IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 203 OF 2006

PETER NGANGA MUIRURI…….……..
APPELLANT

AND

CREDIT BANK LIMITED

CHARLES AYAKO NYACHAE t/a NYACHAE & CO. ADVOCATES

THE ATTORNEY GENERAL……..…..……
RESPONDENTS

(Appeal from the Ruling and Order of the High Court of Kenya

Nairobi (Nyamu, J.) dated 12th May, 2006

in

H.C.Misc. Application No. 1382 of 2003 (O.S.)

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JUDGMENT OF THE COURT

The parties to this appeal have come to this Court on appeal for the third time. In their first appeal, to wit Civil Appeal No. 237 of 1997 the appellant was Credit Bank Ltd with Peter Nganga Muiruri as respondent. In that appeal as in both the other two appeals, the dispute arose from a mortgage debt. There were two suits which were filed by the appellant herein against the first and 2nd respondents which were consolidated and compromised by the recording of a consent judgment. Later on a dispute arose as to the interpretation of parts of that consent and the superior court in a ruling by Hayanga J. made orders which gave rise to the first appeal. This Court differently constituted handled that appeal and in a judgment which was pronounced on 6th February, 1998 rendered itself, in pertinent part, thus:

"The tenor and effect of clause 1 (b) of the consent judgment did not extenuate in any manner the respondent's contractual obligations in the repayment of his mortgage debt together with the accrued interest thereon to the appellant. The deposit of Kshs.1.8 million on his loan account which money in respect of the purchase of the suit property in a public auction by Deepak Pundit did not give him proprietary rights over it and the interest accruing thereon could not be a charge on his mortgage debt with the appellant. The wording of the penultimate sentence in the ruling of the Learned Judge may be

unclear but a composed interpretation of clause 1 (b) of the consent judgment leaves no doubt that the Kshs.1.8 million deposited in the respondent's loan account with the appellant on 6th January 1995 on account of the purchase of the said property in a public auction by Deepak Pundit together with the interest thereon is no part of his efforts to redeem the suit property. Once this money is paid by the appellant to Mr. Deepak Pundit the respondent will have to redeem the suit property by liquidating his mortgage debt on the basis of his contractual obligations in respect thereof. In the result we think that the appellant's appeal is without a sound foundation and the same is dismissed with costs to the respondent."

The second appeal, to wit **Civil Appeal No. 263 of 1998** was filed by Mr Muiruri against Credit Bank Ltd and its advocate Charles Ayako Nyachae. A dispute had arisen between the parties regarding certain monies which had been deposited in a joint bank account. The appellant moved the superior court for that money to be paid over to him relying on a professional undertaking to his advocate by the 2nd respondent. The superior court (Aganyanya J.) by an order dated 26th March 1998, declined to enforce that undertaking and thus provoked that appeal. In allowing the appeal this Court, differently constituted, stated, as is material, as follows:-

" The upshot of what we have said is that this appeal is allowed and the ruling of the superior court is set aside. Ms. Nyachae & Company Advocates are hereby ordered to deposit within the next 30 days the sum of Kshs. 1, 373, 832.40 plus interest thereon at 15% per annum from the date of payment thereof by the advocates to the bank until the date such deposit, in an interest bearing account in the joint names of Ms Nyachae & Company and F.N. Wamalwa and Company, advocates and that such sum should remain so deposited until the dispute as to the said amount is resolved."

Pursuant to that decision the deposit was made on 27th March 2000 of Kshs. 1,658, 949 .65. Subsequently by a notice of motion filed on 3rd November 2000, the appellant herein unsuccessfully moved the superior court for an order releasing the money to him. Kasanga Mulwa J. heard the application and held that the application for the release of the money was premature and dismissed it. We presume the learned Judge meant that a decision as to the ownership of the money had not been made.

Thereafter on 8th November 2003 the applicant in the dismissed motion filed **Miscellaneous Application No. 1382 of 2003** (**OS**) , which was an application for orders, inter alia, that:-

" (1) A declaration whether or not the fundamental rights and liberties of the plaintiff were violated by an inconclusive decision of the Court of Appeal in its **Civil Appeal No. 263 of 1998, Nairobi**.

(2) A declaration whether or not refusal by the Court of Appeal to determine conclusively issues of the amount of the deposit account and ownership by an order either confirming, reversing, varying the decision of Aganyanya J. or remitting proceedings in respect thereof to the High Court and leaving undetermined the said issues amounted to abdication of their judicial mandate to hear and determine justiciably disputes in contest finally and without delay was in the events an abdication of the Court's primary duty and function as custodian of the rights and liberties of the subject.

(3) A declaration whether or not a hearing without a determination of issues in the Appeal denied the plaintiff due process and his legitimate expectation therein for a conclusive determination without delay and violated sections 70(a) and 77 (9) of the Constitution of Kenya.

(4) A declaration whether or not in the events that have happened and on a true construction of the undertaking the mortgage account has been fully redeemed and an order to give effect of the said declaration.

(5) An order of the Hon. Court determining conclusively:-

(i) Whether or not on a true construction of the undertaking the defendants should not forthwith top – up deposit account No. 01520-36451 Standard Bank of Kenya Ltd, Harambee Avenue, with an additional payment of Kshs. 3, 457, 277/78 and interest thereon calculated at 32% per annum from 23rd October,

2003 to the date of compliance with this order.

(ii) …

(6) The Honourable Court be pleased to make any other orders deemed fitting within its inherent jurisdiction.

(7) …"

The Originating Summons was listed before the Hon. the Chief Justice for mention on 17th December, 2003 for him to give directions on the bench to hear the application. When the matter was called a preliminary point of law was raised as follows:-

(i) The application is bad in law, misconceived and an abuse of the court process.

(ii) The matters and issues raised are directly matters and issues upon which the Court of Appeal had already made a finding as regards the parties thereto.

(iii) It is in the interests of justice that litigation should come to an end and the present suit is a fatal attempt by the Plaintiff to re-open issues already settled by a court of competent jurisdiction.

(iv) The Plaintiff sought and was granted the same orders he was seeking.

(v) The Orders of the High Court and Court of Appeal had been complied with.

(vi) There is no provision for the present suit and or orders sought and in any event the same has been brought belatedly as well as after the orders being challenged had been complied with.

In his submissions before Gicheru, CJ, Mr. Ashitiva for the respondents submitted inter alia, that the application by the applicant to enforce the undertaking was adjudicated upon on 3rd January 2001 and no constitutional rights had been violated against the applicant; nor had any allegation of such violation been made by the applicant in the application. In his view, issues which were raised in that application were an attempt to reopen those issues.

Mr. Wamalwa in answer submitted, inter alia, that the matter before the superior court ended up with a consent in which the applicant was allowed to redeem his property on the basis of a professional undertaking by the 2nd respondent on designated terms. The application before the superior court was to enforce that undertaking. The matter later went to the Court of Appeal which, in a nutshell, recognized the existence of that undertaking. Mr. Wamalwa, it would appear to us, appreciated that the decision of the Court of Appeal in that regard was in an interlocutory appeal, as thereafter the matter went back to the superior court which by consent of the parties ordered that the parties negotiate an appropriate consent on certain issues before it would enforce the undertaking. Mr. Wamalwa stated from the bar before Gicheru CJ, that the parties had failed to agree on a suitable consent. In his view therefore a constitutional issue had arisen which could be dealt with under **section 77 (9)** of the Constitution. He contended that the applicant was thrown out of the Court of Appeal without the issues he presented before it being adjudicated upon, and hence the application.

Gicheru CJ, reserved his ruling, which he delivered on 5th February, 2004 and in that ruling, as material, he rendered himself, thus:-

"The gist of the applicant's complaints it would appear to me, is the alleged unsatisfactory manner in which the Court of Appeal dealt with his matter and the inability of the parties to agree over the 2nd respondent's undertaking with a view to the same being enforced by the superior court. These in my view are not issues which merit constituting a Constitutional Court under **sections 70 (a) and 77 (9)** of the Constitution as from the submission of Counsel for the applicant the matter is not closed in the superior

court. I would therefore sustain the respondent's preliminary objection in as much as it concerns constituting a constitutional court to address the applicant's complaints under **sections 70 (a) and 77 (9**) of the Constitution with the costs occasioned by the preliminary objection to the respondents. It is so ordered."

Following that ruling the applicant, on 10th February 2005 took out a motion on notice in that suit seeking declaratory orders, as follows:-

(1) A declaration whether or not fundamental rights and freedoms of the Plaintiff were violated by the decision and orders of Gicheru, CJ, of 5th February 2004 pursuant to a mention for directions on 17th December, 2003 thereby denying the applicant access to the Constitutional Court and denying him a hearing by an authority lawfully appointed to hear constitutional issues.

(2) A declaration whether or not in the event that the decision as well as the process of taxation of costs thereafter by Mrs. Matheka Principal Deputy Registrar and the costs allowed therein of Kshs.63,110/= and any consequential process and orders for enforcement of costs are null and void or violated the applicant's rights and freedoms.

On the basis of those prayers the applicant prayed for orders of prohibition to stop execution of Gicheru CJ's orders, mandamus directed at him to constitute a court to enforce the applicant's right and, an order of stay of the process of taxation and execution of costs against the applicant.

That application was placed before Nyamu J., who on 24th March 2006, heard arguments from Mr. Wamalwa, counsel for the applicant who is the appellant in the appeal before us, Mr. Ashitiva for 1st and 2nd respondents herein and Mr. Kaka for the Hon. The Chief Justice. All these counsel addressed the learned Judge.

In his submission, Mr. Wamalwa urged the view that the applicant had exhausted all available legal avenues. He could neither appeal nor apply to set aside any judgment or order of both the superior court and this Court which he is aggrieved about. His complaint, he said, was basically that the Court of Appeal has failed to determine all the issues between the parties that had been referred to it and thus violated the applicant's fundamental rights. In his view, by Gicheru, CJ, declining to constitute a constitutional bench, he thereby applied a subjective instead of an objective test in determining what was or was not a constitutional issue. His decision was for that reason unreasonable more so because he ignored the procedure in situ to wit, the Chunga Rules. These are rules which were promulgated by the former Chief Justice, Bernard Chunga pursuant to the provisions of section 84 of the Constitution, and which rules, in Mr. Wamalwa's view, created a legitimate expectation to the applicant that he would be heard by a constitutional court and a reasoned decision be given by it.

Mr. Ashitiva on his part submitted, and on that Mr. Kaka concurred, that it was within the jurisdiction of Gicheru, CJ, to consider whether or not the matter before him warranted a constitutional bench. He considered the matter in his capacity as a constitutional Judge and his finding that there was no constitutional issue which had been disclosed in the applicant's application clearly showed he was exercising a judicial rather than an administrative function.

Nyamu, J. in a rather lengthy and winded ruling held, **inter alia,** that the matter before him was **res judicata,** the issue therein raised having been canvassed before Gicheru CJ, who then delivered the ruling of 5th February, 2004, against which there had been no appeal. In his view the Hon. the Chief Justice when dealing with the matter, was sitting in his capacity as a Judge of the High Court. He implied that had Gicheru CJ, not dealt with the matter, he would have been seised of jurisdiction not only to deal with the matter but also to make such orders as he deemed proper, including an order reviewing the decision of this Court, which the applicant was aggrieved of. On that score the learned Judge rendered himself thus:

"I presume that I was appointed to hear the matter by the Honourable the Chief Justice because he could

not hear a matter where his own ruling is challenged under the Fundamental Rights and Freedoms Provisions of the Constitution. **Section 84** states that the original jurisdiction to hear any allegations of the contraventions or threatened contravention is vested in the High Court … When a challenge is directed at a Judge's order or ruling pursuant to **section 84** of the Constitution a Judge of the High Court has jurisdiction by virtue to (sic) section 84 (1) and (2) of the Constitution to hear the challenge. The Jurisdiction I am now exercising in this matter or any other High Court Judge placed in similar situation, does not certainly extend to considering or reviewing the merits of the ruling of another Judge. In my view where there is a final order or ruling the jurisdiction extends to whether the process, or procedure adopted in obtaining the ruling there were any procedural improprieties which could have led to any violation or contravention of the fundamental rights and freedoms of the applicant e.g. was there a fair hearing as per the Constitutional requirements or a breach of procedural and statutory requirements which are aimed at a safeguarding a fair hearing. On the other hand where a court regardless of its status refuses to hear an applicant at all or is in clear breach of the applicant's rights like sending him to prison for contempt contrary to process of the law the courts jurisdiction is in my view much wider. The exercise of this Jurisdiction by any Judge of the High Court is not based on rank and it ought not to be a source of unpleasantness but a big credit to our systems of justice. This is a very rare jurisdiction but it is now being invoked in several cases. The question is therefore no longer whether such a challenge can be entertained but rather to what extent can another court intervene. I see no inconsistency with the status and dignity of a Judge that his decision should be subject to a constitutional challenge."

The learned Judge must have realized he was stepping onto shaky grounds because he went on to state as follows:-

"In the case of Judges the guard of the guards is the Constitution and the law. Indeed the Chief Justice in his discretion, I would humbly suggest could seize the opportunity to take up himself those constitutional applications where the issues of status or hierarchy of the courts is an issue so as to mitigate the distastefulness or the unpleasantness of the challenge by hearing the applications were (sic) the challenge for example springs from the Court of Appeal leaving the Court of Appeal to handle the appeals. Indeed in this case the Originating Summons spring from what the Court of Appeal is alleged to have done or not done."

We pause there to consider in detail the jurisdictional point which the learned Judge raised **suo motu.** The present appellant's constitutional application was listed for hearing before the learned Judge. Having held that he lacked the jurisdiction to hear it, it was not open to the learned Judge to at the same time consider whether he had the jurisdiction generally to entertain a constitutional challenge of a decision emanating from this Court. The issue was extraneous to the matter before him, and in our view it was raised for reasons outside the dispute between the parties. We state so advisedly. The learned Judge at some point stated thus:-

"Finally it is necessary to borrow from other jurisdiction because when I made perhaps the first conservatory order invoking this jurisdiction eyebrows were raised."

If indeed eyebrows were raised there was justification for it.

We want to set the law straight on the jurisdiction of what the learned Judge called "the Constitutional Court".

The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed "The Judicature**". Section 60** of the Constitution establishes the High Court with " unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law." Although the Constitution stipulates that the jurisdiction of the High Court in criminal and civil matters is unlimited it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers.

Section 64 of the Constitution establishes the Court of Appeal with such "… jurisdiction and powers in

relations to appeals from the High Court as may be conferred on it by law". On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other court other than the High Court.

Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrates Courts and Kadhi Courts, and also Courts Martial. Each of those courts exercises such jurisdiction and powers as "may be conferred on it by law."

There is no provision in the Constitution which establishes what Nyamu J. referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division. It is not an independent Court but merely a division of the High Court. The wording of **Section 67** of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk bout a Constitutional Court. Instead it talks about the High Court.

With regard to protective provisions **Section 84** of the Constitution does not in any of its sub-sections talk about the Constitutional Court. Instead it talks about an application being made to the High Court.

In view of what we have stated above, it is quite clear that Nyamu J.'s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a court called the Constitutional Court with supervisory powers over all other courts. The Hon. the Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explains why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court.

Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. As the late Nyarangi JA once remarked in the case of **The Owners of the Motor Vessel "Lilians" vs Caltex Oil Kenya Ltd** [1989]KLR l "Jurisdiction is everything. Without it, a court has no power to make one more step".

To conclude on this aspect, it is our view and we hold that Nyamu J. raised and considered this issue to give him the opportunity of answering his critics and to popularize his view as to the scope and extent of the jurisdiction and powers of his division. The law is not on his side. If his views were to be allowed to gain currency we opine that confusion in the administration of justice will be engendered and disharmony will ensue among Judges of the High Court.

Moreover, if Nyamu J.'s views were to be accepted, it will create an absurd situation. Appeals from the High Court lie to this Court. If this Court's decisions will be subject to a review by the so called "Constitutional Court", an appeal from that court will lie to this Court for a second time, and if any of the parties feels any of his fundamental rights has been violated by this Court he will have recourse to the "Constitutional Court" whose decision thereon will be appealable to this Court. There will be no end to litigation. Nyamu J. realized this and tried to distinguish between the merits of a decision and procedural violations. No part of a decision of any court can be severable on appeal and be dealt with separately, except where by reason of rule 74, of this Court's rules the party appealing has singled out the part of the decision he is aggrieved of, upon which he seeks a decision. Procedural aspects in the administration of justice are an integral part of those decisions and are not severable. Besides there is no legal sanction for that approach and the Judge's experiment must await the amendment of the law as he himself proposed. Before then, courts must follow the law as it is currently. The High Court has no Jurisdiction whatsoever to review this Court's decisions and for any Judge of the High Court to state otherwise is an affront to the doctrine of precedent.

Returning to the crux of his decision, Nyamu J. declined jurisdiction to grant the orders the applicant had sought in his application and thus provoked this appeal. Thirty six grounds have been listed in support of the appeal. But Mr. Wamalwa for the appellant dealt with all of them together and from our understanding of those grounds four broad issues are raised.

Firstly the appellant laments that his Originating Summons was improperly referred to the Hon. the Chief Justice, on the basis of an administrative practice which had no sanction in law. We understand that in the superior court there is a practice in which suits which raise constitutional issues are referred to the Chief Justice to constitute a bench to hear them. The appellant's Originating Summons dated 8th November 2003 was so referred. It was then that the Chief Justice ruled that in his view the appellant's motion did not disclose a Constitutional issue. Nyamu J. ruled that the Chief Justice, acting as a High Court Judge, had the right not only to make orders on matters referred to him but also in his absolute discretion as he considers appropriate to call for any matter and handle it himself. The appellant contends that Nyamu J. erred in giving validity to such practice which he considers to be autocratic.

The second ground is that Nyamu J. erred in holding that the Chief Justice had jurisdiction to entertain the Originating Summons , when the latter was not a member of the Constitutional Court.

The third ground is that Nyamu J. failed to appreciate that the appellant's Originating Summons was listed for mention before the Chief Justice and yet the latter improperly proceeded to make final orders thereon and thus shut out the appellant from the Constitutional Court. The appellant contends that for that, among other reasons, there was no determination of his Originating Summons.

Lastly the appellant laments that Nyamu J. erred in holding that because the appellant did not raise objection to his Originating Summons being referred to the Hon. the Chief Justice he had thus acquiesced to the practice and had waived his right to raise objection to the procedure.

In his submission in support of the appeal, Mr. Wamalwa contended that the promulgation of The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, (The Chunga Rules) created a legitimate expectation to an applicant that an application made pursuant to those rules would be determined by the constitutional court. To the extent that the appellant's motion brought under those rules was placed before the Chief Justice and not the constitutional court there was no valid determination of the matter. Consequently, in his view the application is still pending and Nyamu J. erred in holding that it had been determined by the Chief Justice. Otherwise, it would be a denial of due process to ignore the aforesaid rules in favour of a practice which had been replaced by the Chunga Rules. He cited authorities in support of his submissions among them **Musiara Ltd v. Ntimama [2004] 2 KLR 172** and **Epco Builders Ltd v. Adams Marjan**. Civil Appeal No. 248 of 2005 (unreported).

Messrs Ashitiva and Ang'awa Atanda, appeared for the respondents, with the former appearing for the 1st and 2nd respondents while the latter appeared for the Attorney General. In a nutshell their submissions were threefold. Firstly, that Nyamu J. correctly held that the appellant's motion was **res judicata**, in their view because the Chief Justice had the jurisdiction and power sitting as a High Court Judge to make the orders he did. Secondly, the appellant having not appealed against that decision he could not properly seek to challenge it before a Judge of concurrent jurisdiction. Thirdly, that to the extent that the appellant's counsel submitted to the jurisdiction of the Chief Justice, presented submissions before him on the merits of his originating summons and in those submissions failed to raise the issue of the Chief Justice's jurisdiction to handle the matter, he was estopped from raising the issue. The practice of constitutional applications being referred to the Chief Justice is an age long practice which has not been faulted in the past, and the Chief Justice's decision determined the appellant's application when he ruled that no constitutional issue was raised by the application.

In a recent decision of this Court to wit **Jasbir Singh Rai and three others v. Tarlochan Singh Rai and 4 others Civil Application No. NAI. 307 of 2003**, the Court considered the jurisdiction of this Court to re-open litigation in matters already decided by it. In considering the issue the decisions of the Court in **Musiara Ltd v. Ntimama [2005] 1 E.A 317** and **Chris Mahinda t/a Nyeri Trade Centre v. Kenya**

Power & Lighting Co. Ltd. Civil application No. NAI. 174 of 2005 (unreported) were considered. In both decisions the court held, obiter, that it can revisit its earlier decisions in exceptional circumstances in exercise of its residual inherent jurisdiction. In a unanimous decision in the **Jasbir Singh Rai** case, a bench of five Judges held that public policy demanded that there be an end to litigation. Besides there was neither Constitutional nor statutory authority for the Court to do so. The Court further held that under our Constitution as it presently stands, there is no separate court known as the Constitutional Court. Power has been vested in the High Court to interpret the constitution and any single Judge or a bench of three in certain designated situations as provided under **section 67** of the Constitution has or have jurisdiction and power to deal with any constitutional issue. In a well reasoned judgment to which the other four members of the bench concurred, Omolo, J.A rendered himself thus regarding review of decisions of this Court by the High Court: -

"For my part, I would start from this stand-point. The Court of Appeal in Kenya, just like the High Court and all other courts subordinate to the High court, are all creations of various written laws. The High Court and the Court of Appeal are created under the Constitution...

In Kenya, the only court with unlimited jurisdiction in civil and criminal matters is the High Court. Nevertheless, if the High Court wants to re-open a concluded determination, it has **section 80** of the Civil Procedure Act and Order 44 of the Civil Procedure Rules. But I doubt whether even the High Court would have jurisdiction to re-open a concluded criminal matter and this would cause no one any hardship or injustice. There is the Court of Appeal on top of the High Court and the Court of Appeal can even extend time to enable an appeal to be lodged out of time. But there is no provision in the Appellate Jurisdiction Act similar to **section 80** of the Civil Procedure Act under which Order 44 of the Civil Procedure Rules was made..... The Court can only hear appeals from the High Court.

Later on the learned Judge further stated: -

"I have said enough, I believe, to show that when one considers our statutory position and the authorities based on the statutes this Court still has no jurisdiction to re-open, rehear and then recall its earlier decision and substitute it with another. Nor do I subscribe to the view expressed by Mr. Oraro that a party who feels that the Court by its decision, has injured his or her fundamental right has the right to go to the High Court so that that court can, in effect reverse the decision of this Court made on an appeal from a decision emanating from the very self-same High Court. It is to be remembered that there is an appeal from the decision made by the High Court pursuant to the provisions of the Constitution and in my view it would be an absurd situation to keep moving from the Court of Appeal back to the High Court and then back to the Court of Appeal again. I have always thought that law is no friend of absurdities".

And Bosire JA, in a supporting judgment rendered himself thus: -

"I have had the advantage of reading in draft form the conclusions he has come to and the reasons thereof and I agree with those conclusions and reasons he has given for them. I wish however, to state that the Court of Appeal is the final court in Kenya. The appellate process ends there. Whatever decisions which emanate from the Court, except those I have stated above, are final and binding on the parties concerned. This application appears to challenge the doctrine of finality. This is a doctrine which enables the court to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down. It is a doctrine or principle based on public interest."

The appellant by filing the originating summons which was referred to the Chief Justice, and also the motion before Nyamu J. was challenging the doctrine of finality. There is neither constitutional nor statutory authority to support that approach. Therefore, neither the Chief Justice nor Nyamu J. had the jurisdiction to entertain the appellant's application to the extent that he was seeking to challenge a decision of a court of competent jurisdiction against which no constitutional or statutory right of appeal or review was available. We would respectfully point out to the appellant and his legal advisors that this matter had been concluded a long time back and attempts to revive it can only have one outcome – failure.

Having come to that conclusion we see no basis for specifically dealing with the other issues raised by Mr. Wamalwa.

In the result, we are of the view that Mr. Wamalwa's submissions though attractive have no basis in law, and this appeal must therefore, be and it is hereby dismissed with costs to the respondents to be paid by the appellant.

Dated and delivered at Nairobi this 8th day of February 2008

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR