IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA, KIAGE, GATEMBU & SICHALE, JJ.A)

CIVIL APPEAL NO. 368 OF 2014

BETWEEN

MULTICHOICE (KENYA) LTD...APPELLANT

AND

WANANCHI GROUP (KENYA) LIMITED ....1ST RESPONDENT

THE COMMUNICATIONS COMMISSION OF KENYA.....2ND RESPONDENT

KENYA BROADCASTING CORPORATION.........................3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court at Nairobi (Constitutional and Human Rights Division) (Mumbi Ngugi, J.) delivered on 17th *September, 2014 in Petition No. 98 of 2012)*

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JUDGMENT OF OUKO, (P)

A decision was taken by the President of the Court to constitute a bench of five judges to hear this appeal after the Court (Waki, Nambuye & Koome, JJ.A) found the necessity of doing so on the basis of a letter dated 24th October, 2016 from the firm of Sisule Munyi Kilonzo and Associates, representing the 2nd respondent. In the letter, it was contended, like in this appeal that, from the decisions of the courts, including this Court there was no unanimity on the application of **Order 45** of the Civil Procedure Rules; that whereas in some cases this Court has held that a party who has filed a notice of appeal is barred from taking out an application for review under **Order 45**, in other cases it has found that a notice of appeal is a mere expression of an intention to appeal and does not bar a party wishing to apply for review of a decision. Cited in support of the former category is this Court's decision in the case of **Kisya Investments Limited V. The Attorney General & Another** (1966) eKLR. This decision, it was submitted, was in conflict with others from this Court, in the other category like **Yani Haryanto V. E.D & F. Man. (Sugar) Limited,** Civil Appeal No. 122 of 1992; and that the unanimous decision of the five Judge bench in **Equity Bank Ltd V. West Link Mbo Ltd** (2013) eKLR further confirmed that a notice of appeal is in law an appeal and that once it (the notice of appeal) is filed, it is not open to a litigant to seek a review of a judgment. These arguments form the substance of this appeal and for now I say no more on the question.

I take advantage of this appeal to, briefly outline, what in in my view I consider is the correct practice and the proper circumstances for constituting a bench of more than three judges in this Court because the long-held practice appears to have been lost along the way. In the past it was the function of the President of the Court (in the years -1954 to 1977- when the predecessor of the Court had President) or the Presiding Judge in the years immediately preceding the promulgation of the 2010 Constitution, to constitute such benches. Today acting on an oral application, a three-judge bench would direct that the President of the Court constitutes an enlarged bench, like it happened here or in **Trouistik Union International & Another V Jane Mbeyu & Another,** Civil Appeal No 145 of 1990. Sometimes, in response to mail from advocates, the Presiding Judge or President would impanel the bench.

As way back in history as 1954, it was recognized by the predecessor of this Court, in the case of **Income Tax V. T**(1954) E.A 549, that the role of empaneling a five-Judge bench rested with the President of the Court. Spry Ag. V.P explained the process and circumstances of doing so as follows:

> **"I would also remark that where it is intended to ask this Court to reverse one of its own decisions, the President should be asked to consider convening a bench of five judges, although a bench-of –three has the same powers (see Lands Commissioner V Bashir, (1958) E.A. 45)"** (My emphasis).

See also **Nguruman Limited V. Shompole Group Ranch & Another**, Civil Application No. NAI 90 of 2013.

From decided cases the following two situations have been identified as some of the grounds convening a five-judge bench. In the first place, such a bench will be constituted where the Court is being asked to depart from one of its own previous decisions as was stated in **Income Tax V. T** (supra) and reiterated thus in **P.H.R. Poole V R** (1960) E.A 62:

> **"A full court of appeal has no greater powers than a division of the court; but if it is to be contended that there are grounds, upon which the court could act, for departing from a previous decision of the court, it is obviously desirable that a matter should, if practicable, be considered by a bench of five judges."**

In the case of **Peter Mburu Echaria V Priscilla Njeri Echaria,** Civil Appeal 75 of 2001, the Court reiterated that:

> **"Dr. Kamau Kuria intimated before the appeal was heard that he was asking the court to depart from the decision in Kivuitu's case and thus asked for a bench of five judges in accordance with the practice recommended in Poole v R [1960] EA 62. That is why this bench is so constituted. This Court while normally regarding its own previous decisions as binding is nevertheless free in both civil and criminal cases to depart from such decisions when it is right to do so. (See Dodhia v National & Grindlays Bank Ltd & Another [1970] EA 195."**

See also **Joseph Kabui v. R.** (1)[1954], 21 E.A.C.A. 260 on that point. Secondly, the Court may wish to review its conflicting opinions or opinions

that have ignored or without justification departed from settled law. This was explained in **Eric V. J. Makokha & 4 others V. Lawrence Sagini & 2 others,** Civil Application No. NAI.20 of 1994 as follows;

> **"We must now examine the Nyamogo case. We must, of course, treat the holdings in that case with great respect. We are not sitting on appeal from that ruling and have no jurisdiction to make any orders on that case. But the holdings in that case and the orders made in it, have raised eye-brows in the profession as to its correctness. The conclusion is also at variance with the view of the law expressed in the court below not only in the Nyamogo case itself but in the one expressed in the court below in the present application before us. It also seems, *prima facie*, at odds with the common law position as we know it. We think it in the interest of the profession to say which of these conflicting views is right. That explains the somewhat unusual composition of the court.**
>
> **Some muted but not impolite observation was made about the numerical composition of the court by the applicants' counsel but the breadth and sophistication of the submissions made to us for four whole days, justified the strengthening of the normal bench of three by two more heads. Because of the hierarchal structure of the court, it is also the practice adopted to review the inconsistent decisions of this Court. But it would be technical and narrow to suggest that as the two consistent rulings of the High Court only differed from one ruling of the Court of Appeal, the practice of constituting 5 judges recommended and adopted in the Income Tax v T 1974 EALR 546 and followed as recently as October1993 in Trouistik Union International and another v. Jane Mbeyu and another Civil Appeal No. 145 of 1990 should not be followed."** (My Emphasis)

The five Judge bench in **Patrick Gathenya V. Esther Njoki Rurigi & Another,** Civil Application No. 290 of 2005 was similarly constituted to resolve an apparent conflict in previous decisions of the full Court in **Rafiki Enterprises Ltd. V. Kingsway Tyres & Automart Ltd,** Civil Appl. Nai. 375/95 (UR), on the one hand, and **Musiara Limited Ltd V. William Ole Ntimama** (2004) eKLR, which was, applied in **Chris Mahinda t/a Nyeri Trade Centre V. Kenya Power & Lighting Co. Ltd** Civil Appl. Nai. 174/05 (UR), on the other hand, on whether the Court of Appeal has residual jurisdiction to reopen the appeal once decided.

Though the Rules Committee is empowered under **Section 5(3)(i)** of the Appellate Jurisdiction Act to make rules to fix the number of judges of the Court comprising an uneven number not being less than three, no such rules, unfortunately have been made. So that, apart from **Section 5(3)(i)**, and the general provisions in **section 13(1)(b)** of Court of Appeal (Organization and Administration) Act, the impaneling of benches has been a matter of practice and not rules of Procedure. Under **section 13(1)(b)** aforesaid, the President of the **e** on;

“(b)…responsible for the allocation of cases and the constitution of benches, including ordinary and extraordinary benches, of the Court”

The Act does not define what extraordinary benches are but, in my assessment, these would not be the usual benches of one judge (in chambers) or three in open court, but of a number greater than these provided that the number is odd. The practice and circumstances of constituting benches will be streamlined if the proposals to amend the rules of the Court are adopted.

I have explained that the only reason why this appeal was placed before an extraordinary bench is the perceived conflict in the decisions of this Court on the construction of **Order 45** aforesaid. But how have we reached here?

In 2006 the International Telecommunication Union (ITU) issued guidelines to its member states directing that the transition from analogue to digital broadcasting must be effected by 17th June, 2015. Though that was the deadline for the switchover, the Government of Kenya set itself a deadline of December 2012.

To achieve this, a Task Force that was established for this transition, recommended that the migration be undertaken in three phases and that there be a common transmission of digital broadcasting signal, which would be availed by a separate entity.

The 2nd respondent (the then Communications Commission of Kenya) (CCK) was designated as the sector regulator for broadcasting while the Kenya Broadcasting Corporation (KBC) (the 3rd respondent) as the public broadcaster and mandated to incorporate an independent company to manage signal distribution services in order to avoid conflict of interest. These recommendations led to the enactment of the Kenya Communications (Amendment) Act 2008. It extended CCK’s licensing responsibilities as well as other regulatory powers and duties in relation to broadcasting. On the other hand, KBC was granted conditional authority to provide broadcasting signal distribution services as the public broadcaster and, in accordance with the recommendation of the Task Force, incorporated a subsidiary, M/s Signet Limited to offer distribution services.

Wananchi Group (Kenya) Limited, the 1st respondent, a player in the industry was discontented by the way they were being treated in the process and petitioned the High Court to declare that CCK had discriminated against it in breach of **Article 27(1)** and **(2)** of the Constitution, violated its freedom of media as enshrined in **Articles 34(1)** and **(2)** of the Constitution; that CCK be ordered to enforce the provisions of **section 46(N)** and **46(O)** of the Kenya Information and Communications Act, 1998 as well as **Regulations 11** and **16** of the Kenya Information And Communications (Broadcasting) Regulations, 2009 as prescribed with respect to all parties and not selectively; that KBC be restrained, by itself or through its subsidiary, Signet Limited from providing signal distribution services until it is duly licensed under **section 46N** of the Kenya Information and Communications Act, 1998 .

Briefly, the 1st respondent’s case was that CCK was treating some players in the broadcasting industry more favourably in respect of access to digital broadcasting on the broadcasting signal distribution system provided by KBC; that both CCK and KBC are in breach of their statutory duty because they are offering a commercial advantage to Multichoice (Kenya Limited) (the appellant) over the rest in the industry by allowing it to broadcast on the digital platform while denying the 1st respondent and the rest similar opportunity; that by affording the appellant preferential treatment, the CCK and KBC are not only in breach of statutory provisions contained in the Kenya Information and Communication Act, but are also in violation of **Articles 27** of the Constitution on the right of the petitioner to equal treatment before the law, **Article 33** on the right to freedom of expression, **Article 34(1)** on freedom of the media and **Article 47** on the right to fair administrative action.

The 1st respondent’s request to KBC to offer its service on the digital platform appears to have been turned down leading to the former lodging with CCK a complaint of unfair trade practices against KBC. The complaint was similarly not acted upon.

In summary, I understand the 1st respondent’s grievance to have been that it had been denied an equal opportunity like the appellant through GoTV in a joint venture with KBC to broadcast on the digital platform.

Obviously, CCK and KBC denied the accusations arguing that the Minister had the power under **section 46(1)** to make transitional provisions; that it had invited applications for issuance of broadcast licences under the new regulatory regime but the High Court (Warsame J, as he then was) had issued orders in **Magic Radio Ltd V. The Communications Commission of Kenya,** Misc Civil Applic No. JR 284 of 2011, to restrain the issuance of broadcast licences under the new regulatory framework; that in another suit challenging the decision of the State to switch from analogue to digital broadcasting, the High Court, Lenaola J, (as he then was) had also in **Media Owners Association V. The Communications Commission of Kenya and 2 Others,** Petition No. 244 of 2011, issued injunctive orders restraining CCK from interfering with licences, frequencies, spectrums and broadcasting services pending the hearing and determination of the petition. In these circumstances, CCK argued, it could not commence the process of issuing new licences; that the 1st respondent being a new entrant in the frequency distribution field and with the court orders in place, there was no framework under which it could be granted a licence, and therefore one could not talk of discrimination as the relevant law had been stayed by the court; that KBC was authorized to provide the services in question before the new law came into force, and that the new law allowed it to continue providing the services. The appellant agreed with the position taken by CCK and KBC.

Mumbi Ngugi, J. after considering the arguments summarized above, and for the purpose of this appeal, set out to answer the question; whether the 1st respondent’s constitutional rights under **Articles 27**, **33** and **34(1)** of the Constitution were

violated by the actions of CCK and KBC enumerated in the previous paragraphs.

The learned Judge was satisfied, from the evidence before her, that KBC had not applied for a signal distribution licence after the expiry of one year from the commencement date, and to that extent, the 1st respondent was right in stating that KBC was operating in breach of the law. But that omission, in her view, did not amount to a violation of the 1st respondent's rights; and that though this failure may have been a demonstration of CCK's dereliction of duty, it did not in any way curtail the 1st respondent's rights.

All in all, the Judge was satisfied that CCK had not failed, as the industry regulator, to adequately perform its statutory mandate in view of the existence of court orders which restrained it from issuing any licences under the Kenya Information and Communications Act. To that extent, the Judge found no merit in the petition against CCK. She reiterated on the point that;

> **"77. In the circumstances, I am unable to issue any of the orders sought by the petitioner. With regard to the orders that the petitioner is seeking against the CCK, such matters are already the subject of the <u>Media Owners and Magic</u> <u>Radio</u> case which are still pending before Lenaola, J, and it would be in its interest to be enjoined in the matters, if it is not yet a party, so that it can agitate its claim before the court".**

Turning to the claims against KBC that it was not only giving preferential treatment to the appellant by allowing it to broadcast on the digital platform, but also permitting it, through GoTV, to sell locked set-top boxes which could only receive content from GoTV, the Judge said that if that be the case, then it would not only be in breach of the policy guidelines and the statutory requirements, but also amount to limiting the right of the public to receive information under **Article 33**.

She then said this in closing;

> **"78. I do find and hold, however, that the sale to consumers of locked set-top boxes limits the rights of the public under Article 33 of the Constitution, is nor in conformity with the provisions of the governing law and violates the stated government policy with regard to information and communication as contained in the ICT Sector Policy Guidelines. I therefore direct that such set-top boxes as may be sold to consumers be open and operable between networks. Whatever decision will emanate from the court with regard to the issuance of broadcast licences now pending before the court, the body charged with issuance of such licences must ensure that the principles of fairness, equity and responsiveness to audience needs are respected".**

This paragraph is the reason for the constitution of this extraordinary bench. The appellant was offended by it and returned to Mumbi Ngugi, J with a motion quite tellingly expressed to be brought under **Articles 19, 20, 22, 23** and **259** of the Constitution and **Rules 3, 19** and **23** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 as well as the inherent powers of the court. If the provisions upon which the motion was brought were telling, the prayers were themselves unusual. I can do no better than to employ the very words used by the appellant without attenuating their effect.

> **"1. The Honourable Court be pleased to give directions as to whether the decree dated 28th May 2013 and issued on 5th July, 2013 (the decree') is properly drawn.**
>
> **2. The Honourable Court be pleased to issue directions as to whether the decree made as paragraph 78 of the judgment dated and delivered on 28th May 2013 ('the judgement') should have been reflected in the decree;**
>
> **3. Should the Honourable Court determine that paragraph 78 of the judgment should have been reflected in the decree, <u>the Honourable Court be pleased to review that part of the judgment and consequential decree (as amended) that determined that the sale to consumers of locked set-top boxes limits the rights of the public under Article 33 of the Constitution,</u> is not in conformity with the provisions of the governing law and violates the stated government policy with regard to information and communication as contained in the ICT Sector Policy guidelines and that such set-top boxes as may be sold to consumers should be open and operable between networks"** (My emphasis).

It is the highlighted part of the judgment that carried the appellant's message to the court, and the key word is "review". The learned judge understood the appellant to be asking her to confirm that the decree ought to contain the contents of paragraph 78 in order to conform to the terms of the judgment, and thereafter to review the part of the judgment regarding the set-top boxes; that the 1st respondent did not seek any orders relating to set-top boxes. The complaint was premised on the fact that the court, without jurisdiction addressed the matter of set-top boxes when it was not before her; and that the court ought to have confined its consideration of the case to licensing of signal distribution and not set-top boxes.

Based on the foregoing, and the learned Judge having understood the application to be for review, isolated two issues for determination; whether the appellant, having filed a notice of appeal to challenge the judgment, was at the same time entitled to seek a review of the very judgment. The second issue, which by necessary implication depended on the answer to the first issue, was, whether the appellant had satisfied the conditions for the grant of an order of review under **Order 45** of the Civil Procedure Code.

On the first question, whether under **Order 45,** the filing of a notice of appeal to this Court is or is not a bar to the filing of an application for review, the learned Judge, observed from her research that, there are **"several conflicting decisions on this point, both from the High Court but also from the Court of Appeal"**. She cited the decisions where she found this, to which I will return. I have keenly studied those decisions and can confirm, save for one, in the rest the courts have been quite

clear and unanimous, that a notice of appeal is not an appeal but only a manifestation of intention to appeal.

In the end, the Judge arrived at that conclusion, choosing to go with the authorities that state that a notice of appeal is not an appeal but is a means through which a party evinces an intention to appeal. Consequently, she declared that the applicant was properly before her despite the notice of appeal in this Court and proceeded to address the next question.

The question was whether paragraph 78 of the judgment could be included in the decree, and if so, the court was asked to review it. Once again after reviewing the law in **Order 45** and several decisions on the relief of review, the learned Judge rejected the invitation to review her judgment, holding that;

> **"37. With the greatest respect to the applicant, I am unable to find an error in the above analysis that can be the subject of review. What the applicant appears to be asking the court to do is to reconsider the facts that were before it at the hearing of the petition alongside the new facts that are set out in the affidavit of Mr. Kyengo and reach a different conclusion. It is, in effect, asking the court to re-open the case so that the applicant can present those facts and arguments that it did not present at the hearing of the petition. The court, in my view, has no jurisdiction to do this".**

Not to be deterred, the appellant now brings this appeal on seven grounds, complaining, in the main, that it was erroneous for the Judge to reject the application for review; that paragraph 78 of the judgment did not represent the pleadings and arguments before that court; that by raising it *suo moto* the Judge exceeded her jurisdiction; that had the question of locked set-top boxes been formulated as one of the ways the 1st respondent's rights were said to have been violated, the appellant would have adequately responded to the claim; that on the authority of **Anarita Karimi Njeru V. The Republic** (1976-80)1KLR 1272, the 1st respondent was required to set out precisely which of its rights had been breached; that the 1st respondent did not plead that the sale of the locked set top boxes infringed on its rights; that, if not reviewed the order contained in paragraph 78 would pose an insurmountable challenge to the appellant to implement; that given the foregoing there was **an error apparent on the face of the record;** and that since the locked set-top boxes were not part of a licensee's network, but devices, the provision of **section 46 O(2)(d)** did not relate to broadcasters or end user devices, such as set top boxes. For this latter reason, the appellant argues that the Judge ought to have, nonetheless reviewed her order under the rubric **"any other sufficient reason".**

In opposition to the appeal, the 1st respondent pointed out that the appellant cannot hide behind the fact that the petition did not specify that the sale and restrictions of set-top boxes breached the 1st respondent's rights, when that fact was explicitly pleaded. The failure by the appellant to respond to the averment could only be blamed on itself and not the learned Judge; that there was no apparent error on the record as there was no sufficient reason for the Judge to review her decision.

The 2nd respondent filed notice of grounds for affirming the decision of the High Court under Rule 98. Whereas the 2nd respondent was happy with the outcome of the application for review, it considered the reason adopted by the Judge in arriving at that outcome erroneous. To it the learned Judge did not have to consider the merits of the application and would have rejected the application right away on the basis that the appellant was not properly before her; that the appellant having filed a notice of appeal was precluded from applying for review of the very judgment it had appealed. Relying on the authorities of **Kisya Investments Ltd V. Attorney General**, Civil Appeal No. 31 of 1995 and **Equity Bank Ltd V. West Link Mbo Ltd** (2013) eKLR, the 2nd respondent submitted that since in filing a notice of appeal, an appeal is deemed to have been filed, the subsequent application taken out by the appellant was incompetent, and on that score should have been struck out. On the substance of the application for review, the 2nd respondent dismissed it as an appeal against the learned Judge's judgment disguised as an application.

This being a first appeal I have re-examined the record, as required by **Selle & Another V. Associated Motor Boat Co. Ltd.& others** (1968) EA 123, in a long line of similar decisions and the following are the conclusions I have drawn, starting with the easier question, whether the Judge ought to have dismissed the application for review on the basis that the appellant had invoked the appellate process by lodging a notice of appeal.

The two limbs of this appeal are based on the construction of **Order 45**, whose foundation is **section 80** of the Civil Procedure Act. The section is in the exact identical language as **Order 45**, at least in so far as the first limb of this appeal is concerned. It states;

> **"80. Any person who considers himself aggrieved—**
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> **a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".** (My Emphasis).

Order 45 like section 80 states that;

“(1) Any person considering himself aggrieved—

> **a. by a decree or order from which an appeal is allowed, <u>but from which no appeal has been</u> <u>preferred;</u> or**
>
> **b. by a decree or order from which no appeal is hereby allowed….”** (own emphasis).

Both provisions require no further elucidation as they are as clear as they can be; that a party will only be entitled to seek review, if he has not preferred an appeal or if there is no right of appeal. While the statement requires no explanation, the dispute is on the question of, when an appeal is “preferred”? Or put differently, is a notice of appeal an appeal?

By **Rule 75** of the Court of Appeal Rules, a person desiring to appeal to the Court of Appeal from the High Court or courts of equal status has, as a first step to give notice in writing. The notice must be lodged with the registrar of the court from which the person intends to appeal. That notice serves a significant purpose both in the courts below and this Court. For an application seeking an order stay of execution, an injunction or a stay of any further proceedings under our **Rule 5(2)(b)** to succeed it must be demonstrated by the applicant, among other things, that a notice of appeal has been lodged in accordance with **Rule 75.**

The Rule states;

> **“5. (2) Subject to sub-rule (1), the <u>institution of an appeal</u> shall not operate to suspend any sentence or to stay execution, <u>but the Court may</u>—**
>
> **a. ……..**
>
> **b. in any civil proceedings, <u>where a notice of appeal has been</u> <u>lodged</u> in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just”.** (Emphasis)

The Court in **<u>Nairobi City Council V. Resley</u>** [2002] 2 EA 493, made the following clarification;

> **“It is trite law that without a notice of appeal against particular orders, we would have no jurisdiction to grant a stay of those orders…. It is also trite law that once we have no jurisdiction, we must down tools and say we can go no further, we must stop here.”**

Likewise, for the purpose of applying for an order of stay of execution under **Order 42 Rule 6(4)** of the Civil Procedure Rules provides that;

> **“6. (1)No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**
>
> **.....**
>
> **<u>4. For the purposes of this rule</u> an appeal to the Court of Appeal shall be <u>deemed to have been filed</u> when under the Rules of that Court notice of appeal has been given”.**
>
> **(**Emphasis).

It is the notice of appeal, evincing the aggrieved party’s intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4), respectively. For the purposes of the latter, an appeal to the Court of Appeal is **“<u>deemed</u> to have been filed when under the Rules of that Court notice of appeal has been given”.** This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.

In colloquial terms, to deem something to be, is to “regard” or “consider” it as the thing though it is not, in fact the thing. It is, as Griffith C.J. called it, a fiction. In the Australian case of **<u>Muller V. Dalgety & Co. Ltd</u>**, (1909) 9 CLR 693, at p 696, Griffith C.J. expressed as follows the meaning of the term:

> **"The word " deemed " may be used in either sense, but it is more commonly used for the purpose of creating what *James* L.J. and Lord *Cairns* L.C. called a "statutory fiction" (see *Bill* v. *East and West India Dock Co.)* (1), that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced."** (Emphasis supplied).

The word "deemed" as used in **Order 42 Rule 6(4)** clearly conveys the construction that it is not an appeal, strictly speaking.

Order 42 Rule 6(2) can be said to be in the category of what are commonly termed **'deeming provisions'**. It only deems a notice of appeal as "an appeal".

The term "deem" was defined by this Court in **Telkom Kenya Ltd vs. Jeremiah Achila Gogo & Another** Civil Appeal No. 153 of 2004, as follows:

> **"The word "deemed" is used a great deal in modern legislation – sometimes it is used to impose for purposes of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain – sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible..."**

See also the decision of the East African Court of Justice in **Anyang' Nyong'o & 10 others V. Attorney-General & others** (2008) 3 KLR (EP) 398, where once again it was explained that **" the Legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist".**

Though the provisions of **Rules 82 to 87 (except 85)** distinguish an appeal from a notice of appeal, they also show that the two are mutually complementary in the sense that one cannot exist without the other. An appeal, in terms of **Rule 82 (1)** is;

> **"... instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—**
>
> **a. a memorandum of appeal, in quadruplicate;**
>
> **b. the record of appeal, in quadruplicate;**
>
> **c. the prescribed fee; and**
>
> **d. security for the costs of the appeal".**

An appeal is preceded by lodgment of a notice of appeal. If appeal is not instituted within the appointed time above, the notice of appeal will, by the provisions of **Rules 83** and **84** be deemed to have been withdrawn or struck out, as the case may be.

An appeal being a judicial examination by the higher court of the decision of a lower court, is entertained on the basis of the grounds contained in the memorandum of appeal. The appeal is presented to Court in form of a record, containing copies of all documents essential to the appeal, the pleadings, the trial judge's notes, exhibits, the judgment or order impugned and the certified decree or order. It is important to note that the notice of appeal is listed as one of the documents that must form part of the record of appeal. See **Rule 86**. That should suffice to demonstrate that in the strict sense, an appeal does more in the appellate process than a notice of appeal. On the other hand, and as already shown, apart from enabling courts to entertain applications for stay, the other purpose of the notice of appeal is merely to convey the intention to appeal. See **Motel Schwetser V. Thomas Cunningham & Another** (1955) 22 EACA 252, **Ujagar Singh V. Runda Coffee Estates Ltd.** (1966) EA 263 and **Equity Bank Ltd V. West Link Mbo Ltd** (2013) eKLR.

It must follow that, though "appeal" is defined in **Rule 2** of the Court's rules, in relation to appeals to this Court to include an "intended appeal", this definition must be confined to its text and context, reading all the relevant parts of the rules together. That is what this Court advised in this extracted passage from the case of **County Government of Nyeri & another V. Cecilia Wangechi Ndungu** (2015) eKLR;

> **"It is one of the linguisitic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act…"**

To construe the provisions of **Order 45** and to answer the question, whether a notice of appeal is an appeal, the court has to do so with reference to all the relevant provisions.

This brings me to the crux of the first limb of this appeal, at which point it is apposite to state that as far my reading of the authorities in this field goes, there has never been any major inconsistencies in interpretation of **Order 45**, both by the High Court and this Court. Save for the case of **Kisya Investments Ltd**, (supra), all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrated by the review of sampled decisions, including those cited in the appeal; that the court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged. Conversely, the court will not hear an application for review when an appeal has been instituted under **Rule 82** of this Court's rules.

This position was accepted way back in history in 1955 by the Court of Appeal for Eastern Africa in the case **Motel Schwetser V. Thomas Cunningham & Another** (1955) 22 EACA 252, which has been cited in a number of decisions. It was cited in **The Chairman Board of Governors Highway Secondary School V. William Mmosi Moi,** Civil Application No. 277of 2005 (Bosire, Githinji and Waki, JJ.A), with approval thus;

> **"A notice of appeal is however only a formal notification of an intention to appeal and it cannot be said that the aggrieved party had "preferred" an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent, having filed a notice of appeal which had not been withdrawn had a right to apply for review was answered in the affirmative by this Court in Yani Haryanto v E. D & F. Man (Sugar) Ltd. Civil appeal No. 122/92 (ur). In that case the application for review under order 44 of the Civil Procedure Rules was filed two years after the filing of the notice of appeal. After examining the relevant provisions of the law, the court stated:-**
>
> **"The Court of Appeal for Eastern Africa in the case of Motel Schwetser v Thomas Cunningham & Another (1955) 22 EACA 252, held that an appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 of the East African Court of appeal Rules, 1954. Rule 81 of the Court of Appeal Rules, in addition, requires the inclusion of a memorandum of appeal. This statement of the law regarding the status of a notice of appeal was subsequently approved by the Court of appeal for Eastern Africa in the case of Ujaga Singh v Runda Coffee Estates Ltd [1966] E.A 263. So, quite clearly, the Judge had jurisdiction to entertain the application for review…….**
>
> **So that, the Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However, upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other"**

The Court in the two cases placed reliance on two other old but equally important cases for the point being made here, **Yani Haryanto V. E. D & F. Man (Sugar) Ltd.** Civil appeal No. 122/92 (ur) (Gicheru, Kwach & Cockar, JJ.A) and **Ujaga Singh V. Runda Coffee Estates Ltd** [1966] E.A 263. In the former (**Yani Haryanto)** the principle was highlighted as follows;

> **"The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, …. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule**
>
> **79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed... What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore, despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal".** (My emphasis).

In **Philip Ochilo Orero v Ambrose Seko** (1984) eKLR, the appellant's appeal to the High Court having been rejected summarily by Scriven, J, (as he then was) he moved Schofield J with a notice of motion under **section 80** of the Civil Procedure Act and under **order XLIV rule 1** to review Scriven J's order, and to admit the appeal to hearing. Schofield, J. refused to review the orders of dismissal and dismissed the application. On appeal to the Court of Appeal (Hancox JA, Chesoni & Nyarangi Ag JJ.A), it was stated that since Scriven, J's order was appealable but no appeal had been preferred, the case fell within **section 80(a)** of the Civil Procedure Act and was capable of being reviewed under that section.

A similar view was expressed in the following passage from **I.C.Kamau Ndirangu v Commercial Bank of Africa Limited** (1994) eKLR, where Cockar,- as he then was -Omolo & Tunoi- as he then was - JJ.A, restated the proposition thus;

> **"However, Mr Gatonye is on a much stronger pitch in his other reason which is supported by a decision of this Court in Civil Appeal No 122 of 1992 Yani Haryanto v ED &F Man (Sugar) Ltd (unreported) that a mere filing of notice of appeal did not constitute preferment of an appeal. The learned judge had clearly erred in holding that the appellant had by virtue of order 41 rule 4(4) of the Civil Procedure Rules preferred an appeal by filing his notice of appeal. Order 41 rule 4(4) of the Civil Procedure Rules is confined only to the purpose of staying execution".** (My Emphasis).

If further proof is required that this question has been long settled, I will cite, finally the case of **Noradhco Kenya Limited V. Gloria Michele,** (1998) eKLR**,** where Pall, JA also agreed with the earlier decisions in **Yani Haryanto** (supra) and **Motel Schwetser** (supra), and added that;

> **"I agree that the remedy of review is open only when the applicant having a right of appeal has not already preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. But the short point in question here is: Can the lodging of the notice of appeal be tantamount to preferring an appeal itself? The filing of a notice of appeal in my humble view cannot deprive a party of his right under**

O.44 r. 1 of the Civil Procedure Rules to apply for review and the notice of appeal cannot be tantamount to preferring an appeal.

> **..... I am therefore unable to agree with Mr. Ndubi that as the applicant had lodged a notice of appeal which was pending when it applied to the superior court for review of the summary judgment, the superior court did not have jurisdiction to entertain the said application and that there was therefore very little chance of the applicant having a successful appeal from the order refusing the application which did not lie in law".**

The consistency in these authorities is inescapable. As indicated, although Mumbi Ngugi, J. lumped **Equity Bank V. Westlink** (supra) together with **Kisya Investments** (supra) as authority for saying that a party who has lodged a notice of appeal is barred from filing an application for review, my careful reading of **Equity Bank V. Westlink** (supra) does not support that position. In **Kisya Investments** (supra), the Court (Kwach, Tunoi and Lakha, JJ.A) took new tangent and broke the long established chain when it declared that;

> "**The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law".**

The only other case that appears to have followed the same path as **Kisya Investments** (supra) is **Tanjal Investments Ltd V. El Nasr Export & Import Company** (2004) eKLR (Tunoi, Okubasu, and O. Otieno, JJ.A). In that case, after judgment was entered against the appellant, it filed a notice of appeal but failed to file the record of appeal. Being out of time, it applied to a single judge of this Court in chambers for extension of time to bring the appeal out of time. It was dismissed. With the notice of appeal still on record, it returned to the Judge in the High Court to review or set aside the judgment. On the ground that it had filed a notice of appeal, the respondent raised a preliminary objection and the application for review was dismissed. On appeal to this Court, and though counsel for the appellant cited **Motel Schweitzer** (supra), **Yani Haryanto** (supra), and **Thomas Edward Cunningham**, (supra), and counsel for the respondent, on the other hand cited **Kisya Investments** (supra), the Court went by the conclusions in the latter; that the appellant having filed a notice of appeal it could not by a subsequent application made thereafter proceed by way of review. In agreeing with the finding of the High Court and borrowing from **Kisya Investments** (supra), the Court said;

> "**Mr. Amin brought to our attention this Court's decision in Kisya Investments Limited v. The Attorney - General & R. L. Odupoy – Civil Appeal No. 31 of 1995 (unreported)… But even more important is the fact that the appellant applied for a review after its efforts for lodging an appeal had come to naught".**

While it cannot be denied that **Kisya Investments** (supra) case has been followed in some cases, it is equally true that the predominant position by the courts is that the mere filing of the notice of appeal will not bar a party from taking out an application for review. I endorse that as the correct position.

The five Judge bench decision of this Court in **Equity Bank Ltd V.West Link** (supra) did not apply **Kisya Investment** (supra). In fact none of the learned Judges in their separate but unanimous judgments cited it or any other authority aligned to the proposition it advances, perhaps because the authority was not relevant to the sole issue before it, the jurisdiction of this Court to entertain an application under Rule 5(2) (b) of the Court of Appeal Rules.

For example Githinji, JA after noting that **Rule 5(2) (b**) is the counterpart of **Rule 6(1)** of **Order 42** Civil Procedure Rules, quoted with his approval the following passage from **Safaricom Limited V.Ocean View Beach Hotel Limited and two others** (2010) eKLR:

> "**At the stage of determining an application under Rule 5(2) b. there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court." (*per Omolo, JA)***

Githinji JA noted that, although by **Rule 2**, an appeal in relation to appeals to the Court is defined to include an intended appeal, that definition is limited only to the jurisdiction to hear **Rule 5(2)(b)** applications.

Musinga, JA considered that it was relevant in considering what an appeal is to also bear in mind **Order 42 rule 6 (4)** of the Civil Procedure Rules. Because it is his decision that has been cited and misunderstood in some of the authorities cited as leaning towards **Kisyan Investments**, it is, important to reproduce the relevant part. The learned Judge said;

“46. What is “an intended appeal”? Rule 75 (1) states as follows:

“Any person who desires to appeal to the Court ***shall give notice in writing, which shall be lodged in*** **duplicate with the registrar of the superior court.”**

The first step in instituting an appeal is the filing of a notice of appeal. Order 42 rule 6 (4) of the Civil Procedure Rules is also relevant in considering what an appeal is. It states that:

“for the purposes of this rule an appeal to the Court ***of Appeal shall be deemed to have been filed when under*** **the Rules of that Court notice of appeal has been given.”**

47. It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant can move this Court for grant of an order of stay under rule 5 (2) (b) of this Court’s Rules. The Court is said to be exercising special independent original jurisdiction because in considering whether to grant or refuse an application for stay it is not hearing an appeal from the High Court decision”. (My Emphasis).

The learned Judge in the above passage made two critical points. In reference to the definition of “appeal” to include an “intended appeal” he made it clear that the definition “intended appeal” was intended specifically to give the Court jurisdiction for the purpose of **Rule 5(2)(b**) applications. Secondly, he stressed that the notice of appeal is “deemed” to be an appeal for the grant of an order of stay under rule 5 (2) (b). I do not, with respect see how that conclusion can be compared with that of **Kisyan Investments**.

The other three judges were equally in agreement. Kiage**,** JA said;

“**The jurisdiction exercised under Rule 5(2)(b) is anchored and founded on Rule 74. Without a Notice of Appeal having been filed, this Court cannot issue any of the orders under Rule (5) (2) (b)”.**

M’inoti, JA for his part concurred thus;

“**In my view, Rule 5(2) (b) was to address powers of the Court of Appeal that are incidental to hearing and determination of appeals from the High Court. Those powers were never meant to exist independent of the jurisdiction of the Court to hear appeals. In fact, and in practice they do not.**

The fact of the matter is that the Court of Appeal cannot assume or exercise jurisdiction in an application under rule 5(2) (b) unless a competent notice of appeal has been filed. The filing of a Notice of Appeal from the decision of the High Court is a condition precedent before the powers under Rule 5(2) (b) can be invoked. This position is reiterated in Order 42 Rule 6(4) of the Civil Appeal Rules, 2010 which provides that an appeal to the Court of Appeal is deemed to have been filed when a notice of Appeal has been given under the Court of Appeal Rules. It is for this reason that rule 2 defines an appeal to include an intended appeal (i.e. where a notice of appeal has been filed). In my view Rule 5(2) (b) read together with rule 2 leaves no doubt that the powers under Rule 5(2) (b) are exercised only in the context of an appeal”.

Finally, Sichale, JA, agreed with Omolo, JA’s holding set out earlier in **Safaricom Limited V. Ocean View Beach Hotel Limited (**supra)**,** although she erroneously attributed it to **Ruben & 9 others V. Nderito & Another** (1989) KLR. She summarized her view on the matter stating that;

“Indeed, the Court of Appeal cannot entertain such an application (under Rule 5(2)(b)) **unless a notice of appeal had been filed. To this extent I am in agreement with the learned Counsel for the applicant that the basis of an application for stay is the notice of appeal”.**

In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.

So, quite clearly, the learned Judge had jurisdiction to entertain the application for review as no appeal had been filed.

In the result, the ground on which the 1st respondent invited the Court to find the learned Judge ought to have relied upon in rejecting the application for review is bereft of merit and is accordingly rejected.

The next question is, whether the applicant made out a case for review of the Judgment. The second limb of **Order 45 Rule 1** stipulates as follows;

“Any person considering himself aggrieved—

a. by a decree or order …..and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

I started this judgment by observing my curiosity at the manner the prayers and the enabling provisions of the law were drafted. An application for review must be premised on three grounds, discovery of new and important matter or evidence, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. From the cited enabling provisions and the grounds in support of the application, it is not readily apparent which of the three grounds set out above in **Order 45 Rule 1** was being pursued. What, in my view, approximates the grounds is ground (vii) in the application where the applicant asserts that **"there is an error apparent on the face of the record"**, though in the written submissions there is a mention that the learned Judge ought to have considered the last ground, **"for any other sufficient reason"** to review her decision.

The appellant went on to identify the errors, not on the face of the record, but which were allegedly committed by the learned Judge. They include: that the learned Judge misapplied **section 46 O(2)(d)** of the Kenya Information and Commissions Act to the set-top boxes provided by a broadcaster to its consumers, yet that provision can only apply to the holder of a signal distribution licence; that she made an order against the appellant and other broadcasters when there was no prayer in the petition for any such order; that the petition did not set out any constitutional right which had been infringed or how such right had been infringed by the interested party or other broadcasters; and that the learned Judge did not give an opportunity to the parties to address the issue, before making the determination on the boxes.

As I have indicated there were many grounds proffered to support the application. To be precise there were 48 odd grounds for an application for review based on error apparent on the face of the record!

The grounds in the memorandum of appeal and submissions attack, not the exercise of discretion by the Judge in declining to review her decision, but appear to challenge the judgment. What constitutes a mistake or error that is apparent on the face of the record, was succinctly explained in **National Bank of Kenya Ltd V. Ndungu Njau** (1997) eKLR, as follows:

> **"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.**
>
> **In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it"**. (My Emphasis).

I adopt those views as they mirror what happened in the appeal before us, where the Judge arrived at her determination on the basis of the law and evidence before her. If, in the appellant's opinion the conclusions were erroneous, it could only appeal. It bears emphasizing that the phrase **"mistake or error apparent"** by its very connotation conveys the fact that the error envisaged is one which is evident *per se* from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is *prima-facie* visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:

> **"The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."**

See **Chandrakant Joshubhai Patel V. R** [2004] TLR, 218; and **Juma Mzee vs. R** (2020) TZCA 39.

With respect, on the application for review, the learned Judge, once again applied the correct principles and ultimately arrived at the right

conclusion, that this was not a suitable case for review. Not even the stretching of the grounds to include **"for any other sufficient reason"** was going to salvage the application.

Therefore, on a full consideration of the material on record and arguments before us, I have come to the conclusion that no grounds have been presented to us to warrant interference with the learned Judge's exercise of discretion.

Accordingly, this appeal should fail and I would dismiss it with costs to the respondents. As Makhandia, Kiage, Gatembu & Sichale JJ.A agree, it is so ordered.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true *Copy of the original.*

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA, KIAGE, GATEMBU & SICHALE, JJ.A)

CIVIL APPEAL NO. 368 OF 2014

BETWEEN

MULTICHOICE (KENYA) LTD..APPELLANT

AND

WANANCHI GROUP (KENYA) LIMITED..................................1ST RESPONDENT

THE COMMUNICATIONS COMMISSION OF KENYA.........2ND RESPONDENT

KENYA BROADCASTING CORPORATION............................3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court at Nairobi (Constitutional and Human Rights Division) (Mumbi Ngugi, J.) delivered on 17th *September, 2014 in Petition No. 98 of 2012)*

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CONCURRING JUDGMENT OF MAKHANDIA, JA

I have read in draft the judgment of Ouko, (P) and entirely agree with the conclusions and the orders proposed. I have nothing useful to add.

Dated and delivered at Nairobi this 22nd day of May, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA, KIAGE, GATEMBU & SICHALE, JJ.A)

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****

CONCURRING JUDGMENT OF KIAGE, JA

I have read in draft the judgment of Ouko, (P) and entirely agree with the conclusions and the orders proposed. I have nothing useful to add.

Dated and delivered at Nairobi this 22nd day of May, 2020.

P.O. KIAGE

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA, KIAGE, GATEMBU & SICHALE, JJ.A)

CIVIL APPEAL NO. 368 OF 2014

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CONCURRING JUDGMENT OF GATEMBU, JA

I have had the benefit of reading, in draft, the judgment of Ouko, JA (P) and I am fully in agreement with the reasoning and the conclusions. I would only emphasize that where a party has filed a notice of appeal but subsequently applies to the court from which the appeal came to review the decision impugned, that party must, in the first place, withdraw the notice of appeal.

Dated and delivered at Nairobi this 22nd day of May, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA, KIAGE, GATEMBU & SICHALE, JJ.A)

CIVIL APPEAL NO. 368 OF 2014

BETWEEN

MULTICHOICE (KENYA) LTD...APPELLANT

AND

WANANCHI GROUP (KENYA) LIMITED ....1ST RESPONDENT

THE COMMUNICATIONS COMMISSION OF KENYA....2ND RESPONDENT

KENYA BROADCASTING CORPORATION ....3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court at Nairobi (Constitutional and Human Rights Division) (Mumbi Ngugi, J.) delivered on 17th *September, 2014 in Petition No. 98 of 2012)*

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CONCURRING JUDGMENT OF SICHALE, JA

I have had the advantage of reading in draft the judgment of **OUKO (P).** I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Dated and delivered at Nairobi this 22nd of May, 2020.

F. SICHALE

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JUDGE OF APPEAL