IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & KANTAI JJ.A.)

CIVIL APPEAL NO. 258 OF 2016

BETWEEN

JOHN KARIUKI MAINA .... APPELLANT

AND

THE HON.ATTORNEY GENERAL..................................... RESPONDENT

(Being an appeal against the judgment and subsequent decree of the High Court of Kenya (G.V. Odunga, J.)

dated 15th March, 2013

in

Nairobi H.C.C.C No. 668 of 2005)

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JUDGMENT OF THE COURT

This is a first appeal arising from the High Court judgment (**G. V. Odunga, J.)** dated 15th March, 2013.

The background to the appeal albeit in a summary form is that the appellant filed in the High Court of Kenya at Nairobi Civil Case No. 668 of 2005 vide a plaint dated 2nd June, 2005 and subsequently amended on 28th June, 2010 with the leave of the Court granted by **Ali Aroni, J**. on 10th June, 2010, averring *inter alia* that on 31st July, 1990, he was assaulted by persons known to him. He went to Thika Police Station to file the assault complaint where he met agents of the respondent who instead of vindicating him caused him to be placed in the cells, accusing him of feigning the assault, pursuant to which accusations he was charged and prosecuted for the offence of causing disturbance in the Senior Resident Magistrate's Court at Thika Criminal Case No. 2602 of 1990, at the conclusion of which he was found guilty of the offence charged, and fined kshs.2,000.00 in default to serve three months' imprisonment. He paid the fine and never appealed against that conviction.

Subsequent to the above conviction he raised complaints against one of his assailants who was arraigned before the Principal Magistrate's Court at Thika in Criminal Case No. 382 of 1992, subsequently dismissed after the appellant declined to testify before the trial magistrate who had declined to accede to his request to either recuse herself from the trial or have the case transferred to another court for trial alleging bias on the part of the trial magistrate resulting in him being jailed for eight (8) days for contempt of Court.

The appellant therefore claiming violation of his rights by officers employed by the respondent sought special damages of kshs.900.00 he lost on 31st July, 1990 when he was thrown into police cells by agents of the respondent, compensation for loss suffered by him from 31st July, 1990 when he was thrown into the police cells, subsequently prosecuted and fined, compensation for assault and bodily harm and other consequences attendant thereto when he was assaulted by his assailants and subsequently thrown into police cells, compensation for defamation suffered by him as a result of the prosecution he was subjected to and any other relief the High Court deemed fit to grant and interest compounded at court rates as from 1st January, 1990 on item (a), (b), (c), (d), (e) to the conclusion of the trial of the claim.

The respondent entered appearance on 17th June, 2005 but filed no defence. The cause was canvassed through appellant's testimony as the sole witness in support of his claim. He was cross examined by counsel on record for the respondent who elected not to call any evidence in rebuttal of the appellant's testimony but sought and was granted leave to file written submissions which were subsequently filed but disregarded by the learned trial Judge on account of containing matters alien to the issues that were in controversy as between the rival parties herein.

At the conclusion of the trial, the learned Judge evaluated the record and made observations thereon *inter alia* that: the appellant's claim against the respondent was hinged on assault committed in 1990 by the agents of the respondent, the assault complained of was a tort and under **section 3** of the **Public Authorities Limitation Act, Cap 40** of the **Laws of Kenya,** proceedings against a public authority falling under the said section ought to have been brought within twelve (12) months from the date on which the cause of action arose; it was apparent from the record that the appellant had filed an earlier suit being HCC No. 2389 of 1994 which was dismissed for want of prosecution. It was not however clear from the record as to whether the suit dismissed for want of prosecution had been filed within time. Further that it was explicit from the record that the suit the learned Judge was seized of was definitely filed out of time with no indication as to whether there was an order extending time for commencement of the proceedings before the Court and then expressed himself as follows:

> **"...the overriding purpose of all limitation statutes is based on the maxim *interest reipublicae ut sit finis litium*– i.e it concerns the State that there be an end to law suits, and it has been the policy of the Courts to lean against State claims."**

Upon reviewing the case of **Dhanesvar V. Mehta vs. Manilal M. Shah [1965] E. A 321** and **Pauline Wanjiru Thuo vs. David Mutegi Njuru, Civil Appeal No. 278 of 1998** both on consequence of noncompliance with the limitation periods in statutes and applying that threshold to the record before him expressed himself as follows:

> **"The Court of appeal held that a preliminary objection based on limitation can be taken for the first time on appeal because it goes to jurisdiction. Accordingly, where the Court has no jurisdiction, the decision would be a nullity. It follows that the instant case was filed outside the limitation period and is hence incompetent unless the plaintiff sought and obtained extension of time to file the same.**
>
> **Apart from the foregoing, the plaintiff conceded that he was not assaulted by the police. His complaint was that when he went to report the incident of assault by three other persons, he was locked in a police cell. However, the plaintiff's cause of action was based on assault caused by people whom he called "criminals". Whereas the plaintiff also claimed to be paid kshs. 900.00 which the plaintiff alleges to have lost while in police custody no evidence was led as to how this loss arose."**

Turning to the claim for defamation, the learned Judge expressed himself as follows:

> **"In the result, I find that the suit is time barred as it is caught up by limitation. However, even if the same was not time barred, the suit would still have failed due to the failure by the plaintiff to prove his case to the standards of a balance of probability."**

In light of the conclusions reached above, the learned Judge concluded as follows:

> **"Consequently, the plaintiff's suit fails and is dismissed but with no order as to costs taking into consideration the display of lack of seriousness on the part of the defendant as evidenced by the kind of submissions filed."**

Aggrieved, the appellant is now before this Court raising thirteen (13) homegrown grounds of appeal which are not only wordy but also repetitive in some aspects. Both the layout and wording falls short of what is expected of a Memorandum of Appeal as stipulated in **Rule 86** of the **Rules** of the Court with regard to framing of a memorandum of appeal. It provides as follows:

> **86(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.**
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> **(2) The grounds of objection shall be numbered consecutively.**
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> **(3) A memorandum of appeal shall be substantially in the Form F in the First Schedule and shall be signed by or on behalf of the appellant.**

The above observations notwithstanding, we are obligated in law to appreciate that appellant acting in person is a lay person probably not schooled to an extent of being capable of comprehending and complying with the threshold envisaged under **Rule 86** of the Court's **Rules** hence our taking upon ourselves to paraphrase those grounds for purposes of merit determination of the appeal. In our view, the appellant's complaints may be paraphrased as follows: That the learned Judge erred both in law and in fact when he failed: to properly appreciate and consider that the alleged procedural lapse on the basis of which his claim against the respondent was vitiated had been raised previously by the respondents, considered and overruled by **Aroni, J.** in the ruling dated 10th June, 2010 rejecting an oral preliminary objection raised against his claim by the state on 8th June, 2009 on the one hand and the Court itself on 20th December, 2012 when the state counsel then appearing on behalf of the respondent revisited that issue; failing to properly appreciate and consider that his claim was unrebutted for the respondent's failure to file a defence against it and the Court's discounting of the written submissions filed by the respondent in opposition thereto; for being biased against his claim in favour of the respondent who had elected not to rebut his claim; by failing to evaluate the merits of his unrebutted, well founded claim and find in his favour.

The appeal was canvassed virtually through written submissions. Appellant appeared in person while the respondent was represented by learned counsel **Mr. Ngumbi**. Both parties relied on written submissions without orally highlighting them. The appellant in his homegrown submissions invites the Court to allow the appeal for the respondent's failure to either file a defence against the claim or call evidence in rebuttal. He therefore sought orders as follows:

> i) *Damages for defamation as he was portrayed as a criminal when infact he was not.*

ii) Damages for compensation for injury in the cause of the assault committed against him by the respondent's servants and or agents.

iii) Cash he refunded to a Mr. Stephen Kanyonyi who paid cash bail for him to be released after he had been arrested and charged with a criminal offence of Kshs. 3,000.00 with profit bringing the figure to Kshs. 11,500.00.

iv) Loss of income for the entire period the criminal trial lasted to the total tune of kshs.2,700,000.00 from 1993 – 2019 a period of 26 years.

v) Refund of Kshs. 2,000.00 he paid as a fine plus interest calculated over a period of twenty-nine (29) years.

vi) Cost of food and transport of 500.00 for four days per year for twenty-six (26) years.

vii) Cost of typing documentation for filing in court of 300.00 per day for twenty-nine (29) years.

viii) Kshs. 900.00 that got lost on 31st July, 1990 and the 25% profit per month for loss of business for the twenty-nine (29) years together with an attendant prayer for any other relief that the Court may deem fit to grant.

In responding to appellant's thirteen grounds of appeal cumulatively, the respondent submits that according to them, the appellant's claim is founded on tortious causes or action arising from assault, battery, defamation and the alleged loss of kshs.900.00 that allegedly got lost on the 31st July, 1990 all of which in their opinion are in the nature of torts. The learned Judge did not therefore when he vitiated appellant's claim holding that the same was filed out of time as the torts complained of seemed to have occurred in 1990 and hence were bound by **section 3(1)** of the **Public Authorities Limitation Act**. The Court did not therefore have jurisdiction to entertain it.

Relying on the case of **Joel Nyabuto Omwenga & 2 Others vs. Independent Electoral and Boundaries Commission and Another [2014] eKLR**, in which the Court of Appeal quoted with approval the words of **Nyarangi, JA** in **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR** at page 14 that:

> **"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

and submitted that the ruling delivered by **Aroni, J**, on 10th June, 2010 did not determine the issue of appellant's claim being time barred as it only dealt with appellant's application for leave to amend his plaint to conform to **Civil Procedure Rules**; and did not therefore bar the trial Judge from determining the issue of limitation in his judgment.

Turning to the merits, the respondent submits that the learned Judge cannot be faulted for declining to make any findings in favour of the appellant on the merits of his claim for the failure of the appellant to prove his claim to the required threshold of proof on a balance of probability; and also for the claim being statute barred under **section 3(1)** of the **Public Authorities Limitation Act**.

Being a first appeal, this Court in **J. S. M. vs. E. N. B. [2015] eKLR** aptly put our role as a first appellate court as follows: -

> **"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."**

In light of the above mandate, the court is enjoined to revisit the record, reevaluate it afresh, analyze it in order to arrive at its own independent conclusion thereon but bearing in mind that it did not see or hear the witnesses as they testified. See **Seascape Ltd vs. Development Finance Company of Kenya Ltd, (2009) KLR 384.**

Having considered the record in light our mandate as set out above, the rival submissions relied upon by the respective parties in support of their opposing positions, issues that fall for determination are whether:

1) Appellant's claim before the High Court was statutorily barred.

2) The learned Judge was precluded from revisiting the issue of appellant's claim being statutorily barred after the ruling of Aroni, J. of 10th June, 2010 and the courts proceedings before the Judge of 20th December, 2012.

3) In light of the conclusions reached on the determination of issues number 1 and 2 above the learned Judge was obligated in the circumstances to interrogate the merits of the appellant's claim and make any pronouncement thereon.

Starting with issue number one, it is our view that limitation of time is a jurisdictional issue. The position in law which is now trite is that whenever an issue of jurisdiction arises, it goes to the core of the mandate of the Court to determine the matter before it. It therefore has to be addressed first. The Supreme Court in the case of **Nasra Ibrahim Ibren vs. Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018**, expressed itself as follows:

> **“A jurisdictional issue is fundamental and can even be raised by the court *suo motu* as was persuasively and aptly stated by Odunga, J. in Political Parties Dispute Tribunal & Another vs. Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:**
>
> **What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded…”**

The predecessor of the Court in the case of **Iga vs. Makerere University (1972) E.A 62**, stated as follows:

> **“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief…….**
>
> **The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.”** [emphasis added]

In arriving at the legal status of the appellant’s claim before the trial court, the learned Judge construed and applied **section 3(1)** of the **Government Proceedings Act, Cap. 40**. It provides:

> **“3.(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.” [emphasis ours]**

The prerequisites for vitiating a claim under the above provision are basically two (2) namely, demonstration that the claim was founded on tort; and second, that the claim was lodged after the expiry of twelve (12) months stipulated in the said section.

We have applied the above threshold to the record and considered it in light of the rival positions herein. With regard to the first prerequisite, we find no error in the learned Judge’s finding that since the appellant’s cause of action was founded on alleged assaults committed against him by agents of the respondent and defamation arising from the criminal prosecution allegedly instigated against him by the agents of the respondents, which we make no hesitation in finding that were in fact founded in tort, we are therefore satisfied that the learned Judge properly construed the above provisions, applied it to the record and drew out a correct conclusion thereon that the first prerequisite under **section 3(1)** of the **Public Authorities Proceedings Act** was satisfied.

Turning to the second prerequisite, we have reevaluated the record and considered appellant’s complaint as laid in the amended plaint, notice of intention to sue the respondent, paraphrased grounds of appeal and, lastly, his written submissions. Our take on the totality of these is that there are three interrelated possible dates when appellant’s causes of action cumulatively addressed in the above processes arose. If those instances were to be treated as separate incidences distinct from each other, the first incident is that which related to events of 31st July, 1990 when he was allegedly thrown into police cells by agents of the respondent as alluded to above. This cause of action therefore arose on the very 31st July, 1990 and lapsed on or about 31st July, 1991 by which time no suit had been filed against the respondent with regard thereto.

The second cause of action arose from his subsequent prosecution in the Senior Resident Magistrate’s Court at Thika in Criminal Case No. 2602 of 1990 which infact gives the basis for appellant’s claim for compensation for defamation. The criminal proceedings resulted in a finding of guilty against him on the basis of which he was fined kshs.2,000.00 in default three months imprisonment handed down against him on 20th June, 1991, which in our view is the date on which the cause of action with regard to this incident arose. It is the same date from which the twelve (12) month’s period is to be computed lapsing on or about 19th June, 1992, by which time no action had been filed by the appellant against the respondent with regard to this incident.

The third incident relates to events that transpired in the Principal Magistrate’s Court at Thika in Criminal Case No. 383 of 1992 instigated by appellant against one of the persons who allegedly assaulted him on 31st July, 1990. Appellant raised complaints on the manner the trial magistrate was handling the proceedings and applied for the trial magistrate either to recuse herself from conducting the trial. Alternatively transfer the case from Thika Law Courts to any other Court for that. That request was declined by the trial magistrate. Appellant refused to take the witness stand. The trial magistrate declared him a refractory witness and ordered him jailed for eight days for alleged contempt of the Court. The above incident occurred on 27th August, 1992 which in our view is the day the cause of action arose lapsing on or about 26th August, 1993.

The notice of intention to sue issued by the appellant against the respondent in which he enumerated the above three incidences cumulatively as giving rise to the cause of his grievance against the respondent on behalf of its agents and or servants is dated 26th January, 1993; outside the timeline for lodging complaint with regard to the first two incidences namely, that of 31st July, 1990 and 20th June, 1992 respectively, if they are to be treated as separate and distinct incidents; but within the timeline for lodging complaint with regard to the last incident as already mentioned above. However, if these were to be taken as interrelated incidents forming a continuous chain of events then the notice of intention to sue was lodged within time.

It is on record that the notice of intention to sue was accordingly acknowledged receipt of by the respondent. There is a verifying affidavit on record. Although it is not clear as to which document the verifying affidavit was in respect of, there is indication therein that appellant commenced a suit against the respondent on 20th January, 1993 in furtherance of his intention to sue, which subsequently proceeded as Civil Case No. 2389 of 1994. Contents of the same verifying affidavit indicate that the suit was subsequently dismissed for want of prosecution occasioned by alleged lack of finances to prosecute the same. Appellant is on record as deposing in the same verifying affidavit that upon successfully seeking leave of court to sue as a pauper, directions or orders were given that Civil Case No. 2389 of 1994 dismissed for want of prosecution be continued as Civil Case No. 668 of 2005 whose proceedings resulted in the instant appeal. The said order is however not traced on the record. Neither does the content of the amended plaint nor proceedings in HCCC No. 668 of 2005 on record confirm that

information. In the absence of proof of the order that revived Civil Case No. 2389 of 1994 and directed that it be continued as HCCC No. 668 of 2005, the learned trial Judge cannot be faulted for treating HCCC No. 668 of 2005 as a distinct court process seeking to vindicate appellant with regard to causes of action relating to the three instances when appellant's possible causes of action against the respondent arose with the last falling on 26th August, 1993, a period of twelve (12) years to the commencement of HCC No. 668 of 2005. This was definitely outside the twelve (12) months period stipulated in **section 3(1)** of the **Act**. The learned Judge was therefore entitled in the circumstances to hold that the appellant's claim in the circumstances was therefore time barred.

The appellant has urged us to find succor in the ruling of **Aroni, J.** of 10th June, 2010 and the proceedings before the trial Judge of 20th December, 2012 and sustain his claim for merit consideration.

We have revisited the said ruling and find that it related to appellant's application for leave to amend the plaint. There is also observation therein that indeed the respondent raised objection to the appellant's suit as laid as follows:

> **"The suit is bad in law for:**
>
> **a) Contravening the provisions of section 13A of the Government Proceedings Act, Chapter 40 of the Laws of Kenya.**
>
> **b) That Plaint is statute by barred.**
>
> **c) The plaint offends the provisions of Order VI and VIII of the Civil Procedure Rules, (sic)"**

In resolving the above and upon considering the rival submissions therein, the learned Judge expressed herself *inter alia* as follows:

> **"I have not had the benefit of the ruling and other cases made reference to by the parties; however, it is clear from the plaint filed on 7th June, 2005 that the same falls short of the requirements of Order VI and VII of the Civil Procedure Rules. I do appreciate that the plaintiff appears in person, I have also considered his plea that the Court should ignore the procedural defects.**
>
> **In considering the application before me, I have in mind the new amendments to the Civil Procedure Act, Amendment No. 6 of 2009 that came into effect on the 23rd of July, 2009. Section 1A specifically requires the court in exercise of its power to give effect to the overriding objective of the Act and Rules made thereunder, to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. I am also recognizant of the fact that rules of procedure are handmaiden and not mistresses of justice."**

Our take on the above pronouncement by the learned Judge is that the learned Judge refrained from pronouncing herself on the issue of lack of competence of the appellant's claim for what the learned Judge termed "**lack of benefit of the ruling and other cases made reference to by the parties hence the focus on the core issue of the application namely leave to amend**", hence the learned Judge's main focus in that ruling being whether leave to amend was warranted or not. We therefore find nothing in the above pronouncement to fault the judge for not finding succor in the said ruling for appellant's time barred claim.

Turning to the proceedings before the learned Judge, it is evident from the record that all that the learned counsel **Miss. Gachoka**, for the respondent did on that date of 20th December 2012, was to intimate to the Court that she would be raising a preliminary objection to the competence of the appellant's claim which she never did till the trial concluded. The above being the correct position on the record, we find no basis for faulting the learned Judge for revisiting the issue of the competence of appellant's and pronouncing himself thereon as he did.

The above conclusion now leads us to the determination of appellant's assertion that directions had been given in the order granting him leave to sue as a pauper that HCCC No. 668 of 2005 be continued as Civil Case No. 2389 of 1994. Paragraph 6 of the amended plaint reads as follows:

> **"6. This Hon. High Court Civil Suit No. 2389 of 1994 that this suit No. 668 of 2005 took over was dismissed under Order XVI Rule 6 of the Civil Procedure Rule on 22nd June, 2001 and the Order that allow a fresh suit and the Order that I attached to this plaint marked as (Exh. No. 104) for reference."**

There is clear indication in the above paragraph that the order was annexed to the plaint. As mentioned earlier on herein, that order is not included in the record. The position in law is that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmation of the issue. That is the purport of **section 107(1), 109** and **112** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, which provide as follows:

> **107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**
>
> **112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

In **Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013] eKLR** the court expressed

itself *inter alia* as follows;

> **"We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."**

See also **Nation Media Group vs. Jakayo Midiwo [2018] eKLR** in which it was stated as follows:

> **"On the other hand, evidence is the cornerstone of any trial. Cases are won or lost on evidence presented and the applicable laws. That is why a whole statute was enacted, the Evidence Act, to provide for both the standard and burden of proof in a trial."**

The above being the position, we reiterate our earlier finding that in the absence of such proof, appellant's claim in HCC No. 668 of 2005 is a stand-alone claim distinct from the suit that was dismissed for want of prosecution HCCC No. 668 of 2005 having been filed after twelve (12) years after the cause of action accrued, it was hopelessly incompetent and did not at the trial and does not on appeal fall for merit consideration.

Lastly, appellant has also faulted the learned Judge for failure to apply the overriding objective principle to sustain the claim in the manner **Aroni, J.** applied those principles to sustain the application for leave to amend the plaint when similar objection was raised against his request for leave to amend.

In **Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010**, stated *inter alia* as follows:-

> **"It seems to us that in the exercise of our powers under the "02 principle" what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are "02" 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 "02 principle" could easily become an unruly horse."**

Further in **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008) (unreported)** the Court stated as follows: -

> **"That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."**

And in **Murandula Suresh Kantaria vs. Suresh Nanalal Kantaria, Civil Appeal No. 277** of **2005 (unreported)**, the Court added the following:

> "**the overriding principle is not a panacea for all ills and in every situation, and that proper basis must be laid before the Court can invoke the same in favour of a party. In exercising the power to give effect to the principle, the Court must do so judicially and with proper and explicable foundation"**

Applying the above threshold to the appellant's complaint herein, it is our finding that we find nothing in the above principle that would have mandated the learned Judge to ignore a clear provision of Statute he was obligated in law to construe, properly appreciate and apply as he did. We find no error in the manner the learned Judge construed the applicable law and considered it in light of judicial precedents arising on the issue which the learned Judge either affirmed or felt bound by them and then vitiated the appellant's claim.

The upshot of all the above assessment and reasoning is that we find no merit in this appeal. It is accordingly dismissed. Due to the nature of the litigation, we direct each party to bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb.)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR