IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & KANTAI, JJA)

CIVIL APPEAL NO. 117 OF 2017

BETWEEN

NATIONAL BANK OF KENYA.....APPELLANT

VERSUS

ANTHONY NJUE JOHN.....RESPONDENT

(Appeal from the Judgment and Decree of Employment & Labour Relations Court of Kenya at Nairobi (Monica Mbaru, J.) Dated 22nd February, 2017 in Employment & Labour Relations Cause No. 1278 of 2014)

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JUDGMENT OF THE COURT

The appeal arises from the Judgment of the Employment and Labour Relations Court (ELRC) Nairobi, (**Monica Mbaru, J**.) dated 22nd February, 2017.

The background to the appeal is that, the respondent joined the appellant's (the Bank) establishment on 28th September, 1992, as a clerical officer rising through the ranks to the rank of Manager Sales, earning a salary of Kshs. 194,413.00 per month as at 24th June, 2014 when his services were terminated effective 30th April, 2014, for being of unacceptable performance.

The respondent was aggrieved by that termination and filed a statement of claim dated 4th August, 2014, contending that termination of his employment was malicious, whose particulars were given *inter alia* as follows: failing to give either notice for the intended termination or a fair hearing at all; humiliating him by making false accusations of poor performance against him without giving him adequate opportunity to defend himself; terminating his services without basis or justification for doing so; canvasing allegation of nonperformance; and transferring him from his former Branch to a new Branch with underlying malice with a view to setting him up for termination.

He therefore sought orders for reinstatement to his former position without loss of benefits, payment of his salary arrears and damages for wrongful termination. In the alternative, payment of all lawful terminal dues namely payment in lieu of notice, pay in lieu of leave days earned, salary for the month of June, pay in lieu of leave days accrued May/June 2014, salary for the remainder of the years he would have worked until his retirement as particularized in the claim, all amounting to Kenya shillings 34,870,236/=.

The Bank filed a Memorandum of Reply dated 23rd October, 2014, admitting that the respondent had been its employee but that his services were lawfully terminated in accordance with the terms of the contract of employment, **clause 4.7.2** of the Bank's Performance Management Policy (PMP) and the relevant provisions of the Employment Act, 2007 (the Act). That upon review of his performance in 2013, he was rated as being of unacceptable performance. He was put on a Permanent Improvement Plan (PIP) but failed to improve hence the lawful termination of his employment with the Bank.

The cause was canvassed by way of oral evidence and production of exhibits. In support of his claim, the respondent stated that, he had served the Bank for twenty two (22) years with a clean record and maintained that termination of his services by the Bank was unfair as he had never been served with any notice for poor performance.

David Macharia Muraya (DW1), who gave evidence on behalf of the Bank, stated that, he too had been an employee of the Bank for twenty two (22) years and therefore knew the respondent very well. He was aware the respondent was evaluated both in 2013 and 2014 and rated to be of unacceptable performance hence termination of his employment by the Bank but had no documents to prove his assertion that the respondent was reevaluated in 2014 and still found to be of unacceptable performance.

At the conclusion of the trial, the Judge evaluated and analyzed the record and made observations thereon that there was no evidence to show how the respondent was reviewed in 2014 and found to be of unacceptable performance to warrant termination; that the procedure for dealing with a non performing employee is as set out in **section 41** of the Act under which the Bank was obligated to bring to the attention of the respondent the action they were contemplating against him on account of his alleged poor performance; to demonstrate to the satisfaction of the court that the respondent who had been placed on PIP by the Bank after the 2013 evaluation and scheduled him for re-evaluation in 2014, had infact been so reevaluated in 2014 and still found to be of unacceptable performance.

In light of the above observations, the Judge rendered herself as follows on liability:-

> **" [27] To move outside the law, and the provisions of section 41 of the Employment Act, the resulting adverse action taken against the employee is devoid of procedural fairness. In this case, the claimant had performed well and was moved to a new branch within a short time. He was acting manager at a key branch, Moi Avenue Branch as key officers were either away or had exited. To pay the claimant for his hard work with a termination was most unfortunate. I find no genuine, just or justifiable cause that led to the summary action against the claimant communicated retrospectively on 16*th May, 214 vide letter dated 30th April, 2014. Such I find to be contrary to section 45 of the Employment Act as being unfair."***

Upon finding that the termination of the respondent's employment with the Bank was unfair, the Judge granted the main relief as prayed for as follows:

> **"[29] The remedy of reinstatement is available to an employee unfairly treated by the employer in terms of the parameters set out under section 49 of the Employment Act. Such a remedy is given in exceptional cases and in a situation where such would adequately address an employee who had been visited with grave injustice. In this case, the Claimant was terminated aged 44 years. He testified that he had not been able to secure new employment since he had made effort to start small business.**
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> **[30] Section 12(3) of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act; gives this Court power to order a reinstatement in appropriate cases. The claimant's case stands as one such case where a reinstatement would be the best remedy to address the unfair termination of his employment.**

Turning to the alterative remedy, the Judge made observations thereon *inter alia* as follows:

> **"Such remedy would also address the claim for payment of due salaries for the period of July, 2014 to April, 2029 when the Claimant hopes to retire at 60 years. See Mary Kiptui Chemweno versus Kenya Pipeline Company Limited [2013] eKLR."**

Flowing from the above observation, the Judge directed the Bank to pay the respondent salaries due for 3 years all being Kshs. 6,998,868.00, compensation amounting to 12 months' salary at the last gross salary due on 30th April, 2014 all being 2,332,956.00, leave days due at Kshs.44,742.00, salary for 24 days work in June, 2014 at Kshs.155, 530.00, prorated leave May/June 2014 Kshs.639.50, Notice pay Kshs. 193,199.00; and costs.

The Bank was aggrieved and filed this first appeal raising seven (7) grounds of appeal. It is the Bank's complaints that the Judge erred:

> **a. In making a finding that the respondent's termination was unprocedural and substantively unfair.**
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> **b. In failing to properly appreciate facts and the respondent's own acknowledgement of such poor performance during the performance improvement plan.**
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> **c. In failing to consider both factual and legal considerations for reinstatement of an employee.**
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> **d. In failing to take into account the principles of making an award of compensation as set out under section 49 and 50 of the Employment Act, 2007.**
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> **e. In erroneously awarding compensation equivalent to 12 months' pay without laying any legal basis for the same.**
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> **f. In providing an alternative award of three (3) years' salary without legal basis.**
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> **g. In basing the Judgment on faulty appreciation of the law.**

The appeal was canvased by way of written submissions fully adopted by learned counsel **Mr. Chacha Odera** for the appellant, and **Mrs. J.A. Guserwa** for the respondent without highlighting. Similarity in the cause of action that gave rise to litigation resulting in this Appeal and Civil Appeal No. 118 of 2017 **National Bank of Kenya Ltd versus Samuel Nguru Mutonya**, a common appellant, common grounds of appeal and similarity in the opposing sets of submissions filed in the respective appeals by learned counsel for the respective parties is what accounts for the replication of submissions herein in Civil Appeal No. 118 of 2017.

In support of grounds 1&2, the appellant relied on the holding in the case of **Alfred Nyungu Kimungui versus Bomas of Kenya [2013] eKLR**, and submitted that the Bank has factored the provisions of **section 41** of the Act in its Performance Management Policy at clause **4.7.2** pursuant to which the Bank acted both lawfully and fairly when terminating the respondent's employment with them. The Bank also maintained that the respondent's performance was evaluated in 2013 and rated unacceptable. He was subsequently put on PIP which bore no fruits, hence the lawful and also fair termination of his employment with the Bank. Lastly that the decision to terminate the respondent's

employment being a managerial decision was not amenable for scrutiny and supervision by a court of law and on that account the appellant urged us to reverse the trial court's decision and substitute it with an order affirming the termination of the respondent's employment with the Bank.

In support of ground 3 of the appeal, the appellant relied on the case of **Kenya Airways versus Allied Workers Union Kenya & 3 others [2014] eKLR, section 49(3)** as read with **section 50** of the Act and **section 12(3) (vii)** of the Employment and Labour Relations Court Act and faulted the Judge for the failure to appreciate that the remedy of reinstatement, one of the remedies awarded to the respondent is not an automatic right for an employee. It is discretionary as each case depends on its own set of facts and circumstances. That the Judge therefore failed to exercise that caution hence the failure to bear in mind the spirit of fairness and ends of justice to both parties when ordering the respondent's reinstatement.

It was further appellant's submission that the Judge also failed to bear in mind the factors stipulated for in **section 49(4)** of the Act before awarding the remedy of reinstatement, which include, but are not limited to practicability of reinstatement or reengagement and the common law principle that specific performance in a contract of employment should not be ordered except in very exceptional circumstances, which in the appellant's view, were absent in the circumstances of this appeal. The Judge was also faulted for the failure to balance the interest of the respondent's intention to be reinstated with those of the Bank to bring the employer/employee relationship to an end, thereby creating a situation of servitude and bondage between the Bank and the respondent, a position we were urged to reverse as the same was untenable in the circumstances of this appeal the argued appellant.

In support of grounds **4**&**5** of the appeal, the appellant faulted the Judge for the failure to properly construe and appreciate the intent and purport of **section 49** as read with **section 50** of the Act resulting in an injudicious exercise of discretion when the Judge erroneously awarded the respondent twelve (12) months' salary compensation for unfair termination, which action in the appellant's view, was without basis.

Relying on the case of **Elizabeth Wakanyi Kibe versus Telkom Kenya Ltd [2014] eKLR**, the appellant submitted that compensation by way of an award of damages is not meant to facilitate an unjust enrichment of an aggrieved party but to redress economic injuries suffered by the aggrieved party in appropriate circumstances which according to the appellant were absent in the circumstances of this appeal, considering that the respondent had sufficiently been compensated by an award of reinstatement with full benefits as an employee.

The appellant also urged us to be persuaded by the decision of **Ojwang, J** (as he then was) in **Menginya Salim Murgani versus Kenya Revenue Authority HCCC No. 1139 of 2002**; the case of **Southern Highland Tobacco versus MCQueen [1960] EA 490** and **CMC Aviation Limited versus Captain Mohamed Noor [2015] eKLR** in support of the submission that an award of damages for anticipatory years of employment to the retirement age did not lie; that the remedy of one month's salary in lieu of notice was sufficient compensation for the alleged unfair termination of the respondent's employment with the Bank and that the twelve months' salary compensation in addition to reinstatement together with other attendant reliefs prayed for in the alternative were not only excessive and unreasonable in the circumstances of this appeal but did not also lie in law.

Turning to grounds 6&7 of the appeal, counsel faulted the Judge for erroneously awarding the respondent three years' salary compensation, firstly, beyond the twelve (12) months' salary compensation provided for under **section 49(1) (c)** of the Act; and secondly, because there is no provision for back salary as an alternative remedy in **section 49 (3) (a)** of the Act. We were therefore urged to interfere with and set aside all the items forming the award of reliefs prayed for in the alternative as these did not lie in law.

Opposing the appeal, learned counsel **Mrs. J.A. Guserwa,** submitted that contrary to non-disclosure by the Bank either orally in court or in its written submissions, the impugned Judgment has partially been satisfied by the Bank as the respondent was reinstated back to his employment effective 1st April, 2017. What remained to be satisfied by the Bank according to counsel is payment of all the respondent's accrued employee benefits for the period he was out of employment to the date of his reinstatement.

In response to grounds 1, 2 &3 of the appeal, the respondent submitted that the Judge in the impugned Judgment provided sufficient reasons for finding that termination of the respondent's employment was unfair as there was a clear demonstration of the Bank's noncompliance with the procedural prerequisites set out in **section 41** of the Act, when terminating the respondent's employment.

Turning to grounds 4, 5, 6 & 7 of the appeal, the respondent submitted that the Judge exercised her discretion judiciously and within the principles provided for in **sections 49** and **50** of the Act when allowing all the relief granted to the respondent as redress for the unfair termination of his employment.

To buttress the above submissions, counsel relied on the case of **Bamburi Cement Ltd Versus Willima Kilonzi CA No. 62 of 2015; International Planned Parenthood Federation versus Pamela Ebot Arrey Effiom Civil Appeal No. 132 of 2011**; **Kenfreight EA Ltd Versus Benson K. Nguti CA No. 31 of 2015** all for propositions that obligation lies on the employer to demonstrate justification for termination of an employee from employment; and secondly that unfair termination of an employee arises where no valid reason is given by the employer for such termination.

