IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CIVIL APPEAL 124 OF 2016

BETWEEN

POLLY W. GITIMU.....APPELLANT

AND

REPUBLIC.....1ST RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF LANDS & HOUSING.....2ND RESPONDENT

CHRISTINE W. O. SADIA.....3RD RESPONDENT

(An appeal against the whole Ruling and Order of the High Court of Kenya at Nairobi (Warsame, J) dated 24th November, 2011

in

H. C. Misc. Appl. No. 785 of 2005)

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JUDGMENT OF THE COURT

The appeal before us arises from Judicial Review (JR) proceedings determined by **Warsame, J.** (as he then was) on 24th November, 2011. Before that court, the 3rd respondent here **(Christine)** was granted leave on 27th May, 2005 to seek, and did seek in a subsequent motion, the orders of *certiorari* and *mandamus* against the Permanent Secretary in the Ministry of Lands and Housing **(PS)** as follows:

> ***"i. ORDER OF CERTIORARI, To bring into this Honourable Court to investigate and quash the decision of the Respondent contained in his letter dated 20th May 2005.***
>
> ***ii. ORDER OF PROHIBITION, To prohibit the Respondent from removing or evicting the Applicant from House No. MG/767A located in Kileleshwa Estate or from allocating the same to any other person other than the Applicant."***

In issue was a residential house in Kileleshwa known as No.MG/767A **(the disputed house)** which belonged to the Government of Kenya for occupation by civil servants. Christine, who was an Assistant Director of Medical Services at the time, was allocated the disputed house in 1983 and had always lived there with her children, paying a monthly rent of Sh.24,000. On ***18th August, 2004***, the PS issued a circular informing all civil servants in occupation of government houses that the government had decided to sell non strategic Government houses and that they were given an opportunity, on preferential basis, to purchase the houses they were occupying by purchasing forms at a non-refundable fee of Kshs.1,000/=. These forms were returnable on or before ***31st October, 2004*** with the required minimum deposit of 10%. The circular also stated that, those who would not have paid the deposit within sixty (60) days of the circular, had to vacate the houses within 30 days.

At the time of issuance of the circular, Christine was out of the country although her family continued in occupation. On her return and learning about the circular, she wrote to the PS on ***29th November, 2004*** appealing for extension of time to purchase the house since she was not aware of the circular but was willing and able to comply with such conditions as may be deemed necessary. No formal response was

made to that letter, but on 1st December, 2004 she was issued with the application form for *'sale of GoK house No. MG 767A'* and she paid Sh.1000 for it. On ***31st December, 2004***, she paid a sum of Shs.272,000 which was accepted as *'10% deposit for sale of MG767A'* and an official receipt was also issued. However, to her shock and surprise, as she awaited the processing of all formalities, she received a letter from the PS dated ***20th May, 2005*** asking her to vacate the disputed house within seven days to give way to a new owner. She was aggrieved by that letter and so she rushed to court on 27th May, 2005 to seek the orders aforesaid, contending that the action of the PS was capricious, arbitrary and unreasonable in the circumstances. With the grant of leave an order for stay of the PS's letter seeking vacant possession was issued.

Five years on, for reasons that are not apparent on the record, the JR had not been heard. On 24th May, 2010, the appellant **(Polly)** sought to be enjoined in the application as an interested party before it was heard. She said she had been offered the disputed house for sale by the PS on ***15th April, 2005*** and accepted the offer on ***23rd May, 2005***. She had paid the necessary deposits and undertaken to execute a tenant Purchase agreement with the PS for payment of the balance of the purchase price by instalments which she continued to make. By consent of the parties, she was enjoined in the JR on 5th October, 2010. Affidavits and written submissions were filed and considered by the trial court which, in a considered ruling dated 24th November, 2011, came to the conclusion that the PS acted outside the process and procedure set for disposal of the Government house; that Christine had priority over Polly in the allocation of the disputed house; that the transaction between the PS and Polly was made in excess of jurisdiction; and that the decision to allocate the house to Polly was arbitrary, capricious and contrary to the rules of natural justice. The orders sought by Christine were found to be meritorious and were granted.

The PS did not file any notice of appeal to challenge the ruling and indeed stayed away from the hearing of this appeal despite service of a hearing notice. But Polly was aggrieved and filed a memorandum of appeal through M/s P. N. Mugo & Company Advocates raising 20 grounds of appeal. They are rather prolyx and repetitive and heavy on factual challenges. We may reproduce them:

> ***(i) Failing to appreciate that the payment by 3rd respondent was mandatory precondition required for every applicant but not as acceptance of offer or consideration.***
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> ***(ii) Failing to notice that the receipts given to 3rd respondent are clearly marked "APPLICATION" for sale of "Government house" not for purchase of Government house.***
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> ***(iii) Failing to observe that what the 3rd respondent calls invitation or call to purchase the suit house is allocation of Government house for renting not BUYING or SELLING.***
>
> ***(iv) Failing to observe that what the 3rd respondent calls invitation to submit documents for purposes of purchasing Government houses was request for MONTHLY RETURN OF ALL GOVERNMENT HOUSES dated 17/9/2003 long before offer for sale of the houses.***
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> ***(v) Failing to appreciate that for purposes of renting, the 3rd respondent notified Deputy Works Officer Ministry of works that she was out of the country in October 2003 and not 2004 when the Government started selling the houses.***
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> ***(vi) Failing to appreciate that the 3rd respondent had admitted that she was in fundamental breach of the strict terms of the offer as analysed by trial court Judge.***
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> ***(vii) Failing to appreciate that in the terms of the offer there was NO provision for appealing to be allowed to bid for the houses out of time.***
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> ***(viii) Failing to appreciate that he had no jurisdiction to nullify or set-aside the parties terms of offer and make new contract for 3rd respondent more so without such prayer by 3rd respondent.***
>
> ***(ix) Failing to appreciate that he had no jurisdiction to nullify or set-aside appellant lawfully and fully concluded contract more so without such prayers by the 3rd respondent.***
>
> ***(x) Failing to appreciate that he had no jurisdiction to nullify lawful concluded appellant's contract and take away her fully purchased house and award it to 3rd respondent who had breached the terms of offer and was not offered the suit house by the 2nd respondent."***

The written submissions filed on behalf of the appellant, which were briefly highlighted orally by learned counsel **Mr. Mugo**, are not a paragon of clarity. But they elicit several issues worth our consideration. In the main, counsel dwelt on the illegibility of Christine to purchase the disputed house on account of her failure to comply with the terms set by the PS. He submitted that the trial court was in error in finding that the late appeal by Christine was allowed through acceptance of late payments and failure by the PS to respond in writing. In making that submission counsel relied on a document inserted in the appeal record which was not part of the evidence before the trial court but the document was objected to as it amounted to additional evidence introduced without leave of court. The objection was sustained and the document expunged from the record. At all events, the PS who was the purported author of the document never appeared to lend credence to it. Counsel further submitted that the payment of application fees and deposit of purchase price did not amount to a sale agreement which could override the proper contract concluded by Polly through an offer and acceptance, and part performance, in line with the Law of Contract Act. As such, wondered counsel, the court could not purport to be the vendor and conclude a contract of sale for Christine who was not qualified to purchase one. In sum there was no breach of the rules of natural justice or arbitrariness by the PS.

Finally counsel submitted that the procedure adopted in taking out a JR was wrong since the real dispute was a breach of contract of sale. As

such, no orders of *certiorari* or *mandamus* could issue by dint of ***section 8 (1)*** of the **Law Reform Act** which prohibits the issuance of prerogative writs in civil matters. This, in his view, was an issue of jurisdiction which the trial court did not consider. He cited the cases of ***Commissioner of Lands vs Kunste Hotel Limited [1997] eKLR*** and ***Zakhem Construction (Kenya) Limited vs Permanent Secretary, Ministry of Roads & Public Works & Another [2007] eKLR*** for the proposition that the remedy for breach of contract does not lie in the process of judicial review.

On the other hand, learned counsel for Christine, **Mr. Kevin Wakwaya,** instructed by M/s Rachier & Amolo Advocates, orally highlighted the written submissions filed on her behalf emphasizing that the trial court was properly seized of the matter as a JR and not a simple matter of breach of contract. Counsel asserted that Christine was questioning the process adopted by the PS in carrying out the public duty of disposing of Government property. She was able to show in the end that the PS acted in violation of the rules of natural justice, and in breach of the Christine's rights. She was also able to show that the process adopted by the PS was arbitrary, capricious, unreasonable, based on irrelevant and or improper considerations and in excess of powers. As such, submitted counsel, the matter lay squarely under ***sections 8*** and ***9*** of the Law Reform Act and **Order LIII** of the former Civil Procedure Rules. All that Christine was invoking was the supervisory jurisdiction of the court to check the legal and procedural validity of the decision of a public authority in the performance of a public duty. There was no dispute, urged counsel, about the status of the PS and the role he was playing in this matter and therefore he was amenable to JR orders. The merits of the decision made were not in issue, and the trial court made no findings on the merits.

Counsel cited the case of ***East African Railways Corp. vs Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327*** where it was held inter alia that:

> ***"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect. Many modern statutes contain provisions, which attempt to remove decisions of tribunals or Ministers from review by the courts by making these decisions 'final' or 'conclusive'. The remedy by certiorari is never taken away by statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal" but does not mean without recourse to certiorari. It makes the decision final on the facts but not final on the law. Notwithstanding that the decision is by statute made "final" certiorari can still issue for excess of jurisdiction or for an error of law on the face of the records."***

He also referred us to this Court's decision in ***Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining & 9 Others [2017] eKLR*** and the Ugandan case of ***Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300.*** Finally counsel referred us to the evidence on record which was supportive of the assertions made by Christine and urged us to uphold the decision of the trial court.

We have considered the matter fully. In our view, the most important issues arising from the grounds of appeal and the submissions of counsel are:

> ***(i) Whether the subject matter of the dispute was justiciable as a JR;***
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> ***(ii) If so, whether the trial court exercised its discretion judiciously.***

The first issue is jurisdictional and it calls on us to examine the scope of JR proceedings. Fortunately, the same issue arose in the recent case of ***Child Welfare Society of Kenya vs Republic & 2 Others Ex-parte Child in Family Focus Kenya [2017] eKLR*** where the scope was revisited *in extenso*. The Court had this to say:

> ***"39. For a long time in the history of the common law, JR has been tried and tested as the most efficacious remedy for control of administrative decisions. It was not concerned with private rights or the merits of the decision being challenged but with the decision making process. See Commissioner of Lands vs Kunste Hotel Limited [1997] eKLR and R vs Secretary of State for Education and Science ex-parte Avon County Council [1991] 1 ALL ER. 282. It was also principally concerned with the 3 'Is' --- "Illegality, Irrationality and (procedural) Impropriety" --- and many are the decisions which followed such narrow considerations. For example:- An Application by Bokobu Gymkhana Club [1963] EA 478; Council of Civil Unions vs Minister for the Civil Service [1985] AC 2; both cited with approval in the Ugandan case of Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300 which courts in this country have followed, stating:***
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> *"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."*
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> ***40. However, the dynamism of society and the events of recent history have decidedly thrust JR into a whole new trajectory. Nyamu, J. as he then was, clearly 'smelt' the impending extension of the scope of JR in 1998 when in the case of Republic vs The Commissioner of Lands, ex-parte Lake Flowers Limited Nairobi Misc. Application No. 1235 of 1998 he stated as follows:***
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> *"..Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and*

persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

41. In the same year, this Court expressed similar views in the case of Bahajj Holdings Ltd. vs Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998 stating that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. The trend continued in Kuria & 3 Others vs Attorney General [2002] 2 KLR 69 where the Court expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit."

See also Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43; Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47, and Keroche Industries Limited vs Kenya Revenue Authority & 5 Others (supra).

42. The bells for expansion of the scope of JR rang even louder after the promulgation of the Constitution 2010. Odunga, J. for example, in Republic vs. Commissioner of Customs Services, ex parte Imperial Bank Limited [2015] eKLR recognized that "Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision" and the "need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front". Mativo, J. similarly in the case of Ernst & Young LLP vs Capital Markets Authority & Another [2017] eKLR (decided on 7th March, 2017), extensively examined comparative jurisprudence before expressing the following view:-

"...judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution. The constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution... Judicial review is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, then the decision in question cannot stand court scrutiny..... Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution."

43. One of the sources of that bold view by the High Court is our own Supreme Court which had earlier, in the case of Communication Commission of Kenya vs Royal Media Services & 5 Others [2014] eKLR held that "... the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law." and that "... the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in Marbury vs Madison 5 U.S. 137 (1803)."

44. Finally, as we settle the principles upon which we shall consider the matter before us, this Court, as recently as 20th July, 2017, in the case of Independent Electoral and Boundaries Commission (IEBC)

vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR was in no doubt about the current place of JR in our system of governance. After extensively reviewing the CCK Supreme Court decision (supra) and other cases, including Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51, and Pharmaceutical Manufacturers Association of South Africa in re ex-parte President of the Republic of South Africa& Others 2000 (2) SA 674 (CC) at 33, the five-Judge bench held:

"In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and Rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both..... We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches."

We are aware that the events leading to the JR in this matter arose in the year 2005 before the new Constitution was promulgated, though the decision came after the promulgation. Nevertheless, even at the time, the evolving trajectory of JR was palpable. With such exposition therefore, it cannot lie in the mouth of the appellant herein to assert that the actions of the PS were not amenable to the supervisory jurisdiction of the court or that ***sections 8*** and ***9*** of the ***Law Reform Act*** and ***Order LIII*** of the ***Civil Procedure Rules*** were not applicable. The trial court was clear in its mind, and pronounced itself on it, that what was being questioned was the process adopted by the PS in carrying out his public duty. It stated thus:

> ***"The most important issue to appreciate is that Judicial Review is concerned to (sic) quash orders or decisions made in excess of jurisdiction or lack of it or breach of the principles of natural justice."***

We have re-examined the orders sought in the JR which were earlier reproduced and in our view, they are not based on a pleading of breach of contract but the process leading to the issuance of a notice to vacate the disputed house. Accordingly, we find on the first issue, that the subject matter was justiciable as a JR and the trial court had the jurisdiction to deal with it.

On the 2nd issue, we find the trial court had a discretion to exercise and we can only interfere with it on clear and well tested principles. Madan, JA (as he then was) in ***United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd*** ***[1985] eKLR*** summarized them thus:-

> ***"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. [It] is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."***

The trial court examined the facts placed before it through the prism of JR and came to the conclusion that fairness and due process, as well as the rules of natural justice were violated. It found as uncontested, and is borne out by the record, that the PS had the statutory power to sell the government house; that Christine was eligible for preferential treatment in the sale of the house but was out of the country when the advert went out; that she applied for extension of time to comply but there was no written response; and that instead, she was allowed to buy the purchasing forms and pay the deposit required for sale of the house. On those facts, the trial court held that due process and procedure were flouted and that the PS acted in excess of jurisdiction.

It reasoned as follows:-

> ***"It is therefore my view that the applicant was entitled to be given an opportunity on preferential basis to purchase the subject house since she was in occupation and since she made an expression and willingness to purchase the same. The applicant did not also make an intention but filled the necessary forms and paid the requisite and mandatory 10% deposit. As at 31st December 2004 when the respondent accepted the 10% purchase price from applicant, the house was not to be offered to any other party without notifying the applicant that her application was rejected or accepted. In any case there is no evidence that the applicant was unable to fulfill the conditions set out in the circular issue by the permanent secretary Ministry of Lands and Housing and dated 18th August, 2004.***
>
> ***It is therefore my decision the respondent having accepted the appeal and having allowed the applicant to pay the 10% deposit for the sale of Government house, was estopped from offering the said house to a third party. It is clear that from the date of payment of the 10% deposit till 20th May 2005 the respondent neither informed the applicant that her application was denied nor refunded*** *(sic)****. It is therefore clear that the attempt to re-allocate the house to the interested party was not in accordance with the due process and procedure that were set by the respondent. The subsequent and purported allocation of the house to the interested party was made in excess of jurisdiction because the respondent became functus officio upon accepting the deposit from applicant."***

As regards the finding on violation of the rules of natural justice, the trial court again reasoned as follows:

> ***"From the time the applicant made the appeal, to the time respondent allegedly allocated the house to the interested party, there was no indication or evidence that the house was available for allocation to other persons other than the applicant. Indeed as was rightly pointed out by the advocate for the applicant, there was no time the applicant was called to take back her deposit. She was not also told the offer to sell the house to her had been revoked and/or rejected. It is therefore my decision that the letter dated 15th April 2005 offering the house to the interested party and the one dated 20th May 2005 asking the applicant to vacate the house was made in violation of the rules of natural justice and in breach of the rights of the applicant who was in occupation of the said house from 1983. The applicant was entitled to be accorded the first opportunity. She had priority rights over the interested party in so far as the allocation of the subject house is concerned. It is my decision that the respondent was not entitled to allocate the house to the interested party after having accepted the deposit of the applicant on 31st December 2004. The offer and acceptance between the respondent and the interested party was made in excess of jurisdiction and was not available to the Interested Party. Consequently the decision to allocate the house to the interested party and one directing the applicant to vacate the premises was arbitrary, capricious and contrary to the rules of natural justice."***

With respect, we think the trial court laid a proper factual and legal basis for the exercise of its discretion. It would seem that the appellant seeks to persuade us to give a different weight to that given by the Judge to the various factors in the case, but that does not accord with the principle. In our view, the trial court appreciated the facts, largely uncontroverted even at the hearing of this appeal where the PS does not feature, and took account of considerations of which he should have. In sum, we find no misdirection weighty enough to overturn the trial court's discretion. Ultimately, this appeal fails and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 9th day of November, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR