



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MISCELLANEOUS CIVIL APPLICATION NO.860 OF 2001

BETWEEN

J.G KIBE.....1ST APPLICANT

**SAMUEL KAMAU MACHARIA.....2ND
APPLICANT**

SCENERIES LTD.....3RD APPLICANT

**GEORGE KANG'ETHE WARUHIU.....4TH
APPLICANT**

GRACE GITHU.....5TH APPLICANT

SOLOMON KARANJA.....6TH APPLICANT

AND

ATTORNEY GENERAL.....1ST RESPONDENT

NGENGI MUIGAI.....2ND RESPONDENT

**DAVID IRUNGU NDEGWA T/A CITY MERCHANT AUCTIONEERS.....3RD
RESPONDENT**

JUDGMENT

Introduction

1. The Applicants in the present matter were also Applicants in Milimani (Commercial Division of the High Court) **Civil Suit No. 55 of 1998** which was filed at the said Division on March 17, 1998 while the 3rd Applicant was the Plaintiff in High Court, **Civil Division Suit No. 4232 of 1991** consolidated with **HCCC No.6542 of 1991**. The Respondents in the said **HCCC No.55 of 1998** were the 2nd Respondent, a businessman and Mr. Edward Torgbor and Mr. Chege Kirundi, arbitrators appointed in 1996 by the Applicants and the 2nd Respondent respectively, to adjudicate

in two suits, namely, **HCCC No.4232 of 1991** and **HCCC No.6542 of 1991** which were both filed in the Civil Division of the High Court.

2. The instant Petition was then filed against the said 2nd Respondent, the Attorney General (hereafter the AG), who is sued on behalf of the State, and the 3rd Respondent, Mr David Irungu Ndegwa trading as City Merchant Auctioneers, a firm of auctioneers. It was alleged in the Petition that the Civil Division of the High Court on the application of the 2nd Respondent, unlawfully issued warrants of attachment of the goods of the 1st and 2nd Applicants on June 11, 2001 in execution of a purported judgment entered by that Division in **HCCC No.4232 of 1991** as consolidated with **HCCC No.6542 of 1991**.
3. The Applicants basically challenge the legality of the proceedings that led to the grant of the orders and the resultant warrants of attachment and have thus filed the instant Application urging the Court to *inter alia* set aside the said orders. In their Originating Motion dated 31st July, 2001, therefore, they specifically pray for the following orders;
 1. ***A declaration that the Commercial Division of the High Court situated at Milimani is [a] High Court within the meaning of Section 60 of the Constitution.***
 2. ***A declaration that the Civil Division of the High Court situated at the High Court building in Central Business District is also [a] High Court of Kenya within the meaning of Section 60 of the Constitution.***
 3. ***A declaration that judgments and orders made by any judge when attached to the Commercial or Civil Division of the High Court respectively, are of equal force and status.***
 4. ***A declaration that a judge of the High Court when attached to one of the Divisions of the High Court has no power to overrule, ignore or vary an order or judgment made by a judge sitting in another division of the High Court in a matter concerning the same issues previously adjudicated upon between the same parties.***
 5. ***A declaration that a division of the High Court has no jurisdiction to entertain an application and deliver a ruling/judgment which has the effect of overruling, setting aside or varying prior orders made by a different Division of the High Court in the same issue raised by the same parties relating to the same subject matter.***
 6. ***A declaration that Section 60 of the Constitution forbids competition of the Divisions of the High Court in hearing a dispute pending before the High Court.***
 7. ***A declaration that the order made by the Commercial Division of the High Court (Hon. Mr. Justice Kuloba) on March 30, 1998 in Milimani HCCC No. 55 of 1998, suspending, postponing and staying arbitration proceedings had, by virtue of a consent order made on July 16, 1996 in HCCC No. 4232 of 1991 Consolidated with HCCC No. 6242 of 1991, barred the Civil Division of the High Court (Hon. Mr. Justice O'kubasu) from hearing [the] second Respondent's application dated April 30, 1998 on July 9, 1998 when the orders of stay granted by the Commercial Court were in force.***
 8. ***A declaration that the disregard by the Civil Division of the High Court (Hon. Mr. Justice O'kubasu) on July 9, 1998 of the orders of stay made on March 30, 1998 in Milimani HCCC No. 55 of 1998, by the Commercial Division (Hon. Mr. Justice Kuloba) and hearing the second Respondent's application dated April 30, 1998 filed in Civil Division HCCC No. 4232 of 1991 Consolidated with HCCC No. 6242 of 1991 contravened Section 60 of the Constitution, was unconstitutional and that all the proceedings of the Civil Division are null and void.***
 9. ***A declaration that appeals lie to the Court of Appeal equally from orders and judgments of both the Commercial Division of the High Court and the Civil Division and that only one decision***

given on the same dispute between the same parties may be appealed against.

10. *A declaration that an order made by the Civil Division of the High Court in disregard of a prior order of stay made by the Commercial Division of the High Court in the same dispute between the same parties and on the same issues contravenes Section 60 of the Constitution is null and void, and not enforceable.*
11. *A declaration that an order made by the Civil Division of the High Court in disregard of a prior order of stay made by the Commercial Division of the High Court in a dispute between the same parties and on the same issues, contravenes the citizens' right under Section 77 (9) of the Constitution to have the existence and extent of a civil right determined by an impartial and independent tribunal within a reasonable time.*
12. *A declaration that any decision made by an adjudicating authority within the meaning of Section 77 (9) of the Constitution whose composition fails to disclose their pecuniary interest in the subject matter of the adjudication or other relevant matters which constitute grounds for their disqualification from adjudicating on the subject matter is null and void, and unenforceable for not being made by an independent and impartial tribunal.*
13. *A declaration that any award or purported award made by the arbitrators who have pecuniary interests in any aspect of the matter of adjudication and fail to disqualify themselves from participating in the arbitration is ipso facto, unfair, void and unenforceable by the High Court by virtue of Section 77 (9) of the Constitution.*
14. *A declaration that any decision of any court, tribunal or arbitrator in Kenya which offends the Pinochet rule (i.e. R vs Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Urgate [1999] 1, All ER. 577) contravenes Section 77 of the Constitution, is null and void, and unenforceable.*
15. *A declaration that the arbitrators' purported award made on December 8, 1997 purportedly pursuant to a consent order made on July 16, 1996 in HCCC No 4232 of 1991 consolidated with HCCC No. 6542 of 1991, is null and void for being made by an Arbitration Tribunal which was not independent and impartial within the meaning of Section 77 (9) of the Constitution.*
16. *A declaration that the arbitrator's purported award made on March 16, 1998 purportedly pursuant to a consent order made on July 16, 1996 in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991, is null and void for being made by an Arbitration Tribunal which was not independent and impartial within the meaning of Section 77 (9) of the Constitution.*
17. *A declaration that the arbitrators appointed pursuant to the consent order made on July 16, 1998 in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991, did not make any arbitration award on December 18, 1997.*
18. *A declaration that the arbitrators appointed pursuant to the consent order made on July 16, 1998 in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991, did not make any arbitration award on March 17, 1998.*
19. *A declaration that the second Respondent's application dated December 3, 1997 filed in the Arbitral Tribunal set up by the consent order made on July 16, 1998 in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991, was filed when the Arbitral Tribunal lacked jurisdiction to hear the same as Mr. Chege Kirundi was disqualified from hearing the same by his pecuniary interest in the subject matter of the arbitration.*
20. *A declaration that the arbitral award made by the Arbitral Tribunal on December 8, 1997 when Mr Chege Kirundi sat as an arbitrator is null and void.*

21. *A declaration that following the disclosure before the two arbitrators by the first applicant on January 13, 1998 of Mr Chege's pecuniary interest in the subject matter of arbitration, Mr Edward Torgbor, too, was disqualified from participating in the arbitration.*
22. *A declaration that the arbitral award made by the Arbitral Tribunal on March 16, 1998 when both Mr Chege Kirundi and Mr Edward Torgbor were disqualified from serving as arbitrators is null and void.*
23. *A declaration that all the proceedings of the Arbitral Tribunal which took place from when Mr Chege Kirundi was disqualified from serving as an arbitrator are null and void.*
24. *A declaration that the Civil Division of the High Court did not enter judgment for the said respondent on March 17, 1998 in either HCCC No. 4232 of 1991 or HCCC No. 6542 of 1991.*
25. *A declaration that an informal application to the Deputy Registrar of the High Court on March 31, 1998 by the second respondent in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991 for judgment to be entered from him in accordance with a purported arbitral award made by arbitrators on March 17, 1998 and for a decree to issue was a contempt of court and a callous abuse of the court process in view of the stay of arbitration by the Commercial Division of the High Court the previous day, ie March 30, 1998 in Milimani HCCC No. 55 of 1998.*
26. *A declaration that the decree signed, sealed and issued by a Deputy Registrar issued on April 8, 1998 in HCCC No. 4232 of 1998 consolidated with HCCC No. 6542 of 1991 pursuant to the informal application made on March 31, 1998 referred to in 25 above is null and void.*
27. *A declaration that in view of the order of stay, suspension, and postponing of arbitration proceedings by the Commercial Division of the High Court (Hon. Mr Justice Kuloba) on March 30, 1998 in Milimani HCCC No. 55 of 1998, the filing by the second Respondent of the application dated April 30, 1998 for judgment to be entered for him by the Civil Division of the High Court in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991 in terms of a purported arbitral award made on March 17, 1999 was a contempt of court taking the form of abusing its process and the application was invalid.*
28. *A declaration that through his application dated April 30, 1998 filed in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991, the second Respondent set out to obtain the entry of judgment through deception and defrauding of this Honourable Court.*
29. *A declaration that a Deputy Registrar has no jurisdiction to hear an application to enter judgment in terms of an arbitral award.*
30. *A declaration that if, which is denied, a Deputy Registrar has jurisdiction to hear an application to enter an arbitral award, he lacks jurisdiction to enter judgment before a judge of this Honourable Court has heard the application and ordered that judgment be entered.*
31. *A declaration that a judgment entered by a Deputy Registrar on application of a party enforcing an arbitral award is null and void.*
32. *A declaration that if, which is denied, the decree signed, sealed and issued on April 18, 1998 by the Deputy Registrar of the High Court on the informal application of the second Respondent is valid, the second Respondent's application dated April 30, 1998 for judgment to be entered for in terms of the award made on March 17, 1998 was legally unnecessary and the purported judgment entered for him on July 9, 1998 is null and void.*
33. *A declaration that the judgment on which the warrants of attachment dated June 11, 2001 are based was purportedly entered for the second Respondent by a Deputy Registrar on April 8, 1998 when there was a stay granted by the Commercial Division of the High Court and are null and*

void.

- 34. A declaration that the assumption of jurisdiction on July 9, 1998 by the Civil Division of the High Court (Hon. Mr. Justice O'kubasu, as he then was) to hear the second Respondent's Chamber Summons dated April 30, 1998 filed in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991 when there were in High Court of Kenya Milimani, in HCCC No. 55 of 1998, prior orders of stay made by the Commercial Division of the High Court made the same day, i.e. July 9, 1998 and on June 10 and March 30, 1998 respectively, was unconstitutional, null and void.**
- 35. A declaration that the warrants of attachment dated June 11, 2001 issued by the Civil Division of the High Court in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991 when there were in Milimani HCCC No. 55 of 1998 orders of stay, are null and void for the second Respondent's non-disclosure of the orders of stay issued by the Commercial Division on March 30, 1998.**
- 36. A declaration that on July 9, 1998 the second Respondent obtained judgment and subsequently warrants of attachment fraudulently or by deception and the purported judgment is null and void.**
- 37. A declaration that the warrants of attachment dated June 11, 2001 issued in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991, are based on non-existent arbitral orders made on December 18, 1997 and March 17, 1998 respectively and are null and void.**
- 38. A declaration that there being no awards made by arbitrators on December 18, 1997 and March 17, 1998 the Civil Division of the High Court could not enter judgment on July 9, 1998 as prayed in the application dated April 30, 1998.**
- 39. A declaration that the purported judgment entered for a party by a Deputy Registrar of the Civil Division of the High Court in violation of both an order of stay issued by the Commercial Division of the High Court and of the rules of natural justice as embodied in order 45 of the Civil Procedure Rules and or the Arbitration Rules (1997) contained in Legal Notice No. 58 of 1997 contravenes section 77 (9) of the Constitution, is null and void, and unenforceable.**
- 40. A declaration that the purported entry of judgment on July 9, 1998 by the Civil Division of the High Court in HCCC No. 4232 of 1991 in favour of the second Respondent as prayed in his application dated April 30, 1998 by Hon. Justice O'kubasu on July 9, 1998 and all subsequent proceedings in the said consolidated suits are null and void.**
- 41. A declaration that any and all purported warrants of attachment issued following the purported entry of judgment on July 9, 1998 including those dated June 11, 2001 by the Civil Division of the High Court in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991, are null and void.**
- 42. A declaration that if, which is denied, the Civil Division of the High Court has made a typing error and the warrants of attachment dated June 11, 2001 based on a purported judgment entered by it on March 17, 2001 were intended to be issued under either the judgment purportedly entered by a Deputy Registrar on April 8, 1998 or the one purportedly entered by the Civil Division of the High Court on July 9, 1998 in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991, the warrants are null and void.**
- 43. A declaration that the purported attachment of Kshs.5 Million by the third Respondent is illegal, null and void.**
- 44. An order that the execution of judgments entered for the second Respondent on April 8 and July 7, 1998 and decrees issued thereafter be stayed permanently.**

45. *An order that the warrants of attachment dated June 11, 2001 or any others issued by the Civil Division of the High Court in HCCC No. 4232 of 1991 consolidated with HCCC No. 6542 of 1991 be suspended/lifted/quashed/set aside.*
46. *As an alternative to 45 above, an order that the warrants or attachment dated June 11, 2001 issued by the Civil Division of [the] High Court in HCCC No. 4532 of 1991 consolidated with HCCC No. 6542 of 1991, be permanently stayed.*
47. *As an alternative to 45 and 46 above, the third Respondent be prohibited from executing the warrants of attachment dated June 11, 2001 or any others issued by the Civil Division of the High Court in HCCC No 4232 of 1991 consolidated with HCCC No 6542 of 1991.*
48. *An order that the third Respondent be restrained from attaching Kshs 5 million deposited in court by the first and second Applicants in HCCC No 4232 of 1991 consolidated with HCCC No 6542 of 1991.*
49. *A declaration that the second Respondent has committed the contempt of court known as abuse of the process of the court.*
50. *A declaration that the circumstances in which the court's process may be abused are varied and numerous and the categories of such cases are therefore not closed.*
51. *An order that Kshs 5 million deposited in court by the applicants in HCCC No 4232 of 1991 consolidated with HCCC No 6542 of 1991 be released to them forthwith.*
52. *General damages.*
53. *Costs of this suit."*

4. A casual reading of all the above prayers would point to the fact that what is really in issue is the proceedings in **HCCC No.4232 of 1991 and HCCC No.6242 of 1991** and whether the orders issued in them were lawfully issued and whether the processes used in executing those orders were also lawful and within the constitutional mandate of the High Court under **Section 60** of the **Repealed Constitution**. The question of the conduct of the named arbitrators and their arbitral awards is also in issue.

The Applicants' Case

5. The Applicants' case is contained in their Written Submissions dated 17th December, 2012; further Written Submissions dated 3rd October, 2014; and their Affidavit dated 31st July, 2001, in support of the Originating Motion. They averred that the warrants herein dated June 11, 2001 are based on a non-existent judgment entered on March 17, 1998 as no judgment was ever entered in either **HCCC No.4232 or 6542 of 1991**; no formal or informal Application was made to the Civil Division of the High Court that day; and that the said warrants are, in fact, based on a purported decree signed and issued by a Deputy Registrar on April 8, 1998 on an informal Application made to her by the 2nd Respondent on March 31, 1998 a day after the Commercial Division of the High Court had suspended, postponed and stayed further arbitration proceedings.
6. It was their further case that the said warrants are based on a purported entry of judgment in **HCCC No.4332 and 6542 of 1991** made by Ms F. Simbiri Jaoko, a Deputy Registrar sometime between April 30 and May 29, 1998 and that the said Deputy Registrar had no power to enter judgment upon an application for enforcement of an arbitral award; and that neither a judge of the High Court nor a Deputy Registrar can properly enter judgment for any party before the Application for such judgment to be entered is heard and determined as happened in the instant case. In this regard, it was their argument therefore that the conscience of all Courts should be offended by any judgment entered by a tribunal whose members are disqualified from hearing it

by virtue of pecuniary interests or other connections, and will set it aside at once.

7. It was their contention further that the arbitral award made on December 8, 1997 and March 16, 1998 is null and void for all purposes of the law and should be so declared because of the conduct of the arbitrators and the Court.
8. The Applicants further argued that they are greatly dismayed by the fact that the Civil Division of the High Court had totally ignored orders of stay made by the Commercial Division of the same Court despite the fact that its attention was repeatedly drawn to it. In this regard, they asserted that the practical effect of the entry of judgment for the 2nd Respondent by Hon. Justice Kuloba rendered the orders of stay granted by the Commercial Division in **Milimani HCCC No.55 of 1998** useless and inoperative.
9. In addition, that any judgment or arbitral award made by a Judge or an arbitrator who is disqualified from hearing a matter within the meaning of the **Pinochet Rule** so offends the conscience of the Court that it must be set aside any orders made and proceedings commenced *de novo* before a properly constituted tribunal. That therefore the purported arbitral award made on December 8, 1997 and purportedly amended by another of March 16, 1998 are null and void; and the entry of judgment by the Commercial Division on July 9, 1998 in terms of the amended purported award could not validate an invalid arbitral award.
10. For the above reasons the myriad prayers reproduced above are sought.

The Attorney General's Case

11. The AG while opposing the Originating Summons Application filed Grounds of Opposition dated 11th March, 2013 and Written Submissions dated 27th October, 2014. The AG's opposition is premised on the following grounds;

“(1) That the motion is an abuse of the court process for the matters herein, the subject matters of the Motion, are functus officio and cannot be handled by a court of concurrent jurisdiction;

(2) That the issues averred in the Motion are amenable only to an appeal and not a constitutional petition;

(3) That in the absence of the suitability of appeal, the Applicant has an alternative remedy to institute an application to set aside the orders depending on the justiciability of the allegations vis-a-vis the grounds for setting aside;

(4) That further to the above, the issues raised calls for institution of disciplinary proceedings for various parties or individuals involved in the alleged malpractices before competent forums;

(5) That the time frame taken to institute, hear and determine the motion is an affront to fair hearing which is a non-limitable right hence the motion is unconstitutional; and

(6) That the delay in prosecuting the Motion has the potential to occasion great prejudice to the disadvantage of the parties involved hence should be dismissed.”

12. Accordingly, it was the AG's submission that the issues raised by the Applicant are issues that can only be tried by an appeal court and not adjudicated as a constitutional Petition or question. That the grounds raised therein do not constitute grounds for a constitutional question or an application for interpretation and instead they are grounds based on a history of a decision of the High Court and of concurrent jurisdiction of this Court having dealt with the subject matter involving these same parties which has the effect that it seeks to appeal through the back door, a

decision that had been lawfully issued and it is an abuse of the Court process for the Applicants to engage in some form of forum shopping and moving from Division to Division in the High Court instead of going to the Court of Appeal.

13. While relying on the decision in **Peter Nganga Muiruri vs Credit Bank Limited and Another, Civil Appeal No.203 of 2006**, it was the AG's position that this Court cannot exercise jurisdiction in regard to matters of appeal of which an appellate court has exclusive jurisdiction.
14. In addition, the AG submitted that the Applicants have not demonstrated that their constitutional rights have been infringed in any way as the Application raises no constitutional issues that require this Court to give remedies and invocation of constitutional remedies should only be reserved for serious breaches of the Constitution. That the fact that a judgment or a ruling of the court is wrong does not mean that any fundamental rights of a party aggrieved by it have been breached.
15. While further relying on **Attorney General of Trinidad and Tobago vs Ramanoop (Trinidad and Tobago) [2005] UKPC 15 (23 March 2005)** and **Chokolingo vs Attorney General of Trinidad and Tobago (1981) 1 ALL ER 244** it was the AG's argument that the Application herein is unmerited and an abuse of the court process and the same ought to be dismissed with costs to the Respondents.

The 2nd Respondent's Case

16. The 2nd Respondent filed Written Submissions dated 8th September, 2014 and before that he had filed a Replying Affidavit dated 27th September, 2001 in which he opposes the instant Originating Motion Application.
17. His case is that the matters in dispute herein are pending hearing in both **HCCC No.4232 and 6542 of 1991** as well as **HCCC No.55 of 1991** and that the said disputes were referred, by consent, to the arbitrators, Mr. Torgbor and Mr. Kirundi. In this regard his contention was that the said consent which is clear and unambiguous has not been vacated by consent and no challenge on its legality has been filed or in any way urged and that with respect to the second case, the main suit is pending hearing.
18. It was his further averment that the narrative of facts as stated by the Applicants do not bring any of those disputes within the purview of a constitutional matter for the purported facts, though laced with Counsel's unfounded conclusions, theories and conjectures do not disclose any issue of a constitutional nature and the said suits are yet to be heard and determined by the High Court in any event. Further, that not all parties in the suits now sued in the current Motion have been served with summons, including the arbitrators and the beneficiary of the transfer of property subject of the suit i.e. Kenya Re-Insurance Company. That no orders can therefore issue against such parties.
19. The 2nd Respondent also contended that the High Court, in both cases, was independent and impartial and gave fair judgments and he denied that **Section 77 (9) of the Repealed Constitution** was infringed and neither was there any competition between the various Divisions of the High Court as alleged. Further, that appropriate orders were made in **HCCC No.4232 and 6542 of 1991** which was the file under which the order for reference to arbitration was made and additionally, that no attempt was made to bring the order in **HCCC No.55** to the judge in **Nos.4232 and 6542 of 1991** before the award was confirmed as a judgment of the High Court. In addition, the foregoing notwithstanding, any conflict real or apparent on the part of Mr. Kirundi would be an issue for review and/or appeal to a Court of competent jurisdiction.
20. The 2nd Respondent also urged the point that the Applicants herein have raised issues of validity of the award, entry of judgment and its execution and yet, those issues were before Courts of competent jurisdiction and those that have not been resolved and are pending hearing cannot be deceptively converted to constitutional issues. In this regard he asserted that the Applicants have

wasted the Court's time while fighting against securing the integrity of the arbitral proceedings.

21. Finally, he contended that the Deputy Registrar and the judges who handled the dispute in the Civil and Commercial Divisions had the capacity to do as they did and that this Court has no jurisdiction to adjudicate on a matter already adjudicated upon by the Court of Appeal in **Civil Appeal No.138 of 2000**.

22. For the above reasons, he seeks dismissal of the Motion with costs.

Determination

23. After reading the various pleadings filed before this Court on the present matter and hearing Counsel for all the parties, the first issue that calls for the determination by this Court is whether this Court has the jurisdiction to determine the instant Originating Motion Application. If the answer to this question is in the affirmative, I shall proceed on to determine whether any remedies are available to the Applicants, if any. In saying so, I am aware that these proceedings were commenced under the **Repealed Constitution** where the jurisdiction of the High Court was as provided for under **Section 60** which provided as follows:

1. *There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.*
2. *The judges of the High Court shall be the Chief Justice and such number, not being less than eleven, of other judges (hereinafter referred to as puisne judges) as may be prescribed by Parliament.*
3. *The High Court shall be duly constituted notwithstanding a vacancy in the office of a judge of that Court.*
4. *The office of a puisne judge shall not be abolished while there is a substantive holder thereof.*
5. *The High Court shall sit at such places as the Chief Justice may appoint.*

24. In addition, I shall start from the premise that following the decision of the Court of Appeal in **Peter Ng'ang'a Muiruri (supra)** all the Divisions of the High Court then and now are equal and none can purport to superintend or supervise the conduct of another including to declare their actions and/or decisions to be unlawful or unconstitutional. The High Court was and remains one Court with no superiority conferred on any one of its Divisions including the then Judicial Review and Constitutional Division.

25. I shall now turn back to the question of jurisdiction in that context.

Does this Court have Jurisdiction over the Matter?

26. The Respondents have all submitted that this Court lacks the jurisdiction to entertain the matter and while relying on **Republic ex parte Japeth Noti Charo vs Malindi Land and Environment Court and Justice Angote [2014], JR Misc App No 167 of 2014; Hussein Khalid and 16 Others vs Attorney General and 2 Others, Petition No 324 of 2013** and **Peter Nganga Muiruri vs Credit Bank Ltd and 2 Others (supra)** they reiterated that this is not the appropriate forum for addressing the issues raised in the instant Application and that this Court lacks the jurisdiction to review and/or re-litigate matters decided or pending in the High Court and/or in the Court of Appeal.

27. While opposing these contentions, the Applicants maintained that this Court has the jurisdiction to determine the issues raised herein and that the submissions by the Respondents on the question of

jurisdiction are akin to the conduct of the proverbial man of straw and that like him the 2nd Respondent has erected for himself a huge house of straw and proceeded to demolish it with evident delight. Accordingly, it was their submission that they are not asking this Court to interfere with the decision of the Court of Appeal, but rather to determine *inter alia* the validity of the warrants issued on 11th June, 2001, by the High Court in its Civil Division (see paragraph 19 of the Applicants' Reply to Submissions of the 2nd Respondent).

28. In that regard, the question of jurisdiction goes to the very heart of every litigation. This Court has more than once emphasised on the importance of a court ascertaining whether it has jurisdiction before entering the arena of determining a matter presented before it. The guiding dictum on jurisdiction that has been consistently endorsed by our courts is to be found in the celebrated case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** where the Learned Judge expressed the view that;

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics."

He went on to state that:

"If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist."

The Learned Judge finally concluded thus:

"Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

29. Similar sentiments have been echoed in subsequent decisions for instance in **Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others Civil Application No. 2 of 2011** where the Supreme Court held that:

"[68] A Court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

30. Lastly the dictum by the Court in the case of **Prosecutor vs Dusko Tadic Decision on the Defence Motion of Jurisdiction in the Trial Chamber of the International Tribunal, Case No. IT-94-I-T**, is pertinent. It stated thus:

"[10] But jurisdiction is not merely an ambit or sphere (better described in this case

as "competence"; it is basically - as is visible from the Latin origin of the word itself, jurisdictio- a legal power, hence necessarily a legitimate power, "to state the law" (dire le droit) within this ambit, in an authoritative and final manner. This is the meaning which it carries in all legal systems."

I am duly guided by the above authorities on the question of jurisdiction and I do not see any reason to depart from the reasoning in the expositions therein.

31. In addressing the question of jurisdiction therefore, I must perhaps briefly outline the chronology of the litigation that has led to the instant Motion and I note the history of this litigation is largely undisputed.

*The first stage of this litigation as can be deduced from the pleadings is that the Applicants on 9th August, 1991 filed **Civil Suit No.4232 of 1991** which was later consolidated with **HCCC No.6542 of 1991**.*

On 16th July, 1996, the parties recorded a consent order whereby the matter was referred to arbitration and the parties nominated Mr. Justice (rtd) Edward Torgbor and Mr Chege Kirundi as arbitrators. On 8th December, 1997, the arbitrators made a Ruling and gave interim orders that the Applicants do deposit the sum of Kshs.150,000,000 within 7 days in an interest bearing account in the joint names of the party's advocates and the arbitrators.

On 18th December, 1997, Sceneries Ltd, the 3rd Applicant therein, made an application by a Notice of Motion before the arbitrators seeking to have the above order set aside for impossibility of compliance. The said Motion was however dismissed on 2nd March, 1998.

*On 17th March, 1998, the Plaintiffs therein by an Originating Summons, filed **Milimani HCCC No.55 of 1998** in which they sought the orders that the joint arbitrators be restrained from hearing and/or further hearing, and/or proceeding any further with the said arbitration and that the Order of Reference made by the court on the 16th July, 1996 and all the proceedings in the said arbitration be stayed except for the purpose of implementing the said orders. They also sought for termination of the mandate of the arbitrators.*

On 30th March, 1998, at the Commercial Division of the High Court, Kuloba J (as he then was), after hearing the said Originating Summons Application, granted interim stay orders to the effect that the arbitration proceedings and hearing should be postponed, suspended and stayed to await the outcome of the Application. On 13th July, 1998 the Learned Judge further extended the orders of stay.

*On 30th April, 1998, the 2nd Respondent, by a Notice of Motion filed in **HCCC No.4232 of 1991** made an application to the Court for judgment to be entered in accordance with the arbitration award made on 17th March, 1998 by the arbitrators. In this regard, on 9th July, 1998, O'kubasu J (as he then was) gave ex parte orders allowing the application.*

The above order prompted the Applicants to file a Notice of Motion on 9th July, 1998 seeking a stay of the execution of the said orders by O'kubasu J and the setting aside of the said orders.

In a Ruling delivered on 31st July, 1998, O'kubasu J dismissed the said Application and granted a temporary stay for 14 days and leave to appeal the said decision.

On 18th February, 1999 the Applicants by a Notice of Motion applied to the High Court for orders that the said Application do operate as a stay of execution and/or any further action against it while pending the hearing and determination therein and that the time within

which to set aside the purported arbitration award Ruling be extended to the date thereof.

On 14th March, 2000, the Applicants filed an appeal at the Court of Appeal in **Civil Appeal No.42 of 2000** where they sought to set aside all the orders made by O’kubasu J on 31st July, 1998 dismissing their Application in regard to the setting aside of the ex parte orders. On 27th May, 2002, by a letter drafted by M/s Macharia and Co. Advocates, the parties reached a consent, made under **Rule 93 (3)** of the Court of **Appeal Rules** and withdrew their appeal.

On 8th May, 2000, the Commissioner of Assize, Hon Alnashir Visram dismissed the Applicants’ Application filed on 18th February, 1999 which sought for extension to apply for the setting aside of the arbitration award.

On 19th May, 2000, by a Notice of Motion filed the same day the Applicants filed an application in Civil Appeal No.138 of 2000 wherein they requested for orders of stay of any further proceedings in **HCCC No.4232 and 6542 of 1991** pending hearing and determination of the appeal and stay of execution of the orders issued on 8th May, 2000. On this basis, on 8th June, 2001, the Court of Appeal dismissed the said Application.

On 11th June, 2001, the **Civil Division** in **HCCC No.4232 and 6542 of 1991** issued warrants of attachments of moveable properties belonging to the Applicants herein and thereafter the present proceedings were commenced.

32.From the above rendition of events, it is not in dispute therefore that the Applicants herein had approached the Court of Appeal in grievance of the circumstances surrounding the grant of the orders now being challenged. The Applicants have however made it explicit that they are not asking this Court to interfere with the decisions of the Court of Appeal, but rather to determine the validity of the warrants issued on 11th June, 2001 and all matters surrounding the issuance of those warrants.

33.Does this Court have the jurisdiction to determine these issues? My answer to that question is in the negative. I say so because the said orders of warrants of attachment stemmed from the decision of the Court in the Ruling of 30th March, 1998 where the Application for stay was allowed by Kuloba J As I have stated elsewhere above, the Applicants challenged the decision by O’kubasu J in regard to allowing the ex parte Application by the 2nd Respondent but the same was dismissed by the Learned Judge who further granted them leave to appeal his decision. In the said Ruling, the Learned Judge rendered himself as follows;

“... The dispute herein was by consent of the parties referred to arbitration. The dispute was deliberated upon by two arbitrators who then filed their award. The order of this Court made on 9th July, 1998, was to the effect that judgment be entered in terms of the award filed. That is the order that the applicants are seeking to set aside. Mr. Githu Muigai cited a number of relevant authorities on setting aside of ex parte judgments/orders. I accept all these authorities as relevant on the issue of setting aside ex parte orders or judgments but in this case the position is quite different. Indeed there was nothing the parties could do once the arbitration award has been filed but to apply for setting it aside. This matter is now within the ambit of order XLV of the Civil Procedure Rules which is entitled “Arbitration Under Order of a Court”. Now that judgment has been entered in terms of the award filed, a party which is dissatisfied with the judgment as entered may then apply for the setting aside of the award. That would then be considered in the light of Order XLV Rule 15 of the Civil Procedure Rules. The applicants herein are not hopeless since they will be perfectly entitled to apply for the setting aside of the award.

In view of the foregoing I find that the application to set aside ex parte order of 9th July, 1998 has no merit and the same is dismissed with costs. Orders accordingly.”

The Court then proceeded to grant leave for appeal as had been requested by Mr. Muigai on behalf of the Applicants therein.

34. Subsequently, the appeal was settled by consent of the parties. And in my view that was the appropriate forum for addressing the questions in regard to the validity or otherwise of the said purported conflicting orders by the High Court. It is my further considered view that by this Court having to determine the validity of the said warrants of attachment, it will have to reopen the questions relating to the grant of the said orders, questions which were addressed by the High Court earlier on in this matter.
35. I reiterate that the Applicants have clearly expressed the view that this Motion is not intended to challenge the decision of the Court of Appeal but rather the validity of the warrants of attachment. In my view, the question of the validity of the warrants was addressed by the Court as I have stated herein above. It would thus be absurd for this Court to reopen the same issues and to address them as expected by the Applicants. The foregoing reasons notwithstanding, my second reason as to why this Court does not have the jurisdiction to grant the orders sought in the Originating Motion Application herein is that this is not the appropriate forum to challenge the orders of the High Court as this Court has similar and competent jurisdiction as the Court that granted the same orders. By examining the validity or otherwise of the said warrants, it would mean that this Court will be sitting as an Appellate Court and exercising an appellate function which in my view is a preserve of the Court of Appeal - See **Peter Ng'ang'a Muiruri. (supra)**
36. Having answered the question of jurisdiction in the negative, I am inclined to down my tools at this point and I cannot go into a determination of the merits of the instant Originating Motion.

Disposition

37. There being no jurisdiction I hereby dismiss the Originating Summons dated 31st July 2001 with the further order that the Applicants shall bear the costs thereof as costs must follow the event.
38. Orders accordingly.

DATED, SIGNED DELIVERED AND AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Karanja holding brief for Dr. Kuria for Applicants

No appearance for Responden

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

19/2/2016