REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 1350 OF 2003

REPUBLIC.....APPLICANT

VERSUS

COUNTY COUNCIL OF NAROK.....1ST RESPONDENT

PERMANENT SECRETARY, MINISTRY OF

LOCAL GOVERNMENT.....2ND RESPONDENT

DISTRICT LANDS REGISTRAR,

NAROK DISTRICT.....3RD RESPONDENT

EX-PARTE

WILDLIFE LODGES LIMITED

RULING

This ruling is in respect of the Notice of Motion application dated 16th September, 2010 which seeks that **"the consent orders entered herein on 21st July, 2010 and 25th August, 2010 by the Deputy Registrar, Mr. S. Wahome, be set aside and expunged from the record."** The application, filed by Wilderness Lodges Limited ('Wilderness'), is brought under the inherent jurisdiction of the Court; sections 1A & 1B of the Civil Procedure Act; and all other enabling provisions of the law.

This being a judicial review application, the Applicant is the Republic. The County Council of Narok ('Council'), the Permanent Secretary of the Ministry of Local Government ('PS') and the District Lands Registrar, Narok District ('Registrar') are the 1st, 2nd and 3rd respondents respectively. Wildlife Lodges Limited ('Wildlife') is the ex-parte Applicant. For lack of a better term I will refer to the applicant in respect of the application, the subject of this ruling, as the 'Interested Party'. In order to avoid confusion, I will refer to the parties by their names.

Briefly, on 6th November, 2003 Wildlife obtained leave to commence judicial review proceedings and seek various judicial review orders against the respondents in respect of a parcel of land known as NAROK/CIS-MARA/KOYAKI 3 situate in Masai Mara Game Reserve. The said leave was directed to operate as stay of all dealings in respect of the said parcel of land.

A civil case to wit **Nairobi High Court Civil Case No. 1248 of 2003, WILDLIFE LODGES LIMITED v COUNTY COUNCIL OF NAROK AND WILDERNESS LODGES LTD** was filed immediately thereafter. The subject matter of this particular case is the parcel of land in question in these judicial review proceedings.

Subsequently, Wilderness filed a notice of motion application dated 29th August, 2005 in this matter seeking to be enjoined as an interested party and praying that the leave granted to Wildlife to commence these judicial review proceedings be vacated. The application was not heard after Nyamu, J (as he then was) directed on 20th June, 2006 that the hearing of the said notice of motion awaits the outcome of a constitutional reference that had been filed in **NAIROBI HCCC NO. 1248 OF 2003.** This directive was in accordance with the rules, at the time, in respect of constitutional petitions which provided that proceedings were to be stayed upon the filing of a constitutional reference or petition.

On 21st July, 2010 consent was entered between Wildlife being the ex-parte Applicant and the respondents (the Council, the PS and the Registrar) compromising the matter. This consent was set aside by the same parties on 25th August, 2010 and a new consent entered in the following terms:

"Upon reading a consent letter dated 19th August, 2010 filed on 23rd August 2010 and signed by M/s Nyiha Mukoma & Company Advocates for the Applicant, M/s Momanyi & Associates Advocates for the 1st Respondent and C. N. Menge Principal Litigation Counsel for the 2nd and 3rd Respondent the following order is hereby recorded;

By Consent of the parties herein this matter be and is hereby marked as settled in the following terms:-

1. **That the consent letter dated 9th July 2010 and filed on 21st July 2010 be and is hereby withdrawn and the court order issued on 23rd July 2010 be and is hereby set aside with no order as to costs.**
2. **An Order of Certiorari be and is hereby granted to the Applicant directed to the Permanent Secretary Ministry of Local Government removing into this Honourable Court and quashing the decision of 18th September 2003 authorising the County Council of Narok to execute and register the Lease Agreement dated 25th September 2003 between County Council of Narok and Wilderness Lodges Limited over all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 on which land the Council has erected buildings known as KEEKOROK LODGE situated in the Masai Mara Game Reserve.**
3. **An Order of Certiorari be and is hereby granted to the Applicant directed to County Council of Narok removing into this Honourable Court and quashing the Lease Agreement dated 25th September 2003 between County Council of Narok and Wilderness Lodges Limited over all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in favour of Wilderness Lodges Limited in the Masai Mara Game Reserve.**
4. **An Order of Certiorari be and is hereby granted to the Applicant directed to the District Land Registrar, Narok removing into this Honourable Court and quashing this decision of 25th September 2003 to register the Lease Agreement dated 25th September 2003 between County Council of Narok and Wilderness Lodges Limited over all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in the Masai Mara Game Reserve.**
5. **An Order of Certiorari be and is hereby granted to the Applicant removing into this Honourable Court and quashing, the decision of the District Land Registrar of 25th September 2003 to register as entry number 4 a surrender of lease under Section 64 of the Registered Lands Act.**
6. **An Order of certiorari be and is hereby granted to the Applicant removing into this Honourable Court and quashing the registration of entry number 4 made under Section 64 of the Registered Lands Act in respect of all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in the Masai Mara Game Reserve.**
7. **An Order of Mandamus be and is hereby granted to the Applicant directed to the County**

Council of Narok compelling the Clerk and the Chairman of the County Council of Narok to execute and seal the Further Variation of Lease effective from 28th August 2001 for 33 years over that parcel of land known as NAROK/CIS-MARA/KOYAKI 3 in the Masai Mara Game Reserve in favour of Wildlife Lodges Limited and the Commissioner of Lands (in accordance with Section 53 of the Trust Land Act) do execute the same and thereafter the said lease be registered at the District Land Registry, Narok.

8. **An Order of Mandamus be and is hereby granted to the Applicant directed to the District Land Registrar, Narok compelling him to register the Further Variation of Lease freed and discharged from all encumbrances effective from 28th August, 2001 for 33 years between County Council of Narok and Wildlife Lodges Limited over all that parcel of land known as NAROK/CIS-MARA/KOYAKI 3.**
9. **That the Applicant and the 1st Respondent do bear their own costs.**
10. **That the Applicant do pay the costs of the 2nd and 3rd Respondents."**

This is the consent which Wilderness seeks to set aside. The grounds in support of the application as found on the face of the application are:

"(d) The said consent was entered without jurisdiction as:

(i) A Deputy Registrar of this Honourable Court has no powers whether by the consent of the parties or otherwise to grant prerogative/judicial orders of certiorari or mandamus either as Mr. Wahome purported to do or at all.

(ii) In any event as relief by way of orders of certiorari and/or mandamus are discretionary at the instance of a judge of this Honourable Court, not as of right, the same cannot be obtained by consent.

(iii) The orders of mandamus in Order Nos. 7 in both the 1st and 2nd consent orders and No.8 in the 2nd consent order are in excess of the terms of the orders in respect of which this Honourable Court had granted leave to the Applicant on 6th October 2003.

(e) The 1st and 2nd consent orders were entered in breach of the rules of natural justice and are thus a nullity. Though, these orders are ostensibly made 'by consent' and affects the Wilderness Lodges Limited as well as the Commercial Bank of Africa (in case of the 2nd consent order), neither is a party to it.

(f) There is a pending undermined application by Wilderness Lodges Limited to be joined as a party in these proceedings as well as the setting aside of the leave granted to the Applicant to commence judicial review proceedings. Thus, the entry of the consent order prior to the determination of the said pending application is unlawful and an abuse of the process of this Honourable Court."

The application is also supported by the affidavit of the Managing Director of Wilderness, Mr. Nayan Patel. Through the said affidavit, Wilderness informs the Court that it was never served with the application for leave and the notice of motion by Wildlife.

It is Wilderness' case that on 1st December, 2003 Wildlife instituted **Nairobi HCC No. 1248 of 2003** and sought therein orders that:

a. **A declaratory order do issue that the actions of the 1st Defendant (the County Council of Narok) on 30th November, 2003 to forcefully evict it (Wildlife) and its sub-tenants in its bid to hand over possession of the suit premises was in contempt of the orders made in the judicial review matter on 6th November, 2003.**
b. **An injunction to restrain Wilderness from taking possession of the suit premises and from**

taking over the running or conduct of Wildlife's business thereon; and

c. **A mandatory injunction to compel the County Council of Narok to return to Wildlife possession of the suit premises and its business thereon.**

Wildlife also filed a chamber summons application together with the plaint seeking orders similar to those contained in the plaint pending *inter partes* hearing. Those orders were granted and the chamber summons fixed for *inter partes* hearing on 30th December, 2003. On 3rd December, 2003 Wilderness filed an application to set aside the ex-parte orders and the application was fixed for hearing on 10th December, 2003 together with Wildlife's chambers summons. It is Wilderness' case that by the time of filing the application before this Court its application to be enjoined in these proceedings had not been heard.

Wildlife at one time filed contempt of court proceedings and on 2nd February, 2004 Ojwang, J (as he then was) ordered as follows:

a. **The Application by Notice of motion filed by the second Defendant on 3rd December, 2003 may be set down for hearing on the basis of priority once the second Defendant, within 28 days from the date of this Ruling, hands over the suit premises with its operations to the first Defendant.**
b. **In the meantime the Plaintiff will have leave to make any such applications as may be necessary and in relation to the suit premises and the operations conducted thereon.**
c. **The Managing Director of the second Defendant shall, within the next 30 days appear before a Judge in chambers to show that he has duly complied with the first Order above, or, in the alternative, to show cause why he should not be committed for contempt.**
d. **The Acting Town Clerk of the first Defendant, the Treasurer of the first Defendant and the Advocate of the first Defendant, Moitalel Ole Kenta, shall each and all, within the next seven days, take due action to purge their contempt of the Court Orders of 6th November, 2003 and 1st December, 2003 and they shall each and all, appear before a Judge in Chambers ten days from the date of this Ruling, to show that they have purged their contempt, or, in the alternative to show cause why they should not be committed for contempt.**

Thereafter the parties filed one application after the other culminating in the application before this Court.

At one point the Council purported to hold a full Council meeting in which it was resolved that Keekorok Lodge be handed over to Wildlife and the lease granted to Wilderness on 25th September, 2003 be cancelled. The decision was allegedly based on a Preliminary Decree issued by the Court on 7th June, 2010 in **HCCC No. 1248 of 2003.** The firm of advocates then on record for the Council was directed to settle all the matters pending in Court in the terms of the resolutions of the Council. Wilderness reacted to this purported resolution by filing **Nakuru H. C. Misc. Civil Case No. 79 of 2010** in which it sought to have the minutes of the Council quashed on the ground that they were fabricated by the Council Chairman and the Clerk.

Counsel for Wilderness submitted that the consent cannot be allowed to stand since it directly affected the interests of Wilderness even though Wilderness had neither be named as a respondent or an interested party in the application for leave and in the substantive notice of motion. He argued that failure to serve Wilderness with the chamber summons application for leave and the substantive notice of motion contravened the clear provisions of Order 53 Rules 3 and 4 of the Civil Procedure Rules.

Rule 3 provides that:

> **(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.**

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

Rule 4 states:

(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.

The second ground in support of the application is that the Deputy Registrar had no jurisdiction to enter the consent. It is submitted that a Deputy Registrar has no powers to grant judicial review orders since the same are judicial orders and not the ministerial acts contemplated by Order 49 (formerly Order XLVIII) of the Civil Procedure Rules. In support of this argument Mr. Amoko cited the decision of Nyamu, J (as he then was) in **R v REGISTRAR OF SOCIETIES EX-PARTE JUSTUS NYANGAYA & 3 OTHERS [2005] eKLR** where the learned Judge held that a Deputy Registrar has no powers to enter a consent judgment in judicial review proceedings.

Mr. Amoko also cited the decision of the same Judge in **REPUBLIC v MINISTER OF CO-OPERATIVE DEVELOPMENT AND MARKETING & 3 OTHERS EX-PARTE COFFEE GROWERS CO-OPERATIVE SOCIETY LIMITED & 2 OTHERS [2006] eKLR**. In that case the learned judge opined:

"As regards issue 2 and 3 I find that in judicial review the Deputy Registrar had no authority to sign and enter the consent order of 12th September, 2005 because the entering of such an order is a matter for the judges and not a ministerial act. The termination of judicial review proceedings is a matter for the court and not for the Deputy Registrar. I therefore reiterate the reasoning, I adopted in the case of R V REGISTRAR OF SOCIETIES EXPARTE JUSTUS NYANGAYA (SDP) HC Misc. 1133 of 2000 where in almost similar circumstances I set aside an order entered by the Deputy Registrar."

Mr. Amoko submitted that the two decisions are in consonance with the provisions of sections 8 and 9 of the Law Reform Act, Cap 26 which vests the power of issuing the orders of certiorari, mandamus and prohibition on the High Court meaning a judge.

Further, Mr. Amoko argued that this is in agreement with the cardinal principle that judicial review remedies are discretionary in nature and such discretion can only be exercised by a judge. It was submitted for Wilderness that unlike in private law, parties cannot enter consents in judicial review proceedings since it is upon the judge to decide whether or not to grant the orders.

Wilderness also contends that the consent orders were issued without it being given an opportunity to be heard. This was therefore in contravention of a cardinal rule of natural justice which provides that no man should be condemned unheard.

Mr. Amoko for Wilderness submitted that the consent order conferred reliefs for which no leave had been sought nor granted. He argues that orders 7 and 8 of the consent were not among the reliefs that Wildlife had indicated it would be seeking when it applied for leave. Mr. Amoko submitted that no leave was sought and/or obtained in respect to the orders, phrases and words in orders 7 and 8. Mr. Amoko argues that not only are the prayers not found in the application for leave but they were not sought through the substantive notice of motion. It is Wilderness' case that leave is a mandatory requirement of Order 53 Rule 1(1) of the Civil Procedure Rules and no orders can be granted without leave.

Finally, Wilderness contends that the consent judgment amounted to an abuse of the process of the court for the reasons already stated.

Wildlife filed Grounds of Opposition dated 22nd November, 2010 and a replying affidavit sworn on 22nd November, 2010 by Pan Lianxue in opposition to the application. The respondents (the Council, the PS & Registrar) did not file affidavits or grounds of opposition. They however filed submissions in opposition to the application.

When the matter came up for hearing on 10th December, 2013 Ms Sirai instructed by the Attorney General for the PS and the Registrar withdrew the submissions dated 4th October, 2011 and indicated that the Attorney General was no longer opposed to the application. On 11th December, 2013 when the matter came up for further hearing Mr. Kemboy for the Council withdrew the Council's submissions dated 31st October, 2012. He indicated that the Council was not taking any position in regard to the application.

At this stage, it is important to address the impact of the withdrawal of the submissions by the Council, the PS and the Registrar on the application. One would imagine that the consent would no longer be valid since one side no longer subscribes to the same. I, however, hold the view that the consent remains valid. The Council, the PS and the Registrar being parties to the consent have not lodged a formal challenge to that consent. The withdrawal of the submissions filed in opposition to Wilderness' application by the clients of Ms Sirai and Mr. Kemboy does not in any way alter, vary or expunge the consent judgment.

Having said so, I will now proceed to state the stand of Wildlife in regard to this application. Wildlife's case is best captured by its grounds of objection filed on 22nd November, 2010. The grounds are:

> **"a) THAT Wilderness Lodges Limited is not a party to this suit hence it lacks the necessary *locus standi* to make an application to set aside the consent orders dated 10th July 2010 and 25th August 2010.**
>
> **b) THAT the affidavit of Nayan Patel only supports the setting aside of the consent order of 10th July 2010 which consent order was set aside by the consent order dated 25th August 2010. There is therefore no evidential support for the Application dated 16th September 2010 as far as the consent dated 25th August 2010 is concerned.**

c) THAT the effect of the consent order dated 25th August 2010 is to settle the suit in its entirety and hence this court has no jurisdiction on an application by a stranger to set aside the same order.

d) THAT this being a Judicial Review matter, the only remedy open to Wilderness Lodges Limited, is to appeal against the terms of the said consent.

e) THAT all the parties have by way of the consent expressed their wish to be bound by its terms and none of them is dissatisfied with the terms of the consent order dated 25th August, 2010; this Honourable Court should follow the wishes of the parties to the suit as expressed in the consent dated 25th August 2010."

It was submitted that Wilderness does not have the necessary *locus standi* in this matter having admitted that its application to be made a party to these proceedings is yet to be heard. Wildlife asserts that the rights of Wilderness, as far as the suit is concerned can only be engendered once an order is made allowing it to join the suit. It is submitted that before Wilderness is enjoined as a party, it can only appear before the Court for the purposes of arguing its application to be enjoined in the suit and before the application is heard and determined, Wilderness is technically a stranger to this suit.

Wildlife argues that Wilderness has acted indolently and without care in respect of its application to be enjoined as a party. Wildlife contends that the application by Wilderness to be enjoined as a party was filed in 2005 and the same has gone unattended and without any attempt to fix it for hearing. It is contended that instead of prosecuting its application to be enjoined, Wilderness filed a fresh application and opts to ask the Court to overlook the fact that it has to date not prosecuted its application to be enjoined as an interested party.

Wildlife submits that Wilderness's failure to prosecute the application to be enjoined as an interested party may have been informed by the fact that it was in continuous and unabated contempt of court orders by occupying the suit premises contrary to the court orders until the Council finally obeyed the orders and restored possession to Wildlife. Counsel for Wildlife submitted that the consent order cannot therefore be set aside *ex debito justitiae* as was the case in **CRAIG v KANSEEN [19943] 1 All E.R.**

In support of its argument that the application cannot be entertained by this Court since Wilderness is a stranger, counsel for Wildlife cited the decision in **DAGIT SINGH THEEMAR & OTHERS v SURJIT SINGH SAGOO & 2 OTHERS, Mombasa HCCC No.320 of 2003** where Mwera, J (as he then was) observed that:

"In the present matter the position is that the applicant had yet to successfully argue his application to be made a co-defendant in this suit. He had no orders of stay of further proceedings until his application of 23.12.2003 had been determined and so the parties to this suit had all the leeway in their cause. Only parties to a suit have the right to go forward as they deem fit including compromising it. Only parties to a suit can complain and get relief when one or the other tries to "steal a match." Strangers cannot."

The learned Judge went ahead and concluded that:

"This court however takes liberty to observe that as it upholds the preliminary point, why, the applicant may still consider to file his own suit and seek whatever kind of reliefs he desires there. The owners of this one have closed it down."

Wildlife therefore argues that Wilderness cannot be heard in this matter since it is a stranger.

Another ground in opposition to Wilderness' application is that there is a valid consent on record and the same is binding and only the exceptions set down in **FLORA WASIKE v DESTIMO WAMBOKO [1982-1988] 1 KAR 625** can justify its being set aside. In the said case, Hancox, JA observed that:

"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out....."

It is therefore argued that since none of the parties has disowned the consent of 25th August, 2010 there are no grounds for setting it aside.

Another argument put forward in opposition to the application is that the consent in question, from its wording, is a final order given in terms that definitively settle the dispute. The finality of the order in question is as envisaged in Section 8(3) of the Law Reform Act, Cap 26 and therefore the only remedy available to Wilderness is to appeal against the said order as provided for in Section 8(5) of the Act.

Wildlife contends that the affidavit of Nayan Patel does not support the prayers sought in the Notice of Motion. Wildlife argues that it is important to note that as the application by Wilderness stands, there is no evidence tendered that supports the orders it prays for. According to Wildlife, nowhere in the supporting affidavit of Nayan Patel is there reference to the consent order of 25th August, 2010. The consent order that the said supporting affidavit refers to and attacks is the consent of 21st July, 2010. This consent is non-existent. It is therefore submitted that for the reason that there is no evidence in support of the application, the same cannot stand and it must therefore fail.

On the submission by Wilderness that a Deputy Registrar has no power to enter a consent judgement in judicial review proceedings, Wildlife argues that a Deputy Registrar has such power as per the provisions of Order XLVIII of the former Civil Procedure Rules (now Order 49 of the Civil Procedure Rules, 2010). Rule 2 of Order 49 provides that judgment may, on application in writing, be entered by Registrar where parties consent to judgment being entered on agreed terms. Wildlife submits that the decision of Nyamu, J (as he then was) in **Justus Nyangaya,** supra, is not binding on this Court and that the holding in the said authority was *per incuriam.* In that case the learned Judge had concluded that a Deputy Registrar could not enter a consent judgment and Order XLVIII (now Order 49) of the Civil Procedure Rules was not applicable to judicial review proceedings.

Instead, counsel for Wildlife has urged this Court to follow the decision of Musinga, J (as he then was) in **REPUBLIC V COMMISSIONER FOR COOPERATIVES EX-PARTE FRANCIS NJUGUNA KUBAI [2005] eKLR** where he opined that:

"It therefore appears to me that the High Court, in dealing with matters of mandamus, prohibition and certiorari in the civil jurisdiction acts as a civil court and may, where appropriate, follow rules of procedure as made by the Rules Committee under Section 81 of the Civil Procedure Act otherwise there would have been no other reason as to why that Committee formulated the Rules under Order 53 together with all the other Civil Procedure Rules."

Wildlife argues that the other provisions of the Civil Procedure Rules are applicable to judicial review proceedings where appropriate. It points to the irony of Wilderness' argument that Order 49 of the Civil Procedure Rules is not applicable whereas this particular application is not brought under Order 53 of the Civil Procedure Rules. Wildlife contends that consent judgements are available in judicial review proceedings and since the Deputy Registrar had the authority of the parties to record the said judgment, the judgement cannot be a nullity.

In reply to the submissions by Wildlife, counsel for Wilderness submitted that the objections raised by Wildlife are procedural objections which are not well founded and in any event cannot be sustained in light of the sea change in the process of adjudication introduced by Article 159(2)(d) of the Constitution as well as sections 1A and 1B of the Civil Procedure Rules.

On the claim that Wilderness had no standing because it is yet to be enjoined, counsel submitted that any person affected by an adverse order issued without notice or without jurisdiction has a right to apply to the court to have it set aside *ex debito justitiae*. It is submitted that such setting aside can be done by the court of its own motion. The decision in **CRAIG v KANSEEN [1943] 1 All ER 108** and **JUSTUS**

NYANGAYA, supra, were relied on.

In **CRAIG v KANSEEN** the Court held that:

"An order which is a nullity is something which the person affected by it is entitled to have set aside *ex debito justitiae*. The court in its inherent jurisdiction, can set aside its own order and an appeal is not necessary."

Wilderness contended that the best approach where issues of technicalities are raised is that of the Court of Appeal in **KENYA ANTI-CORRUPTION COMMISSION v AHMED MWIDANI & 4 OTHERS, Mombasa Civil Appeal (Application) No.114 of 2008.** In that case the Court stated that:

"Long before the promulgation of the Constitution we were happy to observe that the winds of change against undue regard to technicalities of procedure had blown towards the shores of substantive justice as is clearly set out in the long line of cases of this court as cited by Mr. Kaguchia on Section 3A and 3B of the Appellate Jurisdiction Act.

Concerning submissions made on Sections 3A and 3B of the Appellate Jurisdiction Act we consider that we are under a statutory duty to apply the overriding objective in every situation before us because it is the whole object of the Act, its provisions and rules. To add another building block to the Indombi case it is the basis and the reason for the exercise of our power under the Act, provision or rule. It is the length, width and depth of our interpretation of the Act, provision or rule and nothing whatsoever can prevent the Court in civil cases from acting fairly and justly in every situation in the face of the objective. Thus in the circumstances of the case before us the demands of the objective in our view will be met by dismissing the application in order to pave way for a speedy hearing of the appeal on merit.

On the other hand the cited Article 159(2)(d) of the Constitution, in our view, operates on a higher plane against reliance on technicalities of procedure in all cases where judicial power is to be exercised. Granted that in determining this application we are exercising judicial power the technical points raised must in the same way give way to the hearing of the appeal on merit."

Mr. Amoko therefore urges this Court to overlook the objections of Wildlife to the application.

In my view, there are two major issues for the determination of the Court. The first issue is whether Wilderness ought to be given a hearing considering that its application to be enjoined in these proceedings has never been heard. If it is found that Wilderness deserves a hearing then the question would be whether the consent judgment of 25th August, 2010 should be allowed to stand. Under this issue, the questions to be answered are whether a Deputy Registrar has jurisdiction to enter a consent judgment in judicial review proceedings and whether a consent judgment entered to the exclusion of an interested party is a valid judgment.

Mr. Amoko for Wilderness submitted at length about the authenticity of the letter from the Office of the Attorney General which originated the challenged consent. He argues that the fact that Mr. C. O. Menge admitted that he uses the pseudonym J Gitau is sufficient reason to fault the consent. It is Wilderness' case that the affidavit which was sworn on 15th August, 2010 is unmoored. Wildlife, however, argues that an affidavit is a document that can stand on its own as long as the deponent therein affirms the truth and as long as it is relevant to the subject matter. Wildlife's counsel cited Order 19 Rule 7 of the Civil Procedure Rules which states that:

"The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdiscreption of the parties or otherwise in the title or other irregularity in the form thereof or an any technicality."

In my view, the most important thing to note is that the Attorney General did not deny the consent. It is therefore not necessary for this Court to pierce the veil and delve into the nitty-gritty of the circumstances

leading to the signing of the consent. The integrity of Mr. Menge cannot therefore become the subject of this ruling when his master (the Attorney General) has not disowned him. It is also pertinent to note that the said affidavit was sworn on 15th August, 2010 and it cannot be said it was sworn in opposition to or in support of the current application as the application was filed on 16th September, 2010.

Wildlife argues that Wilderness cannot be allowed to file any application in these proceedings because it is yet to be made a party. This argument cannot be accepted. Judicial review proceedings are governed by sections 8 and 9 of the Law Reform Act, Cap 26 and Order 53 of the Civil Procedure Rules, 2010. I agree with Musinga, J (as he then was) in **EXPARTE FRANCIS NJUGUNA KUBAI,** supra, that the other provisions of the Civil Procedure Rules can be called to the aid of the court where the Order 53 is found to be inadequate. The rules are, however, not directly invoked. What is invoked is the inherent jurisdiction of the court. Inherent jurisdiction cannot be exercised in a vacuum. That is where the other provisions of the Civil Procedure Rules become useful. The court will, however, rely on the rules found in Order 53 where the rules take care of the issues raised.

Wildlife asserts that Wilderness is not a party to these proceedings and it cannot be heard. The answer to this argument is found in Order 53 of the Civil Procedure Rules. Order 53 Rule 3(2) provides that the notice of motion shall be served on all persons directly affected by the application. Rule 3(3) requires that an affidavit giving the names and addresses of the persons served should be filed in court. Where service is not done the affidavit should state this fact and give reasons why service has not been done. Rule 4(4) of Order 53 places the responsibility on the court of ensuring that the application has been served.

The rules therefore encourage service on any person who is likely to be affected by the judicial review proceedings. In the case before me, Wilderness was directly affected by these proceedings. It was never served and its application to be enjoined was stayed by the Court following the filing of a constitutional reference in **HCCC No 1248 of 2003.**

The fact that a party who is likely to be affected ought to be heard is reinforced by Rule 6 of Order 53 which provides that:

"On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made."

That rule therefore clearly shows that judicial review proceedings are open to any person who is likely to be affected by the orders. I therefore do not agree with Wildlife that Wilderness cannot be heard since it has never been enjoined in the proceedings. Wilderness was entitled to participate in these judicial review proceedings as a matter of right. The orders that were sought by Wildlife and which were eventually allowed through the impugned consent judgement affected Wilderness' rights.

Can a consent judgment be entered in judicial review proceedings? The answer is in the affirmative. The only question that needs to be answered is whether a Deputy Registrar can enter a consent judgment in judicial review proceedings. I do not think that Order XLVIII (now Order 49) of Civil Procedure Rules is applicable. A Deputy Registrar cannot purport to exercise the authority bestowed upon that office by Rule 2 and enter a consent judgment in judicial review proceedings. He can, however, enter a consent judgment under the supervision of a judge.

This is the position taken by H. Woolf, J. Jowell and A.L. Sueur in the 6thedition of **De Smith's Judicial Review** at paragraph 16-071 where they opine that:

"A significant proportion of claims, given permission to proceed, are withdrawn before the full hearing. If the parties agree about the final order to be made, the court may make the order without a hearing if it is satisfied that the order should be made. Because of the public interest involved in many judicial review claims, the parties cannot determine for themselves what order

should be made. The court will not make an order if it is not in the public interest to do so. In addition, if a decision of a court or tribunal is the subject of the claim, it would be wrong for that decision to be altered merely by agreement of the parties. The court must be satisfied that this is appropriate."

I agree with the learned authors. It is imperative that the judge has to approve any agreement by the parties before the same is adopted as a judgement of the court. Without the blessing of a judge, no consent can be entered in judicial review proceedings.

Wilderness pointed out that the consent judgment had reliefs that had neither been sought in the application for leave or in the notice of motion. This fact has not been contested by Wildlife. Rule 4(1) of Order 53 provides that no grounds shall be relied upon or any relief sought at the hearing of the notice of motion except the grounds and relief set out in the statutory statement. The orders for which no permission had been granted were therefore illegal since they were issued against the clear provisions of Rule 4(1).

There was an argument by counsel for Wildlife that the only avenue that was open to Wilderness was to file an appeal. Nyamu, J (as he then was) was confronted with the same question in **EXPARTE JUSTUS NYANGAYA,** supra, and he stated that:

"On this I find that in the circumstances of the case before me since the IPs were parties to the proceedings in law and they were deliberately excluded from the consent letter/order or judgement the very act of excluding them is a fraudulent act taking into account that the exclusion was clearly aimed at conferring benefits to the excluding parties and denying the IPs of the same benefits. Similarly the exclusion of the IPs if not done fraudulently does in the circumstances constitute negligent misrepresentation to say the least and an unforgiveable mistake as well.

I therefore find that the applicants are perfectly entitled as they did to apply to set aside the challenged order/judgement even on the basis of the three limbs of the laws (or grounds) as expounded in the FLORA case above."

D. S. Majanja, J commenting on the applicability, to judicial review matters, of the principles established by the Court of Appeal in the **FLORA WASIKE** case observed that:

"The rule stated by the Court of Appeal in the case of Flora Wasike v Destimo Wamboko (supra) must be considered in light of judicial review and public law proceedings. In public law or judicial review proceedings the greater public interest is at stake and two parties cannot consent to deprive third parties of their rights. A third party so affected by such a consent order is in law entitled to set it aside ex debito justiciae."

I agree with the two decisions cited above. In my view the principles established in **Flora Wasike** are not applicable to consent judgements entered in judicial review proceedings. Parties cannot enter a consent judgement to the exclusion of a necessary party and then turn around to tell the said party that the only available remedy is to file an appeal. This Court cannot be called a court of justice if it cannot invoke its inherent powers to right such a wrong. Wilderness was already knocking on the door and the parties who entered the consent were fully aware that it was an interested party in the proceedings. As already pointed out, any party who is likely to be affected by the outcome of a judicial review application is entitled to participate in the proceedings as a matter of right. The consent judgement entered herein was clearly meant to defeat the interest of Wilderness. The Court is therefore under a duty to set aside such consent.

Before I conclude, I note that Wildlife argued that the application before this Court is not supported by any affidavit. I have perused the supporting affidavit of Nayan Patel and it is clear that the same has given a chronology of the events up to and including the consent order of 25th August, 2010. At Paragraph 40 of the affidavit, specific reference is made to a consent judgement entered by Mr. Wahome on 26th August, 2010. There may be a mistake on the date but it is clear that Wilderness is referring to

the consent judgement of 25th August, 2010. Although the application is directed at two orders, it is apparent that the only subsisting order is that of 25th August, 2010. The order which Wilderness seeks to set aside is therefore clear.

Looking at the consent judgment in question, it is clear that the same was entered without jurisdiction and in clear breach of the rules of natural justice. The purported consent judgment was null and void from the beginning. It was an abuse of the court process and it cannot be allowed to stand. The application succeeds and orders will issue as per prayer No. 3. Costs will be in the cause.

Dated, signed and delivered at Nairobi this 13th day of March, 2014

W. KORIR,

JUDGE OF THE HIGH COURT