REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE , KIAGE & MURGOR, JJA)

CIVIL APPEAL NO.18 OF 2013

BETWEEN

NATIONAL UNION OF WATER AND SEWARAGE EMPLOYEES…..…..1ST APPELLANT

RUFUS OLELA OSOTSI……..2ND APPELLANT

PHILEMON OTIENO ATIK……3RD APPELLANT

ANNE BURUGU…….…….4TH APPELLANT

VERSUS

NAIROBI WATER AND SEWARAGE COMPANY LIMITED…...……..…1ST RESPONDENT

NAIROBI CITY COUNCIL……2ND RESPONDENT

KENYA LOCAL GOVERNMENT WORKERS UNION (KLGWU)…...…3RD RESPONDENT

ASSOCIATION OF LOCAL GOVERNMENT EMPLOYEES…...…….....4TH RESPONDENT

(*Appeal from the Ruling/Order of the Industrial Court of Kenya at Nairobi (Nzioki wa Makau, J.) Dated 13th December, 2013*

in

Industrial Cause No. 823 of 2012)

****

JUDGMENT OF THE COURT

This is an appeal from a ruling of **Nzioki wa Makau, J.** dated the 13th day of December, 2012.

The background to the appeal is that, the appellants filed Industrial Court cause no 823/2012, against the respondents dated the 18th day of May, 2012 and amended on the 21st day of May, 2012. The cause was

resisted by the 1st respondents' defence dated 15th day of June, 2012 and that of the 2nd respondent dated 29th day of May, 2012. The appellants joined issue with the respondent defences vide their replies thereto dated, the 22nd day of October, 2012.

On the 7th day of August 2012, the first respondent filed a list dated 6th day of August 2012, containing what it termed as similar matters as the cause filed by the appellants against it, namely;

1. INDUSTRIAL CAUSE NO. 1648/2011- NATIONAL UNION OF WATER & SEWARAGE EMPLOYEES V/S NAIROBI CITY WATER AND SEWARAGE COMPANY LIMITED.

- Memorandum of claim dated 26th September, 2011

- Statement of response dated 26th January, 2012

2. INDUSTRIAL CAUSE NO. 90/2011- NATIONAL UNION OF WATER & SEWARAGE EMPLOYEES V/S NAIROBI CITY WATER AND SEWARAGE CAMPANY LIMITED.

- Notice of motion Application dated 25th January, 2011

- Memorandum of defence dated 22nd February, 2011

3. INDUSTRIAL CAUSE NO. 2133/2011- NATIONAL UNION OF WATER & SEWARAGE EMPLOYEES V/S KENYA LOCAL GOVERNMENT WORKERS UNION & NAIROBI CITY WATER AND SEWARAGE COMPANY LIMITED.

- Memorandum of claim dated 21st December, 2011

- Notice of motion Application dated 21st December, 2011

- Replying affidavit by Respondent, sworn by Boniface M. Munyao dated 30th January, 2012.

- Replying affidavit by interested party, sworn by Ivy Nyarango dated 1st March, 2012.

4. HCCC NO.784 OF 2004- PETER NJIHIA NJOROGE & 2200 OTHERS VS. THE CITY COUNCIL OF NAIROBI AND NAIROBI CITY WATER AND SEWARAGE COMPANY LIMITED.

- Plaint and verifying Affidavit dated 20th July, 2004.

5. HC MISC. APP. NO. 57 OF 2011- REPUBLIC V/S THE INDUSTRIAL COURT OF KENYA, NATIONAL UNION OF WATER & SEWARAGE EMPLOYEES AND NAIROBI CITY WATER AND SEWARAGE COMPANY LIMITED.

Exparte Applicant. Kenya Local Government Workers Union.

- Notice of Motion Application dated 1st April, 2011.

- Order of the court dated 18th March, 2011.

6. HC MISC APP. NO. 30 OF 2011- REPUBLIC V/S THE INDUSTRIAL COURT OF KENYA, NATIONAL UNION OF WATER & SEWARAGE EMPLOYEES, WATER PROVIDERS ASSOCIATION AND WATER COMPANY, ECONOMIC PLANNING DIVISION MINISTRY OF LABOUT, and ASSOCIATION OF LOCAL GOVERNMENT EMPLOYEES Exparte

Applicant. Kenya Local Government Workers Union. Order dated 2nd March, 2011.

7. INDUSTRIAL CAUSE NO. 399/2012- NATIONAL UNION OF WATER & SEWARAGE EMPLOYEES V/S NAIROBI CITY WATER AND SEWARAGE CAOMPANY LIMITED.

Memorandum of claim dated 12th March, 2012.

On the 12th day of October, 2012, the following entries were made on the record regarding the above list;

"Mr. Owuor

The directions taken will be,

Mr. Macharia

Date taken was for the motion which is spent. I have filed the list. 7 matters are in court and there is now one more. The only issue is to determine who is to represent the workers. We could agree to consolidate the cases. The financial issues raised by Mr. Owuor can be resolved once this is resolved.

Court:

The cases connected to this case being 1648/2011, 90/2011, 2133/2011, 784/2004, 57/2011, 30/2011, 399/2012. 2020/2012 be mentioned on 22nd October 2012 at 9.00 a.m. for directions, Mr. Owuor to serve all the parties in the cases above.

The parties to ensure prompt attendance so as to take directions in the matters.

Signed: Judge

Mr. Owuor

There is also 1664/2012 which relates to the issue brought by Mr. Macharia.

Court:

The court adds the cause 1664of 2012 to the list of the cases to be mentioned on 22nd October, 2012."

Further on the 24th day of October, 2012, the following entries were made:

Mr. Macharia:

No appearance for 4th respondent the ALGAK. Not even sure they were served. We wish to have the application of Rule 23 of the Industrial Court Rules for court to consolidate the cases. The counsel in the cases are broadly agreed that the underlying disputes before court can be framed as follows:-

(1) Who between the KLGWU and the NUWASE is the lawful representative of the unionisable employees of Nairobi City Water Services? It is a matter of great importance, touches on the constitution and right of employees to join a union of their choice as read against S.54 of the Labour Relations Act. That is the fundamental point.

Mr. Isoe:

The matter should not be consolidated and the circumstances which arose are at different time and these are not capable of being determined at the same time. The only related ones are 823 of 2012 and 784 of 2004. I am opposed to consolidation. The parties who are keen can make application.

Mr. Odhiambo

There is a matter in the High Court 784 of 2004. We share the sentiments that these applications should be consolidated.

Mr. Macharia:

There is probability for me to state what is the commonality of the suits. 784 of 2004 was a suit started for all employees of the City Council. One of the parties was the KLGWU as the last plaintiff. The sole dispute in the case was the termination dues, the same terminal dues are the subject of Mr. Owuor's suit 823A of 2012. The workers' dues are an issue here. The only issue being that in 784 of 2004 the KLGWU was acting for workers. In 823 of 2012 NUWASE is the one representing workers. The constant jostling between the 2 unions are fighting to represent the workers. The first issue flowing through all these issues should be determined. One case involves a claim on union dues against Nairobi City Council. In those suits KLGWU claims NUWASE is not the proper union. That is the underlying point. Once that is done, we can go into the disputes.

<u>Court Ruling</u>

The court has been bombarded with a series of suits putting various parties being KLGWU, NUWESA, Nairobi City Council, Nairobi Water and Sewerage Services, ALGAK and employee of the City Council and NWSS.

The court is persuaded that one of the key issues to be determined will pave way for the resolution of all the claims presented. In the premises *ex debito justiciae* ***and in line with provisions of Rule 23 of the Industrial Court (Procedures) Rules 2010 the court consolidates Cause No. 2020 of 2012, 823A of 2012, 90 of 2012, 2133 of 2011, 1684 of 2011, 90 of 2011, 2133 of 2011, HCCC 784 of 2004, Cause 30 OF 2011 and 399 of 2012 so as to determine which union represents the workers.***

The cases will therefore all be stayed pending resolution of the issue crystallized in the pleadings in the various cases.

The parent or operating file will be Cause 823A of 2012. Parties will be well directed to note that the Registry will place all new related suits before me for directions in view of the order above.

Signed: Judge"

On the 30th day of October, 2012 the court, with the consent of the parties present, gave directions that only two issues fell for determination by the court, namely:-

(a) between the National Union of Water and Sewerage Employees (NUWASE) and the Kenya Local Government Workers Union (KLGWU) which is the lawful trade union to represent unionizable employees of the Nairobi City Water and Sewerage Company Limited.

(b) Do the provision of Article 36(1) 36(4) and 41(c) entitle unionizable employees of Nairobi City Water and Sewerage Company Limited to join any other union of their choice.

The parties further agreed that the consolidated causes were to be disposed of by way of written submissions followed by highlighting in court. At the conclusion of the oral highlighting of the

submissions, the learned Judge rendered himself inter alia thus:-

> ***"The Court is established under Article 162(2) and has the status of the High Court. Its jurisdiction is superior to that of the Industrial court pre 13th July, 2012 when 11 Judges of the Court were sworn in at a ceremony at State House Nairobi. The Judges of the Court now have the capacity not only to review but to sit on appeal against decisions of the former Industrial Court Tribunal which was a subordinate court.***
>
> ***The plethora of decisions from the High Court- Mecol,*** (sic)
>
> ***USIU and Momanyi confirm the status of the former court. I am in agreement with my brother Judges Hon. Mr. Justice Lenaola and Hon. Mr. Justice Manjanja for their erudite reasoning in the Judgments referred to. The rights of workers are recognized in the Constitution of Kenya. Prominence is given to those rights in Article 36 and 41. The importance attached to this sector of society informed the decision to establish a specialized court with the status of the High Court under Article 162(2). This is a Court capable of supervising subordinate courts and can review, hear appeals or otherwise adjudicate on decisions of the former court.***
>
> ***In the premises, having considered the issues raised and having considered the authorities cited, the law and submissions of counsel, the court is minded to render itself thus. The decisions of Justice Kosgei and Justice Rika in cause 439 of 2010 and 213 of 2010 are with due respect to the Judges of the Industrial Court amenable to review. The decisions made were erroneous and ex*** *debito justitiae* ***this Court proceeds to review and vacate the orders granted therein. The employees of the 1st respondent have unfettered freedom under Article 41 and 36 of the Constitution to join a union of their choice. I agree with the Hon. Justice Maraga where he stated that not even a court of law can force an employee to join a particular union. In the premises, the court answers the 1st issue in the following terms- The Kenya Local Government Workers Union is the appropriate union for the employees of Nairobi City Water and Sewerage Company Limited.***
>
> ***The Court has called for the file cause No. 118 of 2010 in which the Collective Bargaining Agreement was entered into the Register of Collective Agreements as RCA No. 88 of 2010. The agreement has an effective date from 1st August, 2009 to 31st July 2011. The Colective Bargaining Agreement expired in July, 2011 and unless there is proof of renewal, it is spent. The allegations that the document exhibited at page 8 is the true copy of the Recognition agreement are false and amount to deceit. The Court does not countenance that- and expunges the exhibit from the record.***
>
> ***In the premises the application by the 1st Claimant is disallowed as stated above. Costs to the 1st, 3rd and 4th respondents.***
>
> ***It is so ordered"***

The appellants were aggrieved. They are now before this Court on appeal raising fifteen grounds of appeal, but which learned counsel in his written submissions compressed into three;…. Which may be paraphrased as follows;- that the learned Judge erred both in law and fact:-

> ***(1) in setting aside the orders of both Justice Rika and Justice P. Koskei*** *ex debito justiciae* ***in cause numbers 439/2010 and 213 of 2010 when he had no jurisdiction to do so,***
>
> ***(2) when in a sweeping statement and not supported by any facts or reasons stated that the 3rd respondent was the appropriate union for the employees of Nairobi City Water and Sewerages services.***
>
> ***(3) when he caused and effected a consolidation order*** *ex debito justiciae* ***in the face of***

opposition from the first respondent and then proceeded to stay the consolidated cases pending the resolution of one issue.

When the appeal came up for hearing on 26th day of April, 2017, only learned counsel **Mr. George Ogembo** instructed by the firm of Ogembo & Associates for the 2nd and 4th appellants was in attendance. His was also the only firm that had filed written submissions in compliance with the case management directions given by the Deputy Registrar on 23rd day of November, 2016. The Court being satisfied that, all the other parties had due notice of the hearing date, allowed **Mr. Ogembo** to prosecute the appeal through the highlighting of the written submission.

In support of ground 1, **Mr. Ogembo** submitted that the decision of **Paul Koskei, J.** dated the 11th February, 2011 in Industrial Court cause number 439 of 2010 and that of **Justice Rika, J.** dated the 20th day of September, 2010 in Industrial Court cause number 213 of 2010 were in themselves final orders in terms of **section 17 (1)** of the **Trade Disputes Act,** Cap 234 Laws of Kenya (now repealed); the Trade Dispute Act and a Judgment in rem in terms of **section 44 of the Evidence Act cap 80** of the Laws of Kenya; that no party to either proceedings applied either for a review or setting aside of or appealed against the orders in terms of **Rule 27(4)** of the **Industrial Court Rules 2010**; that in the circumstances the learned Judge had no jurisdiction to call for those files *ex debito justiciae*, review and set aside those orders.

In **Mr. Ogembo's** view, when making the impugned order, the learned Judge proceeded on an erroneous reasoning that the ELRC had a superior jurisdiction to that of the defunct Industrial Court and that therefore the post 13th July, 2012 Industrial Court had jurisdiction not only to review but also to sit on appeal over decisions of its predecessor *ex debito justiciae*.; that the principle of *exdebito justiciae* was erroneously invoked and applied, as Article 162 of the Constitution, 2010 only mandates the court to exercise supervisory powers over subordinate courts and not its predecessor. Further that the said reasoning and finding by the learned Judge offended **Article 165** of the **Constitution, 2010, section 22** of the Sixth Schedule of the Constitution and section **33** of the Industrial Court Act (now repealed) which explicitly vested no jurisdiction in the ELRC as a transition court to proceed and disregard the decisions of its predecessor *suo motu*.

In support of ground 2, learned counsel submitted that the learned Judge's sweeping statement that the 3rd respondent was the appropriate union for the employees of the Nairobi City Water and Sewerage Services had no basis as it was not backed up by any reasons to support the said proposition. Second, it purported to arise from the learned Judges' erroneous action of calling for file number 118 of 2010 and then proceeding to declare a Collective Bargaining Act duly registered as RCA No. 88 of 2010 as spent for the sole reason that it was post 31st July, 2011. Third, the orders were made without jurisdiction as under section **54** of the Labour Relations Act (repealed), a court of law has no jurisdiction to revoke a collective bargain agreement or a recognition agreement. The mandate to do so is by law vested in the Labour Relations Board subject to prior compliance by the parties with the laid down conciliation procedures, argued **Mr. Ogembo.**

Learned counsel urged that the learned Judge's erroneous recognition of a rival union as the appropriate union was devoid of any adjudication on the fate of the existing agreement as between the 1st appellant and the 1st respondent. It also purported to draw strength from an annexed agreement which the learned Judge erroneously declared as false and amounting to deceit and which he purported to expunge from the record when the validity of the 1st appellant's recognition agreement was never one of the issue for determination or were his findings on the said issue based on any tangible material facts placed before him to demonstrate that there was a genuine recognition agreement in favour of the 3rd respondent. No submissions on the validity or otherwise of the annexed agreement were made before the learned Judge by either party as a basis for an invitation to him to make any findings thereon.

Learned counsel urged that the learned Judge also fell into error when he proceeded to answer the issue as regards the proper union without considering whether or not the recognition agreement had been revoked

in law. In learned counsel's view, the learned Judge usurped the clear function and role of the National Labour Board and thereby arrogated to himself powers not vested in him in law. Neither did he inquire as to whether the dispute was properly before him, nor whether parties had exhausted the procedures provided for under the Act.

In support of ground 3, learned counsel urged us to make findings that the learned Judge fell into error when he consolidated the suits *ex debito justitiae* and then proceeded to stay them pending the determination of a single issue in yet the resolution of the said single issue would not settle all the issues in controversy in each of the consolidated suits; that there was no commonality of issues for determination in each of the purported consolidated suits; that the learned Judge arbitrarily picked on cause number 823/2012, and without making it a test suit, proceeded to make final orders therein.

Learned counsel cited **Stumberg and another versus Potgieter [1970] EA323** for the proposition that where there are common questions of law or fact in actions having sufficient importance in proposition to the rest, it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.

This is a first appeal. Our mandate is as was restated by the court in **PIL Kenya Ltd Vs. Oppong [2009] KLR 442** as follows.

> ***"It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that."***

We have given due consideration to the totality of the record in the light of the appellants' submissions. We remind ourselves that as a first appellate court the lack of participation of the respondents in the prosecution of the appeal notwithstanding, we are obligated to render a merit determination of the issues in controversy as contained in the compressed grounds of appeal. In our view, the issue that falls for our determination is:-

> *whether the learned Judge exercised his discretion judiciously when:-*
>
> > *(a) he ordered a consolidation of the enumerated suits, proceeded to stay the same and then purported to determine the same on the platform of the consolidation and stay order.*
> >
> > *(b) he suo motu called for Industrial court cause No. 439 of 2010 and Industrial Court cause number 213 of 2010 reviewed and set aside the final orders that had previously been made therein.*
> >
> > *(c) he suo motu called for Industrial court cause number 118 of 2010 and proceeded to declare a CBA duly registered as RCA 88 of 2010 as spent.*

With regard to (a), it is our observation that issues in controversy as between the disputants in industrial court cause number 823 of 2012 had not been crystallized as at the time the learned Judge picked on it as the pilot file. Neither were the matters ordered consolidated with it introduced through an application. All that the 1st respondent did was to draw the court's attention to the matters allegedly related to Industrial Court Cause number 23 of 2012, vide the aforementioned letter. We observe from the list reproduced above that six of these matters were indicated as Industrial Court causes namely, Industrial Court Cause numbers 823 of 2012; 1648/2011; 90/201; 2133/2011; 399/2012 and the one added by the court, namely Industrial Court Cause number 1664 of 2012. One of these matters was a civil suit namely HCCC No. 784 of 2004. Two of these were Judicial review applications namely H.C. Misc. Application No. 57 of 2011 and High Court Misc. Application number 30 of 2011. From the aforementioned list, not all of the above matters had a complete set of pleadings filed by the respective parties. With the exception of Industrial Court cause number 823 of 2012 chosen by the learned Judge as the pilot file, the state of the proceedings in each of the other affected files was not indicated. Moreover, Industrial Court cause

numbers 439 of 2010; 213 of 2010 and 118 of 2010 were not among the matters appearing on the list filed in court by the 1st respondent for consolidation and disposal.

The principles on consolidation that the learned Judge was enjoined to apply were set out by Kneller, J (as he was then) in **Stumberg and another versus Potgieter** (supra) at page 326;

> ***"Abroad principle has emerged from the English decisions relating to consolidation of applications. It is thus. There are common questions of law or fact, in actions having sufficient important in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered….."***

Also at the learned Judge's disposal was **Rule 23** of the Industrial Court (procedure) Rules 2010 pursuant to which the learned Judge made the impugned order. It provides:-

> ***"23 Consolidation of cases:***
>
> ***The court may consolidate suits if it appears that in any number of suits:***
>
> ***(a) Some common questions of fact or law arise; or***
>
> ***(b) It is practical and appropriate to proceed with the issues raised in the suits simultaneously."***

The learned Judge should have set out and interrogated the issues in controversy in each of the matters intended to be consolidated, identified their commonality, either in law or on facts and then give reasons as to why in his view a consolidation order was the most ideal in the circumstances it is not apparent that the learned Judges' order set out above does not contain any demonstration extract of The that the learned Judge took into consideration the above precautionary steps before making the consolidation order, hence the appellants' complaint that he failed to exercise his discretion properly.

The principles that guide this Court on interference or otherwise with the exercise of a trial court's discretion are well settled. See **Mbogo and another vs. Shah [1968] EA 93**. We do not interfere with the exercise of such discretion unless we are satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

As already observed, the learned Judge failed to set out and interrogate the pleadings in each of the Industrial Court causes he intended to consolidate to demonstrate the existence of a commonality of either law or facts relating to each. He also failed to appreciate that the court's mandate as enshrined in Article 162 (2) (a) of the Constitution did not extend to the handling of both civil and judicial review matters reserved for the High Court by virtue of the provisions of **Article 165, 3(a) (b)** and **d)** of the Constitution. See the case of **Republic versus Karisa Chengo & 2 others SC.5/2015.**

Accordingly, the learned Judge made an error when he made the consolidation order without undertaking the precautionary procedural steps set out above.

Turning to (b) & (c) above, they touch on the jurisdiction of the court to make the impugned orders. They are interrelated and will be dealt with as one. It is now trite that an issue of jurisdiction is a fundamental issue and should be disposed of whenever raised; that being a legal issue it may be taken at any stage of the proceedings; that where a court is convinced that there is want of jurisdiction to entertain any matter before it to finality, that court has no other option but to down its tools. See **Owners of the Motor Vessel 'Lillians" versus Caltex Oil (Kenya) Ltd [1989] KLR1,** wherein **Nyarangi, JA** had this to say:

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

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court had cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristic. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

Article 162 (2) (a) mandated Parliament to establish courts with the status of the High Court to hear and determine disputes relating to Employment and Labour Relations matters. Pursuant to the said mandate, Parliament enacted the Employment and Labour Relations Court Act No. 20 of the 2011 effective 30th August, 2011. Of relevance to the issues in controversy herein are sections **12** and **16**. These provide:- ***"12. Jurisdiction of the court:***

(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provision of this Act or any other written law which extends jurisdiction to the court relating to Employment and Labour Relations including……..

(5) the court shall have jurisdiction to hear and determine appeals arising from-

(a) decision of the Registrar of Trade Unions; and

(c) decisions of any other local tribunal or commission as may be prescribed under any written law.

16. Review of orders of the court:

The court shall have power to review its judgments, award, orders or decrees in accordance with the rules."

The appellate and review procedures of the court are enshrined in **Rules 8** and **32** of the Rules of that court. These provide:-

"Appeals:

8(1) Where any written law provides for an appeal to the court, an aggrieved person shall file a memorandum of appeal with the court within the time stipulated for that appeal under the written law.

…….

32. Review:

(1) A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling."

Clearly the appellate jurisdiction of the court as established pursuant to the provisions of Article 162(2) of the Constitution is limited to matters arising from decisions of the Registrar of Trade Unions and those of any other local tribunal or commission as may be prescribed under any written law. There is also

jurisdiction for the court to entertain appeals from subordinate courts in related matters (Employment and Labour Relations matters) as recently affirmed by this Court in **Law Society of Kenya Nairobi Branch Vs. Malindi Law Society & 6 Others [2017] eKLR**.

The procedure that governs access to the court's appellate jurisdiction is that provided for under **Rule 8,** while that on review is as provided for under **Rule 32**. In both instances and as correctly submitted by the appellant, the court has to be moved by a party to the proceedings from which either the appeal or the request for review arises, and that party must be one who is either aggrieved by the award, order, judgment and or order intended to be impugned.

In addition to the above provisions, we were invited by the appellant to also refer to **Article 259** of the Constitution and section **22** of the Sixth Schedule of the Constitution. **Article 259** of the Constitution enshrines the principles that guide the court in its interpretation and application of the constitutional provisions to matters before it, namely; to ensure that the interpretation undertaken by the court promotes the purposes, values and principles of the Constitution; that such interpretation is one that advances the rule of law, and the human rights and fundamental freedoms in the bill of rights; that it is one that permits the developments of the law and also contributes to good governance.

Section 22 of the **Sixth Schedule** of the Constitution on the other hand provides as follows:-

> ***"Judicial proceedings and pending matters:***
>
> ***22. All Judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court."***

None of the above provisions donated power to the corresponding court to *suo motu* recall, review, and set aside orders and or decisions of its predecessor.

The appellant has also invited us to consider the provisions of **section 33** of the Industrial Court Act (repealed); **sections 54, 57, 58** and **59** of the **Labour Relations Act** (repealed). **Section 33** of the Industrial Court Act made provision for the continuation of all the proceedings pending before that court until the operationalization of its successor or as directed by the Chief Justice or the Registrar of the Court. We find nothing in the said provision that suggests the subordination of the jurisdiction of the predecessor of the court to that of its successor. There is nothing in the impugned ruling that suggests that either the Chief Justice or the Registrar of the Court had given any directions with regard to the matters that were received, reviewed and set aside by the court.

Turning to **sections 54, 57, 58** and **59** of the **Labour Relations Act,** (repealed), we find these deal with the recognition of a Trade Union by an employer, and conclusion of collective bargaining agreements, in instances where an employer has recognized a Trade Union; alternative dispute resolution of disputes arising from a collective bargaining agreement namely by means of conciliation or arbitration and effects of collective bargaining agreement. We find nothing in the said provisions that mandated the ELRC or its predecessor to revisit a concluded and duly registered collective bargaining agreement and then interfere with it *suo motu.*

The upshot of the above assessment is that, we find merit in this appeal. It is accordingly allowed. The impugned Ruling/Order dated the 13th day of December, 2013 be and is hereby set aside together with all other consequential orders. The appellants shall have costs of the appeal.

Dated, and Delivered at Nairobi this 16th Day of February, 2018.

R.N. NAMBUYE

…….……

JUDGE OF APPEAL

P.O. KIAGE

…….

JUDGE OF APPEAL

A.K. MURGOR

…….....

JUDGE OF APPEAL

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

Deputy Registrar.