



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & KIAGE JJ.A)

CIVIL APPEAL NO. 60 OF 2013

TELKOM KENYA LIMITED.....APPELLANT

VERSUS

JOHN OCHANDA (*suing on his own behalf*)

and on behalf of 996 former employees of

***Telkom Kenya Limited*).....RESPONDENTS**

(Being an appeal from the ruling of the High Court delivered at Nairobi by the (Hon. Justice H.P.G Waweru) dated 23rd March 2012 In

HCCC No. 216 of 2007 consolidated with HCCC No. 219 and 255 of 2007)

JUDGMENT OF THE COURT

Telkom Kenya Limited, the appellant herein, was one of three state corporations that were born out the winding up ashes of the Kenya Posts and Telecommunications Corporation sometime around the year 1999. The others were the Postal Corporation of Kenya and the Communications Commission of Kenya. John Ochanda and the other respondents, stated to be 996, which number is itself highly contested, were employees of the appellant who were however retrenched sometime between 31st May and June 2006.

The dispute between the parties arose from the manner in which the appellant effected a staff rationalization programme in the form of downsizing or retrenchment. The said staff rationalization programme was in two (2) phases: the first phase involved staff over 50 years of age while the second was for those below 50 years. Under phase one, the package for staff being retrenched included three months basic salary in lieu of notice, severance payment of one month for every year remaining and transport allowance of Ksh.40,000.00. On the other hand, the package for phase two included two months basic salary in lieu of notice, severance payment of two and a half months basic salary for every year worked, a golden handshake of Ksh.150,000.00 and transport allowance of KShs 40,000.00. The respondents were part of phase one of the programme.

Payment of severance and golden handshake for employees aged 50 years and above was duly effected by the appellant but not so for those under that age. This differential treatment precipitated a suit by the respondents before the High Court claiming that the appellant had acted in an unlawful, discriminatory manner in paying different packages to its members of staff in the two phases. The

respondents further claimed that they were not paid some allowances due to them, for example, pertaining to medical and housing. They also complained that the appellant failed to observe a government gazette notice issued on 23rd June, 2006, which exempted the retrenchees' lump sum payments from tax.

The totality of the respondents' claims as gleaned from the three separate suits they filed, namely **HCCC 216/07 – John Ochanda vs Telkom; HCCC 219/07 – Naphutah Kibutu Kanyoro vs Telkom and HCCC 255/07 – Michael Akeyo & Others vs Telkom** were for:

1. Severance pay at the rate of 3 months basic salary for every year of service completed;
2. 3 months salary in lieu of notice;
3. Transport allowance of Ksh.40,000/=;
4. Medical allowance for the last year of service;
5. Payment of long service loans;
6. Payment of outstanding annual increments;
7. Payment of due increments on promotion;
8. Damages for unlawful recovery of loans;
9. Golden handshake of Ksh.150,000/=.

As the three suits were against the same defendant, the appellant herein, they were consolidated and heard together by Mwera J (as he then was) who by a judgment delivered on 28th Sept 2011 found in favour of the respondents and decreed that they be paid:

- (a) Severance pay based on two and a half months salary for each year of completed service.
- (b) Golden handshake on the same scale as what was paid the retrenchees in phase 2.
- (c) Costs and interest.

Aggrieved by that judgment, the appellant filed a notice of appeal against it before filing **Civil Application No. 237 of 2011** in this Court seeking to stay its execution pending appeal. That application was allowed on 10th May, 2012 on condition that the appellant deposits Ksh. 250,000,000 in an interest earning account in the joint names of the lead advocates, which was done. The intended appeal was filed as **Civil Appeal No. 207 of 2012**. It was heard by a bench of this Court which, by a judgment delivered on 25th October 2013, dismissed it.

While that appeal was pending determination, the respondents moved to execute the decree. This prompted the appellant to file a notice of motion dated 6th September 2011 at the High Court by which it sought a stay of execution pending the determination of the stay of execution application filed in this Court on 14th October 2011 (**No. 237 of 2011**) already alluded to. It also prayed that the application for execution, warrants of attachment and sale be declared null and void, and quashed. The motion listed on the face of it some ten grounds on which it was premised.

Besides filing Grounds of Opposition resisting the appellants' aforesaid application, the respondents also filed a notice of motion on **31st January 2012** seeking the amendment of the judgment and decree so as to reflect three items, namely;

- a. **that the appellant be compelled to calculate the severance pay based on two and a half months salary on the basis of employment records at its disposal or avail the same to court within fourteen days;**
- b. **that the respondents be paid golden handshake on the same scale as was paid to the retrenchees in Phase 2 amounting to Ksh.150,000 each ;**
- c. **that the respondents be paid costs and interest at commercial rates.**

The respondents also craved an order that the appellant do furnish security in the sum of KSh. 2.9 billion or such other sum as the court deemed just in the event it was minded to grant the stay sought.

The two applications were heard together by Waweru J. who, by a ruling delivered on 22nd March 2012 held that the attempted execution of the decree was premature and unlawful having been commenced before taxation of, or agreement on, the respondents' costs. He accordingly set the execution process aside. With that, the learned Judge proceeded to find the stay of execution application was itself rendered premature and ordered it to be held in abeyance until the costs were taxed, and after the directions he gave were met.

The directions the learned Judge proceeded to issue, and which are the subject of the appeal before us, were that;

- i. ***The Defendant shall file and serve within 30 days an affidavit setting out in respect of each plaintiff the number of completed years of service and their monthly salary at the time they were retrenched. This shall be accompanied by a calculation of the severance pay due to each Plaintiff at the rate of two and a half months salary for each completed year of service.***
- ii. ***In default of complying with the direction, the Plaintiffs may file one or several affidavits setting out the facts and details of their own calculations. They may similarly file an affidavit or affidavits if they do not agree with the facts or details given by the Defendant in its affidavit filed under (i) above.***
- iii. ***This matter shall be mentioned on a date to be given at the time of delivery of this ruling for further directions or orders.***
- iv. ***Costs shall be in the cause.***

Dissatisfied with the ruling, the appellant filed notice of appeal dated 2nd April, 2012 and a record of appeal on 19th March, 2013. In its memorandum of appeal, the appellant raised some eleven grounds on the basis of which it asks this Court to set aside the orders and directions of the learned Judge. In summary, the appellant charges that the learned judge committed errors and misdirected himself by:

1. ***Re-opening and retrying of a matter that had been heard and determined by a court of competent jurisdiction, by directing parties to adduce further evidence by filing affidavits setting out particulars yet he did not have the jurisdiction to do so.***
2. ***Ordering the parties to file affidavits after having dismissed the Respondent's Application for review.***
3. ***Misapprehending the purport and tenure (sic!) of Article 159(2)(d) of the Constitution of Kenya and the Overriding Objective in the Civil Procedure Act.***
4. ***Purporting to interpret a decision by a court of competent jurisdiction suo motu and without jurisdiction.***
5. ***Entertaining matters that were not before him and erroneously;***
 - a) ***Determining and computing the quantum of the sums payable to the Respondents under the limb of golden handshake and granting the same.***
 - c) ***Determining the number of Respondents' in the matter yet the issue was never settled in the trial and in the judgment of the case;***
 - d) ***Holding that he could not vary the judgment of the court as sought by the Plaintiffs yet proceeding to vary, review and amend the same judgment;***
 - e) ***Determining that the Respondents' claim was in the nature special damages, yet no issue of special damages was specifically pleaded or proven;***
 - f) ***Holding that the interest awarded to the Respondents in the judgment would apply from the date of filing suit.***

6. ***Fully misapprehended the fact that after delivery of the judgment the High Court was functus officio***

7. ***Shifting the burden of proof from the Respondents to the Appellant by directing the Appellant to file particulars to support the Respondent's claim and prove their entitlements***

11. ***Failing to recognize the fact that the trial had specifically held that the final award shall be “in rem” and not “in personam”***

At the hearing of the appeal, Mr. Mohammed Nyaoga learned lead counsel appearing with Mr. Emmanuel Wetangula for the appellant commenced by submitting that the exact number of claimants before the High Court had mysteriously and impermissibly morphed. At the time of filing of the suit at the High Court, John Ochanda only filed on behalf of 38 former employees of Telkom Kenya Limited, but in the course of the suit many other parties were added pursuant to an order of the Court with the result that, a total of 996 other plaintiffs became claimants in the consolidated suit. Interestingly, and fatally, however, the claimants' names have never been set out. Learned Counsel was emphatic that the Judgment and decree dated 28th September 2012, granted various **declaratory orders** as sought in the plaint and was incapable of enforcement as it was, requiring to be perfected through known legal procedures. Drawing on an analogy of a tortious claim arising from a road traffic accident where an order on liability leads to formal proof, he averred that each individual claimant should have filed a personal suit seeking determination of his dues. Describing the procedure adopted as strange, learned Counsel argued that, Waweru J. was wrong to entertain the application by the respondents as he was unable to vary the judgment of Mwera J. where the Court was *functus officio*. Counsel criticized the learned judge for going ahead to prescribe the doing of many other subsequent actions in the directions under attack. Counsel lamented that the learned Judge “*oddly, came up with a new cause of action and shifted the burden to the defendant*”.

It was Mr. Nyaoga's further submission that the learned Judge's order was a very strange one, which resulted in the judge re-opening the trial and judgment by way of affidavit. It also purported to amend Mwera J's judgment through a procedure alien to law notwithstanding a clear finding by Waweru J that he could not amend the judgment. All the learned Judge could permissibly do and ought to have done was to review the judgment but he did not to do so.

Learned Counsel drew our attention to the case of **RAILA ODINGA & 2 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS [2013] eKLR**, where the Supreme Court laid out the meaning of the term *functus officio*, and stated that the exceptions in that case do not apply to the present one. The intentions of the court were very clear from Mwera J's judgment, admitting to no clarification and Waweru J was thus faulted for trying to convert a judgment *in rem* into a judgment *in personam*. The respondents tried to introduce evidence/documents after the delivery of judgment, and it is trite law that special damages must be specifically pleaded and strictly proved. Thus, the learned judge in his ruling, by demanding that the appellant compute entitlements, wrongfully shifted the burden of proof. Learned Counsel complained that the learned judge directed the appellant to perform the purely judicial function of computing the respondents' dues which was the very reason the respondents had sued so that the court would settle the dispute in which entitlement and computation were the main issues in controversy. To further buttress this argument learned counsel again referred us to pages 82 and 84 of the record which contains the respondents' letters acknowledging difficulties in computation. Computation was a judicial function and that court ought not to have shirked or delegated it to the appellant.

Mr. Nyaoga further submitted on the issue of finality and firmly stated that in law any litigation has to come to an end. He cited the case of **NGUGI V KINYANJUI**, [1989] KLR 146, where the court held that the law will not allow any dispute between the same parties to be reopened while the judgment still remains on record. The opening of the suit via affidavits sought to defeat the law and justice. He also cited the case of **CATHERINE KANYA & 2 OTHERS vs COMMERCIAL BANK OF AFRICA**, Civil Application No. 366 of 2009 (unreported) in which Onyango Otieno JA., considered **Article 159** of

the **Constitution of Kenya**, stating that the respondents could not purport to cure the matter using **Article 159**, as the said Article was meant to ensure justice to a party who has taken proper action to comply with the law. In concluding he posed the twin question that captures the dilemma as he perceived it; ***were the order to be complied with, then what? Would the Judge have come up with a new judgment and decree?***

Rising to answer the appeal, Mr. Pheroze Nowrojee, learned Senior Counsel for the respondents first sought to answer the question: Was the judgment of Mwera J one ***“in rem”***? He stated that in **Civil Appeal No. 207 of 2012**, this Court answered that question. His basis for the assertion was that in so far as the argument had been made by the appellant in that appeal but that bench did not address it, then it must be deemed to have been rejected as ***“An argument not accepted is deemed to be rejected”***. Counsel proceeded to take issue with the fact that the appellant did not bring the judgment in **207 of 2012** which, according to him, fully determined all the issues being raised herein thus rendering this present appeal wholly unnecessary. He cited a passage in the ruling on stay of execution in **Civil Application Nai. 112 of 2012**, where this Court (Githinji, Azangalala & Sichale JJ.A) stated that if the appeal in **207 of 2012** succeeded, then the appeal against Waweru J’s orders would be unnecessary. We did pose the question to Senior Counsel whether that was an acknowledgment that if that appeal failed (as in fact it did) then the current appeal would be necessary.

Mr. Nowrojee decried the fact that more than a year after a judgment in their favour, the Respondents have not been paid and he pointed the finger of blame at the appellant which it accused of acting ***sans*** bona fides. He urged that Waweru J did not reopen the suit and, giving an analogy of his own, pointed out that if a judge orders for payment of fees in a child support suit, a later determination of the exact amount of fees payable is not a new judgment. Mr. Nowrojee pointed out that the learned Judge properly used the principle of the overriding objective, which all parties are required to assist in actualizing, as he was seeking fair execution of the matter. Senior Counsel submitted that the principle of finality should be in favour of the respondents but had been frustrated by the appellant, which he contended, has been placing hurdles and hardships along the way. He urged the Court to maintain and leave undisturbed Waweru J’s orders which he hailed as full of common sense.

Both Mr. Koech and Mrs. Kitonga on her own behalf and holding brief for Mr. Oluoch for some of the respondents associated themselves fully with Mr. Nowrojee's arguments, to which they had nothing further to add, while Mr. Oluoch, learned Counsel for respondents in **HCCC Nos. 216 and 219**, said he would be adopting his written submissions.

In reply, Mr. Wetangula learned co-counsel also for the appellant pointed out and clarified that the decision of Mwera J is not the subject of this appeal and there was therefore nothing sinister or untoward about their not placing before us the judgment of the Court (Kihara Kariuki, PCA, M’Inoti & J. Mohammed, JJA) in **C.A.207 of 2012**. It was just not relevant to the issues before this Court. Counsel submitted that there was no determination therein on whether the judgment of Mwera J was in *in rem* or *in personam* as averred by Mr. Nowrojee. It was only submitted on, Counsel submitted, but the Court framed only 2 issues (at pg 20) which it determined. He contested the view that matters should be deemed to have been determined or rejected just because they were submitted on. Mr. Wetangula reiterated that it had become impossible to comply with Waweru J’s directions or even to execute as majority of the respondents remained unknown. Further, most of the respondents did not know their own numbers. He also pointed out that none of the documents directed to be produced by affidavit were part of the court proceedings and submitted it to be improper that the respondents should be permitted to provide documents computing entitlements after the determination of the case.

Mr. Wetangula argued that the Oxygen Principle could not cure the fundamental deficiency of the suit at the High Court wherein the plaintiffs never made a specific claim for each one of them. In demonstration of this counsel referred to page 122 of the record where there was an attempt to review the Judgment for having a manifest error. He further submitted that special damages ***must*** be specifically pleaded and also strictly proved, failing which they ***should*** not be granted. He further argued that there was no ambiguity about Mwera J.’s orders, and there is absolutely no hindrance to the respondents filing a proper suit by which they could lay proper claims arising from the said judgment. In the result, it was

not the appellant's recalcitrance but the respondents' lethargy that has led to the matter remaining unresolved, counsel concluded.

The determination of this appeal hinges on the single issue of whether or not by ordering adduction of further evidence through the filing of affidavits after the suits as consolidated had been heard and concluded, the learned judge overstepped his mandate and erred in law.

It is apparent from the record that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought. The court's only recourse would have been to review the judgment and having refused to do so, it was rendered *functus officio*.

Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of **CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS** [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. ***Where there had been a slip in drawing it up, and,***
2. ***Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186”***

The Supreme Court in **RAILA ODINGA v IEBC** cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” (2005) 122 SALJ 832 in which the learned author stated;

...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in **JERSEY EVENING POST LTD VS AI THANI** [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

It seems quite clear to us that as at the time the respondents made their application dated 31st January 2012, the proceedings respecting the dispute between the parties had been finally concluded before

Mwera J. His judgment and decree had been perfected and, as we have seen, had subsequently been the subject of an appeal to this Court as well as a number of applications including for stay. The respondents themselves had proceeded to attempt to execute the same. There was finality as to the proceedings, merits and decision in the matter. And the High Court had become *functus officio* so that any issues of grievance could only be dealt with by escalation to this Court on appeal.

We are fortified in this view by the fact that a perusal of the respondents' application shows that what was sought went way beyond the exceptions to the application of the doctrine. There was neither slip in drawing the judgment nor an error in expressing the intentions of the Court. Indeed, the grounds on which the application was premised, properly understood, betray the serious adjudicative exercise that the court was being called upon to perform. The learned judge captured the main grounds as follows;

- i. ***That the judgment by omission or mistake failed to made provision on how the two and a half months salary for every completed year in severance pay would be calculated and/or arrived at.***
- ii. ***That the plaintiffs in the plaint had sought a mandatory order to compel the defendant to calculate the plaintiffs' severance benefits in accordance with employment laws in force, and which prayer was neither considered nor granted. This was an omission or mistake correctable or amenable to amendment under section 99 of the Civil Procedure Act.***
- iii. ***That the Defendant has in spite of repeated requests refused to provide the Plaintiff's employment records in its possession. The Plaintiffs are thus faced with danger of having a judgment in their favour which they cannot execute.***
- iv. ***That the Plaintiffs are entitled to the fruits of their judgment, and in the event that the Court is inclined to grant stay of execution, the Defendant should be ordered to deposit security in the sum of KShs. 2.9 billion or such sum as the court deems just and expedient in the circumstances.***
- v. ***That it is in the interests of justice that the court either amends the judgment and decree or reviews the same to ensure the same is capable of being executed."***

We are of the respectful view that the learned Judge was clearly wrong when he failed to declare the court *functus officio* and devoid of jurisdiction to grant the respondents' prayers.

This was only compounded by the order directing that the Appellant file an affidavit indicating the salary and length of service of each plaintiff plus a calculation of severance pay due to each. The judge in our view was trying to convert the *judgment in rem* into a *judgment in personam* using a procedure alien to law in that he was trying to improperly admit evidence after a suit had been heard and concluded. The documents that were ordered to be filed had not been introduced at the trial of the suits and could not be brought in after the judgment had been proclaimed. This has obvious evidentiary implications in terms of authenticity, veracity and admissibility and leads to the question whether the makers of the documents and the deponents to the affidavits could be amenable to cross-examination on the same at that that post-judgment stage.

Nor was there need or jurisdiction, within the same suit, for the learned judge to attempt to so convert the character of the judgment entered by Mwera J. who had, in what must banish any notion that there was any error or omission in the judgment as framed, stated in an earlier ruling in the matter that he would deliver a judgment "*in rem*", not "*in personam*". The terminology employed was not entirely correct in terms of the exact meaning of the two types of judgment. As commonly understood, a judgment *in personam* is one that is entered against a specific person and is enforced against that person directly while an *in rem* judgment declares rights over property or status and is said to be against the whole world. It can only be surmised therefore that by employing that terminology in the context of the pleadings and the case before him, Mwera J. implied that the suit was purely a declaratory suit, limited in scope and falling short of granting specific, quantified and executable decree in favour of each respondent.

Mr. Nowrojee, SC for the respondents submitted that in Civil Appeal No. 207 of 2012, the Court resolved the question of what type of judgment Mwera J's was. He urged us to accept the reverse reasoning that in so far as the Court did not endorse the argument by the appellant that it was a judgment *in rem*, then by implication it rejected that argument and therefore the judgment was *in personam*. With

respect to Senior Counsel, we are unable to accept that reasoning. All we see from the judgment in **Civil Appeal No. 207 of 2012** is that the Court captured the argument made but did not make any finding or even a comment on it. We are not prepared to hold that such non-finding was a rejection of the submission. Rather, what is clear from that judgment is that the issue was not identified by the Court as crucial or even relevant to the determination of that appeal. The Bench in that appeal gave the distinction between the two types of judgment a wide berth, and with good reason. We, too, are of the view that nothing really turns on the distinction as far as the determination of this appeal is concerned. It turns on the propriety or legality of the re-opening of the determined case, which we have addressed at some length.

There is also the obvious misdirection on the part of the learned Judge in imposing upon the appellant the very obligation that by law resides in the courts, to conduct computations and declare the entitlement of claimants before them. It is not a task that can, without a species of violence to the judicial tradition, be placed upon defendants. The assessment of damages is purely a judicial function that cannot be delegated. This Court so held in **KENYA REVENUE AUTHORITY VS MENGINYA SALIM MURGANI** [2010] eKLR stating, *inter alia*:

“Both the award and level or quantum of damages is in our view, judicial functions which the superior court cannot rightfully delegate....a judgment must be complete and conclusive when pronounced and therefore it cannot be left to the deputy registrar to perfect it. Assessment of damages is not a ministerial act as envisaged by Order 48 (Currently Order 49) of the Civil Procedure Rules and a direction to “assess” or “calculate” damages would be contrary to the requirements of Order 20 (currently Order 21) of the Civil Procedure Rules because it would be incomplete without assessment and would patently be a nullity.”

This judicial function of assessment of damages is one the courts have long jealously guarded for it takes judicial wisdom, experience and consideration to arrive at an appropriate measure of damages. This is partly the reason that in the case of special damages it is the law that they must be specifically pleaded and strictly proved, (see **HAHN V SINGH** [1985] KLR, 716) as this implicates the integrity of the judicial process and avoids ambush and surprise. It is unthinkable that the surprise should be sprung long after judgment has been entered as the learned Judge’s directions seemed to invite. Much as the learned Judge believed himself to be acting in the interests of justice, we take the view that the very act of re-opening the suit through affidavits had the effect of defeating the law and the interest of justice. We respectfully reject the notion that **Article 159(2)(d) of the Constitution** and the overriding objectives of Civil Procedure Act and Rules could be invoked to justify a departure from well-used procedure for perfecting declaratory judgments by inviting parties to compute entitlements and the filing of affidavits as happened in this case. We reiterate that *it* would be a serious abdication of the judicial function were the same to be delegated to the parties who come to the courts for that very determination. Such delegation is a nullity for all purposes and the challenge to the learned Judge’s ruling on that score is well-founded and upheld.

We note that one of the major issues raised by the appellant was the challenge of ascertainment of the number of the respondents. In **HCCC NO. 216 of 2007** and **255 of 2007**, only three plaintiffs were named. It is apparent that the named plaintiffs who sued on behalf of the others did not give a list of the rest of them at any time before or at the trial. The names of the plaintiffs ought to have been appended for the benefit of the defendant and the court. That they were not was a serious omission which has spawned much of the complexity and controversy that has dogged this matter. The very first Order in the Civil Procedure Rules deals with *Parties to Suits*. It sets out in clear detail such issues as who may be joined as plaintiffs (**rule 1**); the fact that one person may sue on behalf of all where numerous persons have the same interest – in which case notices, including by advertisement must issue (**rule 8**); substitution and addition of parties (**rule 10**) and appearance of one plaintiff on behalf of the others – in which case the others must give their authority in writing. There is also procedure set out in **rule 14** by which any relevant applications are to be made. It is difficult to fathom why these clear and simple rules that would have sorted out the conundrum in which the respondents find themselves were not followed.

The respondents are seeking umbrage under **Article 159 (2) (d)** of the Constitution which provides

that *justice shall be administered without undue regard to procedural technicalities*. It does not avail them. We are content to state that the constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been said before, the rules serve as handmaidens of the lady Justice.

The upshot of our consideration of the record of appeal, the submissions by learned counsel and the relevant law is that this appeal is meritorious and must succeed. In the result we allow the appeal and set aside the orders of Waweru J. issued on **22nd March 2012** in their entirety.

The parties shall bear their own costs.

Dated and delivered at Nairobi this 9th day of May 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

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P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR

b.c