IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, MURGOR & J. MOHAMMED, JJA.)

SUP. NO. 20 OF 2013 BETWEEN

MUIRI COFFEE ESTATE…….....……..…….APPLICANT

AND

KENYA COMMERCIAL BANK LTD, ……..1ST RESPONDENT

BIDII KENYA LIMITED …….....…….2ND RESPONDENT

(*An application for leave to be granted to the Applicant to lodge an Appeal from the Decision/Judgment of the Court of Appeal at Nairobi (JJ, JW Onyango Otieno, W. Karanja, D. K. Maraga) dated 26th April, 2013) in*

CIVIL APPEAL NO. 100 OF 2010

****

RULING OF THE COURT

By its Notice of Motion dated 3rd October 2013, **MUIRI COFFEE ESTATE LTD** (the Applicant) prays that this Court do grant it certification to enable it to appeal to the Supreme Court against the judgment of this Court (J. W. Onyango Otieno, W.Karanja and D.K.Maraga JJA) rendered on 26th April 2013. The application is expressed as brought under **Article 163 (4)** of the **Constitution** of **Kenya 2010**, **Section 15** and **16** of the **Supreme Court Rules** and **Rule 1(2)** of the **Court** of **Appeal Rules**.

The Motion, drawn by M/s Wachakana & Co. Advocates, is most inelegantly crafted. In the orders it seeks, it mixes prayers with grounds and what appear to be submissions. Some of the 'orders' sought are no more than general statements of grievance that cannot possibly be granted as orders by this Court. We say, for the umpteenth time, that counsel need to pay closer attention to the pleadings they file in court. Be that as it may, order Number 1 is enough to engage us and should have sufficed:

> ***"THAT leave be granted to the applicant to lodge an appeal against the Decision/Judgment of the Court of Appeal given a 26th April 2013 in Civil Appeal No. 100 of 2010 consolidated with Civil Appeal No. 106 of 2010."***

Even though the said Motion is said to be based on some nine grounds, only one appears to us to be relevant to the consideration of this certification application and is indeed the only one urged by Mr. Muite the learned Senior Counsel who led Mr. Wachakana for the applicant;

> ***"(a) THAT this Honourable Court has jurisdiction to certify that the proposed appeal to the Supreme Court by the Applicant is a matter of utmost public importance as various Courts have made Judgments and Rulings that there exists a consent order dated 4th May 1992 in H.C.C.C No. 1219 of 1992 between the parties herein without a record both in the High Court and the Court of Appeal."***

That ground is echoed and mirrored in prayer 2 of the motion itself which is one of those that are no prayers at all;

> ***"2. THAT this Honourable Court do certify that the matter in issue is a matter of general public importance as concerns whether the High, Court of Appeal and Supreme Court are courts of record and therefore lack jurisdiction to conclusively make a finding of fact and law on whether there was a consent order entered into before honourable Justice Githinji (as he then was) (sic) on 4th May 1992 without reference to an existing or valid record of appeal."***

In support of the Motion, the applicant filed an affidavit sworn on 3rd October 2013 by Hon. Ngengi Muigai one of its directors in which is repeated, as far as is relevant to this application, the contention that absent a record, this Court is devoid of jurisdiction to conclusively make a finding of fact and law that there was a consent order entered before Hon. Justice Githinji [J] (as he then was). The same dependent also swore a supplementary affidavit on 12th June 2014 by which he exhibited various documents he had referred to in the earlier affidavit.

Predictably, the application was opposed by the respondents. **BONNIE OKUMU**, the 1st Respondent's Legal Manager swore a Replying Affidavit on 14th July 2014 in which he alluded to a long line of cases and appeals filed by the applicant to make the point that the applicant is out to merely 'frustrate' the 1st respondent's attempts to realize its security. Among the averments made in that affidavit are;

> ***"7. THAT by a Consent Decree recorded in that suit [HCCC No. 1219 of 1992] on 4th May 1992, the Applicant and the said company admitted liability, undertook to liquidate the same by 31st July 1992 and confirmed that the 1st Respondent could sell the properties if they failed to do so. Annexed hereto and marked 'BO' is a true copy of the said decree."***

That affidavit recounts how that consent decree was set aside on 31st October 1997 upon the application of the applicant and one **BENJOH AMALGAMATED LIMITED,** (Benjoh) which was the 1st Respondent's principal debtor, the applicant being guarantor to the debts. The 1st Respondent appealed to this Court against the setting aside order vide **Civil Appeal No. 276** of **1997**. By a judgment delivered on 19th March, 1998, the Court reversed the setting aside order **"the effect of which is that HCCC No. 1219 of 1992 remains settled in terms of the Consent order referred to above**", it is averred. After stating that some eighteen (18) suits have been filed against the 1st Respondent over the same subject matter, the deponent refers to four appeals still pending before this Court in addition to three suits still undetermined at the High Court and opines that **"it is only just and prudent that the applicant awaits the outcome thereof before moving this Court to issue a certificate for leave to appeal to the Supreme Court."** (At par.16). He concludes by stating that the application before us is **"an abuse of court process, vexatious, frivolous, without merit and the same should be dismissed with costs."**

On behalf of the 2nd Respondent a Replying Affidavit was sworn by **RAHUL DILESH BID**, one of its directors. He averred at paragraph 3 as follows;

> ***"THAT the Applicant's claim before the High Court was determined first in Milimani HCCC. No. 1219 of 1992 wherein Benjoh Almagated Limited as Borrower and the Applicant as Guarantor entered into a Consent Judgment on 4th May 1992 admitting the liability of debt to the 1st Respondent thereby confirming the validity of the charge and undertook to liquidate same by 31st July 1992 failure to which (Sic) the 1st Respondent would be at liberty***

to sell the suit property …"

The deponent made reference to the multiplicity of suits filed against the 2nd Respondent and concluded that the application before this Court is a frivolous and scandalous abuse of the process of the court deserving only of dismissal.

Learned counsel appearing before us adopted and expounded on the positions taken by their respective clients as we have gleaned from the various affidavits we have referred to. **Mr. Muite, SC**, submitted that the core issue on the basis of which the applicant seeks certification relates to what the legal consequence is of a court of record being without a record. Put another way, **do the High Court and the Court of Appeal, which are indubitably Courts of record, have jurisdiction to entertain proceedings and make rulings and judgments on the basis of orders supposedly made before a court of record where that record is in fact missing?**

It was Mr. Muite's submission that the question posed involves a substantial issue that goes beyond and transcends the immediate interests of the parties to the matter before us. To Senior Counsel, it is a matter that has to do with the very administration of justice for precisely the reason that litigants are not the custodians of court records. To him, it is a contradiction in terms for a court constituted as a court of record, to proceed to act upon a matter on record when there is no record of it because, to quote him,

"a court of record is so-called because it keeps a record of its proceedings, rulings and judgments and it is the record that guides the subsequent applications and direction of the litigation." Mr. Muite further submitted that whenever a dispute arises as to what transpired before a court of record, it is the record that speaks and resolves the issue.

> Senior Counsel posited that what there has been before the High Court and this Court is a reconstructed file which is incomplete. In particular, the consent said to have been recorded is absent which is the reason why, absent the record of that consent, Githinji J (as he then was) before whom it is supposed to have been recorded, held that the consent had to be set aside. Mr. Muite attributed the numerosity of suits filed by his client and Benjoh, the principal debtor, to that absence of the record and maintained that the applicant's grievances have never been heard on their merits because **"technicality after technicality have stood on its way because of the consent order".**

Mr. Muite maintained that this application does raise cardinal issues of law of jurisprudential moment deserving of the Supreme Court's interrogation and

final pronouncement. The matter also has a bearing on the administration of justice and raises an issue of general public importance within the meaning of the Supreme Court's authoritative pronouncement in **HERMANUS PHILLIPUS STEYN –VS- GIOVANNI GNECCHI-RUSCONE, SUPCT Appl. No 4 OF 2012, [2013]e KLR.** He also cited the same apex court's decisions in **SUM MODEL INDUSTRIES LTD –VS- INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION SUP. CT. APPL. 1 OF 2011 and MALCOM BELL –VS- HON. DANIEL TOROITICH ARAP MOI & ANOR SUP. CT, APPL. NO. 1 OF 2013, [2013] eKLR**. Mr. Muite was emphatic that all the confusion that has attended the protracted litigation between the parties herein arises from the missing record and has been the reason for the plethora of suits against the respondents. He rejected and repudiated the characterization of his client as frivolous or vexatious and defied the tag of villainy attributed to the applicant with a rhetorical flourish;

> ***"Applicants have been persistent in pursuit of justice. What is a party who has never been heard to do other than to keep trying?"***

Pointing out that **Civil Appeals 100** and **106** of **2010,** as consolidated, the decision whereon the applicant wishes to challenge on appeal, were filed subsequent to the enactment of the new Constitution, Senior Counsel submitted that it would be unjust and contrary to public interest for the applicant to be held prisoner to a consent that is in fact not available before court. He posited that the

applicant seeks the opportunity to persuade the Supreme Court that absent a record there can be no consent as the Court is in no position to verify its existence. He submitted that:-

> ***"A photocopy and a half of a reconstructed record cannot be a platform or basis for the Court of Appeal to make judgments [of the sort sought to be appealed against]".***

He was also of the view that with none of the cases having proceeded to a merit–based trial, compounded by the sums demanded from the applicant having risen from KShs. 3.4 million to KShs. 44.3 million in 8 months and revolving around the very emotive and sensitive issue of land, it would be in the interests of justice to test the single issue of records before the ultimate court.

The matter is critical, in Senior Counsel's submission, because the issue of missing court records is not a problem or challenge limited or peculiar to the parties herein but one that is prevalent, happening everywhere in the country. He concluded that unlike where a party is suspected to have had a hand in the disappearance of court records and therefore deserving of investigation, prosecution and condemnation, the fate of a case where records go missing absent the culpability of any of the parties is uncertain and there is a general public interest need for the highest court in the land to pronounce itself with finality.

Mr. Nyachoti, the 1st respondent's learned counsel in opposing the application sought to re-direct attention to the fact that the consent of 4th May 1992 aside, there was no doubt that financial accommodations were advanced by the 1st respondent and the sum advanced had not been repaid. He pointed out that there was a full merit trial of the dispute in **HCCC.1576** of **1999** which gave rise to a judgment on 23rd July 2004 by Lenaola J. Counsel also pointed out that after the Ruling by Githinji J setting aside the consent judgment was overturned, the applicant applied to have this Court review its judgment vide **Sup 16** of **2012** but that application was declined by this Court. Counsel charged that by the present application the applicant is seeking similar orders against the same parties regarding the same consent order and therefore urges that the application should suffer a similar fate. He altered his submission somewhat admitting that the judgment under attack in **Sup 16** of **2012** was a different one but he maintained that the matters were substantially the same.

Mr. Nyachoti submitted that the long and convoluted history of the current dispute notwithstanding, it was essentially a purely commercial dispute devoid of any uniqueness and devoid of anything that renders it a matter of public interest or importance. He therefore urged us to find that the application does not satisfy the certification criteria set out in **Article 163(4)** of the **Constitution,** and dismiss it.

On his part **Mr. Issa**, learned counsel for the 2nd Respondent, submitted that the issue of the missing record was a novelty as it was not raised before the High

Court or before this Court prior to the application before us. He did however make the significant concession that **"the consent is the well from which all these cases spring."** He pointed out, though, that whenever that consent has previously been challenged by the applicant, it has been on the basis of the alleged ambiguity of the consent and not the absence of its foundational record. He concluded that the record has never been a live issue and therefore besought us to dismiss it as one undeserving of raising before the Supreme Court.

Replying to the submissions by counsel opposing this application, Mr. Muite, Senior Counsel, was emphatic that the real issue in controversy between the applicant and the respondents has never been fully heard, and determined on merit. He was categorical that the judgment of Lenaola J was coloured by and so inevitably upheld, the consent judgment that is the cause of the applicant's grief and grievance.

Mr. Muite also sought to draw a distinction between the current application seeking a certification to appeal against the decision of this Court in **Civil Appeal No. 100** and **106** of **2010** (Consolidated) and the rejected certification application referred to by counsel for the 1st Respondent. The distinction lay, stated Mr. Muite, in the fact that the latter related to **Civil Appeal No. 276** of **1997** which is totally different from the one sought to be challenged herein.

It was Mr. Muite's submission that the consent order has always been in contestation and the missing court records have always been live and disputed which is why they have spawned the plethora of suits between the parties herein. It was his concluding plea that it would conduce to the doing of manifest justice were the appellants to be granted an opportunity to ventilate their substantial grievances on a matter of general public importance at the ultimate judicial forum that is the Supreme Court.

We have given this application, the several forceful submissions made by the parties and the many authorities cited before us careful and anxious consideration. Up until the promulgation of the Constitution of Kenya 2010, the pronouncements of this Court on appeals it decided had the fateful ring of finality and any party aggrieved thereby was bound without further recourse, as this was the forum of last resort. All that changed with the superimposition of the Supreme Court at the apex of Kenya's judicature, giving one last opportunity to appeal. For good reason; however, it is not every decision of this Court that is appealable to the Supreme Court. The Constitution itself limits the appellate jurisdiction of the Supreme Court in **Article 163** as follows;

"(4) Appeals shall be from the Court of Appeal to the Supreme Court –

> ***(c) as of right in any case involving the interpretation or application of this Constitution***
>
> ***(b) in any other case in which the Supreme Court or the Court of Appeal; certifies that a matter of general public importance is involved…"***

Even though either court may grant certification, the Supreme

Court has already provided guidance that certification should first be sought before this Court. That court authoritatively stated in **SUM MODEL INDUSTRIES LTD – VS- INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION** (Supra) as follows;

> ***"This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, the court should ideally be afforded the first opportunity to express an opinion as to whether an appeal would lie to the Supreme Court or not. If the applicant is dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek review of that decision by this Court as provided for by Article 163(5) of the Constitution"***

See also **MALCOLM BELL –VS- HON. DANIEL TOROITICH ARAP MOI & ANOR,. (Supra)**

Now that the application is before the proper forum, what we must decide is whether it satisfies the constitutional threshold of a matter of general public importance being involved. This the applicant must satisfy because the Supreme Court has held that it is only those matters requiring its further input that should

be escalated to it by way of appeal since other tier courts beginning from this Court and those below it, do have the professional competence to deal with technical points of law, no matter how complex. That Court thus declared itself to

be committed to jealously guarding the jurisdiction of this Court and to avoiding any untoward encroachment or intrusion upon matters that fall within the jurisdictional remit of the latter. In **PETER NGOGE –VS- FRANCIS OLE KAPARO & 5 OTHERS SUP CT. PET. No. 2 OF 2012, [2012]eKLR**, the apex Court stated that:-

> ***"… the guiding principle is to be that the chain of courts in the constitutional set–up, running up to the Court of Appeal, have the professional competence, and proper safety***

designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of jurisprudential moment, will deserve the further input of the Supreme Court."

Whereas it is quite clear that a purely legal matter must bear the imprimatur of "cardinality" and be jurisprudentially momentous as opposed to ordinary technical complexity to warrant certification, it is worth-noting that appeals to the Supreme Court from this Court and the certification therefore need not raise purely legal or jurisprudential questions for the former court's determination. This is because the Constitution contemplates **'matters'**, not **'legal matters'**, of general public importance. To that extent there is a great latitude as far as the content of what may fall under general public importance is concerned. The Supreme Court has itself enunciated this understanding in

HERMANUS PHILLIPUS STEYN –VS- GIOVANNI GNECCHI – RUSCONE (Supra) where it stated;

"[50] It is clear to us that, the exact image of a matter of general public importance may vary in different situations save that there

will be broad guiding principles to ascertain the stature of a particular case. Besides, the comparative judicial experience shows that criteria of varying shades have been adopted in different jurisdictions. The general phraseology in the laws of most jurisdictions is, 'a point of law of general public importance;' but Kenya's Constitution, in Article 163

(4) (b) refers to 'a matter of general public importance', as a basis for invoking the Supreme Court's appellate jurisdiction. In our opinion, the Kenyan phraseology reposes in the Supreme Court in principle, a broader discretion which, certainty, encapsulates also the 'point of law of general public importance'"

(Emphasis in the original)

It is thus clear to us that the Supreme Court's appellate jurisdiction under **Article 163(4) (b),** which we must therefore bear in mind when considering a certification application such as is before us, is possessed of greater breadth than merely legal issues or questions. This becomes particularly apt where the issue or matter being raised is such as has a public interest aspect to it, especially one touching on the proper administration of justice.

Some **eleven** categories of questions of that would constitute matters of general public importance were set out in the **HERMANUS PHILIPUS STEYN**

decision of the Supreme Court. Our reading of the said categories, extractable from both the main majority Ruling and the dissenting opinion of two of the Supreme Court Justices, persuades us that they are to be read disjunctively and

not conjunctively. Thus, a matter could qualify for certification if it possessed one or a combination of the categories. It need not fit into more than one of the categories set out therein. The Supreme Court itself condensed the categories at **paragraph 53** of its **MALCOLM BELL-VS- MOI** decision. We consider the last four of the categories listed thereunder to be germane to the application under consideration;

"(viii) issues of law of repeated occurrence in the general course of

litigation may, in proper context, become 'matters of general

importance', as to be a basis for appeal to the Supreme Court;

(ix) questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable number of persons in general, or as litigants, may become

'matters of general public importance' justifying certification for final appeal in the Supreme Court;

x. ***questions of law that are destined to continually engage the workings of the judicial organs, may become 'matters if general public importance' justifying certification for final appeal in the Supreme Court.***

xi. ***question with a bearing on the proper conduct of the administration of justice may become 'matters of general public importance' justifying final appeal in the Supreme Court".***

It is contended for the applicant, if we understand the argument correctly, that it woes, manifested in a multiplicity of suits and multi-level litigation, have

their genesis in a failure by successive courts to fully give effect to the notion and requirement that the High Court is a **court of record**. To the applicant, failure to appreciate and accord full respect to the notion that superior courts are courts of record has perforce led to a miscarriage of justice in that a consent order, unsupportable and unprovable on the record, has been attributed to the applicant with deleterious effects on its right to be heard, or to be heard sufficiently and fully. The paying of scant respect to the critical character and notion of Superior Courts as courts of record, it is contended, is a matter of general public importance as it implicates the proper administration of justice and is a matter that does arise in courts within the country and is likely to keep occurring. The issue raised, therefore, argues the applicant, transcends the immediate individual interests of the applicant, and breaks out into the public domain and should interest all that care for the fair administration of justice and the public generally does have an interest in, and should care about it.

