he added, this Court has only been empowered to hear appeals by the Constitution and no more.

21. Turning to the question, **"what is an appeal?"** Mr. Abdullahi submitted that an application for stay of execution pending appeal is not an appeal. He cited the Supreme Court decision in **SAMUEL KAMAU MACHARIA & ANOTHER vs. KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR**, where the Court stated that:

"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."

The Court proceeded to state that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court 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. ….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 will be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

22. Relating the aforesaid pronouncement by the Supreme Court to this Court's jurisdiction under **rule 5 (2) (b),** counsel submitted that in dealing with applications under that rule, the Court is exercising original jurisdiction when no such power has been donated to it by the Constitution. He added that under the new Constitution the Court's original jurisdiction in terms of the aforesaid rule has been taken away and consequently this Court cannot expand its jurisdiction any inch beyond the boundary set under **Section 164 (3)** of the new **Constitution**.

23. Lastly, Mr. Abdullahi urged this Court to interpret **Article 164 (3)** of the new **Constitution** in accordance with the holding in **REPUBLIC vs. EL MANN [1969] E.A 357,** where the Court held that if there is no ambiguity in the wording of a section of theConstitution the section should be construed according to the ordinary and natural sense of the words used. In that regard, the drafters of the Constitution intended to limit the jurisdiction of the Court of Appeal to the hearing of appeals only, he submitted.

C. THE APPLICANT'S COUNSEL'S SUBMISSIONS

24. Responding to the above submissions, Mr. Gatonye, learned counsel for the applicant, took the view that **Section 64** of the old **Constitution** and **Article 164** of the new **Constitution** are not very different as regards this Court's jurisdiction to hear applications under **rule 5 (2) (b)** of this **Court's Rules**. Although he admitted that **Article 164 (3)** of the **Constitution** does not expressly grant this Court jurisdiction to hear applications, his view was that that which is not forbidden by the Constitution or the law can be done by a court of law in exercise of its Constitutional mandate. And since there is no prohibition at all for this Court to hear and grant orders of stay, the Court can grant such orders whether under **rule 5 (2) (b)** of this **Court's Rules** or in exercise of its inherent jurisdiction.

25. Counsel supported the position taken by this Court in **THE INTERIM INDEPENDENT ELECTORAL COMMISSION & ANOTHER vs. PAUL WAWERU MWANGI** (**supra**) regarding

its jurisdiction under **Article 164 (3)** of the new **Constitution** vis-à-vis **Section 64 (1)** of the repealed **Constitution**. He further submitted that if the intention of the Constitution was to remove this Court's jurisdiction to grant orders of stay it would have expressly stated so. In any event, he added, the Appellate Jurisdiction Act is still operational since all existing laws were preserved by the transitional provisions under the new Constitution. **Clause 7 (1)** of the **Sixth Schedule** to the new Constitution states that:

"7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

26. That in effect means that this Court can still grant orders of stay of execution under **rule 5 (2) (b)** of this **Court's Rules.** But even if this Court's jurisdiction were to be limited to the provisions of **Article 164 (3)** of the new **Constitution**, Mr. Gatonye added, that would still not deny this Court power to grant orders of stay of execution because the definition of an appeal includes an intended appeal. The new Constitution does not define an appeal and the only definition of an appeal is to be found in **rule 2** of the **Court of Appeal Rules** which defines an appeal in relation to appeals to this Court to include an intended appeal. Once a notice of appeal is filed an appeal is presumed to be in existence and only then can an appellant proceed to file an application for stay of execution under **rule 5 (2) (b) of this Court's Rules.** Counsel once again cited **THE INTERIM INDEPENDENT ELECTORAL COMMISSION & ANOTHER vs. PAUL WAWERU MWANGI** (**Supra**) where this Court stated:

"We have said, times without number, that it is the notice of appeal which, for purposes of rule 5 (2) (b) of the Court's Rules gives this Court jurisdiction to hear and determine an application under the rule."

27. Mr. Gatonye further submitted that a Court of Appeal bereft of powers to grant orders of stay cannot fulfil its constitutional mandate as spelt out under **Article 159** of the new **Constitution**. In his view, the jurisdiction to grant stay orders in civil litigation is a fundamental and an integral part in administration of justice. In the absence of such powers this Court would lose its effectiveness in determination of matters that are pending before it prior to their conclusion and its decision would easily be reduced to academic exercises.

28. Counsel added that if **Article 164 (3)** of the new **Constitution** was to be construed pedantically, meaning that this Court's jurisdiction is limited to determination of appeals only where a record of appeal has been filed, litigants who seek justice by way of applying to stay an unfavorable judgment where the High Court has become *functus officio* upon delivery of its decision would be highly prejudiced since they would have nowhere to turn to for interim relief until the appeal is heard and determined.

29. Counsel therefore submitted that the Constitution should not be interpreted narrowly but in a purposive manner as stated in **Article 259** of the **Constitution**. He cited several cases relating to interpretation of Constitutions among them, **TINYEFUZA vs. THE ATTORNEY GENERAL OF UGANDA**, **Constitutional Appeal No. 1 of 1996**, where the Supreme Court of Uganda stated that a court is duty bound to enforce the paramount commands of the Constitution by applying a generous and purposive construction of the Constitution that gives effect to and recognition of fundamental human rights and freedoms.

30. Back to the Appellate Jurisdiction Act, counsel submitted that **Section 3A** of the **Act** sets out the overriding objective of the Act and the Rules made thereunder. It is:

"3A. To facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act."

The Court is further required to give effect to the overriding objective as stated above. In addition, **Section 3B** sets out the duty of the Court in handling matters before it. The section provides as follows:

"3B. 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 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."

31. Mr. Gatonye submitted that there cannot be just determination of appeals by this Court if it is denied the power to grant interim orders of stay pending hearing and determination of appeals before it.

32. Mr. Gatonye further submitted that this Court has inherent power to do justice as stipulated by **rule 1 (2)** of the **Court's Rules** which states as follows:

"1(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

These powers are **"natural, innate, inborn, inbuilt and intrinsic to a court from the moment a court is constituted"** and **rule 1 (2)** cited hereinabove merely recognizes the existence of those powers. These powers are necessary for the ends of justice and to prevent the abuse of the court process, counsel added.

33. Mr. Gatonye cited the book: **The Inherent Jurisdiction of the Supreme Court (Capetown, South Africa: Juta Publishers, 1985)** where the South African jurist, **Jerold Taitz**, states as follows:

"The inherent jurisdiction of the supreme court may be described as the unwritten power without which the court is unable to function with justice and good reason. As will be observed below, such powers are enjoyed by the court by virtue of its very nature as a superior court modeled on the lines of an English superior court. All English superior courts, English colonial superior courts and the superior courts which succeeded them are deemed to possess such inherent jurisdiction save where it has been repealed or otherwise amended by legislation."

34. Regarding **Subsections 3(1)** and **3(2)** of the **Appellate Jurisdiction Act,** the applicant's counsel submitted that they are not unconstitutional. He saw no contradiction between those subsections and **Article 164** of the **Constitution**.

35. In conclusion, counsel submitted that the power of this Court under **rule 5 (2) (b)** is sanctioned by the law, but even if it were not, the Court would still invoke its inherent powers to order interim arrangements pending hearing and determination of an appeal in appropriate cases. He urged the Court to dismiss the preliminary objection.

36. In a brief reply, Mr. Abdullahi stated that the Court of Appeal Rules do not define what an appeal is. The rules merely state that an appeal **"includes an intended appeal"**. He urged the Court to be guided by the Supreme Court decision in **SAMUEL KAMAU MACHARIA & ANOTHER vs. KENYA COMMERCIAL BANK LIMITED** (s**upra**) in determining what an appeal is.

37. With regard to the exercise of "**inherent power of this Court**" as submitted by Mr. Gatonye, Mr. Abdullahi stated that such power is like a blank cheque which the Court has often used to grant orders that it has no powers to issue. As for the overriding objectives of the Court as spelt out by the Appellate Jurisdiction Act, counsel stated they do not confer jurisdiction, they are only procedural and the Court cannot rely on the same to grant orders of stay.

D. ISSUES FOR DETERMINATION

38. Having taken into consideration the submissions by counsel, the issues for determination in this application are fairly straight forward and may be summarized as hereunder:

(i) Whether this Court, in light of **Article 164 (3)** of the **Constitution of Kenya, 2010**, has jurisdiction to grant an order of stay of execution or any other order under **rule 5 (2) (b)** of the **Court of Appeal Rules**.

(ii) Whether **subsections 3 (1) and (2)** of the **Appellate Jurisdiction Act** are unconstitutional.

(iii) Whether the Court of Appeal has inherent power to grant interim orders pending hearing and determination of an appeal.

E. DISPOSITION OF THE ISSUES

1ST ISSUE

39. **Rule 5 (2) (b)** of this **Court's Rules** states as follows:

"Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may –

(a) …….

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."

40. The Court of Appeal Rules were made pursuant to the provisions of **Section 5** of the **Appellate Jurisdiction Act** which empowers the Rules Committee to make rules for regulating the practice and procedure of the Court of Appeal with respect to appeals and in connection with such appeals, for regulating the practice and procedure of the High Court.

41. The Rules on their own cannot confer jurisdiction upon this Court to make any decision or order. Jurisdiction is conferred by the Constitution and the Appellate Jurisdiction Act, in particular **Section 3** of the **Act**. The preamble to the said Act reads as follows:

"An Act of Parliament to confer on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto."

42. The commencement date of the Act was 28th October, 1977 and obviously it was enacted pursuant to the provisions of **Section 64** of the 1969 **Constitution** which stated that the Court of Appeal **"shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law."** That constitution has since been repealed by the **Constitution of Kenya, 2010**, whose **Article 164 (3)** states that the jurisdiction of the Court of Appeal is to hear appeals from the High Court and any other tribunal as prescribed by an Act of Parliament.

43. **Section 64** of the repealed **Constitution** empowered Parliament to enact legislation to stipulate the jurisdiction of this Court but that is not the position under the new Constitution. According to Mr. Abdullahi, that was intentional; the drafters of the new Constitution intended to limit the Court's jurisdiction to hearing appeals only and the intended Act of Parliament shall provide for the Court's organizational and administrative structure only. Applications under **rule 5 (2) (b)** have therefore no place under the new Constitution as they are not appeals and this Court lacks jurisdiction to hear such applications, he submitted.

44. In determining the first issue, I think the starting point is an observation that even after promulgation of the new Constitution the **Appellate Jurisdiction Act** and the Rules made thereunder are still in

operation, as rightly submitted by Mr. Gatonye. Indeed, all the law that was in force before 27th August, 2010 when the new Constitution was promulgated continues in force, only that it is to be construed with such alterations, adaptations, qualifications and exceptions as are necessary to bring it into conformity with the Constitution.

45. That being the case, and considering that **Article 164 (3)** of the new **Constitution** grants power to this Court "**to hear appeals**" from the High Court and other tribunals as prescribed by an Act of Parliament, I must go back to the question– "**what is an appeal**?" The Constitution does not define what an appeal is. The Constitution is the fundamental law of the land and provides a general framework and principles that prescribe the nature, functions and limits of a government or other institutions. Acts of parliament and subsidiary legislation contain the details regarding its operationalisation. I must therefore turn to **rule 2 (2)** of the **Court of Appeal Rules** which states that:

"appeal", in relation to appeals to the Court, includes an intended appeal."

46. What is "**an intended appeal**"? **Rule 75 (1)** states as follows:

"Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court."

The first step in instituting an appeal is the filing of a notice of appeal. **Order 42 rule 6 (4)** of the **Civil Procedure Rules** is also relevant in considering what an appeal is. It states that:

"for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."

47. It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant can move this Court for grant of an order of stay under **rule 5 (2) (b)** of this **Court's Rules**. The Court is said to be exercising special independent original jurisdiction because in considering whether to grant or refuse an application for stay it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court. See **STANLEY MUNGA GITHUNGURI vs. JIMBA CREDIT CORPORATION LIMITED (Supra).**

48. Regarding the provisions of **Article 164 (3)** of the **Constitution of Kenya, 2010**, I do not read any express or implied prohibition of this Court from granting interim orders of stay pending hearing and determination of an appeal. **The Constitution of Kenya, 2010**, could not have spelt out the details as to how the Court of Appeal should exercise its constitutional mandate in handling appeals and interlocutory applications which often arise while appeals are pending before the Court.

49. The drafters of the new Constitution were aware that the Appellate Jurisdiction Act and the Rules made thereunder were still operational and it is these Rules that define an appeal to include an intended appeal and expressly state that this Court may grant the orders stipulated under **rule 5 (2) (b).**

50. In determining whether this Court has jurisdiction to grant stay of execution pending appeal, one must therefore read **Article 164 (3)** of the **Constitution** together with **Section 5** of the **Appellate Jurisdiction Act** as well as **rule 5 (2) (b)** of the **Court of Appeal Rules**. The Court must also interpret **Article 164 (3)** purposively so as to give it effect, bearing in mind the Constitutional mandate of the Judiciary.

51. **Article 259 (1)** of the **Constitution** states that:

"This Constitution shall be interpreted in a manner that –

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) **contributes to good governance."**

52. Further, every provision of the Constitution must be construed according to the doctrine of interpretation that the law is always speaking, thus there cannot be a legal void, a situation where this Court is unable to grant a justiciable relief like an interim stay pending appeal, because of interpreting the law pedantically and concluding that it has no jurisdiction to grant such an order. Further, the Constitution must be given a purposive interpretation so that the objectives of a particular article are realized. In the case of **MINISTER FOR HOME AFFAIRS & ANOTHER vs. FISCHER [1979] 3 ALL ER 21, Lord Wilbeforce**, delivering the considered opinion of the Court stated as follows:

"A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights, and freedoms with a statement of which the Constitution commences."

53. In view of the foregoing, I find and hold that a proper interpretation of the **Constitution of Kenya, 2010** must lead to the conclusion that the wording of **Article 164 (3)** of the **Constitution** permits this Court to grant an order of stay of execution under **rule 5 (2) (b)** of the **Court of Appeal Rules.**

ARE SUBSECTIONS 3(1) AND (2) OF THE APPELLATE JURISDICTION ACT UNCONSTITUTIONAL?

54. In paragraphs 18 and 19 above I have already quoted the provisions of the two subsections. Mr. Abdullahi's argument regarding **subsection 3(1)** is that it restricts the right of appeal to this Court whereas, according to him, **Article 164 (3)** of the **Constitution** now provides an automatic right of appeal from all decisions of the High Court and any other Court or tribunal as prescribed by an Act of Parliament. Counsel contended that the right of appeal is now absolute and any decision of the High Court is appealable to this Court.

55. With great respect to senior counsel, I do not agree. The Civil Procedure Act and the Rules made thereunder as well as the Criminal Procedure Code which have always stipulated the nature of matters that are appealable to this Court have not been amended. For example, **Order 43 (1)** of the **Civil Procedure Rules** sets out the instances where appeals lie as of right from various orders and rules under the provisions of **Section 75 (1) (h)** of the **Civil Procedure Act**. **Order 43 (2)** states that except for matters stated in **Order 43 (1**), an appeal to this Court shall lie with the leave of the Court. Similarly, **Section 348A** of the **Criminal Procedure Code** states:

"348A When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law."

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

57. Turning to **subsection 3(2)** of the **Appellate Jurisdiction Act**, Mr. Abdullahi's complaint was that it was too expansive and unlawfully enlarges the Court's jurisdiction to hear appeals. That subsection

simply states that in dealing with appeals, this Court shall exercise similar powers and authority as that exercised by the High Court. For example, when this Court is sitting as the first appellate Court, it is mandated to evaluate the evidence that was tendered before the High Court and reach its own finding. Where the Court finds that according to evidence on record the High Court ought to have made finds that according to the evidence on record the High Court ought to have made a certain determination but it failed to do so, it can proceed to determine the matter, just as the High Court would have done.

I do not therefore agree that **subsections 3(1)** and **(2)** of the **Appellate Jurisdiction Act** are unconstitutional.

DOES THE COURT OF APPEAL HAVE INHERENT POWER TO GRANT INTERIM ORDERS PENDING HEARING AND DETERMINATION OF APPEALS?

59. To my mind, the answer to the above question must be in the affirmative. Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate. In **SETH LOOKASAN SETHIYA v. IVAN E. JOHN AIR [1975] ALL 113**, it was held that power means authority, whether any discretion is left or not and whether any direction is imperative or directory relates to the manner and exercise of the power and not to the basic ingredient of the authority itself. Inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.

60. Even if **rule 5 (2) (b)** of the **Court of Appeal Rules** was not in existence, in appropriate circumstances this Court would, in my view, be perfectly entitled to exercise its inherent power to order stay of execution pending appeal so that an appeal is not rendered nugatory. No appeal can be filed, served, heard and determined in a day. If this Court did not have power to grant interim relief in the intervening period, great injustice would be occasioned to litigants. An illustration may be appropriate:

Suppose a plaintiff files a suit in the High Court against a defendant, claiming to be the lawful owner of an old commercial building in a city which is occupied by the defendant. The High Court enters judgment for the plaintiff and further orders demolition of the building, being one of the prayers sought by the plaintiff, as he intends to put up a modern high rise building. The defendant files an application for stay of execution pending appeal but the High Court rejects the application. The defendant, having filed a notice of appeal moves to the Court of Appeal to seek stay of execution pending appeal, but the Court refuses to grant the order sought, holding that the Constitution has not given it power to hear interlocutory applications, and proceeds to order that the appeal be set down for hearing in a month's time. In the meantime, the plaintiff/respondent moves with alacrity and pulls down the entire building. Come the hearing of the appeal and ultimately the High Court judgment is overturned, the Court of Appeal finding that the property actually belongs to the defendant! How would one explain the kind of injustice occasioned to the defendant/appellant in this hypothetical case?

61. In **M. MWENESI v. SHIRLEY LUCKHURST & ANOTHER, Civil Application No. NAI 170 of 2000**, this Court held that a Court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent, a stay of execution is irresistible. I may add that a court of law is under a duty to exercise its inherent power to prevent injustice. See **Section 3A** of the **Civil Procedure Act** and **rule 1(2)** of the **Court of Appeal Rules.**

F. CONCLUSION

62. This Court's jurisdiction to grant interim orders of stay under **rule 5 (2) (b)** or even in exercise of its inherent powers of this Court's Rules is deeply entrenched in its operations and has been applied over a long period of time. That jurisdiction is of fundamental importance and without it the Court's effectiveness would be greatly compromised.

63. However, I must also admit that there are many instances in which orders of stay granted by this Court have been abused by appellants due to their failure to prosecute their appeals expeditiously and have thereby occasioned great injustice to respondents and/or parties who have obtained judgments in their favour from the High Court. In my view, the Rules Committee should urgently consider an amendment to **rule 5 (2) (b)** of this **Court's Rules** to limit the time such orders, once issued, can remain in force. With the recent increase in the number of judges of this Court, the Court is now empowered to dispose of appeals much faster than was the case when there were only about ten judges in the Court. In instances where an order under **rule 5 (2) (b)** has been granted, the appeals should be heard on priority basis and disposed of expeditiously, say within six months from the date of filing the notice of appeal.

64. In view of the reasons stated hereinabove, this preliminary objection is dismissed with costs to the applicant.

Dated and Delivered at Nairobi this 31st day of May, 2013.

D.K. MUSINGA
.....
JUDGE OF APPEAL

RULING OF KIAGE J.A

The applicant's Notice of Motion dated 30th March 2011 was an ordinary application for stay of execution application brought, like all such applications, under **Rule 5 (2) (b)** of this Court's Rules and was en-route to an ordinary hearing and disposal the respondent having filed its response and opposition by way of a replying affidavit sworn by its Managing Director MUSTAFA ADEN GODI on 8th April 2011 and filed on 11th April 2011.

The application veered off the beaten path, however, upon the filing by the respondent of its Skeleton Arguments on 16th March 2012. In it, the respondent raised fundamental questions regarding this Court's jurisdiction to entertain an application for stay of execution. Mr. Ahmednassir Abdullahi, learned Senior Counsel for the respondent elaborated on the said issue when, appearing for the hearing of the stay of execution application on 19th March 2012, he told a three-judge bench of this Court that this Court is mandated by the Constitution to hear appeals only and that any provisions in the Appellate Jurisdiction Act and the Rules made thereunder donating extra powers are unconstitutional.

As the issues raised were of first impression and undoubtable importance, Mr. Abdullahi proposed that the hearing of the application be adjourned to another day when it could be heard before a five-judge bench to be constituted by the presiding judge. Mr. Waweru Gatonye, learned counsel for the applicant had no objection to the proposal hence the eventual constitution of the current bench.

Mr. Abdullahi took the jurisdictional question in *limine* as a preliminary objection. The question he was urging raises, in the nomenclature of Sir Charles Newbold, P in the famous case of **MUKISA BISCUIT MANUFACTURING CO. LTD Vs. WEST END DISTRIBUTORS LTD[1969] E.A 696** at 701, a pure point of law. It was a point which, if successful, would have the immediate effect of being entirely dispositive of the application before us.

Being also a jurisdictional point, it had to be dealt with and decided at the outset for the plain reason that should the respondent be right in its contention, the court would have no basis, power or authority to handle the substantive application. Jurisdictional questions are threshold issues which, once raised must be determined before the court can embark on or proceed with the matter substantially before it.

This is so because, in the timeless words of Nyarangi J.A in **THE OWNERS OF MOTOR VESSEL LILLIAN 'S' Vs. CALTEX OIL (KENYA) LTD** [1989] KLR 1 at P14;

"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 obligated to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

(Emphasis Mine)

In his endeavour to have us down our tools, Senior Counsel for the respondent first took us through what he termed the evolution of the jurisdiction of the Court of Appeal through various constitutional epochs. Starting with the Independence Constitution, he averred that that Constitution was trustful of parliament to craft appropriate legislation that would demarcate and delineate the proper contuors of appellate jurisdiction.

Significantly, and I shall return to it later in this ruling, Mr. Abdullahi referred us only to **Section 177 (1)** of the Independence Constitution which provided that;

"Parliament may, if it thinks fit, establish a Court of Appeal for Kenya, which, subject to the provisions of this Constitution, shall have such jurisdiction and powers as may be conferred on it by any law."

Mr. Abdullahi next moved to the 1969 Constitution which it is that remained in force until the year 2010 when the current Constitution was promulgated. The 1969 Constitution is also commonly referred to as the ***former Constitution***. He drew our attention to its Section **64 (1)** which provided thus;

"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."

It was Senior Counsel's contention that although the former Constitution appeared to restrict appeals to statutory donation or conferment, it still trusted parliament to make the appropriate legislation to address the jurisdiction of the Court of Appeal. This Parliament did, in Mr. Abdullahi's submission, through the enactment of the **Appellate Jurisdiction Act,** Cap 9 Laws of Kenya. Section 3 of the Act to which I shall return repeatedly, provides for the jurisdiction of this Court in the following 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 and determination 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 in the High Court."

Turning to the current constitutional dispensation, Mr. Abdullahi pitched camp at **Article 164 of 2010** Constitution which is as follows;

"164(1) There is established the Court of Appeal, which –

(a) **Shall consist of the number of judges, being not fewer than twelve , as may be prescribed by an Act of Parliament; and**

(b) **shall be organized and administered in the manner prescribed by an Act of Parliament**

(2) There shall be a president of the Court of Appeal who shall be elected by the judges of the Court of Appeal from among themselves

(3) The Court of Appeal has jurisdiction to hear appeals from –

(a) the High Court

(b) any other court or tribunal as prescribed by the Act of Parliament."

According to Mr. Abdullahi, the constitutional text that this Court has "jurisdiction to hear appeals," without further reference to anything else it may do, provides a major departure and expresses a permanent constitutional constriction of the Court's jurisdiction.

In Senior Counsel's most direct submission, by the 2010 Constitution this court's owers were 'cut down to size'. What is more, the Constitution evinced a mistrust of Parliament to define or demarcate the jurisdiction of the Court of Appeal. Parliament simply does not come in when it comes to the jurisdiction of the Court he urged.

In broad submissions, Mr. Abdullahi declaimed and celebrated a totally new day where the Constitution flung open the gates of this Court to provide for direct access for litigants. To him no longer would litigants and their legal advisors scratch their heads in trying to establish whether a right of appeal to this Court exists: that right is direct, unfettered, and absolute. One can now appeal, he argued, on anything, and such strictures and limitations as existed by way of leave and other requirements are now obsolete and unconstitutional. He also stated that other courts beside the High Court also have source access to the Court of Appeal and declared the advent of a democratizing court in which the word 'power' in respect to jurisdiction and such other archaic and anachronistic terms have gone out the window.

Expanding on the metamorphic theme, Mr. Abdullahi sought to distinguish this now-stifled Court from the Supreme Court and the High Court which under the Constitution could have their respective jurisdictions further expanded by statute. The only statute touching on this Court in the contemplation of the Constitution is only an operationalizing statute to address internal administration but definitely not to expand the jurisdiction deliberately narrowed by the Constitution itself, in his view.

Mr. Abdullahi then drew a parallel between this Court and the subordinate courts. He pointed out that **Article 164** that deals with this Court is the second shortest of the articles on the Judiciary and then only marginally longer than **Article 169** which concerns itself with subordinate courts. On these premises, Senior counsel argued that this Court earned itself the dubious distinction of the least interest of the Constitution's drafters who 'came down heavily' on the Court. To him, the fact that both the High Court and the Supreme Court were given both original and appellate jurisdiction, while this Court was restricted to appellate jurisdiction only, is further proof that its stature prestige and authority was meant to decrease in the new constitutional order. He then offered the theoretical explanation that it is a fate the Court brought upon itself ***"because of its obsession with Rule 5 (2) (b) of the Court of Appeal Rules."***

Turning to the crux of the respondent's preliminary objection, Mr. Abdullahi submitted that in so far as **Section 3 (1)** of the Appellate Jurisdiction Act addresses this Court's jurisdiction in the context of appeals ***"from the High Court in cases in which an appeal lies"***, it is doubly unconstitutional for restricting appeals to those emanating from the High Court and even then in only such cases as appeals lie. To Senior Counsel, **Article 164 (3)** of the Constitution envisages appeals from the High Court as well as other courts and tribunals and for all cases coming to this court so that the statute's limitations or restrictions are, *ipso facto,* unconstitutional.

Mr. Abdullahi's contention was that in so far as **Section 3 (2)** of the Act seeks to confer "power and authority" to this court, it is even "more unconstitutional" for employing language and terms that are no longer tenable under a democratic Constitution. Language apart, it was submitted for the respondent that Cap 9 gives this Court more power or jurisdiction than the Constitution does and is, to that extent, unconstitutional.

In short, Mr. Abdullahi's two pronged attack on **Section 3 of the Appellate Jurisdiction Act** is that it offends the Constitution by dealing with this Court's jurisdiction first in inappropriately **restrictive** and later in inappropriately **expansive** terms.

Leaving the statute awhile, the respondent next directed fire at **Rule 5 (2) (b)** of the Court of Appeal Rules which is in the following terms;

" (2) Subject to sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may –

…

(c) **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 any further proceedings on such terms as the court may think just."**

It was Senior Counsel's submission that the orders grantable under **Rule 5 (2) (b)** are **original** in character and not appellate and therein lies their unconstitutionality. Mr. Abdullahi cited a number of decisions of this Court in which the character of the jurisdiction exercised under **Rule 5 (2) (b)** was stated to be original. These included **RUBEN & 9 OTHERS Vs. NDERITO & ANOTHER [1989] KLR 459** and **SAFARICOM LTD Vs. OCEAN VIEW BEACH HOTEL LTD & 2 OTHERS CIV. APPL. 327 OF 2009 [2010] e KLR**. Regarding the latter case, Senior Counsel submitted that the analyses and conclusions of the judges done on the exact character of the jurisdiction conferred by **Rule 5 (2) (b)** may have been perfectly right under the old (former) Constitution but would be untenable under the new.

He was particularly scathing of Nyamu J.A's observation in SAFARICOM that this Court had the "sole power to rule on its own jurisdiction and to define the limits of its jurisdiction …" and that it "could not fold its hands and decline to intervene in the face of a plain nullity perpetrated by the High Court staring at it … As the final court it does, in my opinion, retain a 'residual' or inherent jurisdiction in respect of … issues and nullities."

To Mr. Abdullahi, the foregoing dicta amounted to the Court 'going over board' and was symptomatic of a jurisprudence establishing a roving jurisdiction for this Court which must be avoided at all costs. He also took issue with this Court's decision in **INTERIM INDEPENDENT ELECTORAL COMMISSION & ANOR Vs. PAUL WAWERU MWANGI CIV, APPL. 130 OF 2011 [2011]** eKLR which was made post-promulgation of the Constitution terming it 'entirely wrong'. He vigorously disagreed with the Court's holding that the jurisdiction exercised by the Court under **Article 164 (3)** of the Constitution is the same as that exercised under **Section 64** of the former Constitution. To Senior Counsel, "it is these sweeping statements that have undone this Court and damaged the jurisprudential integrity of the Court." He referred to the said finding as 'a loose statement that served only to undermine the dignity of the Court'. I shall return to and attempt to place in proper context the finding that so provoked the respondent's ire and fire.

To further buttress his submissions, Senior Counsel placed reliance on the Supreme Court decision of **SAMWEL KAMAU MACHARIA & ANOR Vs. KENYA COMMERCIAL BANK LTD & 2 OTHERS APPL. 2 OF 2011, 2012** eKLR where that court restated the axiomatic position that a court's jurisdiction flows from either the Constitution or legislation or both and no court can properly arrogate to itself jurisdiction exceeding that which is conferred upon it by law. This was, on the question of jurisdiction, a sequel to the same court's advisory opinion in **RE: THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION CONST. APPL. 2 OF 2011, [2011] eKLR** which had dealt extensively with the issue of jurisdiction. The clear message from the Supreme Court is that where the Constitution provides in exhaustive terms for the jurisdiction of a court of law, the court must act within the prescribed jurisdictional limits and cannot "***by judicial craft or innovation"*** expand them.

As to the interpretational approach we should adopt in dealing with the issue before us, Senior Counsel was emphatic that there being no ambiguity with regard to the meaning of the term ***appeal*** as used in the

Constitution we needed to give the word a strict interpretation consistent with fidelity to the constitutional text. He called in aid the old case of **REPUBLIC Vs. ELMANN [1969] E.A 357** which he extolled as having withstood the test of time and urged us to apply and give the word appeal its natural and ordinary sense which would, in his reckoning, exclude **Rule 5 (2) (b)** applications.

Such an approach, urged Mr. Abdullahi, would be in consonance with and furtherance of the principle of interpretational honesty which, he submitted, is to be gleaned as a desideratum of constitutional construction.

Drawing to a close of his submissions, Mr. Abdullahi urged that an important component of the rule of law was a limited government. He then went on to assert that Kenyans through the Constitution had expressed their desire for a limited Judiciary and so it behoved us to advance the rule of law by obeying and giving effect to the law as written. To him, the upholding of the respondent's preliminary objection would be a signal act of upholding the law.

The pro-respondent judgment that is the subject of appeal to this court vested clear proprietary rights in the sum of Kshs. 40 million in the respondent, Mr. Abdullahi submitted, and so this Court should not scuttle that rights-laden judgment by way of a stay. He considered the fact of the respondent's inability to access the Kshs. 40 million judgment for years as a clear example of the oppressive and deleterious effects of **Rule 5 (2) (b)** which he castigated as the biggest impediment to the principle of expedited justice expressed in **Article 159 (4)** of the Constitution.

To Mr. Abdullahi, if I heard him a right, **Rule 5 (2) (b)** was steeped in politics and policies that engendered a plurality of legal issues that effectively put decrees in the cooler for long periods of time so that the Rule had become an incubator of oppression and was a sword used by the rich and mighty against, presumably, the poor and weak. Whereas the application of the Rule may have been permissible under Section 64 of the former Constitution, Senior Counsel submitted, it had no place under the new which deliberately shackled this Court and denied it any jurisdiction beyond the hearing of appeals.

At the end of these weighty submissions delivered in Mr. Abdullah's trademark forthrightness, Mr. Gatonye, learned counsel for the applicant, sought an adjournment to reflect on what was clearly a raft of troubling issues raised by this preliminary objection.

Rising to meet the objection on the adjourned date, Mr. Gatonye submitted that properly scrutinized, the issues raised by the respondent were devoid of merit and the preliminary objection should be dismissed. He first addressed the purpose of a stay which he submitted was the arresting of execution or ordering interim arrangements pending the hearing of appeals, which is the true business of this Court.

To Mr. Gatonye, stay of execution is an ancient jurisdiction steeped in antiquity and has existed for centuries. It is an integral part of the administration of justice without which the greater part of this Court's work would be rendered merely academic. Far from being a subversion of the will of the people as expressed in the Constitution, Counsel argued that the power to grant stay is the application of the inherent jurisdiction of the Court as an instrument of society for the administration of justice. Absent that power, he warned, the very existence, purpose and authority of the Court would be entirely negated.

Regarding the removal of the words ***"any other matter related thereto"*** with regard to this Court's appellate jurisdiction in the 2010 Constitution, Mr. Gatonye expressed himself as unable to see any real difference. Stating that whatever is not forbidden by the Constitution can be done without constitutional offence, Mr. Gatonye submitted that there is no express or implied prohibition against the hearing and granting of stay applications by this Court. So old and effective a jurisdiction could only have been removed by way of clear language and the framers used none. Further, since **Article 164** of the Constitution does not define the term 'appeal' the pre-existing definition of appeal as including "intended appeal" remains good and effective.

Mr. Gatonye next submitted that it is impractical and unwise to seek to find every detail of law in the Constitution. To him, the Constitution provides only a general framework and much else is left to

legislation to provide for the full details of the organization and powers of the state and its various organs. These various statutes retain their validity and force of law notwithstanding the coming into force of the 2010 Constitution which, under the transitional provisions, preserves them with such necessary modification as bring them in tandem with the new Constitution.

Given that scheme of things, in Mr. Gatonye's submission, the work of the Rules Committee by virtue of **Section 5** of the Appellate Jurisdiction Act is preserved. The Rules of Court expressly define appeal as including 'an intended appeal' so that even where a record of appeal has not been filed, the existence of a Notice of Appeal is sufficient to invoke the Court's jurisdiction. He urged that the definition of appeal in the Rules is good and effective absent any contrary or inconsistent definition in the Constitution or other law.

Next, Mr. Gatonye submitted that a proper and wholistic view of the Constitution complete with its values, principles and objectives leads to the inescapable conclusion that a Court of Appeal such as the respondent envisages, one that is bereft of powers to order stay of execution, would not fulfill the objectives of the Constitution as commanded by **Article 10** including the rule of law, human dignity, equity and good governance. The right to access justice under **Article 48** would be compromised beyond recall if a party were unable to obtain orders for interim conservatory arrangements pending the hearing of his appeal.

Mr. Gatonye lamented that a failure to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law and human rights thereby contributing to good governance would have the opposite and deleterious effect of leading to citizen despair which would manifest in self help and other extra-judicial means of dispute settlement. He urged that in determining the true contours of the power granted this Court by the Constitution, it is incumbent upon us to resolve the issue by minding the object for which the power is bestowed. His view was that in order to give full breadth and meaning to those values and principles that underlie the Constitution, a purposive and enabling; as opposed to a stifling and pedantic, approach is what was required.

It was further argued for the applicant that even without **Rule 5 (2) (b),** this Court would still have the jurisdiction to hear and grant applications for stay under the ***overriding objective***, styled ***'the oxygen principle'*** found in Section 3A of the Appellate Jurisdiction Act as follows;

"3A (1) The overriding objective of this Act and the rules made hereunder is to facilitate just and expeditious, proportionate and affordable resolution of the appeals governed by this Act.

(2) The Court shall, in the exercise of its power under this Act on 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."

The applicant also placed reliance on the Court's inherent power as fundamental to its jurisdiction to grant stay of execution. Mr. Gatonye referred to **Rule 1 (2)** of the Court of Appeal Rules, 2010, which provides thus;

"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Counsel was of the view that this sub-Rule is not the source whence inherent jurisdiction flows or derives. The Rule only recognizes it as a power that is innate, inborn, immanent and intrinsic to a court of law. To him, the power to grant a stay is designed to avoid abuse of process and to meet the ends of justice by ensuring that nothing is permitted to occur that would render the Court's judgment nugatory. He pointed out that this unwritten power that enables the Court to operate and function efficaciously has not been

amended, limited or repealed by statute or the Constitution.

Mr. Gatonye referred us to a passage in **DAVID NKANATE MAGIRI Vs. BENARD BENEDICT MUNGANIA & 4 OTHERS CIV. APPL. NAI 253 OF 2011,** a case cited by the respondent, and submitted that it represented the correct position of law regarding inherent jurisdiction;

"**The court has jurisdiction either under the overriding objective principle or under the inherent jurisdiction of the Court as stipulated in Rule 1 (2) of the Court of Appeal Rules 2010, to grant any interlocutory order that may be necessary for the ends of justice, even on its [own] motion as a court of justice. In our view, it is just in the circumstances that the suit property should be preserved pending the determination of the appeal."**

While admitting that **Section 3A** of the Appellate Jurisdiction Act reproduces the language of **Section 64** of the former Constitution, Mr. Gatonye contended that he saw no contradiction between it and **Article 164** of the current Constitution the provisions whereof he urged should be construed conjunctively and not disjunctively so that it would still be open to Parliament, by legislation, to provide for the Court's jurisdiction in the matter of appeals without offending the Constitution.

On the vexed issue of the exact nature of the jurisdiction that this Court exercises under **Rule 5 (2) (b),** Mr. Gatonye argued that it would be otoise to characterize an application under that rule as an original matter. To him, all applications for stay of execution are no more than preliminary steps in the conduct of an appeal and are not original matters in the sense of originating new causes of action. He was emphatic that there can be no application under **Rule 5 (2) (b)** absent a notice of appeal and that therefore applications for stay owe their life to the existence of appeals. He concluded that whereas a former member of this Court (whom he did not name) appears to have popularized the notion of original jurisdiction with respect to these applications, all that the Court has been propounding is that the applications were fresh matters and the use of the term original was probably no more than linguistic inaccuracy.

Responding to these submissions, Mr. Abdullahi refuted the applicability of **Article 10** of the Constitution to the matter before us and referred to the submissions on it as relating to 'the politics of the Constitution and not the law of it. He then insisted that this Court has consistently and endlessly asserted that it exercises an original jurisdiction under **Rule 5 (2) (b)** which has manifested in the issuance of new remedies totally unrelated to what had previously transpired at the High Court.

He then proceeded to argue that these Rules of Court, specifically **Rule 2**, do not define an appeal but only state its contents as including an intended appeal. Conversely, he argued, the **S.K. MACHARIA** decision of the Supreme Court defines an appeal and **Rule 5 (2) (b)** application cannot fit in that definition.

Turning to the applicant's reliance on inherent jurisdiction, Mr. Abdullahi asserted that in the Third World the court's inherent jurisdiction has been used as a blank cheque that has been deployed to cause much grief and sorrow. To him, the **DAVID MAGIRI** case was one such instance and he dismissed it as a ***carte blanche*** to anarchy while the 'Oxygen Rules' embodied the next frontier of judicial impunity.

Senior Counsel's further grievance against the inherent rules was thus;

"This court always griefs for only one party. It does not do a balancing of interests. It does not look at the other side of the street."

Essentially, in Mr. Abdullahi's view, the inherent jurisdiction and the overriding objective principles have become a vehicle for judicial caprice spawning all manner of unjust and deleterious consequences yet their proper place is merely procedural and wholly incapable of conferring rights.

He then urged us to decline the invitation to venture into innovation in interpreting our jurisdiction. Were we to exercise craft or imagination we would go very far, he warned, but in the wrong direction. He

concluded that the Constitution had in express terms "taken away original jurisdiction for this Court so that it can deal only with appeals."

What to make of the respondents preliminary objection? That it is novel and bold there is no denying and it needs careful consideration.

If I may start where learned Senior Counsel rested, the text of **Article 164 (3)** seems plain enough on the jurisdiction of this court which is to hear appeals. The appeals this court hears emanate from two distinct sources namely;

(a) the High Court and

(b) any other court or tribunal as prescribed by an Act of parliament.

The High Court as the originator of appeals that this Court hears is a matter of constitutional conferment. The right to appeal from that court to this flows directly from the Constitution itself. In this respect, the Constitution restates the situation that existed under **Section 64** of the former Constitution which is that the High Court was the only catchment area for and exclusive source of appeals to this Court.

What the Constitution has now done under **Article 164 (3) (b)** is to potentially expand the sources of appeals to this Court. It gives Parliament the mandate to pass legislation that would confer a right of appeal to this Court in respect of matters emanating from other courts and tribunals. When such legislation should come into being, the source – and subject matter – jurisdiction of the Court will definitely be expanded.

It is a curiosity that the respondent argues that the new Constitution has "taken away" from this Court original jurisdiction. That submission presupposes that this Court was earlier possessed of such jurisdiction. The reality, of course, is wholly different as this Court, as its very name connotes, has ever and always possessed only appellate jurisdiction. The only aspect of that jurisdiction that has changed from time to time has never really been the ***nature*** but rather the ***content*** or ***incidence*** of it.

By this I mean that at different epochs, certain matters have either been subject to appeal to this Court or rendered final in various statutes. The real argument that would attend a study of the history of this Court would not centre on whether or not its jurisdiction has been appellate, but rather for which matters parliament had donated the right of appeal to it. So it is that some matters have been appellable as of right, some only with the leave of court while yet others non-appellable.

The case of **ANARITA KARIMI NJERU Vs. THE REPUBLIC** (No 2) [1976-80] IKLR 1283 cited by the respondent contains an excellent exposition of the evolution of this and its predecessor Courts' appellate jurisdiction over time going back to the dawn of the 20th century. Through that march of time the one theme that has remained constant is that as an appellate tribunal, this Court has been able to entertain only such appeals as statute has declared appellable to it. This Court has never enjoyed a general supervisory role. It was for that reason that the main holding in the case was that, in the absence of express provisions, the Court had no jurisdiction (at the time) to hear appeals from decisions of the High Court under **Section 84** of the Constitution (enforcement of fundamental rights and freedoms). In arriving at that conclusion, correctly given the context in my view, the ANARITA KARIMI court criticized the earlier decision of **MUNENE Vs. REPUBLIC (NO 2) [1976-80] 1 KLR 838; [1978] 1**05 so roundly that the editors of the law reports dubiously and inaccurately editorialized that they **overruled it**. The proper position is they disapproved and departed from it, the earlier bench being of concurrent authority. The criticism was, I think well-deserved for;

"This court then assumed jurisdiction which was not within that conferred by any statute and which had been expressly excluded by statute. With respect, to do so appears to us to do violence to the principles accepted by the court that there is no right of appeal apart from statute." P 1286

(Emphasis Mine)

The Court was so alive to the need to put to rest the question of this Court's jurisdiction that it undertook the "heavy and somewhat wearisome" task of reviewing authorities from England, India, Aden and Tanzania concluding that they all supported the above-quoted rule governing this Court's jurisdiction.

It is of particular interest that the learned judges pointed out two ways in which a Court of Appeals attains jurisdiction and a careful analysis of the two ways will immediately show that **Article 164 (3)** of our current Constitution has preserved them both inviolate. Said the Court;

"The conferment of jurisdiction on a Court of Appeal takes one of two forms. The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court. Here, where the Court of Appeal is to be deprived of jurisdiction, that is done specifically in a particular enactment. The second is where the legislature establishes a Court of Appeal expressly without jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one of two forms; either by conferring o the Court of Appeal jurisdiction to hear all appeals from the High Court, or by conferring a jurisdiction on the Court of Appeal in particular enactments, as considered appropriate." (P 1287)

It would seem to me that in applying the foregoing reasoning to the Constitution, the Court of Appeal does have jurisdiction to hear all appeals from the High Court (unless expressly excluded) but will only hear such appeals from other courts and tribunals as will be specified in the legislation contemplated in **Article 164 (3) (b).**

So understood, it follows that it is inaccurate and way off the mark to state that the Constitution has curtailed, cut back or cut to size the jurisdiction of this Court. To the contrary it seems to have expanded it, but definitely within appellate context.

The respondent urges us to apply a strictly literal meaning to the words "to hear appeals" used in **Article 164 (3) (b)** of the Constitution. We are to see those words as meaning the hearing of appeals and no more and therefore anything else would be unconstitutional. With respect, such an approach is likely to lead to strange consequences. Consider for instance the fact that whereas the Court of Appeal is merely "to hear appeals", the Constitution confers jurisdiction on the Supreme Court to 'hear and determine' specified matters. Are we to conclude, ala literalism, that this Court can only ***hear*** appeals without making ***determinations*** thereon? To stretch the matter even further, are we to conclude that we should not have heard the respondent's preliminary objection because it is not an appeal?

I have anxiously considered the respondent's submissions on the true meaning of **Article 164(4)** of the Constitution and am unable to accept the constrictive and minimalist approach that is proposed. Notwithstanding the respondent's opinion that the new Constitution deliberately set out to cut this Court to size and to relieve it of much of the jurisdiction it has hitherto possessed, there is nothing in the constitutional text itself that supports a view that Kenyans intended to retain as one of their Superior Courts, an appellate one at that, a court that is little more than a figurehead. I hold the view that the Court of Appeal holds a central place in the new judiciary and, having the final word in perhaps well over ninety five percent of all legal disputes, any attempt, be it deliberate or inadvertent, to portray it as devoid of the authority that attaches to such a court is unfortunate and to be decried whatever one's views may be about its past failings. It is the Court of Appeal.

As an appellate court, this Court plays a salutary and critical role, in no wise diminished or abrogated by our new Constitution, as courts of appeal the world over, at any rate in common law jurisdictions, have always played. That is a role that is at the heart of the access to justice project that a progressive, people-centred Constitution espouses. I am happy to borrow from Lord Woolf's Final Report on "Access to Justice" (HMSO, July 1996 where in chapter 14, paragraph 2 he defined the purpose of appeals as follows;

"Appeals serve two purposes, the private purpose, which is to do justice in particular case by correcting wrong decisions, and the public purpose which is to ensure public confidence in the administration of justice by making such corrections to and to clarify and develop the law and to

set precedents."

(See The Right Hon. Lord Justice, Mary Gen Ed, ***Civil Procedure*** No 1 (2003) Sweet & Maxwell (The White Book) P 1253)

It is difficult to see how such a vital role can be played by a Court of Appeal as wimpish and emasculated as painted by the respondent. Such a Court is incapable of incarnating the constitutional vision and is unlikely to inspire, let alone ensure, public confidence.

I now turn to the attack on **Section 3** of the **Appellate Jurisdiction Act** by reason of a perceived dual unconstitutionality. **Section 3(1)** is impugned for being too restrictive in that it declares the High Court to be the sole source of appeals to this Court while the Constitution contemplates other courts and tribunals. My short answer is that all statutes in force before the promulgation of the Constitution remain valid by virtue of being saved by the Transnational and Consequential Provisions in the Sixth Schedule of the Constitution. In particular, Section 7 expressly provides thus;

"7 (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualification and exemptions necessary to bring it into conformity with the constitution."

Section 3 (1) of the **Appellate Jurisdiction Act** is a pre-existing statutory provision and it would be incorrect to hold it unconstitutional for not providing for appeals from other sources other than the High Court. As and when the legislation contemplated by the Constitution is passed granting rights of appeal from other courts and tribunals, appropriate amendments would be made to **Cap 9**, but even if they were not, the saving provision suffices.

The respondent also appeared to fault the same sub-section for containing the qualification "***in cases in which an appeal lies to the Court of Appeal"*** the contention being that under the Constitution one can appeal to this Court on anything and everything. With respect, I cannot agree.

The actual jurisdiction in live cases and the manner and instances in which this Court exercises it is actually to be found in the two procedural statutes. This was recognized by the **ANARITA KARIMI** case as a truism;

"As is well known, jurisdiction has been conferred in this court in civil matters by the Civil Procedure Act and in criminal matters by the Criminal Procedure Code." (at P 1303)

Now, even a cursory look at the **Civil Procedure Act** (Cap 21) and the **Rules** made thereunder as well as the **Criminal Procedure Code** will immediately reveal that it is not every decision of the High Court (or for that matter any other court or tribunal as may in future be appellable here) that is subject to appeal. That much is plain from the wording of **Section 66** of the **Civil Procedure Act** which is;

"Except where <u>otherwise expressly provided in this Act,</u> and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal."

(Emphasis Mine)

This section implies and recognizes that appeals may perfectly and legally be excluded by express provision of law. Indeed, even where not excluded, they may yet be circumscribed by conditionalities including the furnishing of security. It could well be argued from an academic and sophistic stand point that such exclusions and conditionalities are themselves unconstitutional but they derive their being from a sense of balance, proportionality and an appreciation of practical realities.

Provisions in that Act that preclude appeals include;

S. 67 "(2) No appeal shall lie from a decree passed by the court with the consent of the parties."

Regarding second appeals, being appeals from High Court decrees made in exercise of its appellate jurisdiction they are limited or restricted to three instances or grounds for challenging the subject decisions as set out in **Section 72(1)** of the Civil Procedure Act, namely;

"(a) the decision being contrary to law or to some usage having the force of law

(b) the decision having failed to determine some material issue of law or usage having the force of law

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

The position regarding orders is that **Section 75(1)** lists the categories of orders from which an appeal lies ***as of right***. Every other order not in the listed categories can be appealed from only with leave to be sought from the court that made the order to or which an appeal would lie. Again, what we see is a commonsensical and legally sound limitation of the right to appeal and I would state unhesitatingly that such limitation is not offensive of the Constitution.

The same scheme of limitation of the right to appeal appears in criminal matters. Appeals to this Court from convictions on trials conducted by the High Court, commonly referred to as first appeals are highly restricted under **Section 379** of the **Criminal Procedure Code.** Convictions followed by minor sentences in the form of small fines and brief prison terms are not subject to appeal to us unless a judge forms the opinion a question of law of great general importance is involved or upon a certificate that it is a case fit for appeal. Where an accused person pleaded guilty and was convicted no appeal is allowed by virtue of sub-section 3- except as to the extent or legality of his sentence.

There is also an express limitation on the nature of appeals that this Court may entertain from decisions of the High Court in exercise of its appellate jurisdiction as set out in **Section 361** of the Criminal Procedure Code as follows;

"(1) A party to an appeal from a subordinate-court may, subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

(a) **on a matter of fact, and severity of sentence is a matter of fact; or**

(b) **against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence."**

(Emphasis Mine)

It is clear, then, that what emerges from the two statutes that provide for the jurisdiction of this Court is a deliberate and elaborate scheme of necessary exclusions without which, to my way of thinking, this Court would be unable to function out of the sheer load of cases that would otherwise inundate it. I have not heard it said that such restrictions and limitations are unconstitutional, and nor can they be.

The second limb of assault against **Section 3** of the **Appellate Jurisdiction Act** is to the effect that its sub-section (2) is too expensive and grants the court more jurisdiction than is constitutionally envisaged or indeed permissible. The said provision reads thus;

"(2) For all purpose of and incidental to the hearing and determination 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."

If I may first deal with the use of the terms 'power' and 'authority' that were frowned upon by the respondent, it will be observed that the foregoing provision does not purport to arrogate to itself the use of the said terms. It simply repeats that whatever competencies the High Court had in dealing with the matter originally, this Court has in dealing with the appeal. I do not for a moment find offence or impropriety in the use of the terms power and authority in **Cap 9**. They neither denote nor connote anything autocratic, oppressive, tryrannical or otherwise negative.

The concise Oxford English Dictionary 12th Edn. defines power as;

"1. the ability to do something or act in a particular way …3. Right or authority given or delegated to a person or body …."

Power and authority are used interchangeably and it will be noted that as far as jurisdiction in concerned, several statutes use the term "power" with regard to what courts can do. **Section 4** of the **Magistrate's Court Act,** Cap 10, for instance provides;

"The Resident Magistrate's Court shall have and exercise <u>such jurisdiction and powers</u> in proceedings of a criminal nature as are for the time being conferred on it by--

(a) **the Criminal Procedure Code; or**

(b) **any other written law."**

(Emphasis Mine)

I am satisfied that by using the term "power" the **Appellate Jurisdiction** Act in no way offends the Constitution which itself delegates ***sovereign power*** to various state organs among them the Judiciary of which the Court of Appeal is a part.

The respondent's greatest quarrel with the provision is its reference to ***"all purposes incidental"*** to the hearing of appeals which, it opines, do expand this Court's jurisdiction impermissibly in light of the Constitution. I have already stated that I do not subscribe to the impossibly and impractically narrow view of the constitutional expression "to hear appeals." I am certain it must involve a lot more – including a determination of all manner of applications that impact on or are incidental or related to the appeals.

The respondent urges that this provision is unconstitutional as it provides the means by which applications for stay under **Rule 5(2) (b)** get to be entertained by this Court. In truth, of course, it is not just **Rule 5(2) (b)** but all other applications contemplated by the Appellate Jurisdiction Act that are thereby availed statutory backing. I am clear in my mind that one cannot by launching an attack against Section 3 of the Act succeed in outlawing Rule 5(2)(b) applications without, by the same stroke and instrument, equally outlawing all other applications including application for ***extension of time (Rule 4); to adduce additional evidence (Rule 29); for leave to appeal (Rule 38); to amend documents (Rule 44) to urge urgency (Rule 47); to strike out notice of appeals or record of appeal (Rule 84); to withdraw an appeal (Rule 96(5)); to restore a dismissed appeal (Rule 102(3)) and the hearing of references in taxation (Rule 112).*** A mere enumeration of these categories of applications that this Court handles routinely and as a matter of course is sufficient demonstration that a contention that the court can hear appeals and do nothing else cannot possibly be right.

Turning now to applications under **Rule 5(2) (b)** of the Court's Rules, the beginning point is the appreciation that an appeal, in the words of the Supreme Court in the **SK MACHARIA** case, "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***."

An appeal represents society's continued need for certitude that justice has been done. It is a recognition

of human fallibility so that even where a judge has expressed himself in clear terms, he is alive to the fact he could be wrong or be found to have been wrong by a court higher than himself. Thus, even when a litigant is said to have succeeded and has a decree in his favour, it could turn out to be a temporary victory in case the judge should be reversed. The clearest demonstration of this essential tension that I have come across is in the English case of **ERINFORD PROPERTIES LTD Vs. CHESHIRE COUNTY COUNCIL [1974]** 2 ALL ER 448 where Megarry J, having dismissed an interlocutory motion for injunction, nevertheless entertained and granted an injunction pending appeal from the said refusal at the instance of the losing applicant. Explaining the seeming contradiction, the learned judge expressed himself in the following manner, with which I respectfully agree;

"I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant had made out a sufficient case to have the respondent restrained pending the trial …. On the other hand, where the application is for an injunction pending appeal, the question is whether the judgment that has been given is one which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions, and at the other extreme a judge may be very clear in his conclusions yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations for their errors than for judges. A judge who feels no doubt in dismissing a claim for an interlocutory injunction may, perfectly consistent with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending appeal are such that it would be right to preserve the status quo pending appeal. I cannot see that a decision that no injunction should be granted pending trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending on appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes *functus officioquad* **granting any injunction at all." P52.**

(My Emphasis)

I am of course aware that there are those who may not agree with this reasoning but it does fully persuade me and accord with my own way of thinking. Megarry J. was not being at all flippant with this approach and was in no wise suggesting a liberal and uncritical granting of stays or injunctions on demand. His principled approach, which accords with what this Court has attempted to do for decades, was that;

"There may of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the appeal would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in Wilson Vs. Church (No2) [1879] 12 ch.D at 458], where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, 'when a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory."

I do not consider it necessary at this point to demonstrate by case law this court's engagement with **Rule 5(2) (b)** and its fidelity to the principles enunciated by Lord Justice Cotton above. All through, the Court has consistently underscored that this is a wholly discretionary power, exercised on sound principles eschewing whim or caprice **(VENTURE CAPITAL & CREDITLT Vs. CONSOLIDATED BANK NAI 341 OF 2003**) and always evincing a balancing of one thing against the other **(SWANYA LTD Vs. DAIMA BANK, CIV, APPL. NAI 45 OF 2001)** so as to reach a just decision and avoid the greater hardship **(A.G. Vs. EQUIP AGENCIES CIV. APPL. NAI 452 OF 2001)**

It is difficult for me to fathom how a power or jurisdiction so calculated to see that the ends of justice are met can be viewed as improper. Taken in totality, **Rule 5(2)(b)** was not intended to be, and cannot fairly be described to have become at the hands of this Court, an instrument of hardship and oppression as contended for the respondent. True it may be that some litigants have, upon obtaining this Court's favourable intervention under **Rule 5(2) (b)** promptly retreated into the bliss of undisturbed slumber for

years. The jurisdiction under the said provision is not to blame. Nor is it a peculiarly Kenyan problem. In my readings I did come upon a decision of the Supreme Court of Fiji in which its President Justice Gates, expresses himself in a manner that both captures the perils of delay and also provides a vision of possible remedial measures. He was delivering a ruling on stay in **STEPHEN PATRICK WARD Vs. YOGESH CHANDRA** (Civil Appeal CB V0010-10) in the course of which he first stated the principles governing a stay application in the Fijian context, and which I personally would not be averse to considering, as follows;

"[17] In arriving at a decision as to whether the petitioner's circumstances are sufficiently exceptional for the grant of stay relief pending appeal, it is necessary to consider the relevant principles set out in the Court of Appeal in NATURAL WATERS OF VITI LTD Vs. CRYSTAL CLEAN MINERAL WATER (FIJI) LTD CIVIL APPEAL AB 0011.04S, 18th March 2005. They are;

"(a) whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See Phillip Morris (Nz) Ltd [1977] 2NZLR 41(CA).

(b)whether the successful party will be injuriously affected by stay.

(c) The bona fides of the applicants as to the prosecution of the appeal

(d) The effect on third parties

(e) The novelty and importance of the questions involved

(f) The public interest in the proceeding

(g) The overall balance of convenience and the status quo."

It is thereafter that the judge stated;

"In deciding principle (c) above, I have no doubts that the petitioner is bona fide in taking up this appeal and will prosecute it with sufficient expedition. Though appeals do not interrupt the remedies a successful litigant has achieved nowadays appeal courts will be vigilant to guard against delay, whether deliberate or negligent. Appeal courts have moved towards a system of case management. Though Fiji presently has a shortage of judges at the appellate level, that situation will gradually improve as more judges are appointed to the panels. The appeal courts will be careful to ensure that an appellant or petitioner does not 'park' his litigation in the appeal court, without prosecution, for purposes of delay or for the avoidance of confirmed indebtedness."

(Emphasis mine)

These sentiments from an exotic place can apply ***mutatis mutandis*** to the Kenyan situation where some of the challenges have been addressed such as the hiring of more judges for the Court. More is being done.

This court frowns upon tactics meant to delay justice and frustrate the successful litigant at the High Court by post-stay inertia that is inordinate and calls into question the bona fides of the recipient of it. This is demonstrated by the decision in **FRANKART PRINTERS & STATIONERS LTD & ANOR vs. KENYA FINANCE CORPORATION LTD & ANOR CIV. APPL. NAI 82 OF 1990** where the Court had this to say;

"For more than 7 years the applicant having secured the stay order never relisted the motion for hearing. What is required of this Court on an application for injunction or stay of execution pending appeal is to consider whether the applicants deserve that the discretion of this Court should be exercised in their favour, whether they do have an arguable appeal and whether status

quo should be maintained pending the hearing of the appeal … Granting the application, therefore, would be tantamount to the court being a party to the abuse of its process."

The signal benefits of the power exercised by this Court under **Rule 5(2) (b)** are such that they cannot be nullified by a process of argumentation absent an express and unequivocal negation. None was shown to us and I therefore am of the view that **Rule 5(2) (b)** of the Court of Appeal Rules remains good law and efficacious and this Court acts within the law in exercising jurisdiction thereunder.

The respondent argues that this jurisdiction is bad because it is ***original*** in character whereas this is a court possessed solely of appellate jurisdiction. In making that submission, Senior Counsel for the respondent appeared to suggest that the use of the expression "original jurisdiction" in relation to **Rule 5(2) (b)** was an innovation of a judge lately of this Court. That is not entirely correct. The true position is that the phraseology is much more dated going back to at least the last third of the 19th Century. Jessel M.R. did use it in the Law Journal Reports version of **WILSON Vs. CHURCH** 48 LJCh 690 which was decided in 1879. The master is reported to have said;

"No one can say that this is an application to stay proceedings in the action. The action was dismissed. This is an original motion."

Admittedly, the use of the phrase could led to some confusion where original **vis – a vis** appellate is had in mind in the technical sense of jurisdiction. It may well be an unfortunate choice of phraseology but it does not seem to me that the judges who have used the term did so to suggest that this court was appropriating for itself an original-court-of-first-instance jurisdiction such as relates to the trial of a cause of action. The Court has always remained a court of appeal exercising appellate jurisdiction only that in doing so, it is often called upon to consider **Rule 5(2) (b)** applications as freshly conceived and presented before it not having previously been ruled upon by the court from which the main appeal, whether extant or intended, emanated.

That is the sense I get, for instance, from my reading of the judgment of Apoloo, Gicheru & Kwach JJ.A in **STANLEY MUNGA GITHUNGURI Vs. JIMBA CREDIT CORP. LTD CIV. APPL. NAI 161 OF 1988;**

"That rule confers an independent original, discretion on us and we have to apply our minds de novo on the suitability or otherwise of the relief sought. It is not an appeal from the learned judge's discretion to ours."

Reflecting on this dictum a few years later in **GURBUX SINGH SUIRI & ANOR Vs. ROYAL CREDIT LTD CIVIL APPL. NAI 281 OF 1995**, this Court, comprising Gicheru, Omollo and Shah, JJ.A placed the idea of an original jurisdiction with regard to **Rule 5(2) (b)** application in proper context as follows;

"In ordinary circumstances the Court has only appellate jurisdiction and in the absence of Rule 5(2) (b) a party who has been refused a stay of execution or an injunction by the High Court would have been obliged to apply to the Court of Appeal to set aside the refusal and then, having done so, to grant the stay or injunction. That is what is contemplated by order 41 Rule 4(1) of the Civil Procedure Rules. But because of the existence of Rule 5(2) (b) one does not have to apply to the Court to first set aside the refusal by the High Court and then having set aside the High Court order, to grant one itself. That clearly is the sense in which the expression 'independent original jurisdiction' is to be understood and that was made abundantly clear in the GITHUNGURI case, supra, by use of the expressions such as "we have to apply our minds de novo or 'It is not an appeal from the learned judge's discretion to ours'."

The reasoning of the Court above is, in my respectful view, entirely correct. It is noteworthy that even back then, and nearly two decades have elapsed since, the Court recognized that the nature of its jurisdiction under **Rule 5(2) (b)** was already firmly established by long standing authority; "That the jurisdiction conferred on the Court by **Rule 5(2) (b)** is an original one is old hat and authorities to that

effect are legion."

That bench did criticize an earlier decision of this court in **JEAN PIERRE DE LEU Vs. ADRIAN MUTESHI** Civil application No. 169 of 1995 which had held that once a Notice of Appeal was in place, this Court had jurisdiction to decide a **Rule 5(2) (b),** application without requiring the applicant to first seek relief in the High Court. The criticism was based to the effect that the decision was per ***incuriam*** for not considering the mandatory requirements under the then Rule 41 for the applicant to first make an application at the High Court.

Since that provision was later repealed, the criticism of the **MUTESHI** decision can no longer hold and I would, for my part, adopt with approval what the judges said therein as a proper reflection of the law on our jurisdiction under **Rule 5 (2) (b)** save that I think our jurisdiction to be wider and freer than they stated;

"Once a notice of appeal is filed in time under Rule 74 of the Court of Appeal Rules, this Court has jurisdiction to deal with such an application as is before us here. Such jurisdiction is conterminous with that of the Superior Court under Order 41 Rule 4 of the Civil Procedure Rules. It is the Rule 74 notice of appeal that gives jurisdiction to this court.

It has long been established that this Court's jurisdiction to grant orders of injunction or stay are unfettered by any application (similar) in the superior court and we feel that it may even be at times, prudent for an intended appellant to come to this court rather than putting the judge below in the invidious position of saying 'I could be wrong' …"

The jurisdiction exercised under **Rule 5(a) (b)** is anchored and founded on **Rule 74**. Without a Notice of Appeal having been filed, this Court cannot issue any of the orders under **Rule (5) (2) (b).** The jurisdiction has no existence apart and independent of an appeal and the orders issued thereunder are incidental to and inextricably linked to an appeal or intended appeal. In exercising that jurisdiction, this Court does not rove or maraud outside the four corners of the appellate jurisdiction recognized, declared and donated by the Constitution.

The final aspect of the objection argued before us was in respect of the place, if any, of inherent jurisdiction on the one hand and the overriding objective so-called the 'Oxygen Rule' as an independent and stand-alone justification for the grant of relief. Starting with the latter, I am unable to agree that the overriding objective is, in the words of Mr. Abdullahi, Senior Counsel, ***"the next frontier of judicial impunity"***. The principle, as I understand it, is a force for good and there surely must be a basis for holding onto the ideal that the judges of the Court are men and women of honour, judgment, integrity and good sense who will, in giving effect to the Rule, so decide the disputes before them as will vivify the objective of just, expeditious, proportionate and affordable resolution of those disputes.

In any event, the overriding objective is completely consistent, and in humming harmony, with the guiding principles that courts are commanded by **Article 159 (2)** of the Constitution to adhere to when exercising judicial authority;

"(a) Justice shall be done to all, irrespective of status

(b) Justice shall not be delayed

(c) Justice shall be administered without undue regard to procedural technicalities

(d) The purpose an principles of this Constitution shall be protected and promoted."

It would seem that the overriding principle was actually a fore- runner and harbinger to the very principles enshrined in the Constitution. It certainly does not defeat or hinder them. I only need to add that the overriding objective is not some esoteric creation of this Court. Rather, it is a principle that under lies the unceasing search for fundamental justice within the judicial process and not just in this country. A

detailed treatment of the subject is found in part 1 of the ***White Book 2003*** (supra) pp 5-31. It is anything but an instrument of injustice as was contended.

As regards the Court's inherent jurisdiction, it was asserted by the applicant and fiercely contested by the respondent, that even were it the case that this Court could not, by reliance on **Rule 5(2) (b)** and **Section 3** of the **Appellate Jurisdiction Act** grant interim relief without violating the Constitution, it was available to it, by very fact of being a Superior Court, to make such orders as would meet the ends of justice.

It seems plain to me that from the very meaning of the term, inherent jurisdiction must mean the full range or panoply of powers, authority and competence that a court is possessed of by the very nature of being a court. That jurisdiction is not conferred or granted by any rule or law but is rather of the essence of being a court of law, sworn and instituted to achieve the ends of justice and possessed of the unquestioned ability to take such steps, make such orders and give such directions as will ensure that its existential purpose and its processes are not abused, scuttled or negated by any mischievous or nefarious conduct.

That this jurisdiction is not donated but is merely recognized and left at large by the **Rules** is clear from **Rule 1 (2)** of the **Court of Appeal Rules**; 2010;

"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Indeed, the **Civil Procedure Act**, which is 'an Act of Parliament to make provision for procedure in civil courts" (of which this Court is one) when dealing with matters civil) at Section 3A is couched in exact terms save for having 'Act' in place of Rules. Of interest, and properly so, is the fact that the side note reads "saving of inherent powers of Court." Neither Statute nor Rules grant those powers. They only acknowledge them. Inherent powers are essential and permanent attributes of the courts and the same cannot be curtailed as long as courts remain courts. A court, especially a superior court, bereft of inherent jurisdiction would be a soulless oxymoron.

Having this view of the matter, I have no difficulty accepting as correct the passage quoted by the applicant from Jerold Taitz' The ***Inherent Jurisdiction of the Supreme Court';***

"The inherent jurisdiction of the Supreme Court may be described as the unwritten power without which the court is unable to function with justice and good reason, such powers are enjoyed by the court by virtue of its very nature as a superior court modeled on the lines of English Superior Courts and the superior courts which succeeded them are deemed to possess such inherent jurisdiction …."

In the course of my reading I came across the old case of **OLIVIA DA RITTA SIQUERA E FACHO AND ANOTHER Vs. E.R. SE QUEIRA & 2 OTHERS** Civil Case 264/1929. It dealt with an application by one of the defendants for a stay of execution of a decree passed against him by the Chief Justice, (Sir Jacob Barth) on 19th August 1932, pending appeal. He had not as yet filed an appeal and had run out of time but he had applied for leave to file it out of time. Under the existing rules, he would seem to have run out of all options available for his aid. The manner in which the application for relief was dealt with by Lucie Smith, the Acting Chief Justice, goes to demonstrate how the inherent jurisdiction works and I shall cite his ruling ***in extensu;***

"The applicant would therefore appear to have no remedy under the rules, and we will now examine the Civil procedure Ordinance itself.

Section 99 of the Ordinance reads; 'Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court'. This section is modeled upon Section 151 of

the Indian Code. Mulla, at P 393 et seq; gives a comprehensive list of matters in which the court has inherent power, although the code contains no express provisions. Item (y) reads; 'To order a stay of execution in view of an application by a judgment debtor to the Judicial Committee for special leave to appeal to His Majesty in Court" And this dictum is supported by the case of Nanda Kishore Singh Vs. Ram Golam Sahin, reported in 40 Cal at page 955… I therefore find on the authority of Nanda Kishore Singh that this court has inherent power, *ex debito justitiae,* **to order the stay of execution prayed for."**

I conceive of the inherent power as enabling this Court to intervene with the shield of justice to protect a pleader from an execution that would in the particular circumstances of the case be oppressive or such as to render his appeal an empty and futile pursuit, injurious harm having occurred by execution. Such a power exists and would be exercised absent any rules granting the power to order stay.

Fortunately for us, the rule for actualizing what is a necessary and laudible judicial intervention for the doing of justice does in fact exist. I have already found that **Rule 5 (2) (b)** is a proper, necessary and efficacious jurisdiction. I only say that even were I wrong on both the **Rule** and **Section 3A** the **Appellate Jurisdiction Act**, I would find this Court well and properly able to intervene ***ex debito justitiae***.

I do not for a moment subscribe to the view, sought to be sold to us by Mr. Abdullahi, that we should not worry about whatever issues that would flow from a successful validation of his arguments because, according to him, the High Court will sort them out and there would be no crisis. To accept that view would be tantamount to a grievous abdication of our duty as a court, an untenable retreat from jurisdiction and would have unimaginable consequences in the administration of justice. For who can tell what forces would be let loose, what anarchy rule, were it the case that judgments, no matter how atrocious and plainly reversible on appeal, could be executed at will, the court appealed to being impotent to intervene in the interim? Such a spectre is so drastic and chilling a departure from the experience and practice of courts in the modern world that had it been the intention of the framers to birth so strange a judicial landscape, they would have done so in bold, express and expansive terms.

As I was concluding my ruling on this preliminary objection, a fortuitous happening did occur, namely the delivery by the Supreme Court of its Ruling on precisely this point in **THE BOARD OF GOVERNORS; MOI HIGH SCHOOL, KABARAK Vs. MALCOLM BELL AND HON DANIEL TOROITICH ARAP MOI.** Sup. Appl 1 of 2013.There, as here, the respondent argued a preliminary objection through another Senior Counsel, Mr. Muite, that that court was bereft of jurisdiction to grant a stay of execution pending appeal.

Having carefully read the said Ruling, I find myself fortified post facto, in the reasoning I have followed and the conclusions I have reached hereinabove. I will only state that the Supreme Court's emphatic declaration of its jurisdiction to hear and grant orders of stay of execution pending appeal casts our own jurisdiction, which is spelt out more clearly and expressly in the Statute and Rules, well beyond successful disputation. Without rehashing what the Supreme Court had to say on the matter, I find the following passages and eventual holdings to be germane and worthy of reproduction;

"…the Court, in its exercise of discretion, may consider the convenience of interlocutory orders within the context of the appeal itself. Interlocutory reliefs, in this respect, may be apposite by ensuring that the appeal is not rendered nugatory and this not only serves the cause of fairness in dispute settlement, but also ensures that the ultimate decision of the court bears the intended constitutional authority."

As to the source of jurisdiction with regard to stay pending appeal;

"In our opinion The Supreme Court's jurisdiction in respect of interlocutory orders, such as stay – of- execution orders, firstly emanates directly from the statute law and the rules; and secondly, rests on the rational principle that the appellate power of 'review and possible reversal' of the substantive judgment appealed against, is destined to be lost unless a requisite interlocutory order was made. This principle is well recognized in comparative judicial experience. In Bremer Vulcan

<u>Schiffbar and Maschinen fabrick Vs. South Indian Shipping Corporation Ltd</u> [1981] AC 909, Lord Diplock in relation to the inherent powers of the High Court, typified such powers as enabling the court to take necessary actions to maintain its character as a court of justice. According to Lord Diplock, it would stultify the constitutional role of the court if as a court of justice it were not armed with power to prevent its process being misused, in such a way as to diminish its capability to arrive at a just decision of the dispute. It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject matter of an appeal, the Supreme Court's capability to arrive at a just decision on the merits of the appeal would be substantially diminished. Both the constitution and the Supreme Court Act have granted the court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case."

I respectfully agree with the above findings which are binding on us all, and happily so. Moreover, they apply with yet greater force to this Court. This Court exists to hear and determine appeals and it must exercise all the powers that attend such a role. This is all the more critical considering that this is the last stop, the final court in all but those deliberately rare instances that are specified in Article **163(4)** of the Constitution where its decisions are amenable to challenge at the Supreme Court.

The upshot is that while recognizing the learning and innovation that has gone into the preliminary objection before us, and while fully appreciative of the bold and erudite submissions made on its behalf by Mr. Abdullahi, Senior Counsel, it all boils down to this poignant statement by Mr. Gatonye, to whom I am equally grateful;

"To uphold the objection would negate the very object and purpose for the existence of the Court of Appeal by rendering its work futile where appeals succeed but the harm already done absent stay cannot be undone".

Far be it from me to engender such a justice-defying result.

I would dismiss the preliminary objection and, notwithstanding the general importance of the matter raised, order that the costs occasioned by it do follow the event and so be borne by the respondent.

Dated and delivered at Nairobi this 31st day of May 2013.

P.O. KIAGE
.....
JUDGE OF APPEAL

<u>RULING OF M'INOTI, JA:</u>

In many respects this application is ordinary and common place. The applicant seeks an order under ***Rule 5 (2) (b) of the Court of Appeal Rules*** to stay execution of a summary judgment and decree of the High Court that ordered it to pay to the respondent a sum of KShs.39,720,000/= and costs.

What, however, is momentous is the preliminary objection provoked by that application. It is a preliminary objection that tests conventional wisdom and practice in Kenya regarding the jurisdiction and powers of the Court of Appeal. It is an objection of great impact on the relevance and efficacy of one of the pillars of the judiciary and the whole notion of access to justice in Kenya. It is an objection at whose heart is a great contestation between two different approaches in the interpretation of the Constitution of Kenya, 2010. I hasten to add, it is an objection I am convinced, born out of the frustration engendered by the practice of the Court of Appeal, over time, to give more attention to its incidental purpose (determination of conservatory applications) at the expense of the primary purpose (determination of appeals).

When the applicant filed its application for stay of execution, after duly filing a notice of appeal, the

respondent gave a notice of preliminary objection on jurisdiction and requested that a bench of five judges be empanelled to hear the objection. The request was granted with the concurrence of the applicant. In ***MUKISA BISCUIT MANUFACTURING CO. LTD VS. EAST END DISTRIBUTORS LTD, (1969) EA 696***, the former Court of Appeal for Eastern Africa stated that a preliminary objection is in the nature of what used to be a demurrer and that it raises a pure point of law. In ***THE OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL (KENYA) LTD, (1989) KLR 1*** the Court of Appeal observed that where a court has no jurisdiction, there is no basis for a continuation of proceedings. It must down its tools. The Court further noted that "***a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue right away on the material before it"***. Consequently we were bound to first hear and determine the respondent's preliminary objection.

Mr Ahmednassir Abdullahi, Senior Counsel, appeared for the respondent. Simply stated, the preliminary objection is that the Court of Appeal does not have jurisdiction to entertain the application for stay of execution because under ***Article 164 (3) of the Constitution of Kenya, 2010***, the jurisdiction of the Court of Appeal is limited to hearing ***appeals***. The jurisdiction to hear appeals does not extend to hearing and determination of the applications for injunction, stay of execution and stay of proceedings provided for under ***Rule 5(2) (b)***. On the same vein, ***sections 3(1) and 3(2) of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya*** which, for the purposes of and incidental to the hearing and determination of appeals, confers on the Court of Appeal the *"power, authority and jurisdiction vested in the High Court"* are also unconstitutional as they purport to confer power, authority and jurisdiction beyond that allowed by ***Article 164(3)***.

Learned Senior Counsel traced the evolution of the jurisdiction of the Court of Appeal from the Independence Constitution to illustrate the essential difference between the jurisdiction of the Court under the previous Constitutions and under the Constitution of Kenya 2010. Thus ***section 177 of the Independence Constitution, 1963***, provided for the establishment of a Court of Appeal for Kenya, which, subject to the provisions of that Constitution, was to have ***"such jurisdiction and powers as may be conferred on it by any law."*** Similarly, ***section 64(1) of the Constitution*** that was repealed in 2010 (hereafter **the Constitution of Kenya, 1969**) merely created the Court of Appeal and conferred jurisdiction on it in the following terms:

"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."

It was contended that under these two previous Constitutions, it was left to Parliament to determine the jurisdiction and powers of the Court of Appeal and it was open to Parliament to confer whatever appellate jurisdiction and powers it deemed necessary. To that extent, it was argued that the powers conferred on the Court of Appeal prior to 28th August, 2010 by the Appellate Jurisdiction Act and the rules made thereunder including the powers under ***Rule 5(2) (b)*** were legitimate and within the constitutional remit.

Since the adoption of the Constitution of Kenya, 2010, however, it was further argued, the situation has changed fundamentally and the jurisdiction of the Court is set exclusively by the Constitution, with no power donated to Parliament to extend that jurisdiction or confer additional powers on the Court. ***Article 164(3)*** of the Constitution of Kenya, 2010 reads as follows:

"The Court of Appeal has jurisdiction to hear appeals from-

(a) the High Court; and

(b) any other court or tribunal as prescribed by an Act of Parliament."

The respondent submitted that a true, plain and honest reading of ***Article 164(3) of the Constitution*** must mean that the jurisdiction of the Court of Appeal is limited to hearing ***appeals*** from the High Court or any other court or tribunal if allowed by an Act of Parliament. There is no provision in the entire Constitution

that empowers Parliament to extend the jurisdiction of the Court of Appeal beyond what is conferred by ***Article 164(3)***. To that extent, the *"jurisdiction"* exercised by the Court of Appeal under ***rule 5(2) (b)*** to hear and determine applications for injunctions, stay of execution and stay of proceedings are illegitimate and extra-constitutional powers.

When entertaining applications under ***rule 5(2) (b)***, it was contended, the Court is not hearing appeals. It is exercising a jurisdiction that the Court has described, time and again as *"original"*, yet under the Constitution, the Court of Appeal has only appellate jurisdiction and no original jurisdiction. Even by practice, it was further argued, applications under ***Rule 5(2) (b)*** do not emanate from the High Court. They are fresh applications that originate and are filed directly in the Court of Appeal.

Learned Senior Counsel submitted that in view of the express and unambiguous language of ***Article 164(3) of the Constitution***, that provision should be interpreted as it is without *"innovation"* or *"craftiness"* so as to show fidelity to law. He argued that ***Art 259*** cannot be used to extend the jurisdiction of the Court of Appeal through interpretation and that in any event that Article also demands, as a value and principle of the Constitution, promotion of honesty in interpretation of the law. He saw the limitation of the jurisdiction of the Court of Appeal, which he read into ***Art 164(3***), as consistent with limitation of power, a hallmark of the rule of law.

For good measure, learned senior counsel further argued that the fact that the provisions on the Court of Appeal in the Constitution are a mere 3 clauses compared to the more elaborate and expansive provisions on the High Court and the Supreme Court must lead to the conclusion that the Court of Appeal is limited to hearing only appeals from the High Court and no more and its jurisdiction excludes all those applications provided for under ***rule 5(2) (b)***. In the view of learned Senior Counsel, ***Rule 5(2) (b)*** is an incubator of oppression and lawlessness which does not advance the rule of law but is used to keep successful litigants from the fruits of their judgments. Regarding the relevance of the national values and principles of governance in ***Art 10 of the Constitution*** in the context of the issues raised in the objection, he saw the same more as matters of the politics of the Constitution rather than strict issues of law.

Lastly, it was argued that the legislation contemplated by ***Article 164(1) (b)*** is limited to the organisation and administration of the Court of Appeal and it cannot be the basis for extending or conferring addition jurisdiction on the Court of Appeal.

Mr Abdullahi relied on several authorities to buttress the above submissions, which I would summarize as follows: ***THE OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL (KENYA) LTD*** for the meaning of 'jurisdiction' and how it is conferred, limited and lost; ***MUNENE VS. THE REPUBLIC, (No 2) (1976-80) 1 KLR 838***to illustrate a majority decision of this Court entertaining an appeal where no right of appeal was conferred by statute, a decision which the Court had later on to depart from; ***ANARITA KARIMI NJERU VS. THE REPUBLIC, (No. 2) (1976-80) 1 KLR 1283*** which departed from ***MUNENE VS. THE REPUBLIC*** and held that the Court of Appeal has only such jurisdiction as is expressly conferred on it by statute and cannot claim a general supervisory role over the judicial process; ***JASBIR SINGH RAI & 3 OTHERS VS. TARLOCHAN SINGH RAI AND 4 OTHERS (NAIROBI CIVIL APPEAL NO. 307 OF 2003 (154/2003 UR)*** to illustrate, in the absence of conferred jurisdiction to do so, refusal by this Court to re-open a concluded appeal where allegations of bias and impropriety on the part of a member of the bench that heard the appeal were subsequently made.

The cases of ***RUBEN & 9 OTHERS VS. NDERITO & ANOTHER, (1989) KLR 459***, ***INTERIM INDEPENDENT ELECTORAL COMMISSION & ANOTHER VS. PAUL WAWERU MWANGI, (NAIROBI CIVIL APPLICATION NO. 130 OF 2011 (UR. 85/2011)*** and ***SAFARICOM LTD VS. OCEANVIEW BEACH HOTEL LTD & 2 OTHERS, (NAIROBI CIVIL APPLICATION NO 327 OF 2009 (UR. 225/2009)*** were relied upon for the proposition that under ***Rule 5(2) (b) of the Court of Appeal Rules*** the Court exercises original jurisdiction, and applies its mind *de novo*, which does not constitute hearing an appeal from the exercise of the trial judge's discretion, while the case of ***INTERIM INDEPENDENT ELECTORAL COMMISSION & ANOTHER VS. PAUL WAWERU MWANGI, (NAIROBI CIVIL APPLICATION NO. 130 OF 2011 (UR. 85/2011)*** was assailed for what the respondent called confusion of the jurisdiction of the Court of Appeal under ***Art 164(3) of the current***

Constitution and under ***Section 64(1) of the Constitution of Kenya, 1969***.

REPUBLIC VS. EL MANN, (1969) EA, 358 was relied upon to make the point that where there is no ambiguity in the wording of the Constitution, it should, like any other legislative enactment be construed according to the ordinary and natural sense of the words used, while ***ANTHONY RITHO &7 OTHERS VS. ATTORNEY GENERAL, NAIROBI HIGH COURT CRIMINAL APPLICATION NO. 701 OF 2001*** was used for the corollary proposition that it is only where there is doubt respecting the extent and scope of any power conferred by the Constitution that the object for which such power was bestowed are to be considered in the interpretation of the Constitution.

The applicant laid particular emphasis on two decisions of our Supreme Court, namely, ***IN RE THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION, SUPREME COURT CONSTITUTIONAL APPLICATION NO. 2 OF 2011*** and ***SAMUEL KAMAU MACHARIA & ANOTHER VS. KCB LTD & 2 OTHERS, (APPLICATION NO. 2 OF 2011)*** to define the word *"appeal"* and to pitch for the submission that the jurisdiction of any court is set and limited by the Constitution or legislation and that the Court cannot arrogate to itself jurisdiction beyond that set by law. These decisions are binding on the Court of Appeal under ***Article 163(7) of the Constitution*** and I shall revert to them later.

Mr Waweru Gatonye appeared for the applicant and not surprising, he took a position diametrically opposed to that of the respondent. I would classify his submissions as two pronged. The first prong involved a reading into ***Article 164(3)*** of conservatory power of the Court when seized of an appeal while the second focused on the consequences for the administration of justice of an interpretation of ***Article 164(3)*** that strips the Court of Appeal of the power to issue conservatory orders.

Regarding the first prong, Mr. Gatonye submitted that so long as the Court of Appeal has jurisdiction under the Constitution to hear appeals, which is not disputed, the power to stay execution pending the hearing and determination of the appeal can be read into ***Article 164(3)***. He saw the power to preserve the subject matter of the appeal as an integral part of the jurisdiction to hear appeals. He submitted that the power presently conferred in the Court of Appeal by ***Rule 5(2) (b)*** does not have to be expressly conferred by the Constitution, statute or rules. It is a power that is inherent in the Court when it is exercising the jurisdiction conferred upon it by the Constitution to hear appeals. It is an intrinsic, natural, innate power of the Court given due recognition in ***Rule 1(2) of the Court of Appeal Rules***.

Mr Gatonye further submitted that there is nothing in ***Art 164(3)*** that expressly prohibits the Court of Appeal from issuing conservatory powers when seized of an appeal, arguing that what is not expressly prohibited by the Constitution must be deemed to be allowed. In his view, the power to stay execution pending the hearing and determination of an appeal is such a critical power of the Court of Appeal that if it was really the intention of the Constitution of Kenya, 2010 to deny it, it would have done so expressly rather than to leave it to implication. He further contended that ***Art 164*** does not define an *"appeal"* and as presently defined by ***Rule 2 of the Court of Appeal rules***, *"appeal"* includes *"an intended appeal"*. To apply for a relief under ***Rule 5(2) (b)*** a party must first invoke the appellate jurisdiction of the Court of Appeal by filing a notice appeal. Once a notice of appeal is filed, an appeal is deemed to be in existence and hence the hearing of applications under ***Rule 5 (2) (b)*** is strictly in the context of an appeal.

The respondent further relied on the nature of the Constitution as the fundamental or basic law to make the point that the Constitution cannot be expected to contain all the details such as the conservatory powers of the Court and therefore the same has been left to statutes and rules. He also submitted that even without ***Rule 5(2) (b)***, the Court could still issue conservatory orders pursuant to the overriding objectives under ***sections 3A and 3B of the Appellate Jurisdiction Act*** whose effect is to override or take precedence over technicalities and legal strictures.

On the second prong, Mr Gatonye argued that were ***Article 164(3)*** to be interpreted to mean that the Court of Appeal has no jurisdiction to issue conservatory powers, then the Court's work would be reduced to a mere *"academic"* exercise and that such interpretation would negate the very purpose of the Court, with

dire consequences for the administration of justice. Mr Gatonye pitched for a holistic interpretation of the Constitution that takes into account its principles, values and objectives. He relied on ***Art 10*** on national values and principles of governance, ***Art 48*** on access to justice and ***Article 159 (2) (e)*** on judicial authority which in particular requires courts, in exercising their authority to be guided by, among others, the consideration that the purpose and principles of the Constitution shall be protected and promoted. He contended that a Court of Appeal bereft of conservatory powers cannot fulfill those constitutional imperatives.

Lastly, Mr Gatonye urged us, in interpreting ***Article 164(3)*** to be guided by ***Article 259 of the Constitution*** which provides how the Constitution should be interpreted.

Like his counterpart, Mr Gatonye, relied on several authorities which, again I summarize as follows: ***INTERIM INDEPENDENT ELECTORAL COMMISSION & ANOTHER VS. PAUL WAWERU MWANGI*** for the proposition that jurisdiction of the Court of Appeal under ***Article 164(3) of the Constitution of Kenya, 2010*** is not different from its jurisdiction under ***section 64(a) of the former Constitution***; the same authority and ***BAT (K) LTD VS. MEA LTD, (2000) LLR 1365*** for the principle that it is the filing of a notice of appeal which gives the Court jurisdiction to entertain applications under ***Rule 5(2) (b)***; ***AHMED VS. SAVINGS AND LOAN KENYA LTD & ANOTHER, (2000) LLR 4145*** and ***EAST AFRICAN POWER MANAGEMENT LTD VS. THE OWNERS OF THE VESSEL "VICTORIA EIGHT", (NAIROBI CIVIL APPLICATION NO. 245 OF 2009,*** to show that the principles that the Court of Appeal applies in ***Rule 5(2) (b)*** applications, namely whether the appeal is arguable and if successful it will be rendered nugatory, directly relate to the appeal; the decision of the Privy Council in ***MINISTER OF HOME AFFAIRS &ANOTHER VS. FISCHER AND ANOTHER, (1979) 3 All ER 21*** for the proposition that a Constitution is a document *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation; the decision of the Supreme Court of Uganda in ***TINYEFUNZA VS. THE ATTORNEY GENERAL OF UGANDA, (CONSTITUTIONAL APPEAL NO. 1 OF 1996)*** in support of the rule of harmony, completeness and exhaustiveness in the interpretation of the Constitution which requires it to be read as an integrated whole; ***STEPHEN BORO GITHIA VS. FAMILY FINANCE BUILDING SOCIETY & 3 OTHERS, (CIVIL APPEAL NO. 263 OF 2009 (UR 183/09)*** to show that the overriding objectives supersede all technicalities, precedents, rules and actions in conflict with them and ***DAVID NKANATA MAGIRI VS. BERNARD BENEDICT MUNGANIA & 4 OTHERS, CIVIL APPLICATION NO. NAI 253 OF 2011 (UR 166/2011)*** to support the view that the Court of Appeal has jurisdiction either under the overriding objective principle or under its inherent jurisdiction under ***Rule 1(2) of the Court of Appeal Rules*** to grant any interlocutory order that is necessary for the ends of justice, even on its own motion as a court of justice.

In my view, this appeal turns on interpretation of ***Article 164(3)***. Therefore, the first consideration is how the Constitution of Kenya, 2010 should be interpreted. Before embarking on the interpretation of ***Article 164(3)***, it is however convenient at this early stage to dispose of the respondent's argument founded on paucity of the provisions of the Constitution relating to the Court of Appeal. I do not think much turns on that fact alone. Even under the Constitution of Kenya, 1969, which the respondents submits granted the Court of Appeal the powers now contested, more expansive provisions were made on the High Court than the Court of Appeal. I would attribute the brevity of the provisions of the Constitution of Kenya, 2010 more to a new drafting style rather than an intention *per se* to deny the Court of Appeal the powers in issue in this application. The Supreme Court has had occasion to comment on the fact that the drafting style of the Constitution of Kenya, 2010 is different from that of many other Constitutions, and I would add including our previous Constitution ***(See IN THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE, (ADVISORY OPINION NO. 2 OF 2012, PARA 54)***. I have also perused the reports of the Committee of Experts which was responsible for assembling and drafting the Constitution of Kenya, 2010 and I have not seen any evidence of a conscious and deliberate decision that supports the respondent's submission.

The authorities relied upon by the parties on the interpretation of the Constitution fall broadly into two categories. On the one hand are those that pay more attention to the words that are used in an enactment rather than the context in which the words are used. They require that words be given their plain and

ordinary meaning when they are clear and admit no ambiguity ***(SEE ELMANN VS. THE REPUBLIC)***. In the first instance these authorities call for strict interpretation of clear and unambiguous words. Implicit in these authorities, however, is the admission that if the words are not clear or admit to ambiguity, their plain and ordinary meaning may be departed from. What of instances where words are clear and unambiguous, but giving them their plain and ordinary meaning ends in what are called absurdities or clearly unintended results? In such instances still, the plain and ordinary meaning may be departed from ***(See ANTHONY RITHO & 7 OTHERS VS. ATTORNEY GENERAL)***, definition of "Court" to exclude subordinate courts). This line of authorities pays little or no regard to any distinction between interpretation of the Constitution and interpretation of other statutory enactments.

The second category of authorities pays more emphasis on context and the apparent purpose of the provision being interpreted ***(MINISTER OF HOME AFFAIRS & ANOTHER VS. FISCHER AND ANOTHER;*** and ***PHILIP TORMEY VS. IRELAND AND THE ATTORNEY GENERAL, (1985) 1 I.R 289)***. They ordinarily settle for the interpretation that best advances the purpose of the enactment, the plain meaning of the words used notwithstanding. Due to emphasis on context, these authorities treat interpretation of the Constitution as different from that of ordinary statutory enactments and eschew the strict or stringent approach that is implicit in the first category.

Underlying these different approaches are deep philosophical questions and arguments touching on the proper province of judges when interpreting the law, fidelity to the law, judicial restraint and judicial activism, the intention of framers of the Constitution or legislatures, etc. which we are least prepared to address in this litigation.

It seems to me that the answer to the proper interpretation of ***Article 164(3)*** lies squarely in ***Art 259(1) of the Constitution***. That provision is an invention of the Constitution of Kenya, 2010, there being no similar or comparable provision in the Constitution of Kenya, 1969. ***Article 259(1)*** provides as follows:

"This Constitution shall be interpreted in a manner that-

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) contributes to good governance.

In my opinion, under ***Art 259***, the words used in a provision are not the only or even the primary tools of interpretation of the Constitution. Certainly the words used are important. They are the starting point and oftentimes they may ensure promotion of the purpose, values and principles of the Constitution, advancement of the rule of law, the Bill of Rights and contribute to good governance. The drafters of the Constitution were also acutely aware that words used in a provision may admit to a meaning that does not, or that least promotes the ends set out in ***Art 259***. In ***RE THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION,*** the Supreme Court spoke to ***Art 259(1)*** as follows at paras. 87 and 88:

"In Art 259(1) the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that- (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; and (c) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights. These Constitutional imperatives must be implemented in interpreting the provisions of Article 163(6) and (7) on Advisory Opinions." (Emphasis added)

In that application, one of the issues confronting the Supreme Court in an application seeking an advisory opinion on the date of the first election under the Constitution of Kenya, 2010 was whether the date of the first election was "a matter concerning county government" for purposes of the Supreme Court's jurisdiction under ***Article 163(6)***. It was contended by one of the parties that the term "county

government" is not defined in the Constitution and that the term should not be too broadly interpreted. The Court resolved the issue as follows:

"We consider that the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government."

If the Supreme Court had proceeded as strictly as it was being requested to do, it would probably have limited itself to the matters of direct and immediate concern to the county governments as established under ***Article 176(1) of the Constitution***. Instead the Court preferred a purposive interpretation that included in the phrase "matters touching on county government" even national government processes that impacted on county government issues. That approach was quite consistent with the requirement in ***Art 259*** that the Constitution be interpreted so as to advance its purpose *(in that case devolution)*. I would not read that decision as a crafty extension of the jurisdiction of the Supreme Court.

Later on in the same judgment, the Supreme Court was invited to find that an independent constitutional commission should not be required to seek the opinion of the Attorney General (a member of the Executive) before commencing the kind of litigation involved in that application because that would be tantamount to interfering with the commission's *"independence"*. In other words, the Court was being asked to interpret the term independent strictly, as we are being asked to do about "appeal". In rejecting that approach, the Supreme Court quoted with approval the Namibia Supreme Court that ***"the Namibian Constitution must…be purposively interpreted, to avoid the "austerity of tabulated legalism" (MINISTER OF DEFENCE, NAMIBIA VS. MWANDINGHI, (1992) 2 SA 355)*** and concluded that ***"the "independence clause" does not accord independent constitutional commissions "carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance"***. In the end therefore, the clear and unambiguous word, "independent" still required consideration by the Court of the purpose for which the independent constitutional commissions were established and how they were designed and configured to relate and operate in the institutional arrangements under the Constitution.

In the Matter of ***the Principle of Gender Representation in the National Assembly and the Senate (supra)***, the majority in the Supreme Court also advised that a Court that interprets a Constitution like the Constitution of Kenya, 2010 should keep an open mind. The Court stated:

"A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other."

In ***PHILIP TORMEY VS. IRELAND AND THE ATTORNEY GENERAL*** the Supreme Court of Ireland held a view very similar to that of our Supreme Court. The Irish court expressed itself as follows:

"The rule of literal interpretation, which is generally applied in the absence of ambiguity or absurdity in the text, must here give way to the more fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of the provision are open in the light of the Constitution as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth

and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution. It follows from such global approach that, save where the Constitution itself otherwise provides, all its provisions should be given due weight and effect and not be subordinated one to another. Thus, where there are two provisions in apparent conflict with one another, there should be adopted, if possible, an interpretation which will give due and harmonious effect to both provisions. The true purpose and range of a Constitution would not be achieved if it were treated as no more than the sum of its parts."

In view of the provisions of ***Article 259*** as interpreted and applied by the Supreme Court, I am of the opinion that while all decisions on the interpretation of the Constitution that ante-date the Constitution of Kenya 2010 are important, they must be applied subject to the provisions of ***Art 259***.

The next issue relates to the jurisdiction of the Court of Appeal under the Constitution of Kenya, 2010. There is no doubt that the jurisdiction of the Court of Appeal is conferred differently in the Constitution of Kenya, 2010 from the way it was in the Constitution of Kenya, 1969, although that in itself does not make out the case for a constricted interpretation of ***Art 164(3)***. In ***ANARITA KARIMI NJERU VS. THE REPUBLIC (No. 2)*** the Court of Appeal undertook a detailed review of the evolution of its jurisdiction, going back to 1902. The Court identified two approaches in the conferment of jurisdiction in the appellate court in the following terms:

"The conferment of jurisdiction of a Court of Appeal takes one of two forms. The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court. Here, where the Court of Appeal is to be deprived of jurisdiction that is done specifically in a particular enactment. The second is where the legislature establishes a Court of Appeal expressly without jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one of two forms: either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court; or by conferring jurisdiction on the Court of Appeal in particular enactments, as considered appropriate."

Section 64(1) of the Constitution of Kenya, 1969 conferred jurisdiction in the second form identified above, that is, by establishing the Court of Appeal to hear appeals from the High Court, but leaving it to statute law to determine the precise jurisdiction and powers. That provision was introduced in 1977 to establish the Kenya Court of Appeal following the break-up of the former East African Community and the attendant demise of the East African Court of Appeal. Under that Constitution, the jurisdiction of the Court could be expanded or limited by legislation. To claim jurisdiction to hear a particular appeal one was required to identify specific legislation that granted the right of appeal to the Court of Appeal. It was in this context that it was always asserted that there was no right of appeal where none was created by statute.

The Constitution of Kenya 2010, on the other hand confers jurisdiction of the Court in the first form by simply stating that the Court has jurisdiction to hear appeals from the High Court. The new Constitution can be said to have broadened the right of appeal, in the sense that the Constitution itself has expressly provided a general right of appeal from decisions of the High Court, but left it to legislation, if necessary to provide additional right of appeal from decisions of tribunals and other courts established by the Constitution.

In my opinion, the effect of ***Article 164(3)*** is, as far as appeals from the High Court are concerned, to make it henceforth unnecessary for a party to first identify specific legislation which confers jurisdiction on the Court of Appeal before the Court can assume jurisdiction. Arguments such as that advanced in ***Anarita Karimi Njeru*** that there was no right of appeal from decisions of the High Court under ***section 84 of the Constitution of Kenya 1969***, as it then stood (before introduction of ***section 84(7)*** in 1992 to expressly provide for a right of appeal) are no longer tenable.

This is not to suggest that, by dint of Art 164(3) all and sundry decisions of the High Court are appealable to the Court of Appeal. A holistic and purposive reading of Constitution, particularly the right to access

justice (in this context "appellate justice" (Article 48)) the right to fair hearing (Article 50), judicial authority (Article 159) and Article 164(3) itself would accommodate limitation of what is appealable, if the limitation satisfies the requirements of Article 24 of the Constitution. I certainly do not subscribe to the view that all limitations on the right of appeal set by statutes that antedate the Constitution are saved lock, stock and barrel by clause 7 of the sixth schedule of the Constitution.

There is no dispute between the parties, and there cannot possibly be any, that under the Constitution of Kenya, 2010, the Court of Appeal has jurisdiction to hear appeals from the High Court. That is, however, where the agreement ends. When hearing and determining applications for conservation of the subject matter of the appeal pending the hearing and determination of the appeal, is the Court of Appeal exercising a separate and distinct jurisdiction from its jurisdiction to hear and determine appeals from the High Court? Is the term *"jurisdiction"* being used interchangeably to mean first the *jurisdiction* of the Court of Appeal to hear appeals from the High Court and secondly the *powers* which the Court can exercise when its jurisdiction to hear appeals has been invoked? ***Black's Law Dictionary, 8th Edition, 2004*** defines jurisdiction as it relates to a court simply as ***"a court's power to decide a case or issue a decree".*** In my opinion, the arguments in this case can be recast as follows to bring out the jurisdiction-power dichotomy.

To the respondent, there are two separate jurisdictions involved. The first is that of the Court of Appeal to hear appears from the High Court and the second is that of the Court of Appeal to hear and determine applications under ***Rule 5(2) (b)***. The first is the jurisdiction that is conferred by ***Art 164(3)***. The second is what is claimed to be unconstitutional because it is not conferred by ***Article 164(3).*** The respondent thus uses the term jurisdiction loosely to encompass the powers that the Court can invoke when hearing an appeal. To the applicant the Court of Appeal has jurisdiction to hear appeals from the High Court. What is sanctioned in ***rule 5(2) (b)*** is not a separate and distinct jurisdiction of the Court of Appeal, independent from the appellate jurisdiction. It is merely an incident of the powers that the Court of Appeal can deploy for the purposes of proper hearing and determination of an appeal. The powers under ***Rule 5(2) (b)*** are not any different from the powers of the Court of Appeal to extend time for taking any action in the appeal, to take additional evidence, to allow amendment of documents or even to adjourn the hearing of an appeal. The applicant therefore uses the term jurisdiction more strictly. It seems to me that there is a clear distinction to be made between jurisdiction properly so called and the powers that a Court can exercise when its jurisdiction has been properly invoked.

The respondent asks us to interpret the word *"appeal"* in ***Article 164(3)*** to mean strictly the appeal that ***"lies from a lower court 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"*** (See ***SAMUEL KAMAU MACHARIA & ANOTHER VS. KCB LTD & 2 OTHERS***) and which therefore excludes the kind of hearings provided for under ***rule 5(2) (b).***

I am not convinced, as the respondent contends, that to *"hear appeals"* in ***Article 164(3)*** must be interpreted to exclude a power in the Court of Appeal to issue conservatory orders pending the hearing and determination of the appeal or that when hearing an application for conservatory orders, the Court of Appeal is **NOT** hearing an appeal. Nor do I think that interpreting ***Article 164(3)*** to include such power is infidelity to the law, disingenuous, crafty or an unconstitutional elongation of a jurisdiction limited by the Constitution. The short answer is that the Constitution sanctions, nay demands a purposive interpretation under ***Art 259***.

The Constitution of Kenya, 2010 has placed great premium on access to justice for the people of Kenya. The judiciary is evidently revamped in Chapter 10. ***Article 48*** requires the State to ensure access to justice for all persons. In criminal cases, ***Article 50(2) (q)*** confers on a convicted person a right to appeal to a higher court as prescribed by law; ***Article 159*** sets out the guiding principles in the exercise of judicial authority to include *"justice shall be administered without undue regard to procedural technicalities"* and *"the purpose and principles of this Constitution shall be protected and promoted."* Above all, the Constitution has created an extra level of court in the form of the Supreme Court at the apex; to which appeals on the interpretation of the Constitution lie as of right and on other matters upon certification by the Court of Appeal or by the Supreme Court itself. We must ask ourselves,

what is the purpose of these provisions? Was it merely to create institutions without any regard to their efficacy and ability to deliver on the promise of the Constitution, the fulfilment of which these institutions were created? To my mind the answer is clearly NO. I am convinced that the purpose of all these constitutional provisions was to create efficacious courts that can address real-life complaints and problems of Kenyans.

To interpret ***Article 164(3)*** in such a way as to strip the Court of Appeal of the power to conserve the subject matter of an appeal cannot be to promote the purposes, values and principles of the Constitution or to advance the rule of law or to contribute to good governance in Kenya. It will mean that all the Constitution did in creating the Court of Appeal as one of the pillars of the judiciary was to create a mere shell, an emasculated court fine-tuned to dispense academic, theoretical and abstract justice. What kind of access to justice is it where a party who has litigated from the subordinate courts, through the High Court reaches and succeeds in the Court of Appeal only to be told, *"sorry, your judgment is not worth the paper it is written on because the subject matter of your litigation disappeared irretrievably the moment you left the High Court?"* It is true, as the respondent argues, that the High Court has jurisdiction to grant stay of execution of its orders and decrees (**Order 42 Rule 6(1) of the Civil Procedure Rule, 2010**) and even where the High Court has declined an application for injunction, it can still issue an injunction for purposes of preserving the status quo pending appeal against the refusal ***(ERINFORD PROPERTIES LTD & ANOTHER VS. CHESHIRE COUNTY COUNCIL, (1974) 1 CH. 261)***. What happens where in deserving cases the High Court declines to grant a stay of execution or to issue a conservatory injunction, yet an aggrieved litigant has a constitutional right to have his or her dispute heard and determined by the Court of Appeal?

In the Matter of the ***PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE*** (Supra) the majority in the Supreme Court opted for the interpretation of the Constitution that would enable, as much as possible organs established by the Constitution to fully discharge their mandate. The Court stated:

"We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution."

The provisions of the Constitution of Kenya, 2010 relating to the National Police Service offer a good illustration why I am reluctant to embrace the approach and interpretation of the Constitution advanced by the respondent. ***Article 244 of the Constitution*** sets the following as the *"objects and functions"* of the National Police Service:

"The National Police Service shall-

(a) strive for the highest standards of professionalism and discipline among its members;

(b) prevent corruption and promote transparency and accountability;

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standard of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society."

There is no provision empowering Parliament by legislation to confer additional objects and functions on the police. So, can it be argued that the National Police Service under the Constitution of Kenya, 2010 has no mandate to combat crime because, there is no such object or function of the police under ***Art***

244? Application of ***Art 259*** to the interpretation of ***Art 244*** would (possibly and; without deciding) answer that question in the negative because combating crime is the very *raison d\\\'être* of establishing the police service, and that function cannot be denied merely because it is not written in black and white in the Constitution. To my mind, these are the **"imperfection or inadequacy of words"** that the Irish Supreme Court said should not be used to defeat or pervert any of the fundamental purposes of the Constitution.

The next issue is the nature of the power exercised by the Court of Appeal under ***Rule 5(2) (b) of the Court of Appeal Rules***. That rule is made under the Appellate Jurisdiction Act, Cap 9 laws of Kenya. The Appellate Jurisdiction Act was enacted in 1977 hot on the heels of the establishment of the Kenya Court of Appeal. It was enacted pursuant and to give effect to section 64(1) of the former Constitution. As the long title of the Act proclaims, it is ***"an Act of Parliament to confer on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto." (Emphasis added). Section 5 of that Act*** provides for the making of rules for regulating the practice and procedure of the Court of Appeal with respect to appeals. Over time, the Rules Committee has made, amended and revised the rules, the operating rules currently being the Court of Appeal Rules, 2010. It is important to point out that the Appellate Jurisdiction Act ante dates the Constitution of Kenya, 2010 and therefore is one of the legislation that was saved by ***clause 7(1) of the Sixth Schedule of the Constitution*** and which is required to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

Rule 5 of the Court of Appeal rules has been made pursuant to ***Section 5 of the Appellate Jurisdiction Act***. That rule provides as follows:

"5. (1) No sentence of death 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.

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;

(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just." (Emphasis added).

As the long title of the Act makes clear, its purpose was to confer jurisdiction to hear appears from the High Court as required under section 64(1) of the Constitution of Kenya, 1969 and **"for purposes incidental thereto".** In my view, ***Rule 5(2) (b)*** was to address powers of the Court of Appeal that are incidental to hearing and determination of appeals from the High Court. Those powers were never meant to exist independent of the jurisdiction of the Court to hear appeals. In fact and in practice they do not. The respondent is quite right that overtime the Court of Appeal has described the power it exercises under ***Rule 5(2) (b)*** as *"original jurisdiction"*. This description is what has brought confusion on the true nature of the powers under ***5(2) (b).*** Taken at face value, it creates the false impression that the Court of Appeal has an original jurisdiction like the original jurisdiction of the High Court and that that jurisdiction exists and is exercisable independent of the jurisdiction conferred on the Court by the Constitution to hear appeals. The fact of the matter is that the Court of Appeal cannot assume or exercise jurisdiction in an application under ***rule 5(2) (b)*** unless a competent notice of appeal has been filed. The filing of a Notice of Appeal from the decision of the High Court is a condition precedent before the powers under ***Rule 5(2) (b)*** can be invoked. This position is reiterated in **Order 42 Rule 6(4) of the Civil Appeal Rules, 2010** which provides that an appeal to the Court of Appeal is deemed to have been filed when a notice of Appeal has been given under the Court of Appeal Rules. It is for this reason that rule 2 defines an appeal to include an intended appeal (i.e. where a notice of appeal has been filed). In my view ***Rule 5(2) (b)*** read together with ***rule 2*** leaves no doubt that the powers under ***Rule 5(2) (b)*** are exercised

only in the context of an appeal, and the Court of Appeal has jurisdiction under the Constitution to hear appeals. As the applicant, in my view correctly argued, even the twin principles that guide the Court of Appeal when determining applications under ***rule 5(2) (b)*** leave no doubt that those applications are heard and determined in relation to and in the context of an appeal. The consideration whether an applicant has presented an arguable appeal which will be rendered nugatory if the Court does not intervene pending its hearing and determination establishes a strong and clear nexus between ***rule 5(2) (b)*** applications and an appeal.

The Respondent laid particular emphasis on the Supreme Court of Kenya decision in ***SAMUEL KAMAU MACHARIA & ANOTHER VS. KCB LTD & 2 OTHERS, APPLICATION NO. 2 OF 2011*** where the Court stated:

"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."

There cannot be any doubt about the correctness of the above proposition. The only difference in this case is that I have expressed the view that the power exercised by the Court of Appeal under ***rule 5(2) (b)*** is in the context of the Court's appellate jurisdiction and therefore is not a distinct and separate jurisdiction independent of the appellate jurisdiction which is expressly conferred by the Constitution.

Since the arguments in this case were conclude, the Supreme Court has had the opportunity to pronounce itself on the issue presently before us, as it relates to the jurisdiction of the Supreme Court. In an opinion rendered on 8th May, 2013 in the ***BOARD OF GOVERNORS, MOI HIGH SCHOOL KABARAK & ANOTHER VS. MALCOM BELL, (SUPREME COURT PETITION NOS. 6 AND 7 OF 2013),*** the Supreme Court was faced with an application for stay of execution pending the hearing and determination of an appeal that had been certified by the Court of Appeal as raising a matter of general public importance under Article 163(4) (b) of the Constitution. A preliminary objection was raised that the Supreme Court did not have jurisdiction to entertain interlocutory applications and that its jurisdiction was restricted by Article 163(3) and (4). In dismissing the objection, the Supreme Court stated as follows in para. 33:

"[33] It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court's capability to arrive at a just decision on the merits of the appeal, would be substantially diminished. Both the Constitution and the Supreme Court Act have granted the Court the appellate jurisdiction; and within that jurisdiction, *the parties are at liberty to seek interlocutory reliefs, in a proper case."*

Regrettably it was not possible to recall counsel to address us on this binding authority.

Having found that ***Article 164(3)*** does not bar the Court of Appeal from hearing and determining applications under by ***rule 5(2) (b),*** there's one last observation I would like to make before concluding.

Much as I do not subscribe to the respondent\\\'s interpretation of ***Art 164(3)***, I nevertheless empathize with its frustration. Over time, the Court of Appeal has tended to give priority to the hearing and determination of ***rule 5(2) (b)*** applications at the expense of hearing and determination of appeals. A

substantial part of the backlog in the Court consists of applications for interim conservatory orders. This problem is created by the litigants themselves, but the Court is not entirely blameless for it is really up to it to take charge and dictate, within the law, the best way to hear and determine appeals within the principles set by the Constitution. Just last week, it was amazing to see a litigant, the hearing of whose 10 year old appeal was about to commence, asking the Court to forget the appeal and deal with an equally old application for stay of execution!

Routinely, parties who have lost in the High Court rush to the Court of Appeal under a certificate of urgency (more appropriately certificate of EMERGENCY) and invoke ***rule 5 (2) (b).*** Once the Court grants conservatory orders, the urgency suddenly disappears and the beneficiary of the order goes to sleep. Hiding behind a document issued by the High Court called a **certificate of delay**, it can take as many as five years or more to file and prosecute the appeal. The obtaining of orders under ***rule 5(2) (b)*** appear to irresistibly send applicants/intended appellants into a state of comatose or at the very least a deep slumber. This undermines virtually all the constitutional principles on the judiciary and judicial authority.

I am convinced that under ***Art 164(3)*** the primary purpose of the Court of Appeal under the Constitution is to hear and determine appeals. The power to hear and determine conservatory applications is an incidental or collateral power that is supposed to support and actualize the primary purpose of the Court. It certainly is not well when the collateral purpose takes precedence over the primary constitutional mandate of the Court. The Court is called upon, if it is to be absolutely true to ***Art 164(3),*** to introspect and review how it has treated appeals *vis-à-vis* conservatory applications. It must, in those appeals where it considers it necessary to issue conservatory orders, demand that the beneficiary moves expeditiously and files and prosecutes the appeal without delay. Time limits within which such action must be taken could be set. It is only then that we shall be able to assert that appellate justice is administered without undue delay and without being too costly. The Constitution of Kenya, 2010 which demands we comprehensively review our legislation, rules and practices to ensure that they truly accord with all the principles and values of the Constitution offers a great opportunity to address these shortcomings.

Ultimately, the remedy for this unsatisfactory state of affairs is not to deny the power of the Court of Appeal to issue conservatory orders. It is to consciously take legislative and administrative measures to address the concerns. I would dismiss the preliminary objection and award the costs to the applicant. I commend learned counsel, Mr Ahmednassir Abdulahi and Mr Waweru Gatonye for extensive research and a bold objection presented and opposed in equal measure with conviction and passion.

Dated and delivered at Nairobi this 31st day of May, 2013.

K. M'INOTI
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JUDGE OF APPEAL

RULING OF F. SICHALE, J.A.

The applicant herein filed a Notice of Motion application under **Rule 5 (2) (b)** of this **Court's Rules** seeking orders, *inter alia*, for stay of execution of the orders made on 4th February 2010 by Hon. Justice Muga Apondi.

Briefly the respondent **WESTLINK MBO UNITED** filed suit in the Superior Court against the applicant, **EQUITY BANK LIMITED and 2 OTHERS** claiming a sum of **Kshs.39,720,000/=**. The Honourable Justice Muga Apondi entered a summary judgment in favour of the respondent. An attempt by the applicant to obtain an order of stay in the Superior Court was declined on 23rd March, 2011. Undeterred, the applicant moved to this Court, and filed a Notice of Motion dated 31st March, 2011, the notice of appeal having been filed on 9th February, 2010.

The learned Senior Counsel, **Mr. Abdullahi** for the respondent raised a Preliminary Objection on the grounds that an application pursuant to **Rule 5 (2) (b)** of this **Court's Rules** as well as **Section 3** of the **Appellate Jurisdiction Act** is unconstitutional. The learned Senior Counsel urged us to find that in view of the provisions of **Article 164 (3)** of the **Constitution**, the Court of Appeal is not clothed with jurisdictional power to entertain an application under **Rule 5 (2) (b)** of this **Court's Rules.** To fortify his arguments, the learned Senior Counsel made profound submissions on what he referred to as the "**Evolution of the Kenyan Court of Appeal**". He sought to demonstrate that under the 1963 Constitution, **Section 177 (1)** provided as follows: -

"Parliament may, if it thinks fit, establish a Court of Appeal for Kenya which, subject to the provisions of this Constitution, shall have such jurisdiction and powers as may be conferred on it by any law."

According to him, and at the time, the Constitution was still trustful of the Kenyan Parliament and donated to it expansive powers to regulate and demarcate the jurisdiction and powers of the Court "by any law". Similarly, the 1969 Constitution did not derogate from the 1963 Constitution as **Section 64 (1)** provided thus:-

"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."

Mr. Abdullahi argued that although in 1969 the Constitution was still trustful of Parliament, there had been a shift of the mandate of Parliament to regulate and demarcate the jurisdiction and powers of the Court of Appeal from "**by any law**" in 1963 to "**by law**" in 1969.

The learned Senior Counsel for the respondent submitted that unlike the 1963 and 1969 Constitutions, there had been a radical change in the 2010 Constitution which under **Article 164 (3)** provided as follows:-

"The Court of Appeal has jurisdiction to hear appeals from –

a) **the High Court; and**

b) **any other Court or tribunal as prescribed by an Act of Parliament."**

The effect of this, he argued, is that the right of appeal was absolute and the Civil Procedure Act and Rules requiring leave to file an appeal in certain instances were now unconstitutional. In his words, the right to appeal had been "democratized". He further pointed out that Parliament was no longer seized of the authority to regulate and/or demarcate the jurisdiction of the Court of Appeal. The curtailing of the jurisdiction of this Court was deliberate and it was informed by the Court's past poor record and the drafters of the Constitution 'reigned heavily' on the Court.

In his view **Section 3 (1)** and **(2)** of the **Appellate Jurisdiction Act** which provides 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.

(2) For all purposes of and incidental to the hearing and determination 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."

is now unconstitutional in the light of the express provisions of **Article 164 (3)** of the **Constitution**.

His further arguments were that **Section 5 (2) (b)** of the **Appellate Jurisdiction Act** which clothed this

Court with the power to:-

"order stay of execution, an injunction, or a stay of any further proceeding on such terms as the Court may think just"

is original jurisdiction and yet **Article 164 (3)** of the **Constitution** gives the Court the jurisdiction to hear appeals only. To that extent, he posited, **Rule 5 (2) (b)** was unconstitutional. He urged us to find that the jurisdiction in **Rule 5 (2) (b)** is an original jurisdiction which was permissible in the 1963 and 1969 Constitutions but not any more after the promulgation of the Constitution on 28th August, 2010. In arguing his case, the learned Senior Counsel relied on several authorities including the cases of **SAFARICOM LTD AND OCEAN VIEW BEACH HOTEL LTD & 2 OTHERS** as well as **RUBEN & 9 OTHERS vs. NDERITO & ANOTHER [1989] KLR 459** which held that under **Rule 5 (2) (b)** the Court exercises an original jurisdiction. His further criticism was that **Rule 5 (2) (b)** had become a weapon used by the rich to "incubate" injustice.

In opposing the Preliminary Objection, **Mr. Waweru Gatonye**, the learned Counsel for the applicant submitted that the provisions of **Rule 5 (2) (b)** are for purposes of arresting execution; that this was an ancient jurisdiction which has been practiced for centuries; that the hearing and determination of applications under **Rule 5 (2) (b)** is an integral part of the administration of justice by the Court of Appeal without which its work would be rendered academic; that the Court has inherent power to do justice and the failure to grant the interim relief of stay would occasion injustice. The learned Counsel took the view that there was no provision, either expressly or impliedly, curtailing the jurisdiction of the Court as regards applications made under **Rule 5 (2) (b)**. The learned Counsel further relied on **Section 3A** and **3B** of the **Appellate Jurisdiction Act** which provide for an overriding objective to do justice. He argued that an application under **Rule 5 (2) (b)** is premised on the fact that an appeal (or a notice of an intended Appeal) had been filed and that this notice relates to an appeal from the High Court. He maintained that having lodged and served a Notice of Appeal, an application under **Rule 5 (2) (b)** becomes an interlocutory application pending the hearing and determination of the appeal. He cited the case of **INTERIM INDEPENDENT ELECTORAL COMMISSION –vs- PAUL WAWERU MWANGI [2011] eKLR** in which the Court of Appeal stated as follows:

"We have said times without number, that it is the notice of appeal which for purposes of rule 5 (2) (b) of the Courts Rules gives this Court jurisdiction to hear and determine an application under the Rule. An express provision of that Rule is to grant an order for: "…..a stay of any further proceedings."

Further, the learned counsel urged us to interpret the Constitution in order to achieve its purposes which is to promote human rights, equality, freedom, democracy, social justice and the rule of law as provided in **Article 259 (1)** of the **Constitution**. He cited the Ugandan case of **TINYEFUZA –vs- THE ATTORNEY GENERAL OF UGANDA CONSTITUTIONAL APPEAL NO. 1 OF 1996** in which the Court held that the Constitution must be given a purposive approach. In the case, the Supreme Court stated as follows:-

"…..the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramouncy of the written Constitution."

According to Mr. Gatonye, the Constitution must not be construed in a narrow or pedantic manner.

On the inherent power of the Court to do justice, the learned Counsel for the applicant relied on **Rule (1) (2)** of the **Court's Rules** which provide as follows:-

"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

His further submissions are that "**these powers are natural, innate, inborn, inbuilt and intrinsic to a Court……"**

I have considered the rival submission of both counsels for the respondent and applicant. The respondent's submission turns on two issues i.e.

i) The Court of Appeal has no jurisdiction to hear applications for stay in the light of **Article 164 (3)** of the **Constitution**.

ii) An attempt to entertain applications under **Rule 5 (2) (b)** of this **Court's Rules** is an usurpation of power as an application of this nature is an 'original' matter.

On the issue of jurisdiction, the Court's have time and again made it emphatically clear that to act without jurisdiction is to act in vain. I agree with Senior Counsel for the respondent that any orders made and/or proceedings undertaken in the absence of jurisdiction are null and void. To purport to act where jurisdiction does not exist is to act in vain. In the case of **THE OWNERS OF MOTOR VESSEL LILLIAN 'S' vs. CALTEX OIL KENYA LTD 1989 KLR I** at **page 14** (and which was cited by the Senior Learned Counsel for the respondent), the Court said as follows in reference to jurisdiction:

"Without it, a Court has no power to take the next step. Where a Court has no jurisdiction, there would be no basis for a confirmation of proceedings pending the evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The lack of jurisdiction on the part of this Court to hear an application under **Rule 5 (2) (b)** of this **Court's Rules**, according to Mr. Abdullahi was because **Article 164 (3)** of the **Constitution** gives this Court the power to hear appeals only and that an application made under **Rule 5 (2) (b)** is not an appeal. According to him, an application made under **Rule 5 (2) (b)** is an original jurisdiction as opposed to an appellate jurisdiction as envisaged by **Article 164 (3)** of the **Constitution**. To hear such an application, Mr. Abdullahi contended would be tantamount to the Court expanding its jurisdiction.

As to learned Senior Counsel's submission that in hearing an application under **Rule 5 (2) (b)** the Court exercises an original jurisdiction, my view is that such an application is pegged to an appeal that has been filed. It is not independent. Indeed the Court of Appeal cannot entertain such an application unless an appeal had been filed. To this extent I am in agreement with the learned Counsel for the applicant that the basis of an application for stay is the appeal from the High Court.

In the case of **RUBEN & 9 OTHERS vs. NDERITO & ANOTHER [1989] KLR 459**, this is what the Court said as regards applications filed under **Rule 5 (2) (b)**:-

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 of 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 …… the jurisdiction of the Court of Appeal is invited 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 business of the High Court."

I am in agreement with this summation as in my view the Notice of Motion is predicated on an appeal. It is not a stand-alone matter.

Perhaps it is important to remind ourselves why an application for stay under **Rule 5 (2) (b)** is not filed at the same time a Notice of Appeal is filed. Needless to say, this is invariably because at the time a litigant wants to exercise his undoubted right of appeal, the compilation of the record of appeal is not possible as the proceedings are not yet availed to a litigant by the Court and yet the Court of Appeal is a Court of record. One can actually see that in the event that the proceedings were to be ready, a litigant would be

able to file the appeal and an application for relief contemporaneously as it happens in applications for injunctions in the Superior Court. Why then would a litigant be shut out in an application for stay to preserve the subject matter of an appeal because the Court has not facilitated the compilation of a record to enable a litigant lodge an appeal and an application for stay at the same time?

The learned Senior Counsel for the respondent decried the delays in disposition of applications filed under **Rule 5 (2) (b)** and the fact that the court had become an 'incubator' for injustice. The flip side of this is that a litigant intent on filing an application for stay may accuse the Court of 'incubating' injustice for not availing proceedings to facilitate the filing of an appeal! I say this with tremendous respect to the learned Senior Counsel for the respondent.

As indicated earlier, I have considered the rival submissions of the two counsels and I am in favour of the proposition that the Constitution must be interpreted in a purposive manner. **Article 259** of the **Constitution** provides as follows:

"259 (1) This Constitution shall be interpreted in a manner that –

a) **Promotes its, purposes, values and principles;**

b) **Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**

c) **Permits the development of the law; and**

d) **Contributes to good governance."**

In my view, to do otherwise would be to negate the very purposes of the Constitution which places a premium on justice.

I agree with Mr. Abdullahi that justice cuts both ways but in an application under **Rule 5 (2) (b)** the Court is merely being asked to preserve the subject matter of the appeal pending an appeal. It is my further considered view that with the Judicial Transformation, a decree holder should not have to wait inordinately in order to reap the fruits of his/her judgment. There must be a speedy conclusion of appeals so that the Court does not 'incubate' injustice either for the decree holder or the judgment debtor.

I am also in agreement with Mr. Gatonye that the Court also has inherent jurisdiction to do justice. I have found **I.H. Jacob**, **The Inherent Jurisdiction of the Court 1770 Current Legal Problems** an apt description of what constitutes inherent jurisdiction. It states as follows:-

"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 the 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."

If the subject matter of the appeal was to dissipate, an appeal would be merely academic and an injustice would be visited on an appellant for no fault of his/her but because the Court's Rules requiring him/her to compile a record of appeal which record he/she cannot compile for want of typed proceedings. This is

unfair and unjust. The Court has inherent power to prevent injustice.

From the foregoing, it is my view that this Court is properly seized of an application made under **Rule 5 (2) (b)** of this **Court's Rules**.

Accordingly, the Preliminary Objection is disallowed with costs.

Dated and Delivered at Nairobi this 31st day of May, 2013.

F. SICHALE
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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR