REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 505 OF 2008

MUIRI COFFEE ESTATE LIMITED ……..…… PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED …….. 1ST DEFENDANT

BENJOH AMALGAMATED LIMITED ……..… 2ND DEFENDANT

DAVID G. KARIUKI T/A WATTS ENTERPRISES …. 3RD DEFENDANT

BIDII KENYA LIMITED …… 4TH DEFENDANT

R U L I N G

1. The fourth Defendant herein has come before this Court by way of Notice of Motion dated 26th September 2013 which seeks orders that this suit to be dismissed with costs as ordered by the Court of Appeal in its judgement delivered on 26th April 2013 in *Civil Appeal No. 100 of 2010* as consolidated with *Civil Appeal No. 106 of 2010*. The Application is brought under **Articles 40, 159 (2) (d) (e) and 165 (3)** of *the Constitution*, **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as **Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The same is grounded as follows:

> **"1. THAT the 1st, 3rd and 4th Defendants obtained judgment in their favour in Civil Appeal No. 100 of 2010 consolidated with Civil Appeal No. 106 of 2012, being an appeal from the Rulings and orders of this Honourable Court delivered on 18th November 2008 and 2nd November 2009 by Hon. Lady Justice Khaminwa.**
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> **2. THAT by a judgment delivered on 26th April 2013 in Civil Appeal No. 100 of 2010 consolidated with Civil Appeal No. 106 of 2010, the Court of Appeal set aside the learned Judge's orders and dismissed the suit herein with costs to the 1st, 3rd and 4th Defendants.**
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> **3. THAT the suit property L.R. No. 10075 Thika measuring 443 acres was sold to the 4th Defendant through Public Auction on 19th September 2007 and duly transferred to the 4th Defendant on 8th August 2008.**
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> **4. THAT the Plaintiff is still in possession of the suit property and had declined to**

deliver vacant possession to the 4th Defendant.

5. THAT the Plaintiff has embarked on wanton destruction and wastage of the suit property by felling and carting away priceless indigenous trees.

6. THAT it is just and mete in all the circumstances of the case for the orders sought to be granted".

2. The Application is supported by the Affidavit of **Rahul Dilesh Bid** sworn on 26th September 2013. The deponent detailed that he was a director of the fourth Defendant authorised to swear the said Affidavit and thereafter, set out the history of the suit both as before this Court and before the Court of Appeal in the above numbered two Appeals. The deponent attached to his said Affidavit a copy of the 23 page Ruling of the Court which concluded:

"The appellant's preliminary objection dated 18th September 2008 is hereby allowed in its entirety with the result that *Milimani HCCC NO. of 505 of 2008* be and is hereby dismissed with costs to the appellants herein."

The deponent went on to detail that following upon the Court of Appeal's said Ruling, his advocates on record had forwarded a draft Order to the advocates for the second Respondent, as well as to the advocates on record for the first Respondent. Both those firms had declined to approve the Order but such was thereafter extracted once the Court of Appeal had settled and approved the terms thereof. Mr. Bid went on to declare that the fourth Defendant had lawfully purchased the suit property L. R. No. 10075 Thika ("the suit property") on 19th September 2007 for a consideration of Shs. 70 million. The suit property had been transferred to the fourth Defendant on 8th August 2008. In his view, the fourth Defendant was entitled to vacant possession of the suit property as from that date but the Plaintiff retained possession and had declined to hand over the same to the fourth Defendant. The deponent further went on to say that the Plaintiff, through its directors, employees, servants and/or agents have now embarked upon the wanton destruction of indigenous trees being on the suit property despite being served with a Restoration Order by the National Environment Management Authority.

3. On 3rd December 2013, this Court granted a status quo Order with the direction to the O.C.S. of the Thika Police Station to ensure its compliance. Prior to that, on 9th October 2013, the Plaintiff had filed an objection to the fourth Defendant's said Application detailing that the same was vexatious, frivolous and scandalous as well as being an abuse of the due process of law. It denied that there had ever been any sale of the suit property. It maintained that the supposed sale had been fraudulent and laid down the particulars of fraud as follows:

"(i) The Respondents land is valued at Kshs. 693,365,000 yet it was disposed off at the gross under sale of Kshs. 70,000,000.

(ii) No statutory notice was served prior to the sale.

(iii) No redemption notice was ever served by the Auctioneers.

(iv) No actual auction or bidding took place at the purported Auction.

(v) There was no valid statement of account held by the chargee Kenya Commercial Bank.

(vi) The Charges were made without consent of the relevant Land Control Board".

The Plaintiff also maintained that the subject matter of the said Application was weighty and in contention with a further appeal pending for hearing before the Court of Appeal and subsequently to the Supreme Court as **SUP 20 of 2013**. It also quoted other pending applications before the Court of Appeal awaiting hearing and determination. It claimed that this Court may make a wrong

decision in the sense of granting vacant possession of the suit premises to the fourth Defendant. It noted that the fourth Defendant sought vacant possession at an interlocutory stage and that this Court risks making a conclusive and final determination, notwithstanding the pending applications for hearing and determination both at the Court of Appeal and the Supreme Court.

4. Seemingly to bolster its Objection, the Plaintiff filed a Replying Affidavit sworn by Hon. **Ngengi Muigai** on 8th October 2013. The deponent set out the history of the various matters before this Court and detailed that the decision of the Court of Appeal above referred to dated 26th April 2013 had been appealed to the Supreme Court as **SUP 20 of 2013**. The deponent also detailed that there had been an Order for stay granted by this Court on 8th May 2013 pending the hearing of the application for leave to appeal to the said Supreme Court which was scheduled the hearing 13th May 2013. He stated that he was annexing a copy of the supposedly Order and marked as N2. On searching the annexures to the said Replying Affidavit, this Court has been unable to see any such Order and indeed, from its record, there was an appearance made before Court by learned counsel for the Plaintiff on 7th May 2013 under Certificate of Urgency. This Court declined to certify the same as urgent and that stay Application has never been heard to date. Similarly, it appears from the annexure to the Replying Affidavit marked N3 that the Application to the Court of Appeal for leave to appeal to the Supreme Court has again, never been heard and determined. The Court would also take it as read that the Court of Appeal has not dealt with *Civil Appeal No. 174 of 2010* nor indeed *Civil Application No. 33 of 2010*, details of such applications being annexed to the Replying Affidavit as exhibits N 4 and 5. The deponent then went on to say that the Court of Appeal had granted orders staying the hearing and determination of *HCCC No. 494 of 2008* and exhibited such as N 6 to the Replying Affidavit. That exhibit is a Ruling of Khaminwa J. dated 2nd November 2009 granting a stay for a period of six months from the date of the said Ruling. It is a High Court Ruling and has nothing whatsoever to do with the Court of Appeal.
5. When this matter came before this Court for the hearing of the fourth Defendant's said Application of 26th September 2013, Mr. Wachakana requested an adjournment so that he could put before Court a Ruling delivered by Lady Justice Khaminwa in *HCCC No. 494 of 2008* which was now awaiting appeal in *Civil Appeal No. 20 of 2010*. Mr Wachakana seemed to indicate that he was not only acting for the second and third Defendant but was also holding brief for Mr. Kingara for the Plaintiff. At that stage, Mr. Nyachoti for the first Defendant accused counsel of deliberately mixing up issues before this Court. He maintained that there were a number of decisions of the Court of Appeal to the extent that litigation in this matter should be halted. The Ruling to which Mr. Wachakana referred had been contained in the stay Application filed by him on behalf of the second and third Defendants dated 3rd June 2013. The same was already before this Court but it was the fourth Defendant's said Application dated 26th September 2013 that was for hearing not the Application for stay. At that stage, I allowed Mr. Wachakana one last adjournment which had also been requested for by Mr. Njenga holding brief for Mr. Kingara, who was unavailable on that day.
6. Counsel appeared before me on 16th January 2014 for submissions in relation to the fourth Defendant's said Application when Mr. Njenga, again holding brief for Mr. Kingara, made a further application for adjournment saying that he had been unable to get into Mr. Kingara's locked office where the client file of the Plaintiff was located. Immediately, Mr. Wachakana stated that he had no objection to the adjournment application. However the same was rigourously opposed by Mr. Issa for the fourth Defendant and Mr. Nyachoti for the first Defendant. Seeing that I had already given counsel for the Plaintiff and for the second and third Defendants 24 hours in which to put their house in order, the adjournment application was dismissed and counsel proceeded to submit with regard to the Application before Court being that of the fourth Defendant dated 26th September 2013.
7. Mr. Issa pointed the Court to the said Judgement of the Court of Appeal delivered on 26th April 2013 as well as the formal Order of the Court issued on 24th September 2013. He noted that quite clearly at Order No. 5 the Court of Appeal had stated:

"The Milimani HCCC No. 505 of 2008 be and is hereby dismissed with costs to the appellants."

That had been the first leg of the Application but he went on to detail that the Court of Appeal in its said Judgement had granted vacant possession of the suit property to the fourth Defendant. He pointed to the Transfer which was registered against the Title of the suit property after the same had been transferred from the first Defendant to the fourth Defendant following the sale of the same by public auction. The fourth Defendant had sought the assistance of the Court under its inherent jurisdiction because the Plaintiff had embarked upon wanton destruction of the suit property. Counsel pointed to photographs annexed to the Affidavit in support of the Application as evidence thereof. The fourth Defendant had approached the National Environment Management Authority through its County Environment Officer at Kiambu who had issued a letter dated 17th July 2013 directing the Plaintiff, its directors, servants and/or agents from further cutting trees on the suit property. Despite this, the Plaintiff proceeded to cut down even more trees and the destruction by the 6th August 2013 was ongoing. In relation to the law, Mr. Issa pointed to the Supreme Court's decision in the **Raila Odinga** suit as well as to his list of authorities filed on 30th October 2013. Counsel's reference to such authorities was in relation to the anticipated submission by the Plaintiff as well as the second and third Defendants that in relation to the Court of Appeal's direction that this suit be dismissed, this Court was now *functus officio*. The Supreme Court's dictum in relation to such reads as follows:

> **"We, therefore, have to consider the concept of "functus officio", as understood in law. Daniel Malan Pretorius, in "the Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law", (2005) 122 SALJ 832, has thus explicated this concept:**
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> **'The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter …. The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker'.**
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> **This principle has been aptly summarized further in Jersey Evening Post Limited vs. A1 Thani [2002] JLR 542 at 550:**
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> **'A court is functus officio when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available".** [Emphasis supplied].

8. Mr. Issa continued his submissions by emphasising that the Orders sought by the fourth Defendant were consequential Orders and further referred this Court to the case of **Registered Trustees of the Apostolic Church v Ololweni (1990) 6NWLR** in which the Supreme Court of Nigeria had found:

> **"It is a misconception to submit that consequential orders made by a court must of necessity be based on the reliefs claimed. The basis for an order made by the court must be looked for from the evidence before the court. It is trite law that a court cannot award more than is claimed. It is equally misconceived that an order cannot be made in favour of a defendant simply because he has not filed a counterclaim. An order made in favour of the defendant even where he has not counterclaimed must flow from the evidence and more so if the justice of the case demands."**

Counsel was of the opinion that a Court in Kenya could grant relief even though the same had not been pleaded. Six years down the line, the Plaintiff was still in possession of the suit property and the fourth Defendant had shown that it was causing destruction thereto. In his opinion, this was one of the

cases where the Court should step in and grant orders for the possession of the suit property where such was entirely justified. He further pointed to the cases of **Shariff Abdi Hassan v Nadhif Jama Adan (2006) eKLR** and **Virginia Ndibe v Housing Finance Company of Kenya Ltd & 2 Ors (2007) eKLR**. With regard to the applicability of the O2 principles, the Court was referred to **Hunker Trading Company Ltd v Elf Oil Kenya Ltd (2010) eKLR**. Mr. Issa concluded by stating that, in his view, it would be unjust to allow the Plaintiff continued possession and occupation of the suit property particularly as regards the wanton destruction thereof.

9. In reply, Mr. Wachakana for the second and third Defendants, opposed the Application on the critical ground that it was premature. He maintained that the subject matter of the Application (and the suit) was also the subject matter of *Civil Appeal No. 33 of 2010* which is scheduled for hearing before the Court of Appeal. However, parties had not received hearing notices for the same. This Court had stayed proceedings as per the Ruling in *HCCC No. 494 of 2008*. That suit involved the same reasonable grounds and was based on the fraudulent sale thereof to the Applicant. Counsel also went on to state that the subject matter of this suit was before the Supreme Court in *SUP No. 20 of 2013*. However he noted that the Application for leave to present the appeal was still pending before the Supreme Court. In his opinion, the same was a matter of public interest because all the Judgements that had been delivered in relation to the suit property had been so delivered in the essence of the Courts' records. The matter before the Supreme Court was weighty and of general importance as a concern on a point of law where there had been conflicting decisions in the High Court involving the same subject matter. This was the issue that must be addressed by the Supreme Court. The Plaintiff would be severely prejudiced if this Court gave a decision prior to the Appeal pending before the Supreme Court, as well as *Civil Appeal No. 16 of 2012* pending in the Court of Appeal. Also there was *Civil Application No. 33 of 2010* still to be heard. If the fourth Defendant was granted the possession of the suit property, such would reflect on this Court if it was to make such a decision while all the matters were pending in the Courts above. Mr. Wachakana pointed to the decision in **Waki Holdings Ltd v Jane M. Karukenya (2005) eKLR as per Lenaola J.** and that of **Onyango Otieno J** (as he then was) in the case of **Savani v Savani & 2 Ors HCCC No. 69 of 2002**. Finally, counsel noted that the second Defendant was a sister company to the Plaintiff and should the Court grant vacant possession of the suit property at this stage, the Plaintiff and the second Defendant would be severely prejudiced.
10. Mr. Nyachoti appearing for the first Defendant adopted the submissions of Mr. Issa. The first Defendant relied entirely upon the Judgement of the Court of Appeal in *Civil Appeal Nos. 100* and *106 of 2010* as annexed to the Application. Counsel maintained that the Court had clearly detailed, in its Judgement, as to the dispute between the Plaintiff and the fourth Defendant on the one hand, and the first Defendant on the other. The Judgement had set out details of all those suits in relation to the suit property since 2012. Most importantly, *HCCC No. 494 of 2008* had been considered by the Judges. In his view, the pendency of that suit had no relevance to the Application before Court. The Ruling made in *Civil Appeal No. 33 of 2010* was made in favour of the first Defendant staying the proceedings in *HCCC No. 494 of 2008*. As far as the Application before Court was concerned, that Ruling was of no relevance and did not help the Plaintiff now the second Defendant. Counsel concluded that this Court would note from the said Judgement that the entire dispute as between the Plaintiff, the first Defendant and the second Defendant had been resolved many times both by this Court and the Court of Appeal. He asked that the Application be allowed.
11. In reply, Mr. Issa noted that as regards *HCCC No. 494 of 2008*, the Plaintiff was not a party, it having withdrawn its suit as against the Defendants. Secondly, there had been an application for injunction which had been heard by Lady Justice Khaminwa and her Ruling had never been appealed. What was pending before the Court of Appeal as between the first Defendant on the one hand and the Plaintiff and the second Defendant on the other, had nothing to do with the striking out of that suit after Lady Justice Khaminwa's Ruling of 3rd November 2008. Further counsel noted that there was no appeal as of right to the Supreme Court. As of today, no leave had been granted as against the Judgement of the Court of Appeal. This Court cannot proceed in the hope that leave would be granted and moreover, in the Application for Leave, the said Judgement of the Court of Appeal had not been attached. Counsel was of the view that it was most unlikely that the Supreme Court would allow an appeal as this was a commercial matter not one of public interest.

There were no conflicting decisions as regards the suit premises and the Court of Appeal had determined in its said Judgement, that this litigation must come to an end. Mr. Issa then referred to the fifth authority on the fourth Defendant's List of Authorities being **Samuel Kihara & Anor. v Housing Finance Company of Kenya Ltd & 2 Ors (2007) eKLR**. Finally, counsel noted that neither in the Replying Affidavit nor in the submissions of counsel for the second Defendant, had any mention been made whatsoever concerning the wanton destruction to the suit property.

12. I have carefully perused the Judgement of the Court of Appeal delivered on 26th April 2013. The history of the various suits and applications before this Court has been carefully laid out in the introduction thereto. Thereafter, the Court went on to consider the evidence adduced for and against the Application before it. Such was particularly with regard to the objections now raised as against the Application before this Court as regards the alleged fraudulent sale by public auction of the suit property to the fourth Defendant. The Court also went into considerable detail as regards the submissions of counsel for all parties as before it. Thereafter, the Court summarised what it saw the issues before it as follows:

> **"1. Whether the suit is *res judicata*?**
>
> **2. Whether the learned Judge made final conclusions in the suit at the interlocutory stage?**
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> **3. Whether the 1st respondent's suit is *subjudice*?"**

After referring to various authorities, the learned Judges of Appeal concluded that this suit before this Court was *res judicata* and that the learned Judge ought to have so found. As regards whether she had made final conclusions at the interlocutory stage, the learned Judges of Appeal found that she had indeed done so particularly with regard to the Charge over the suit property in question. They believed that that the conclusions reached by my sister were prejudicial and that they should have been heard in full before any such conclusions were made. To this end, the learned Judges referred to the Court of Appeal's finding in **Kenya Railways Corporation v Thomas M. Nguti & 6 Ors Civil Appeal No. 210 of 2004 (unreported)** as follows:

> **"There is, of course, no general rule of law that final orders cannot be granted in an interlocutory application. But it will be a rare case when such orders would be granted where there are serious disputes of fact which can only be resolved after hearing the parties."**

The learned judges considered that the above Ruling was relevant to the matter before them and consequently answered that issue in the affirmative. As regards whether the suit was *subjudice*, the learned Judges of the Court of Appeal found that the same was both *res judicata* and *subjudice* resulting in both the appeals being allowed and the rulings of Khaminwa J. dated 18th November 2008 and 2nd November 2009 set aside. As above, the Court concluded that this suit should be dismissed.

13. As a result of the dismissal finding of the Court of Appeal, is this Court now entitled and has jurisdiction to entertain the fourth Defendant's said Application of 26th September 2013? I have referred to and set out above, the relevant paragraphs in the authorities of **Raila Odinga** of our Supreme Court and that of the Nigerian Supreme Court in the **Registered Trustees of the Apostolic Church** case. The **Raila Odinga** decision particularly emphasised the doctrine of finality, the relevant sentence (as above) reading:

> **"once proceedings are finally concluded, the court cannot review or alter its decision."**

It would seem therefore that the Court of Appeal having dismissed this suit in its said Judgement dated 26th April 2013, there is nothing further that this Court may order in relation to this suit. However, such ignores the inherent powers of this Court to control its process for the ends of justice. As stated by the Court of Appeal way back in May 1985 in the case of **Wanguku v Kania (1986 –**

1989) EA 589:

> **"Section 3A of the Civil Procedure Act (Chapter 21) preserves the inherent powers when there are no rules. It is within the discretion of the Court to dismiss for want of prosecution and to reinstate the application after receiving a satisfactory explanation."**

That decision was followed by the Court Appeal in **Wanjiku v Esso Kenya Ltd (1995 – 1998) 1 EA 332** where as regards inherent jurisdiction, the Court found that residual jurisdiction could be exercised only in special circumstances to avert injustice. **Gicheru, Akiwumi and Shah JJA** held:

> **"As regards whether the learned Judge erred in invoking his inherent jurisdiction under section 3A of the Civil Procedure Act, which has been described by Hancox JA, as he then was, in *Wanguku v Kani [1982-1988] I KAR 780 at 785* as 'residual jurisdiction which should only be exercised in special circumstances……. in order to put right that which would otherwise be a clear injustice'."**

14. Coming more up-to-date, the Court of Appeal, having set out the overriding provisions as per **sections 3A and 3B** of the *Appellate Jurisdiction Act* in **Karuturi Networks Ltd & Anor. v Daly & Figgis Advocates (2009) eKLR,** quoted extensively from that Court's finding in **Caltex Oil (Kenya) Ltd (now renamed Total Marketing Kenya Ltd) v Evanson N. Wanjihia CA NAI 190 of 2009 (unreported)** as follows:

> **"Before we set out the terms of the conditional stay it is important to state that in our view the powers of this Court have recently been enhanced by the incorporation of an overriding objective in Sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and sections 1A and 1B of the Civil Procedure Act, Cap 21 following the enactment of the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009. The overriding objective provides that the purpose of the two Acts and the rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes.**
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> **Although the overriding objective has several aims the principal aim is for the Court to act justly in every situation either when interpreting the law or in exercising its powers. The Court has therefore been given a greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. The provision came into operation on 23rd July 2009 and it is our view that by striking the balance as set out above we have also given effect to the overriding objective by firstly taking into account the special circumstances of the matter before us and secondly placing the two parties on equal footing as far as is practicable pending the outcome of the intended appeal. We have endevoured to do so by balancing the respective claims and hardships and designing a stay order on terms.**
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> **It follows therefore that the jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective as set out above including its principal aims. In our view, dealing with a case justly includes inter-alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court including the granting of appropriate interim relief in deserving cases. As managers, we realize that in this country and elsewhere the main scourges of civil justice are cost and delay. Eliminating or reducing cost is now a new statutory requirement imposed on all courts including this Court, in the management of all civil matters. As elaborated above, refusing to grant a stay of the taxation would result in extra costs and delay including the filing of yet another appeal to this Court arising from the same matter. On the other hand our invocation of the overriding objective could avoid any further proceedings and reduce both cost and delay".**

15. The learned counsel for the fourth Defendant referred this Court to the overriding objectives as

contained both in the Civil Procedure Act as well as the Appellate Jurisdiction Act. He also pointed to the Ruling of **Nyamu JA** in the case of **Stephen Boro Gitiha v Family Finance Building Society & 3 Ors (2009) eKLR** in which the learned Judge observed:

"The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. I must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as it is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner."

16. This Court was also referred to the commentary of the Court of Appeal in the **Hunker Trading Co.** case (supra) where it first observed that the application before it was a unique one in the sense that it was, as far as the Court was concerned, the first application before it, grounded on the new provisions of the *Appellate Jurisdiction Act* (**sections 3A and 3B**). Indeed, this Court is only too aware of the principles as expounded in the case which can be briefly summarised as follows:

"The advent of the "O_2 principle" in our opinion, ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings; ensures the efficient use of the available judicial and administrative resources of the courts; and results in the timely disposal of the proceedings at cost affordable by the respective parties. That culture must include where appropriate the use of suitable technology. It follows therefore that all provisions and rules in the relevant Acts must be "0_2" compliant because they exist for no other purpose. The "0_2 principle" poses a great challenge to the courts in both the exercise of the powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In our view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail our redesigning approaches to the management of the court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.

The "0_2 principle" is certainly not going to be a magic potion capable of solving all out problems in the civil justice system. Instead it is a challenge to every court in every matter that comes up before it. The best design for each matter will be determined on a case to case basis; and above all the attainment of the objective at least in the short term will depend on the skills, innovativeness and the commitment of the courts including the Rules Committee, which in our view has a special role in assisting the courts attain the objective by, for example, undertaking a continuous review of the rules so as to retain those that would serve the interests of the objective and shed off those that hinder the objective. In the long term, we believe that best practices and precedents will emerge for use and improvement by future generations.

It seems to us that in the exercise of our powers under the "0_2 principle", what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are "0_2" compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the "0_2 principle" could easily become an unruly horse. For this reason, we would like to reiterate here what this Court observed in the case of MRADURA SURESH KANTARIA vs SURESH NANALAL KANTARIA (supra):

'While the enactment of the "double 00 principle" is a reflection of the central importance the court must attach to case management in the administration of justice we wholly endorse the

holding in the Australian case of PURUSE PTY LIMITEDF vs COUNCIL OF THE CITY OF SYDNEY [2007] NSWLEC 163 where the Court underscored that in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable foundation'.

In the KANTARIA case we observed:

'The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained".

17. Counsel for the second Defendant relied upon the **Waki Holdings** case for support in his argument that this Court should not exercise any inherent powers while there still remained the possibility, even though remote, that the said Judgement of the Court of Appeal could be reversed in the Supreme Court. He also maintained that there were other applications pending in the Court of Appeal which could have the effect of nullifying the said Judgement. **Lenaola J.** in the **Waki** Holdings case summarised at paragraph 8 that the plaintiff therein sought vacant possession of the suit property as the registered proprietor thereof as a bone fide purchaser for value and that the defendant therein was a trespasser who had refused to vacate despite repeated requests to do so. That would seem to be the position in this case before this Court. Counsel sought to rely on paragraph 20 of **Lenaola J's** Ruling which read as follows:

"The Plaintiff may well be entitled to possession immediately yet the Defendant and the administrators of the estate of the late Vincent Karukenya have raised serious issues that cannot by all means be said to be frivolous. Further, the only claim as against the Defendants as set out in the Plaint is vacant possession. It is now being sought at the interlocutory stage and there may be nothing left to try at the end save the counterclaim. In other circumstances I would have been inclined to grant the eviction but each case must be looked at in its own peculiar circumstances. The instant is one where I would be reluctant like Lord Jauncey to grant a mandatory injunction and would rather that the matter went to trial. I am in that regard reminded that grant of injunctions are a matter of discretion and as was said in *Daniells v Mendonca and Another EWCA Civ.1176 a decision given on 15. 4. 1999, 'The granting of mandatory injunctions is a very serious matter. It is clear that the court must be mindful before imposing them……. The court has an unfettered discretion...'."*

With due respect to learned counsel, this Court is not considering the granting of any injunction that may have been requested by the fourth Defendant. **Lenaola J's** aforesaid Ruling is clearly distinguishable from the matters before this Court. Similarly, with the other authorities quoted to this Court by the second Defendant. all of them related to injunctions and interlocutory applications upon which the findings were that the matters before the courts concerned should await full trial. As I understood counsel, what he was trying to impress upon this Court, was that I should make no order for possession of the suit property in favour of the fourth Defendant until such time as the entire appeal process has been exhausted.

18. As detailed in the said Judgement of the Court of Appeal dated 26th April 2013, this suit brought by the Plaintiff, sought to upset the sale of the suit property by public auction from the first Defendant to the fourth Defendant. The suit has now been struck out in its entirety. What then is now the position with the suit property? To my way of thinking, the result of the suit being struck out is that the sale to the fourth Defendant has been confirmed as valid. As a result, the fourth Defendant is entitled to vacant possession of the suit property having paid valuable consideration for the same. The Plaintiff has grimly hung on to its possession of the suit property and, before Court, there has been placed in evidence by the fourth Defendant, that the Plaintiff is causing wanton destruction thereto. Such has not been denied by the Plaintiff in either the Replying Affidavit to the Application nor indeed in its counsel's submissions. In my opinion, such actions by the Plaintiff amount to sufficient reason for this Court to step in under its inherent jurisdiction to put a stop to the destructive actions of the Plaintiff in relation to the suit property. I am not

impressed by arguments that there is still leverage which may allow the Plaintiff to remain in possession in relation to outstanding applications before higher Courts than this one. Accordingly and in accordance with the overriding objective, I allow the fourth Defendant's Notice of Motion dated 26th September 2013 more particularly prayer 3 thereof. The first and fourth Defendants will be entitled to their costs of the Application. Orders accordingly

DATED and delivered at Nairobi this 12th day of February, 2014.

J. B. HAVELOCK

JUDGE