



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**PETITION NO. 17 OF 2016**

**IN THE MATTER OF CHAPTER SIX OF THE CONSTITUTION OF KENYA 2010  
(LEADERSHIP AND INTEGRITY)**

AND

**IN THE MATTER OF ARTICLES 48, 60, 64, 159, 164, 165, 259 AND 260 OF THE  
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTION 2, 3A AND 5 OF THE APPELLATE JURISDICTION ACT  
AND RULE 4 OF THE COURT OF APPEAL RULES**

AND

**IN THE MATTER OF SECTION 190(B) OF THE SUPREME COURT ACT NO. 7 OF 2011**

AND

**IN THE MATTER OF SECTION 24 OF THE REGISTRATION OF LANDS ACT, 2012**

BETWEEN

**HEZEKIAH MICHOKI ..... PETITIONER**

VERSUS

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**ELIZAPHAN ONYANCHA OMBONGI ..... 2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. This matter has had a rather long history and has been litigated before this court and the Court of Appeal. It is necessary to give a brief background to contextualize the present petition before this court.

2. On 18<sup>th</sup> October 2007 Hon. Justice Kaburu Bauni delivered a judgment in Kisii HCCC No. 207 of 1988 in which he declared that land parcel number LR No. **Gesima Scheme/149** belonged to Elizaphan Onyancha Ombongi (the 2<sup>nd</sup> respondent herein) and restrained Hezekia Michoki (the petitioner herein) from interfering with the 2<sup>nd</sup> respondent's quiet possession of the parcel of land and ordered the petitioner

to execute the appropriate documents to the 2<sup>nd</sup> respondent to give effect to the decree. The petitioner was aggrieved by that decision and filed a Notice of Appeal signifying his intention to appeal against the judgment to the Court of Appeal. The petitioner did not serve the Notice of Appeal on the 2<sup>nd</sup> respondent or his advocates and also did not file the record of appeal in time. The petitioner's application for extension of time to serve the Notice of Appeal and to file the record of appeal out of time was dismissed by a single judge of the court **Hon. Onyango Otieno, JA** on 5<sup>th</sup> December 2007. The petitioner was aggrieved by the decision of **Onyango Otieno, JA** and wished to have the matter referred to the full court for determination.

3. The petitioner did not apply to have reference made to the full court before the single judge at the time the ruling was made and neither did he make a request to the Registrar of the court within seven days as required under Rule 54 (1) (a) and (b) of the Court of Appeal Rules. Instead the petitioner applied under Rule 4 of the Court of Appeal Rules for leave to apply in writing to the Registrar out of time. **Omolo, JA** allowed the application and directed the petitioner to make the application to the Registrar within seven days. It was the turn for the 2<sup>nd</sup> respondent to be aggrieved and the 2<sup>nd</sup> respondent made a reference to the full court challenging the decision of **Omolo, JA**. The full court on 19<sup>th</sup> June 2015 dismissed the reference by the 2<sup>nd</sup> respondent with costs.

4. The reference by the petitioner to the full court challenging the decision of **Onyango Otieno, JA** sitting as a single judge was heard and the full bench of the court rendered a ruling on 4<sup>th</sup> March 2016 dismissing the reference with costs holding that there was no basis upon which the single judge's exercise of discretion could be faulted.

5. Against the foregoing background the petitioner filed the present petition dated 21<sup>st</sup> April 2016 where he prays for the following orders:-

**1. An order of a permanent injunction restraining the 2<sup>nd</sup> respondent either by himself and/or whomsoever is claiming through him from trespassing, transferring, alienating and/or in any way interfering with the petitioner's quiet possession and peaceful enjoyment of land parcel number Gesima Settlement/149.**

**2. A declaration that Section 19(b) of the Supreme Court Act, No. 7 of 2011 is contrary to the letter and spirit of Article 48 of the Constitution and therefore null and void as it is inhibitive of the right to access justice.**

**3. This honourable court hereby extends time to the petitioner for serving Notice of Appeal and filing of appeal out of time from the decision of the late Kaburu Bauni J. delivered on the 18<sup>th</sup> October, 2007 in Kisii HCCC No. 207 of 1988 and hereby issues a certificate that the case is fit for appeal.**

**4. Any other relief that this honourable court may be pleased to grant as may be necessary to meet the ends of justice.**

**5. Costs of the petition be to the petitioner.**

6. The petition is supported on the supporting affidavit sworn by Hezekiah Michoki the petitioner herein dated 21<sup>st</sup> day of April 2016. The 1<sup>st</sup> respondent filed a statement of grounds of opposition to the petition on 20<sup>th</sup> June 2016. The 2<sup>nd</sup> respondent filed a Notice of Preliminary Objection dated 17<sup>th</sup> June 2016. The court on 20<sup>th</sup> June 2016 directed the 2<sup>nd</sup> respondent's preliminary objection to be argued together with the main petition and directed the parties to file their written submissions.

7. The 1<sup>st</sup> respondent's written submissions were filed simultaneously with the grounds of opposition, on 20<sup>th</sup> June 2016. The petitioner filed his submissions on 19<sup>th</sup> August 2016 while the 2<sup>nd</sup> respondent filed

his submissions on 26<sup>th</sup> September 2016.

8. The petition is premised on Articles 48, 60, 64, 159, 164, 165, 259 and 260 of the Constitution. Simply stated the petitioner contends that his right of access to justice has been curtailed as his efforts to have an appeal against the judgment in Kisii HCCC No. 207 of 1988 determined on merits have been futile as his application seeking leave for extension of time to file a Notice of Appeal out of time has been declined by the Court of Appeal. The petitioner's application to have the Court of Appeal extend time for filing a Notice of Appeal and record of appeal out of time was dismissed by a single judge of the court and the consequent reference to the full bench of the court was similarly dismissed. It is the petitioner's contention that reliance by the court on technicalities has denied him access to justice and he argues that Section 19(b) of the Supreme Court Act No. 7 of 2011 bars appeals to the Supreme Court in decisions from the Court of Appeal on refusal to grant leave to appeal to the Court of Appeal. This he contends infringes his right to access justice on technical application of the law and rules to his disadvantage and prejudice.

9. The petitioner seeks the intervention of this court and seeks for extension of time within which to lodge an appeal against the decision of Hon. Justice Kaburu Bauni in Kisii HCCC No. 207 of 1988 delivered on 18<sup>th</sup> October 2007. The petitioner has submitted the following issues/questions for determination:-

**(a) Whether the petitioner's right to access justice has been hindered by any written law and/or rules of procedure?**

**(b) Whether written law can defeat the intent of the clear provisions of the Constitution?**

**(c) Whether Section 19(b) of the Supreme Court Act, No. 7 of 2011 is inhibitive to the right to access justice and therefore null and void to the extent of its inconsistency with Article 48 of the Constitution?**

10. The 1<sup>st</sup> respondent vide his statement of grounds of opposition filed to oppose the petition avers that:

**1. That the petition is untenable, unfounded and a gross abuse of the process of the courts of law.**

**2. That the petition is a breach of the principles of stare decisis and res judicata since the matter has already been determined by courts of competent jurisdiction in the High Court and the Court of Appeal.**

**3. That the petitioners application has equally been overtaken by events thus rendered nugatory.**

**4. That the petition is incompetent, bad in law, frivolous, vexatious, fatally and incurably defective and ought to be struck out abinitio.**

11. The 2<sup>nd</sup> respondent in his replying affidavit averred that in Kisii HCCC No. 207 of 1988 his late father Jeremiah Ombongi Manyura was the plaintiff and the petitioner was the defendant. He deponed that the suit was heard on merit and a judgment delivered and decree issued. The petitioner filed a Notice of Appeal but did not serve the same and/or file a record of appeal within the stipulated time. As indicated earlier in this judgment, the petitioner's applications for leave to extend time for filing of the Notice of Appeal and the record of appeal were dismissed by the Court of Appeal.

12. The 2<sup>nd</sup> respondent denies that the petitioner has been denied his constitutional right of access to justice as conferred under Article 48 of the Constitution. To the contrary the 2<sup>nd</sup> respondent states the petitioner has utilized his right of access as contemplated under the constitution and the enabling law. The 2<sup>nd</sup> respondent argues that under Article 163 (4) of the Constitution appeals lie from the Court of Appeal to the Supreme Court thus:-

**(a) As of right in any case involving the interpretation or application of the Constitution.**

**(b) In any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).**

The 2<sup>nd</sup> respondent contends that the issue the petitioner is raising by his petition is of a private nature and is not one of general public importance capable of certification for purposes of appeal to the Supreme Court. The 2<sup>nd</sup> respondent further contends the issue of injunction that the petitioner is inviting this court to deal with has previously been dealt with by this court and is therefore *res judicata*. Equally the 2<sup>nd</sup> respondent submits the issue of extension of time to file a Notice of Appeal having been dealt with by the Court of Appeal this court lacks any jurisdiction to deal with the same.

13. The petitioner argues that under Article 164 of the Constitution the Court of Appeal is conferred jurisdiction to hear and determine appeals from the High Court. The petitioner consequently submits that he has a legitimate expectation founded on Article 48 of the Constitution that his right of appeal to the Court of Appeal from the decisions of the High Court ought not to be taken away by any provisions of legislation and/or Rules made thereunder. The petitioner argues that under Section 7 of the **Appellate Jurisdiction Act**, the High Court has been given power to extend time for giving a notice of appeal to the Court of Appeal. Section 7 provides thus:-

**7. The High Court may extend the time for giving notice to intention of appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”**

14. Although the petitioner admits that his attempts to have the Court of Appeal extend time for him to file a Notice of Appeal and record of appeal, he submits that the power of the court under Rule 4 of the Court of Appeal Rules vide which the Court of Appeal can extend time is **limited by the Rules or by any decision of the court or a Superior Court**. He submits that the power of the High Court under section 7 of the **Appellate Jurisdiction Act** is wider and distinct from the power of the Court of Appeal donated under Rule 4 of the Court of Appeal Rules. The petitioner contends that notwithstanding that he had filed an application seeking the extension of time to file a Notice of Appeal in the Court of Appeal that does not preclude him from invoking the original jurisdiction of the High Court contemplated under Section 7 of the **Appellate Jurisdiction Act**. He contends the issue of *res judicata* would not arise in those circumstances.

15. In support of the argument that the Court of Appeal and the High Court exercise exclusive jurisdictions while considering applications for extensions of time to file Notices of Appeal and/or certification of appeal, the petitioner relied on the Court of Appeal case of **Hermanus Phillipus Styn – vs- Giovanni Gnechi – Ruscone CACA No. 4 of 2012** where the Court of Appeal considered the parameters for certification of an appeal to the Supreme Court. The Court of Appeal refused to certify the appeal but in its consideration the court referred to the decision of the Supreme Court in the case of **Sum Model Industries Limited –vs- Industrial and Commercial Dev. Corporation SC Civil Application No. 1 of 2011** where the Supreme Court in part stated:-

**“This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal’s decisions in this regard, it is at liberty to seek a review of that decision by this court as provided for by Article 163(5) of the Constitution.”**

16. The petitioner in arguing that Section 19(b) of the **Supreme Court Act, 2011** is unconstitutional to the extent that it imposes strictures to the right of access to justice as enshrined in Article 48 of the Constitution as read with Article 163(4) of the Constitution which provides for the jurisdiction of the **Supreme Court** relied on the cases of **Kenya Bus Services Ltd & Another –vs- Minister for Transport & 2 Others [2012] eKLR**, **Dry Associates –vs- Capital Markets Authority; Nbi Petition No. 328 of 2011 (unreported)** and **Lawrence Ndittu & 6000 Others –vs- Kenya Breweries Ltd & Another; Supreme Court Petition No. 3 of 2012 [2012] eKLR**. In the **Kenya Bus Services Ltd** case (supra) **Majanja, J.** in holding that Section 13(A) of the **Government Proceedings Act** violates Article 48 of the Constitution stated as follows:-

**“The strictures imposed by these provisions must be considered in light of the right of access to justice. The right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and reliefs from courts.”**

In the **Dry Associates –vs- Capital Markets Authority** case (supra) the court stated:-

**“Without access to justice, the objects of the constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedom are realized. Article 48 therefore invites the court to consider the conditions which clog and falter the right of persons to seek the assistance of the courts of law.”**

The petitioner submits therefore, that to the extent Section 19(b) of the **Supreme Court Act** bars him from seeking redress by way of seeking certification from the Supreme Court following refusal by the Court of Appeal to grant him leave to appeal the decision of the High Court, the said provision is unconstitutional.

17. The 1<sup>st</sup> respondent in his written submissions identified the issues for determination to be as follows:-

- 1. Whether the petitioner should canvass matters settled in the Court of Appeal?**
- 2. Whether Section 19(b) of the Supreme Court Act is unconstitutional?**
- 3. Whether the petitioner is entitled to the prayers sought?**

The 1<sup>st</sup> respondent on the 1<sup>st</sup> issue submitted that the petitioner having sought extension of time to file a Notice of Appeal firstly, before a single judge who dismissed the plea and secondly, before the full bench of the court by way of reference who also dismissed the plea, the issue of extension of time was finally determined and this court lacks any jurisdiction to deal with the matter. The 1<sup>st</sup> respondent contends that the High Court cannot reopen a matter that has been determined by the Court of Appeal and argues that by this petition, the petitioner is in fact seeking to reopen a matter that the Court of Appeal has already dealt with contrary to the twin concepts of *stare decisis* and *res judicata*. The 1<sup>st</sup> respondent stated that Article 164(3) provides that the Court of Appeal has jurisdiction to hear appeals from the High Court or tribunal as prescribed by an Act of Parliament and Appeals from the Court of Appeal to the Supreme Court lie as of right or by certificate of leave as provided under Article 164(3) and (4) of the Constitution respectively.

18. The petitioner exercised his right of appeal to the Court of Appeal when he filed a Notice of Appeal to appeal to the Court of Appeal against the decision of the High Court. He failed to serve the Notice of Appeal on the respondent and his application for extension of time to file and serve the Notice of Appeal out of time made to the Court of Appeal was refused. This decision of the Court of Appeal under the doctrine of *stare decisis* or precedent binds the High Court. The Court of Appeal having pronounced itself on the issue, the petitioner could only have sought leave to appeal the decision of the Court of Appeal to the Supreme Court but he was alive to the fact that such action was futile as Section 19(b) of the **Supreme Court Act, 2011** expressly barred such an action.

19. Respecting adherence to the doctrine of *stare decisis*/precedent the 1<sup>st</sup> respondent relied on the Supreme Court decision in **Petition No. 4 of 2012, Jasbir Singh Rai & 4 Others [2012] eKLR** where at paragraph 40 the court stated:

**“This is a clear perception of the doctrine of precedent in the functioning of the superior courts in the common law tradition. The message is simply this. As a matter of constituent practice, the decisions of the higher courts are to be maintained as precedent; and the foundation laid by such courts is in principle, to be sustained. This of course, leaves an opening for the special circumstances which may occasionally dictate a departure from previous decisions.”**

20. The 1<sup>st</sup> respondent further submits that the instant petition is caught by the doctrine of *res judicata* as indeed it is in reality not a constitutional petition as the matter it seeks pronouncement on has already been dealt with by a competent court. The matter is *res judicata* as the High Court made a determination as regards the ownership of the land the subject matter of the suit. On the issue of extension of time to appeal the decision of the High Court, the Court of Appeal has conclusively dealt with the matter and this court would have no basis or jurisdiction to deal with the matter. The issue of extension of time to file a Notice of Appeal is *res judicata*. In the case of **ET –vs- Attorney General & Another [2012] eKLR** the court while considering the application of the doctrine of *res judicata* rendered itself thus:-

**“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi –vs- National Bank of Kenya Ltd & Others [2001] EA 177* the court held that parties cannot evade the doctrine of *res judicata* by merely adding other “parties or causes of action in a subsequent suit.” In that case the court quoted *Kuloba, J.* in the case of *Njaugu –vs- Wambugu & Another Nairobi HCCC No. 2340 of 1991 (unreported)* where he stated, “If parties were allowed to go on litigating forever over the same issue with the same opponent before, courts of competent jurisdiction merely because he gave his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....”**

21. In the present petition the petitioner inter alia seeks an order for the extension of time to file a Notice of Appeal. Without doubt the petitioner has previously sought before the Court of Appeal leave to file a Notice of Appeal out of time and the Court of Appeal has finally pronounced itself on the issue. The petitioner appears to take the position that even after his application for extension of time to file a Notice of Appeal has been heard and refused by the Court of Appeal, he can still come to the High Court by virtue of Section 7 of the **Appellate Jurisdiction Act**, Cap 9 Laws of Kenya and make a similar application seeking leave for time to be extended to file a Notice of Appeal.

22. My view is that the petitioner had the option to make his application for extension of time to file a Notice of Appeal before the High Court under Section 7 of the **Appellate Jurisdiction Act** or to make the application before the Court of Appeal under Rule 4 of the Court of Appeal Rules, 2010. The petitioner having exercised his option to make the application for extension of time under rule 4 of the Court of Appeal Rules, which application was heard and determined on merit cannot come back to the High Court to make a similar application. Apart from the petitioner being estopped to do so, the High Court (ELC) in the instant case cannot override the decision of the Court of Appeal. The court is bound by the decision of the Court of Appeal and in the instant matter it would be ridiculous for the court to entertain the application and make a decision which would amount to overturning the decision of the full bench of the Court of Appeal. I do not propose to venture into such adventure and I would hold the petition in so far as it is grounded on that ground to be frivolous and an abuse of the court process.

23. The Supreme Court in the case of **Daniel Kimani Njihia –vs- Francis Mwangi Kimani & Another, Civil Application No. 4 of 2014** while considering an application for review of denial of leave to appeal to the Supreme Court, in dismissing the application stated:-

**“...It is clear to us that this court had not been conceived as just another layer in the appellate court structure. Not all decisions of the Court of Appeal are subject to appeal before this court. One category of decisions we perceive as falling outside the set of questions appellable to this court, is the discretionary pronouncements appurtenant to the Appellate Court’s mandate. Such discretionary decisions, which originate directly from the Appellate Court, are by no means the occasion to turn this court into a first appellate court, as that would stand in conflict with the terms of the Constitution.”**

24. In the case of **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others; Supreme Court Petition No. 2 of 2012** the Supreme Court held that Section 14 of the **Supreme Court Act** was unconstitutional as it purported to give the court **“special jurisdiction”**. Not provided for by the Constitution. The court inter alia stated thus:-

**“Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional in so far as it purports to confer “special jurisdiction” upon the Supreme Court, contrary to the express terms of the Constitution. Although we have a perception of the good intention that could have moved parliament as it provided for the “extra” jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article 163 of the Constitution, or under Section 23 of the Sixth Schedule on “Transitional Provisions.”**

25. Placing reliance on the above decision of the Supreme Court in the **Macharia Case** (supra) among others **Lenaola, J.** (as he then was) in the case of **Commission of Administrative Justice –vs- Attorney General & Another HC Petition No. 284 of 2012 [2013] eKLR** held that:-

**“Section 16(2) (b) of the Supreme Court Act 2011 is declared to be ultra vires the Constitution, 2010 to the extent that it adds to the jurisdiction of the Supreme Court to determine appeals where the court is satisfied that a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.”**

26. The jurisdiction of the Supreme Court to hear appeals from the High Court is clearly set out under Article 163(4) of the Constitution. Appeals from the Court of Appeal to the Supreme Court lie:-

**(a) As of right in any case involving the interpretation or application of the constitution.**

**(b) In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved subject to clause (b).**

Article 164(5) of the Constitution provides:-

**(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court and either affirmed varied or overturned.**

27. The Supreme Court was not created to the intent that all appeals irrespective of their nature and character could end up there and that is why Article 163(4) of the Constitution stipulated the type of appeals that the court could entertain. It follows therefore there had to be a way of filtering the appeals that found their way to the court. Section 19 of the **Supreme Court Act** has to be seen in this context as it further amplifies Article 163(4) regarding the appeals that the Supreme Court can hear and determine. It provides thus:-

**19. The Supreme Court shall hear and determine appeals from the Court of Appeal or any other court or tribunal against any decision made in proceedings, only to the extent that:-**

**(a) a written law, other than this Act, provides for the bringing of an appeal to the Supreme Court against such decision; or**

**(b) the decision is not a refusal to grant leave to appeal to the Court of Appeal.**

28. In the case of **Fahim Yasin Twaha –vs- Timamny Issa Abdala & 2 Others [2016] eKLR** the Supreme Court referred to the decision of **Lenaola, J.** in the case of **Commissioner on Administrative Justice –vs- Attorney General & another [2013] eKLR** with approval where the High Court (**Lenaola, J.**) had held Section 16(1) and (2) (b) of the **Supreme Court Act, 2011** to be unconstitutional for purporting to extend the jurisdiction of the Supreme Court. **Lenaola, J.** in the case had held that the addition of the words **“a substantial miscarriage of justice”** to Section 16 of the Act was in effect to give the Supreme Court an extra criteria and jurisdiction to hear and determine applications for leave to appeal to that court.

29. Granting of leave to appeal or to extend time to appeal are issues or matters of a procedural nature involving the exercise of discretion by the court before whom such an application is made. In the case of **Daniel Kimani Njihia** (supra) the Supreme Court pronounced itself when it stated:-

**“Not all decisions of the Court of Appeal are subject to appeal before this court. One such category of decisions we perceive as falling outside the set of questions appellable to this court is the discretionary pronouncements appurtenant to the appellate court’s mandate. Such discretionary decisions, which originate directly from the appellate court, are by no means the occasion to turn this court into a first appellate court, as that would stand in conflict with the terms of the Constitution.”**

30. In arriving to the above conclusion the Supreme Court no doubt had in mind the provisions of Section 19(b) which is specific that the Supreme Court would not hear appeals relating to refusal of grant of leave to appeal to the Court of Appeal. To declare Section 19(b) of the **Supreme Court Act, 2011** as unconstitutional as the petitioner urges this court to do would be to open the Supreme Court to another cluster of appeals arising from refusal by the Court of Appeal to extend time to appeal or grant leave to appeal. These are discretionary decisions in regard to which the Supreme Court has determined appeals do not lie to it as it would amount to constituting the Supreme Court as a first appellate court. To declare Section 19(b) of the Supreme Court unconstitutional would amount to in another manner extending the jurisdiction of the Supreme Court unconstitutionally.

31. The Petitioner has argued that Section 19(b) inhibits his access to justice as enshrined under Article 48 of the Constitution. The petitioner exercised his right of access to justice by applying for extension of time within which to file a Notice of Appeal to Appeal in the Court of Appeal which application the Court of Appeal in exercise of its discretion rejected. Under Article 163(4) not every decision of the Court of Appeal is appellable to the Supreme Court and that is what it should be. The Supreme Court in the **Daniel Njihia** case (supra) has stated that discretionary pronouncements appurtenant to the appellate court’s mandate do not constitute matters that should end up in the Supreme Court as appeals. The Court of Appeal under Article 163(4) (b) of the Constitution is required to certify that a matter is of general public importance for the same to be admitted by the Supreme Court if it is not a matter involving the interpretation or application of the Constitution in respect of which has jurisdiction as of right. The Supreme Court can itself under the provision certify the matter as of general public importance and can under Article 163(5) review a certification of the Court of Appeal under clause (4) and vary or overturn the same which emphasis the fact that appeals cannot automatically emanate from the Court of Appeal to the Supreme Court.

32. In the matter before the High Court the petitioner sought an order of permanent injunction which after full hearing by the court, the court through the judgment delivered on 18<sup>th</sup> October 2007 made a final order to the effect that:-

**“The defendant is hereby restrained by himself servants or agents from claiming or interfering with the plaintiff’s quiet possession of the said land. Defendant is also directed to execute documents to transfer the said land to the plaintiff and in default the court executive officer to do the same.”**

33. The issue relating to possession and injunction was conclusively determined by the High Court vide its judgment and the judgment has not been set aside and therefore the petition to the extent that prayer 1 seeks an order of permanent injunction, the same is *res judicata*. This court cannot deal with an issue that was directly in issue and was determined by a court of competent jurisdiction. I cannot entertain the petition to the extent that to do so would basically mean I sit on appeal over the decision of **Kaburu Bauni, J.** who was exercising a concurrent jurisdiction as myself.

34. The upshot is that I find the petition to be devoid of any merit and I accordingly dismiss the same but taking account of the circumstances, I make no order for costs and I direct that each party bears their own costs of the petition.

35. Orders accordingly.

**Judgment dated, signed and delivered at Kisii this 6<sup>th</sup> day of October, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Omoto for Begi for the petitioner

Ms. Opiyo for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> respondent

Milcent court assistant

**J. M. MUTUNGI**

**JUDGE**