Being a first appeal, this Court in ***J. S. M. v 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, we are enjoined to revisit the evidence presented before the court below afresh, analyze it in order to arrive at

our own independent conclusion but bearing in mind that we did not see or hear the witnesses as they testified. See also **Seascape Ltd V Development Finance Company of Kenya Ltd, (2009) KLR 384.**

We have considered the record in light of our mandate as set out above, the rival submissions and principles of law relied upon by the respective parties in support of their opposing positions. Issues that fall for our determination are therefore as follows:

1. Whether the Bank adopted the correct procedure when terminating the respondent's employment with them.

2. Whether the reason advanced by the Bank for termination of the respondent's employment was valid

3. Whether all the remedies awarded to the respondent by the court lie in law.

With regard to issue number one (1), since it is not disputed that the employer/ employee relationship subject of this appeal was subject to the prerequisites of the Act, the procedure the Bank ought to have followed when terminating the respondent's employment is what is set out in **sections 41, 43** and **45** of the Act. In **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR,** the Court summarized those procedures as follows:-

> **"Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.**
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> **The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.**
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> **Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."**

We fully adopt the above position as the correct position in law that the Bank ought to have invoked when contemplating termination of the respondent's employment. None of the above procedures were outlined by DW1 as having been undertaken by the Bank before terminating the respondent's employment. We therefore find no basis for interfering with the Judge's finding that the procedure employed by the Bank to terminate the respondent's employment was unprocedural.

The reason advanced by the Bank for terminating the respondent's employment was poor performance. In **Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)** the court observed as follows;

> "a. **Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.**
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> **b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.**
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> **c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.**
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> **d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."**

We have considered the above observations in light of the Bank's submission that the decision to terminate the respondent's employment was taken in the exercise of its managerial supervision over the respondent and was in the circumstances not amenable to the trial court's scrutiny and interference. We are in agreement with the Bank's assertion that when the Bank terminated the respondent's employment, it did so in the exercise of its managerial supervisory power over the respondent in the discharge of his day to day duties as an employee of the

Bank. We however do not agree with the Bank's submission that such exercise of managerial supervisory power over the respondent in the discharge of his duties as an employee of the Bank was not amenable to scrutiny and interference by the trial court. Such a position in our view, would render nonsense the existence of the procedures provided for in sections **41, 43** and **45** of the Act. It is therefore our considered opinion that Parliament in its wisdom when enacting the Act governing the employer/employee relationships saw the need to incorporate therein provisions for redress for grievances that may arise as between the parties with regard to the discharge of their obligations under a contract of employment. This in our opinion is what forms the basis for an aggrieved party to invoke the Court's policing powers which in our view, only come into play like in the instant appeal, when there is complaint of noncompliance with the laid down legal procedures inbuilt in the Act in circumstances where the employer/employee relationship has gone sour.

In light of the above reasoning, it is our view that, neither the trial court nor this Court on appeal were called upon to discharge the function of day to day supervision of the Bank in the discharge of its managerial supervisory role over the respondent in the discharge of his day to day duties as an employee of the Bank, but to address a grievance the respondent raised against the Bank with regard to the manner in which his employment with the Bank had been terminated. Both the trial court and this Court's role was therefore and still is limited to examining the circumstances under which the respondent's employment was terminated and determine as to whether there was basis in the respondent's complaint that his termination was unfair.

The reasoning the trial Court gave for finding in favour of the respondent as already highlighted above was basically that DW1 conceded that there ought to have been a follow up appraisal of the respondent's performance in 2014 to that of 2013 to confirm whether there was improvement in his performance or not before termination.

We have considered the said reasoning in light of what we have set out above as the correct procedure for terminating an employee's contract as restated by the Court in the **Janet Nyandiko case** (supra) and the observation of the ELRC in the **Jane Samba Mukala case** (supra). We find no basis for faulting the Judge's finding that an appraisal ought to have been conducted on the respondent's work performance in 2014 to confirm whether the respondent had improved on his 2013 performance rating before termination of his employment and that in the absence of such proof, termination of the respondent's employment with the Bank was unfair.

Turning to justification for the remedies awarded to the respondent as redress for the unfair termination of his employment with the Bank, it is our finding that the remedy for reinstatement is provided for under **Section 49(3) (a)** of the Act. Factors to be considered by a court of law when considering reinstatement as an appropriate remedy for an aggrieved employee are as set out in ***Section 49(4) (a)*** to ***(m)***. Before settling for reinstatement as an appropriate award, the Judge reasoned as follows:

> **"Section 12(3) of the Employment and Labour Relations Court read together with Section 49 of the Employment Act; give this Court power to order a reinstatement in appropriate cases. The Claimant's case stands out as one such case where a reinstatement would be the best remedy to address the unfair termination of his employment".**

We have considered the above reasoning in light of the circumstances of this appeal and we are satisfied as was the trial Judge that the circumstances demonstrated above both on the record and the reasoning of the Judge warranted an order for reinstatement considering that the fault lay with the Bank in failing to re-evaluate the respondent's performance in the year 2014 as had initially been planned before terminating his employment with them on account of what the Bank termed as unacceptable performance. We therefore affirm the Judge's finding that reinstatement was the most appropriate remedy in the circumstances of this appeal. Other reliefs attendant to the relief of reinstatement namely; salary arrears from the date of termination to the date of reinstatement together with entitlement to full benefits as an employee restored back to his employment are also affirmed as payable and where withheld, are amenable to the execution process in the normal manner.

Turning to alternative remedies undisputably awarded by the court, **section 49** of the Employment Act makes provision for a wide range of remedies. The mode of assessment of those remedies was set out by the Court, in **Co-operative Bank of Kenya Ltd V. Banking Insurance & Finance Union CA No. 188 of 2014** as follows:

> **"Our understanding of the Act is that the prescribed remedies…are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies….are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."**

Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this appeal, it is guided by the principles enunciated in numerous case law from this Court. In the case of **Coffee Board of Kenya V. Thika Coffee Mills Limited & 2 Others [2014] eKLR,** it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

In **Alex Wainaina T/A John Commercial Agencies versus Janson Mwangi Wanjihia Civil Appeal No. NA 297 of 2014 (UR),** the court held *inter alia* as follows:

> **"On the first issue, we think it is trite law that where relief is prayed for in the alternative, a court of law has to choose on the facts, whether to grant the main relief or the alternative and give reasons either way. Both ought not to be granted in a blanket form. On this the trial court was in error."**

The above position was reiterated by the Court in the case of **Olive Mwihaki Mugenda & Another versus Okiya Omtata Okoiti & 4 others [2016] eKLR.** At paragraph 41 observations were made as follows:

> **" *The 1st* appellant submitted that the trial court erred in granting both the main and alternative orders sought in the 1*st* *respondent's Notice of Motion dated 7th December, 2015; that a reading of the Motion shows that the 1st* respondent sought prayers 4 and 5 in the alternative to prayers 1,2 and 3; that the trial court erred in granting both the main and alternative prayers; that in Alex Wainaina t/a John Commercial Agencies- VS- Janson Mwangi Wanjihia [2015] eKLR, this Court held that "where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative reliefs and state the reasons for doing so." Both cannot be granted in blanket form."**

At paragraph 68 the court concluded as follows:

> **"The next issue for our determination is whether the trial court erred in granting both the main and alternative reliefs sought in the Notice of Motion dated 7*th* December, 2015. It is not in dispute that the trial court granted the main and alternative prayers in the Motion. The decision of this Court in Alex Wainaina t/a John Commercial Agencies Vs. Janson Mwangi Wanjihia [2015] eKLR, is good in law. This Court held there that "where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative relief and state the reasons for doing so. Both *cannot be granted in blanket form." The 1st respondent has not demonstrated to our satisfaction or at all that the principle in Alex Wainaina (supra) is bad in law. We are inclined to follow the same and we hereby make a finding that in Ruling delivered on 18th* December, 2015, the trial court erred in granting both the main and alternative prayers in the Motion."**

In light of the above two pronouncements, by the court, it is our finding that the trial court having allowed the main relief which we have already affirmed above had no mandate to award the alternative reliefs. These were therefore granted in error, therefore stand vitiated and are accordingly set aside.

Turning to costs which ordinarily follow the event, we bear in mind the fact that the appellant lost its appeal against the main relief but succeeded on its appeal against the relief granted in the alternative. We find it prudent to order that each party shall bear own costs in this appeal. The orders on costs as awarded by the High Court stand affirmed.

Dated and Delivered at Nairobi this 6th day of August, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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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.

DEPUTY REGISTRAR.