The issue of the consent order featured prominently in the judgment the applicant seeks to challenge at the Supreme Court. The Court addressed the matter under the head of whether the suit was *res judicata* as follows;

> ***"In the appeal before us, it is not disputed that there are several matters - some concluded while others are still pending, which basically relate to the same subject matter. It is not disputed either***
>
> ***that one such case is HCCC NO. 1219 of 1992 in which the 1st and 2nd respondents entered into a consent judgment (sic) and confirmed the validity of the charge documents (now being contested) admitted***
>
> ***liability of the debt owed to the 2nd appellant herein, and undertook to liquidate the same by 31st of July 1992, and confirmed that the 2nd appellant was at liberty to sell the said properties if the debt was not paid as agreed."***

The court reverted to the same issue and reiterated the centrality of the consent in these emphatic terms;

> ***"In this case, as pointed out earlier on, the parties herein did enter into a consent in which the 1st and 2nd Respondents admitted the debt owed and made an undertaking to settle the same. This in effect in our considered view also meant that they accepted the validity of the charges on which their indebtedness was based. They are therefore***
>
> ***estopped from reneging on that consent and their relitigation on these two matters is manifestly res judicata. At the risk of sounding repetitive we reiterate that the challenge on the validity of the charges was determined by the High Court (Lenaola J,) and the same was upheld by this Court on appeal. That issue must therefore be laid to rest and cannot continue to be relitigated ad nauseum".***
>
> (Our emphasis)

It is noteworthy that in the judgment by Lenaola J referred to by the Court, being **H.C.C.C. No. 1576** of **1999** decided on 23rd July 2004, the seemingly ubiquitous consent featured prominently with the learned Judge stating, *inter alia*.

> ***"43. Do all these issues show that the matters are res judicata? Without hesitation, I shall say yes. HCCC 219/92 has been settled in terms of the consent order … The plaintiffs hit a dead***
>
> ***end when the Court of Appeal upheld the consent order as framed and agreed to by the parties. They have no other recourse save to pay or have the securities sold as they alternatively agreed to do ….***
>
> ***47. …. It does not matter therefore that the judgment was by consent and not on merit after trial. It is binding as of the judgment was one after evidence had been called!***
>
> ***48. I have attempted earlier to show that the next effect of the consent order was to put to rest all questions as regards the dispute between the parties and res judicata can properly be invoked as I hereby do.***
>
> ***49. Accordingly I uphold the objection contained at paragraph 24 of the Amended Defence dated 16th November 2000 that the plaintiffs herein are estopped from relitigating on matters previously raised in HCCC 1219/92 and the subsequent suits."***

It is indisputable that in virtually all proceedings between the parties that came after 1992, the consent entered in **HCCC 1219/92** has loomed large and has been a decisive factor in the determination and disposal of those cases. The Court of Appeal decision that Lenaola J referred to as heralding the end of the road for the applicant and Benjoh was made on 10th March 1998. It was a decision that reversed, overruled and set aside the decision of Githinji J (as he then was) by which the learned Judge had in a ruling delivered on 31st October 1997 granted an

application by Benjoh and the present applicant to set aside or review the consent order of 4th May 1992.

In reversing Githinji J, this Court (Kwach, Tunoi, Bosire JJA) was unusually blunt and caustic in castigating the learned Judge's decision. Said the Court:

> ***"The learned Judge relied on the case of <u>Gerald Gikonyo & Anor –vs- Wamuchege Gatu & Others</u> (HCCC NO. 2002/96) (unreported) a decision of his own in which he had held that where the original record is lost and certified copies of the record and judgment or order made by the court are not available at the time of hearing, an application by a party challenging the judgment or order allegedly made by the court in the original has to succeed <u>exdebito justi tiae</u> so that a retrial can be held to facilitate the making of a proper record. If the learned Judge was trying to lay down a general principle in that case then we must disabuse him of any notion he might have entertained that he had succeeded in doing so. So general a statement as he adumbrated can only bring the law into disrepute and provide a field day for unscrupulous litigants who wish to obstruct the course of justice. If by simply arranging for the court records to disappear you can put back the clock and postpone the day of reckoning, the courts will be forced to enlist the services of armed guards to secure the safety of its (sic) files".***

The learned Judges were clearly unimpressed by the dilemma that Githinji J saw himself as confronted by as captured in his ruling;

> ***"This is a reconstructed file pursuant to the order of the Senior Deputy Registrar dated 16.5.97. The Deputy Registrar could not trace the Court file despite efforts …***

In the present case, the original record is lost or misplaced. <u>There is no copy or certified copy of the proceedings leading to the recording of the consent order (DECREE). Although there is a Photostat copy of the Decree, the original decree is not available</u>. There is no way to vouch for the correctness of the Photostat copy of the Decree. It is apparent from the copy of the plaint that the plaintiffs' lawyers were D. M. Kinyua & Co. Advocates. It is undisputed that the consent order impugned was recorded in the presence of Mr. Menye advocate and not in the presence of Mr. D. M. Kinyua. Mr. Kungu Muigai states that plaintiffs never engaged Mr. Menye advocate. In the absence of the original record, it is not known in what circumstances Mr. Menye advocate attended court and entered into the consent order. It is not known whether or not he had filed a notice of change of advocate or whether he was holding brief for Mr. D. M. Kinyua. The application and the replying affidavit of G. M. O.

Ochino which preceded the consent order are not available thought (sic) it is conceded that defendant had not filed a defence by the time the consent order was recorded.

In the above circumstances, it is impracticable for the court to determine the present application judicially. For instance, it is difficult to make a finding whether or not the consent was entered into by an advocate who was lawfully acting as an agent of the plaintiffs. It is also difficult to decide, without the record, whether or not grounds on which a consent order can be set aside exist."

We pause here to say that the approach taken by Githinji J is neither abhorrent nor aberrant when viewed against the practice of other jurisdictions where judges have taken the absence or incompleteness of the

record as a grave, disturbing and concerning phenomenon. In South Africa, for example such absence has led to the 'inevitable' setting aside of convictions and sentences in criminal matters. See, for instance, **<u>P. DAVIDS –VS- THE STATE</u> [2013] Z A W C H C 72**, a March 18, 2013 decision by Bozalek, J of the Western Cape High Court and **<u>S –VS- CHABEDI</u> [2005] SACR 415 (SCA) at para [5**]. This accords with this Court's own approach as seen in **<u>DAVID KINYUA MAINGI, & 2 OTHERS –Vs- R NYERI CR. APP.NO. 98 OF 2003</u>.**

It seems to us that the various suits and appeals we have referred to, and several related ones besides, all proceeded on the basis that there was an incontestable, properly-entered-into and therefore effective and efficacious consent. Indeed, whenever the *res judicata* objection was raised and sustained, the underlying understanding and assumption was that there was a consent properly entered into. This Court's judgment quashing Githinji J's setting aside order added finality to that assumption.

We are cognizant that in this application we are not called upon to review or pronounce upon the propriety or correctness of any of the pronouncements and findings already made by this Court in the convoluted, vexed and ceaseless litigation between the parties. That notwithstanding, we must also concede that upon hearing the forceful submissions made before us by Mr. Muite for the applicant, we cannot but conclude that the issue of the character of superior

courts as courts of record and the consequences of absence or incompleteness of the record, where rights are determined with finality on the basis of what ought to be on that very record, is neither shallow nor idle. Rather, formulated in the precise manner in which it was before us, the issue appears to us to have far reaching consequences and implications on the integrity of the adjudicative processes of the courts. When so much hinges on the circumstances surrounding the recording of a consent and what transpired in its recording cannot be found on the record, and when the original file together with the original signed copy of

the order or decree (if any for there is no way of telling) cannot be traced, it seems to us that a strident and insistent litigant, who has not been shown to have had a hand in the disappearance of the record, ought not to be shut out until he has asked the ultimate judicial forum in the land to pronounce on whether or not a court of record, acting outside of and without a record to silence him in the name of *res judicata*, has done justly. A plea of that sort, presented and urged in that manner as happened before us seems to us to

raise a matter of general public importance. The Supreme Court's final and authoritative pronouncement on the issue presented is what in our view, will finally put this long-drawn out dispute to rest.

The matter before us brings to the fore the peril to justice that is daily presented by systematic weaknesses both in the recording of court proceedings and in the maintenance, security, and preservation of the same. A long-hand, manual recording of proceedings by the concerned judicial officer as opposed to an independent automated system within built accuracy and integrity safeguards will continue to plague our courts, yet they are, and must remain and be seen to be, courts of record.

The importance of the record is self-evident from the very definition of a court of record. The learned Indian author **P. Ramanatha Aiyar, in <u>The Major Law Lexican</u> , 4th Ed. 2010 Vol. 2 at pa1611** states that a court of record is :-

> ***"a Court where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony … a court that is***
>
> ***bound to keep a record of its proceedings … 'Recordum is a memorial or remembrance in rolls of parchment, of the proceedings and acts of a court of justice …. But legally records are restricted to the rolls of such only as are courts of record, and not the rolls of inferior courts (Coke, Litt.260a)"***

The obligation to keep a record of its acts, proceedings and decisions would then appear to be of the very essence and character of a court of record: "a court of record necessarily requires some duly authorized person to record the proceedings" as was stated in **Ex. PARTE CREGG, 6 Fed, Cas. No. 3. 380 2 curt. 98.**

Historically out in England all courts of record were the King's Courts, in right of his Crown and Royal dignity. Our courts are the people's courts under our constitutional set up and the people would have an interest in proper

proceedings being kept by and available at the Courts. What courts do especially superior courts, is a matter of record.

It is ironical that the record that ought to accurately, faithfully and authoritatively settle any dispute or controversy as to what may have transpired or been said before a court of law is what is here missing with the effect that there is a lack of certitude and the controversy rages unable to be halted by the certain word of the record.

We have said enough to show that this application is for allowing. We are not unaware of and are not discounting the recent decision of this Court in **Civil Application No. Sup 16 of 2012 <u>BENJOH AMALGAMATED LTD &</u> <u>MUIRI COFFEE ESTATE –VS- KENYA COMMERCIAL BANK</u>** by which a different bench rejected Benjoh's and the applicant's application for certification. Having read that ruling, we note that it related to an applicantion for leave to appeal to the Supreme Court against a judgment delivered on 10th March 1998 in **Civil Appeal No. 276** of **1997**.

The Certification limb of the application was not urged with much heart and the Court itself observed as much;

> ***"We observe that counsel did not show any enthusiasm with regard to the prayer on leave to appeal to the Supreme Court and perhaps that is why there was a pauci of submission on this point."***

In getting to allow this application therefore, we in no way run counter to any decision of this Court in a related matter. Even if such a decision had existed, we would still have been within rights to arrive at our conclusion on the basis that each application must be considered on its own merits. The Supreme Court itself has alluded to this in the

HERMANUS PHILLIPUS STEYN decision as follows;

> ***"[54] In R(Crompton) –vs- Wiltshire Primary Care Trust [2009] 1 All ER 978, the court stated the principles under which a protective – cost order may be issued: one of these being that the issues raised are of general public importance; and such issues do not have to be of***
>
> ***importance to all citizens or the whole nation … The court then gave certain direction on how a Judge should evaluate the importance of the issues raised, and make judgment as to whether they are of general importance. First, there is no absolute standard by which to define what amounts to an issue of general public importance. Second, there are degrees to which the requirement may be satisfied: some issues may be of the first rank of general public importance. Third, making the judgment is an exercise in which two judges may legitimately reach a different view, without either being wrong."***

On our own consideration of the application before us as framed, couched presented and argued, we are satisfied that the applicant has a valid matter of general public importance to raise by way of appeal to the Supreme Court. The Motion dated 3rd October 2013 is therefore granted in terms of prayers 1 and 2. Each party shall bear its own costs.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of November 2014.

P. O. KIAGE

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR