# Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others (Motion 42 & 43 of 2014 (Consolidated)) [2016] KESC 6 (KLR) (19 May 2016) (Ruling)

*Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another [2016] eKLR*

Neutral citation: [2016] KESC 6 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**MOTION 42 & 43 OF 2014 (CONSOLIDATED)**

**WM MUTUNGA, CJ, KH RAWAL, DCJ & VP,**
**MK IBRAHIM, JB OJWANG & N NDUNGU, SCJJ**

**MAY 19, 2016**

**IN THE MATTER OF COURT OF APPEAL CIVIL APPLICATION NO. SUP. 20 OF 2013**

**AND**

**IN THE MATTER OF REVIEW OF THE RULING OF THE COURT OF APPEAL DATED 7TH NOVEMBER, 2014**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ........................................ APPLICANT**

**AND**

**MUIRI COFEE ESTATE LIMITED ............................................ 1ST RESPONDENT**

**BIDII KENYA LIMITED ........................................................... 2ND RESPONDENT**

**AS CONSOLIDATED WITH**

**MOTION 43 OF 2014**

**BETWEEN**

**BIDII KENYA LIMITED ............................................................ APPLICANT**

**AND**

**MUIRI COFFEE ESTATE LIMITED ........................................... 1ST RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED ............................... 2ND RESPONDENT**

***(Being An Application For Review Of The Ruling Of The Court Of Appeal Sitting At Nairobi Dated 7th November, 2014 (Kiage, Murgor, Mohammed, JJA) granting certification to appeal to the Supreme Court against the Judgment of Court of Appeal (Onyango Otieno, Karanja and Maraga, JJA) of 26th April, 2013)***

**The test for granting certification to appeal to the Supreme Court as a Court of last resort is different from the test of granting leave to appeal to an intermediate Court**

Reported by Halonyere Andrew & Nowamani Sandrah

***Civil practice and procedure*** *– appeal to the Supreme Court – certification of an appeal to the Supreme Court – whether the test for granting certification to appeal to the Supreme Court was different from the test of granting leave to appeal to an intermediate Court*

***Civil practice and procedure*** *- re judicata - whether the application before the court of Appeal seeking certification for further appeal was barred by the doctrine of res judicata. Constitution of Kenya, 2010, Articles 163 (3) and (4)*

***Civil practice and procedure*** *- appeals- appeals to the Supreme Court-circumstances under which the appeals would be granted to the supreme court- whether the matter brought before the court was one that raised an issue of general importance to raise the warrant of issuance of appeal to the supreme court- whether the Court of Appeal acted per in curium in certifying a a cause as one involving a matter of general public importance, and granting leave to appeal to the Supreme Court, where a different Bench of the Court of Appeal had denied leave - Civil Procedure Rules*

**Brief facts**

On 12th April, 1989 Kenya Commercial Bank (KCB) granted certain financial facilities to a company called Benjoh Amalgamated Limited, with Muiri Coffee Estate Limited acting as a guarantor. Benjoh Amalgamated and Muiri Coffee thereafter defaulted in repayment. On default, KCB instructed auctioneers to realize the securities held under the transaction. The auction to realize the securities was scheduled, however Benjoh Amalgamated and Muiri Coffee launched proceedings against the 1st applicant in the High Court. Consent was entered for payment. There was a default, and KCB instructed auctioneers to move and re-advertise the properties for sale. Meanwhile, Muiri Coffee and Amalgamated Co. filed some other cases before the High Court, seeking an injunction restraining the sale. Those suits were dismissed.

The two parties then reverted to the High Court and filed an application seeking to set aside the consent. The application was allowed. KCB was aggrieved by that decision and appealed to the Court of Appeal. The Appellate Court allowed the appeal thereby reinstating the consent. The dispute between the two sets of parties continued, resulting in yet other suits before the High Court In HCCC No. 1576 of 1999

It emerged that even the Appellate Court's Ruling on the consent, had been challenged and in a decision rendered, the High Court recognized the question was now *res judicata,* having been resolved by the highest Court of the land in which was the Court of Appeal. The said High Court determination was appealed before Court of Appeal. The Court of Appeal held that all the issues that had been raised before the High Court were *res judicata* and that led to the appeal before the Supreme Court.

**Issues**

1. Whether the matter as certified by the Court of Appeal, had met all the principles for certifying a matter as one of general public importance
2. Was the application before the Court of Appeal, seeking certification for further appeal, barred by the doctrine of *res judicata*?
3. Whether the test for granting certification to appeal to the Supreme Court as a Court of last resort was different from the test of granting leave to appeal to an intermediate Court.

4. whether the Respondent's intended appeal involved matters that had been resolved before the promulgation of the Constitution of Kenya 2010, so as to be barred by the doctrine of finality of litigation, and whether in the circumstances the Supreme Court lacked jurisdiction.
5. Whether the Court of Appeal had acted *per incuriam,* in certifying the cause as one involving a matter of general public importance, and granting leave to appeal to the Supreme Court, where a different Bench of that same Court had denied leave.

**Held**

1. It was trite law that in an application for certification and grant of leave to appeal to the Supreme Court, the decisive factor was not whether the Appellate Court decision was perceived as right or wrong by any of the parties, but rather, whether the intended appeal raised "a matter of general public importance".
2. The test for granting certification to appeal to the Supreme Court as a Court of last resort was different from the test of granting leave to appeal to an intermediate Court for example from the High Court to the Court of Appeal. The primary purpose of the appeal was correcting injustices and errors of fact or law and the general test was whether the appeal had realistic chances of succeeding. If that test was met, leave to appeal would be given as a matter of course. In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court was a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court.
3. The importance of the record of a Court, particularly for a Court of record, such as the High Court, could not be gainsaid. The record of a Court of record was a fundamental reference point in the administration of justice. There was no fault with the Court of Appeal Ruling granting certification and its observations and findings, as regards the vital question of the availability of a record of a Court of record. The Court of Appeal in granting leave reinforced the public-interest element in the issue that speaks to its nature as a matter of general public importance, when it held so.
4. The issue of the character of superior courts as courts of record and the consequences of absence or incompleteness of the record, where rights were determined with finality on the basis of what ought to be on that very record was neither shallow nor idle**.** Rather, formulated in the precise manner in which it was before the Supreme Court, the issue appeared to to have far-reaching consequences and implications on the integrity of the adjudicative processes of the Courts.
5. *Res judicata* was a doctrine of substantive law, its essence being that once the legal rights of parties had been judicially determined, such edict stood as a conclusive statement as to those rights. It would appear that the doctrine of *res judicata* was to apply in respect of matters of all categories, including issues of constitutional rights.
6. The doctrine of *res judicata* in effect, allowed a litigant only one bite at the cherry. It prevented a litigant or persons claiming under the same title from returning to Court to claim further reliefs not claimed in the earlier action. It was a doctrine that served the cause of order and efficacy in the adjudication process. The doctrine prevented a multiplicity of suits, which would ordinarily clog the Courts apart from occasioning unnecessary costs to the parties and it ensured that litigation came to an end and the verdict duly translated into fruit for one party and liability for another party conclusively.
7. Contrary to the respondent's argument that the principle of r*es judicata* was not to stand as a technicality limiting the scope for substantial justice, the relevance of *res judicata* was not affected by the substantial-justice principle of article 159 of the Constitution, intended to override technicalities of procedure. *Res judicata* entailed more than procedural technicality, and lay on the plane of a substantive legal concept.
8. Whenever the question of *res judicata* was raised, a Court would look at the decision claimed to have settled the issues in question, the entire pleadings and record of that previous case and the instant case, to ascertain the issues determined in the previous case and whether those were the same in the subsequent case. The Court should ascertain whether the parties were the same, or were

litigating under the same title and whether the previous case was determined by a Court of competent jurisdiction.

9. The position advanced by the respondent, and sustained by the Court of Appeal was inconsistent with the principle that an application for certification first came before the Court of Appeal as the court seized of the facts of the matter, and only thereafter does an aggrieved party come to the Supreme Court seeking a review.
10. The crucial doctrine of *res Judicata,* excludes the possibility that a differing Bench of the Appellate Court from the one that entertained the main cause, would consider the certification question emanating from the same parties, and in the same cause of action. It was clear that the Court of Appeal was not considering different application-issues. The applications rested on one foundation; and they were seeking the same relief, and were founded upon the very same cause of action. Hence the proper Bench to entertain that matter was one and the same.
11. The Supreme Court of Kenya was created upon the promulgation of the Constitution of Kenya, 2010. Before then, the Court of Appeal was the final Court of the land. The Supreme Court, in exercise of its appellate jurisdiction as provided in the Constitution was forward looking. The Court could only hear appeals from the Court of Appeal in matters that were not concluded before 27th August, 2010. Any matters that had been determined by the Appellate Court before that time, had attained their finality, and were not appealable to the Supreme Court.
12. The issue of the consent as between the parties in the matter before the Court was determined by two separate Benches of the final Court (Court of Appeal) on 10th March, 1998 and on 31st March, 2006. The two decisions were rendered before the promulgation of the Constitution 2010, that was, before the establishment of the Supreme Court. Consequently, they were final and binding and they could not be re-opened by the Supreme Court.
13. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle was that the chain of Courts in the constitutional set-up, running up to the Court of Appeal had the professional competence and proper safety designs to resolve all matters turning on the technical complexity of the law and only cardinal issues of law or of jurisprudential moment, would deserve the further input of the Supreme Court.
14. The Court of Appeal had acted *per incuriam,* in certifying the cause as one involving a matter of general public importance and granting leave to appeal to the Supreme Court where a different Bench of that same Court had denied leave. The Supreme Court by the terms of the Constitution was not to serve as just another layer in the appellate court structure, it had specific functions that were well defined.

*Application partly allowed*

***Orders***

i. *Originating Motion No. 42 of 2014 dated 21st November, 2014 as consolidated with Originating Motion No. 43 of 2014 dated 21st November, 2014 were allowed.*
ii. *The certification of the Court of Appeal granted in Application Sup. No. 20 of 2013 on 7th November, 2014 was set aside.*
iii. *The Petition of Appeal already filed by the respondent in the Supreme Court, being Appeal No. 35 of 2014, was struck out, as its sub-strum, namely the certification granted by the Court of Appeal, was spent.*
iv. *Each party to bear own costs.*

**Citations**

***East Africa***

1. *ET v Attorney-General & another* [2012] 1 KLR 129 – (Followed)
2. *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* Civil Application No 4 of 2012– (Considered)
3. *Hon Norbert Mao v Attorney-General,* Constitutional Petition No 9 of 2002; [2003] UGCC3 – (Followed)
4. *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] 3 KLR 199 – (Followed)

5. *Malcolm Bell v Daniel Toroitich arap Moi & another* Application No 1 of 2013 - (Mentioned)

6. *Menginya Salim Murgani v Kenya Revenue Authority,* Civil Application No 4 of 2014- (Followed)

7. *Murgani, Menginya Salim v Kenya Revenue Authority* Civil Application No Sup 4 of 2013- (Mentioned)

8. *Nathif Jama Adam v Abdikhaim Osman Mohammed & others* Petition No 13 of 2014– (Explained)

9. *Ndegwa, Bernard Mugo v James Nderitu Githae & 2 others* Civil Case No 101 of 2006 – (Followed)

10. *Ndutu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804– (Relied Upon)

11. *Ngoge v Kaparo & 5 others* [2012] 2 KLR 419– (Followed)

12. *Njiroine, Daniel Shumari v Naliaka Maroro* Motion No 5 of 2013 – (Explained)

13. *Omega Chemical Industries Limited v Barclays Bank of Kenya Limited,* Application No 6 of 2013 – (Approved)

14. *Otuke,Silas Make v Attorney-General & 3 others* Petition No 44 of 2013 – (Relied Upon)

15. *Ronald Reagan Okumu v Attorney- General,* Miscellaneous Application No 0063 of 2002, High Court HCT 02 CV MA 063 of 2002 – (Considered)

16. *Sum Model Industries Ltd v Industrial & Commercial development Corporation* Civil Application No 1 of 2011 – (Approved)

***United Kingdom***

1. *Henderson v Henderson* (1843) 67 ER 313; [1843] 3 Hare 100 – (Applied)

**Statutes**

***East Africa***

1. Constitution of Kenya, 1963 Repealed section 75 – (Interpreted)

2. Constitution of Kenya, 2010 articles 47, 163 (3) (b) (i) (4) (a) (b) – (Interpreted)

3. Uganda Constitution, articles 50, 137 – (Interpreted)

**Texts & Journals**

1. Mohan, M., (Ed) (2011) *Mulla, Code of Civil Procedure*, Wadhwa: LexisNexis Butterworth 18th Edn

## RULING

**Introduction**

[1. Before the Court are two Originating Motion applications: Kenya Commercial Bank Limited v. Muiri Coffee Estate and Bidii Kenya Limited; Motion No. 42 of 2014 and Bidii Kenya Limited v. Muiri Coffee Estate Limited and Kenya Commercial Bank Limited; Motion No. 43 of 2014. Both applications seek review of the grant of leave to appeal to the Supreme Court, by the Court of Appeal in Muiri Coffee Estate v. Kenya Commercial Bank Ltd. and Bidii Kenya Limited; Court of Appeal Civil Application No. Sup. 20 of 2013.

2. On 8th July, 2015, this Court (Ibrahim & Ojwang, SCJJ) consolidated the two applications due to their similarity and the common question(s) of law raised therein. The Court directed that the application contained in Motion No. 42 of 2014 would be the lead file.

3. The prayers sought in the two applications may be summarised as follows:

   i. the certification that the intended appeal involves matters of general importance, and that leave to appeal to the Supreme Court be granted to Muiri Coffee Estate Limited, be reviewed and set aside;

   ii. the respondent to bear costs of this matter.

**Background**

4. The factual background of these matters can be briefly traced to 12th April, 1989 when the Kenya Commercial Bank (KCB) granted certain financial facilities to a company called Benjoh Amalgamated Limited, with Muiri Coffee Estate Limited acting as a guarantor. Benjoh Amalgamated and Muiri Coffee thereafter defaulted in repayment.

5. On default, KCB instructed auctioneers to realize the securities held under the transaction. The auction to realize the securities was scheduled for 5th March, 1992 but on 4th March, 1992, Benjoh Amalgamated and Muiri Coffee launched proceedings against the 1st applicant in the High Court (Civil Case No. 1219 of 1992, Benjoh Amalgamated Ltd. & Muiri Coffee Estate Limited v. Kenya Commercial Bank).

6. On 4th May, 1992, before Mr. Justice Githinji, the parties in Civil Case No. 1219 of 1992 obtained a 'consent' Order, whereby they 'settled' the dispute, inter alia in the following terms:

    a. Benjoh Amalgamated Limited and the respondent (Muiri Coffee Limited) were to pay the full outstanding amount, principle and interest to the applicant on or before 31st July, 1992.

    b. Should Benjoh Amalgamated Limited and the respondent default with the payment as mentioned above, the applicant (KCB) had the liberty to proceed with the realization of the two securities.

7. Benjoh Amalgamated and the respondent failed to honour the terms of the consent, and KCB moved to enforce the consent by re-advertising the suit properties for sale by public auction which was scheduled to take place on 23rd January, 1993. On 22 January, 1993, Benjoh Amalgamated and the respondent filed an application in the High Court (Civil Case No. 285 of 1993,Benjoh Amalgamated Ltd. & Muiri Coffee Estate Limited v. Kenya Commercial Bank Ltd.), for an Order restraining the sale. The application came up before Mr. Justice Shields, who dismissed it with costs, in a Ruling delivered on 8th February, 1993. There followed thereafter, a string of other applications seeking the same relief: restraining the sale. These divers applications suffered the same fate, namely:

    i. HCCC No. 1520 of 1996, filed by Muiri Coffee and the borrower Company against KCB, seeking injunctive relief, was struck out on 26th June, 1996;

    ii. Nairobi HCCC No. 1611 of 1996 filed by the borrower-company, seeking Orders that the purported sale of the suit property was irregular, unlawful, null and void, was struck out for being res judicata, on 26th January, 1998;

    iii. Nyeri HCCC No. 24 of 1997 filed by Muiri Coffee, was struck out for being res judicata on 9th May, 1997.

8. Then followed an application, HCCC No. 1219 of 1992 filed on 16th April, 1997¾a significant one in this chain of cases. It was filed by Muiri Coffee seeking to set aside the Consent decree. The application was successful; the High Court in a Ruling delivered on 31st October, 1997 set aside the said decree.

9. KCB appealed against that Ruling to the Court of Appeal and, in a decision rendered on 10th March, 1998 the Court of Appeal (Kwach, Tunoi, Bosire, JJA) reversed the High Court decision, reinstating the consent. This 'consent' lies at the core of the matters before this Court. Unfortunately, the High Court's original file in which the said consent was recorded cannot be traced. Hence, there is no record of the Court; and now, Muiri Coffee and Benjoh Amalgamated are contesting the very existence of the consent.

10. The record shows, besides, that there have been a number of suits brought as between these parties¾particularly between Muiri Coffee and Benjoh Amalgamated on one side, and KCB on the other side. These include:

    i. Milimani HCCC No. 1576 of 1999 filed by Muiri Coffee and the borrower company. This was dismissed by Lenaola, J on 23rd July, 2004;

    ii. Civil Appeal No. 239 of 2005, an appeal against the High Court decision in Milimani HCCC No. 1576 of 1999; the Court of Appeal upheld the High Court decision, dismissing the appeal on 31st March, 2006;

    iii. HCCC No. 337 of 2006: transferred to the Commercial Division of the High Court, and assigned new number as Milimani HCCC No. 243 of 2006; and this was struck out for being res judicata on 16th March, 2007;

    iv. A Constitutional Petition that claimed contravention of rights to property, contrary to Section 75 of the (former) Constitution, was struck out on 8th March, 2007 as an abuse of Court process.

11. Thereafter, on 19th September, 2007, the suit property was sold to Bidii Kenya Limited, through a public auction. This precipitated the filing by Muiri Coffee and the borrower of Milimani HCCC No. 122 of 2007, seeking Orders that the sale be declared null and void. Warsame, J (as he then was) struck out the suit for being res judicata.

12. And then comes Milimani HCCC No. 505 of 2008, which is particularly significant for the application before this Court; it is the basis of the consolidated applications herein. Milimani HCCC No. 505 of 2008 was filed by the Muiri Coffee, seeking to restrain Bidii Kenya Limited and KCB from taking possession, or interfering with the possession, of the suit property. This suit was filed together with an application seeking interlocutory injunctive Orders against the respondents, pending the hearing of the suit.

13. The respondents did file a preliminary objection in Milimani HCCC No. 505 of 2008, contending that the matter was res judicata and sub judice. The preliminary motions were heard by Khaminwa, J who, in her Ruling of 18th November, 2008 dismissed the preliminary objection, and in a Ruling of 2nd November, 2009 granted the interlocutory Orders. These two Rulings aggrieved the respondents, who moved to the Court of Appeal via Civil Appeal No. 100 of 2010 and Civil Appeal No. 106 of 2010.

14. The said two matters were consolidated, heard and determined, the Appellate Court holding that the parties to the consent Judgment in HCCC No. 1219 of 1992 were estopped from reneging on that consent, and their re-litigation on the issues was manifestly res judicata. The Court of Appeal on 26th April, 2013 allowed the appeal, and reversed the High Court decision, by allowing the preliminary objection that HCCC No. 505 of 2008 was res judicata. The Court proceeded to set aside the interlocutory Orders that the High Court had granted on 2nd November, 2009.

15. This decision by the Court of Appeal aggrieved the respondent, Muiri Coffee, who now sought to appeal to the Supreme Court. It filed an application in the Court of Appeal: Sup. No. 20 of 2013, Muiri Coffee Estate Limited v. Kenya Commercial Bank Limited and Bidii Kenya Limited¾seeking leave to appeal to the Supreme Court against the Judgment of the Appellate Court (Onyango Otieno, Karanja & Maraga, JJA). The application was to the effect that the intended appeal involved a matter of general public importance: whether the High Court and the Court of Appeal, which are 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.

16. The Court of Appeal granted leave certifying that this matter is one of general public importance, as the question of the record of a superior Court of record is an important matter that needs to be settled by the Supreme Court. The appellate Court thus held:

> "We are cognizant that in this application we are not called upon to review or pronounce upon the impropriety 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 or 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 unjustly."

17. The applicants now seek to review and set aside that certification, and the leave that was granted by the Court of Appeal.

**Submissions**

**1st Applicant**

18. The 1st applicant, KCB, filed its written submissions on 10th March, 2015, and a bundle of authorities on 18th January, 2016, with a supplementary list and bundle of authorities on even date. It was represented by learned counsel M/s. Oraro, S.C. and Nyachoti.

19. Mr. Oraro stated that the application was for a review of the Court of Appeal's Ruling dated 7th November, 2014, granting leave to the respondent to appeal to this Court. He urged that even though the Supreme Court's jurisdiction includes entertaining appeals from the Court of Appeal, a filtering process was necessary to ensure that only cardinal issues of law were considered by the Supreme Court.

20. Counsel submitted that the consent of 4th May, 1992 and the issues in contention, were matters affecting only the parties to this litigation, and bore no general character such as to warrant the intervention of the Supreme Court; and that they did not raise any cardinal issues of law, or of jurisprudential moment, demanding the further input of this Court. It was urged that the consent in question, is a matter of agreement between parties. It was urged to bear significance, that the respondent was not denying entering into the consent. (Counsel referred to paragraph 15 of the replying affidavit of Ngengi Muigai, to support this contention.

21. Learned counsel sought to rely on this Court's earlier decisions, Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone, [2013] eKLR, and Lawrence Ndutu & 6000 Others v. Kenya Breweries Ltd. & Another, Petition No. 3 of 2012, on the proposition that there was no opening to consider what had

not been a subject matter of judicial determination in the Courts below. He urged that what was now being raised, had not been the subject of judicial determination at the High Court and Court of Appeal, but was only raised for the first time at the Appellate Court, in the application for certification. It was submitted that the suit in the High Court which gave rise to the current proceedings and the proceedings in the Court of Appeal, is Milimani HCCC No. 505 of 2008, Muiri Coffee Estate Limited v. Kenya Commercial Bank Limited & Others, in which the respondent sought as against the applicants, the following Orders: a permanent injunction; a declaration that the transfer and sale of suit property is illegal, unlawful hence null and void; a cancellation of the said transfer; a declaration that the charges the subject of this matter were null and void; and damages for fraud.

22. This suit was filed together with an application for temporary injunction and other interlocutory Orders. In response to this, the 1st applicant filed a replying affidavit, and a notice of preliminary objection, raising issues such as sub judice and res judicata- a jurisdictional challenge. It was submitted that the application for injunction and the preliminary objection had been heard separately, and a Ruling on the preliminary objection delivered on 18th November, 2008 dismissing the same; while the Ruling on the application for injunction delivered on 2nd November, 2008 allowed the same. The 1st applicant was aggrieved by these Rulings, and appealed to the Court of Appeal. The Appeal was heard and determined by a Judgment delivered on 26th April, 2013 which allowed it, and consequently dismissed the High Court suit, Milimani HCCC No. 505 of 2008, with costs to the applicants.

23. Aggrieved by that Appellate Court Judgment, the respondent filed an application for certification and grant of leave to appeal to this Court, against the Judgment in Nairobi Civil Appeal No. 100 of 2010, Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & 3 Others as consolidated with Nairobi Civil Appeal No. 106 of 2010, Bidii Kenya Limited v. Muiri Coffee Estate Limited & 3 Others. Leave was then granted to the respondent; and the respondent urged that no issue of cardinal importance, or of jurisprudential moment, was raised in the Court of Appeal.

24. The 1st applicant submitted that this case had not met the threshold principles set out in Hermanus (supra), and that the dispute between the applicant and the respondent is a purely commercial dispute- all the issues pertaining to the consent Order of 4th May, 1991 affecting only the said parties, and bearing no impact on society in general. It was the 1st applicant's case that the issues in this matter do not transcend the claims of the parties to this matter.

25. Learned counsel, Mr. Oraro, further submitted that the respondent herein had earlier filed an application seeking certification under Article 163(4) (b) of *the Constitution*, in respect of the impugned consent between the same parties in Nairobi Civil Application No. Sup. 16 of 2012, Benjoh Amalgamated Ltd. & Muiri Coffee Ltd. v. Kenya Commercial Bank Limited, and that the matter was dismissed by the Appellate Court on 20th June, 2014. In the light of that Ruling, counsel urged that it was not open to a differently-constituted Bench of the same Court to arrive at a contrary decision. The Senior Counsel called in aid this Court's decision in Nathif Jama Adam v. Abdikhaim Osman Mohammed & Others, [2014] eKLR, in which this Court held thus:

> "We call upon all Courts to discharge their responsibilities not only by applying the best criteria in ascertaining the evidentiary premises of the matters before them, and by the professional interpretation and application of relevant law, but also by keeping abreast of the proper findings and determinations of other Courts considering subject-matter common to separate causes."

26. Learned counsel submitted that the certification granted to the respondent to appeal against the Judgment of 26th April, 2013 in Nairobi Civil Appeal No. 100 of 2010 as consolidated with Civil

Appeal No. 106 of 2010, be set aside, and that the application be allowed with costs against the respondent.

**2nd Applicant**

27. The 2nd applicant, Bidii Kenya Limited, filed its written submissions and list of authorities on 22nd May, 2015; and at the hearing of the consolidated applications, it was represented by learned counsel Mr. Mansur.

28. The 2nd applicant's submissions centered on three issues, namely: whether the Supreme Court has jurisdiction to hear an appeal on a matter that was determined by the Court of Appeal in two different Judgments prior to the promulgation of *the Constitution*; whether the Court of Appeal can grant certification on a matter where a differently-constituted Bench has declined a similar application; and whether a party can raise a new issue for the first time in an application for certification, when the issue was not pleaded in the High Court or was not canvassed in the appeal before the Court of Appeal.

29. Learned counsel Mr. Mansur submitted that the respondent's application for certification to lodge an appeal in this Court was a matter already determined in Nairobi Civil Application No. Sup 16 of 2012, where the Court of Appeal dismissed the application for certification, on 20th June, 2014 on the grounds that the matter did not raise issues of public interest, and that the decision sought to be reviewed dated back to 10th March, 1998, long before *the Constitution* of Kenya, 2010 was promulgated.

30. Learned counsel urged that the second application by the respondent herein, was consequently res judicata, and an abuse of Court process. Learned counsel submitted that the Appellate Court's decision could not be allowed to stand, as it would open the floodgates of applications by litigants.

31. Invoking the ratio of this Court's decision in Hermanus (supra);Malcolm Bell v. Daniel Toroitich arap Moi & Another [2013] eKLR; and Menginya Salim Murgani v. Kenya Revenue Authority [2014] eKLR, counsel submitted that the issues raised by the respondent fall short of transcending the interests of the parties, quite apart from having no impact on the society in general; and that the issues had no bearing upon the public interest, so as to merit certification as issues of general public importance.

32. Mr. Mansur sought to rely on this Court's decisions in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, and Daniel Shumari Njiroine v. Naliaka Maroro [2014] eKLR, for the proposition that there was no jurisdiction to reopen cases determined by the Court of Appeal prior to the promulgation of the current Constitution. It was contended that the respondent's claim had been determined by the Court of Appeal in Civil Appeal No.276 of 1997, Kenya Commercial Bank Limited v. Benjoh Amalgamated Limited & Muiri Coffee Estate Limited, and Civil Appeal No 239 of 2005, Benjoh Amalgamated Ltd. & Muiri Coffee Estate Ltd. v. Kenya Commercial Bank Ltd.¾ and as such, this Court lacked jurisdiction to hear the respondent's appeal, since the Court of Appeal in Civil Appeal No. 100 of 2010, as consolidated with Civil Appeal No. 106 of 2010, merely upheld the earlier decisions. Learned counsel urged the principle that, litigation must at some point come to an end.

33. Counsel submitted that the respondent's case at the High Court and in the Court of Appeal had not been that there is no record of the Court, or no consent recorded; on the contrary, the consent had been only recorded, and acted upon by the respondent who had even paid, by its terms, Ksh. 12 million. Counsel urged that at the Court of Appeal, the sole issue was whether the High Court should have held that the proceedings were res judicata.

34. Learned counsel urged the Court to find that this application was an abuse of Court process, and the originating motion be allowed, with the certification by the Court of Appeal being set aside with costs.

**Respondent**

35. The respondent, Muiri Coffee Estates Limited, vigorously contested the consolidated Originating Motion applications. It filed a replying affidavit dated 2nd February, 2015, together with written submissions dated 2nd June, 2015, and a further affidavit on 20th July, 2015- by which it sought to demonstrate that Mr. Meenye, counsel for KCB, did not have a practising certificate at the time of the 'alleged consent' in 1992. This issue, however, was not pleaded or addressed in the oral submissions, and neither was it taken up by any of the other parties.

36. Through learned Senior Counsel, Mr. Muite, the respondent submitted that the applications lacked merit, since the only issue for determination was whether there exists a matter of general public importance, and the Court of Appeal had already certified that the matter involved the question as to the consequences of a Court record going missing.

37. Mr. Muite contended that all the arguments by the applicants relate to issues that go to the merit of the substantive appeal, and so can be argued in the main appeal. He submitted that the applicants ought to restrict themselves to the questions already certified by the Court of Appeal as being of general public importance, these being: what is a Court record? what are the consequences of a Court record going missing? can a Court's Judgment, Orders and/or proceedings be based on, or flow from a missing record?

38. Learned counsel submitted that since Court records are usually in the custody of the Courts, where the records are missing, a Court of law cannot properly proceed. This, according to the learned counsel, made the issue of Court record one with a significant impact on the public, and as a result, the question was one of general public importance: hence the certification by the Court of Appeal. It was counsel's contention that the Ruling by the Court of Appeal granting certification, rightly perceived the core issue calling for the input of the Supreme Court.

39. Learned counsel submitted that in this country, there is a constant public interest in the matter of missing Court records, and that the issue touches on the general body of Court-users, making it one of general public importance.

40. Learned counsel submitted that despite that absence of a Court record in HCC 1219 of 1992, Benjoh Amalgamated Limited and Muiri Coffee Estate Limited v. Kenya Commercial Bank Limited, the Court of Appeal had made pronouncements affecting the constitutional rights of the respondent, and the legal rights relating to property.

41. It was counsel's contention that the applicants were wrong to assume that the Court of Appeal was bound to make the same finding in relation to Application Sup. 20 of 2012, as that which it made in Application Sup. 16 of 2013. He urged that the Court's decision in Application Sup. 16 of 2012 was no bar to the grant of leave and certification. Counsel sought to reply on a passage in this Court's decision in Hermanus (supra):

> " 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 requirements 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 might legitimately reach a different view, without either being wrong".

42. Counsel submitted that the matter as certified by the Court of Appeal, had indeed met all the principles for certifying a matter as one of general public importance, by the terms of Hermanus (supra): for a Court's record lies at the core of the dispensation of justice; and hence, this is a fundamental issue that merits a determination by the Supreme Court.

43. The respondent urged that the Court should dismiss Originating Motions No. 42 and 43, and uphold the Court of Appeal Ruling, granting certification and leave.

**Issues For Determination**

44. This matter raises the following issues for determination:

(a) whether the issue(s) held by the Appellate Court to involve matters of general public importance, meet the threshold set by this Court?

(b) was the application before the Court of Appeal, seeking certification for further appeal, barred by the doctrine of res judicata?

(c) does the respondent's intended appeal involve matters that had been resolved before the promulgation of the current Constitution, so as be barred by the doctrine of finality of litigation, and consequently lack jurisdiction in the Supreme Court?

(d) were the issues certified for appeal by the Court of Appeal the same issues arising before the superior Courts, and so had risen through the judicial hierarchy, and now fall to the appellate jurisdiction of this Court?

**Analysis**

**Matters of General Public Importance: The Requisite Threshold**

45. It is now trite law that in an application for certification and grant of leave to appeal to the Supreme Court, the decisive factor is not whether the Appellate Court decision is perceived as right or wrong by any of the parties, but rather, whether the intended appeal raises "a matter of general public importance". This position was first signalled by the Court of Appeal in Hermanus Philipus Styne v. GiovanniGnecchi-Ruscone, CA No. Sup. 4 of 2012,when it stated:

> " The test for granting certification to appeal to the Supreme Court as a Court of last resort is different from the test of granting leave to appeal to an intermediate Court¾for example from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course... In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court."

46. Subsequently, this Court laid down the principles to guide this filtering process in the Hermanus (supra) and the Malcolm Bell (supra) cases. These principles have been applied by the Court in subsequent cases; and the Court of Appeal too, in accordance with the doctrine of precedent, has applied them when considering applications seeking certification before it. The parties in the instant

matter have taken note of these principles, with the only variance being as to whether or not there has been compliance, in point of fact.

47. The respondent's contention, which it also raised at the Court of Appeal, and the Appellate Court agreed with, is that there is public interest in the matter of Court records, and that the issue of a missing record is a matter that bears upon the broad class of Court users, hence becoming a matter of general public importance. The applicants' submission, by contrast, is that this is a matter peculiar to the parties in this case. The applicants, however, have not taken an unwavering position that the issue of a Court of record missing its record is not a matter of general public importance. But they have taken the firm stand that the respondent's case must fail on grounds of res judicata, and finality of litigation.

48. The importance of the record of a Court, particularly for a Court of record, such as the High Court, cannot be gainsaid. We agree with learned counsel for respondent, Mr. Muite, that the record of a Court of record is a fundamental reference-point in the administration of justice. We have perused the Court of Appeal Ruling granting certification, and we find no fault with its observations and findings, as regards this vital question of the availability of a record of a Court of record. The Court of Appeal in granting leave, indeed reinforced the public-interest element in this issue, that speaks to its nature, as a matter of general public importance, when it held thus:

> " ...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..."

The Court of Appeal proceeded as follows:

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 to systematic weaknesses both in 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 The Major Law Lexicon, 4th Ed. 2010, Vol. 2 at para. 1611 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 inEx. PARTE CREGG, 6 Fed, Cas. No. 3. 380 2 curt. 98."

49. The question of missing records has been of concern to the Courts, time and again. Many are the occasions when the Court has ordered for the reconstruction of Court files (which form part of the Court record). In some cases, reconstruction has failed to yield the desired results; and this appears to be the case, in the instant matter.

50. The centrality of the Court record, thus, goes to the principle of access to justice, in the terms of Article 47 of *the Constitution*. Indeed, this is a matter of general public importance. It is, however, a separate question as to whether the Appellate Court was right in granting leave to appeal to this Court¾an issue to which we now advert.

**Res judicata: Was the Application before the Appellate Court barred?**

51. It was the applicants' submission that the Appellate Court having denied leave in Civil Application No. Sup. 16 of 2012, the second application in which that Court granted leave was res judicata, and an abuse of Court process. The respondent, however, takes a contrary stand, that the Court of Appeal was not bound to reach the same finding in Application Sup. No. 20 of 2013 as it had done in Application Sup. 16 of 2012¾for every matter is to be determined on its own merits. Hence the question: was Application Sup. 20 of 2013 res judicata?

52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney- General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

53. In Silas Make Otuke v. Attorney-General & 3 Others, [2014] e KLR, the High Court of Kenya agreed with the Privy Council decision in Thomas v. The AG of Trinidad and Tobago (1991) LRC (Const.) 1001,in which the Board was"satisfiedthat the existence of a constitutional remedy as that upon which the appellant relies does not affect theapplication of the principle of res judicata".

54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of

procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012 have observed that the principle of res judicata, as a judicial device on the finality of Court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p.293):

> " The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision."

57. The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v. Henderson (1843) 67 E.R. 313, as follows:

> " ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].

58. Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case¾to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

59. That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in E.T v. Attorney-General & Another, (2012) eKLR, thus:

> " The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court.The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of Omondi v. National Bank of Kenya Limited and Others, (2001) EA 177 the Court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the Court quoted Kuloba J., in the case of Njangu v. Wambugu and Another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over

the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata.....”

60. Such is the context of legal principle against which we must examine the two applications before the Court of Appeal. In its Ruling of 7th November, 2014 the Appellate Court, in Application Sup. 16 of 2012, thus pronounced itself:

> “ We are not unaware of and are not discounting the recent decision of this Court in Civil application No. Sup. 16 of 2012, Benjoh Amalgamated Ltd. & Muiri Coffee Estate v. Kenya Commercial Bank 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 application 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 paucity 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 Styne (supra) decision as follows:
>
> ‘[54] In R. (Crompton) v. 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.’”

61. The foregoing passage shows the Appellate Court to have held the view that any application before it should be perceived on its own merit, notwithstanding that ‘a different bench’ of the same Court may have held a clear position. We do not, with respect, agree that such was the position taken in the Hermanus(supra) case. Res judicata as a principle cannot be overlooked, on the basis that a matter is of general public importance, justifying a different Bench of the same Court taking a different approach, and arriving at a different conclusion.

62. In the Hermanus (supra) case, this Court did no more than set out the principles to be applied in considering whether a cause involves matters of general public importance. The general statement that each case stands to be considered on its own merit, indeed, holds. But it is necessary to consider whether the consideration of each case, on the basis of its peculiar facts and circumstances, falls within the four

corners of the principles in Hermanus (supra) and Malcolm Bell (supra). The position advanced by the respondent, and sustained by the Appellate Court, is in our view, inconsistent with the principle that an application for certification first comes before that Court as the Court seized of the facts of the matter, and only thereafter does an aggrieved party come to the Supreme Court seeking a review. This principle is set out in this Court's decision in Sum Model Industries Ltd. v. Industrial & Commercial development Corporation [2011] eKLR, 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 general 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 has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163 (5) of *the Constitution*. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave, would lead to Abuse of the Process of Court."

63. The crucial doctrine of res Judicata, in our perception, excludes the possibility that a differing Bench of the Appellate Court from the one that entertained the main cause, would consider the certification question emanating from the same parties, and in the same cause of action. It is clear to us that the Court of Appeal was not considering different application-issues. The applications rested on one foundation; and they were seeking the same relief, and were founded upon the very same cause of action. Hence the proper Bench to entertain this matter was one and the same.

64. The Court of Appeal's Ruling in Application Sup. 16 of 2012 is attached to the Originating Motion No. 42 of 2014; and the Orders sought were only two:

    i. that leave be granted to lodge an appeal in the Supreme Court against the decision of this Court contained in this Court's Judgment delivered on 10th March, 1998 in Nairobi Civil appeal No. 276 of 1997; and

    ii. that further or in the alternative, the Court be pleased on its own motion to recall, review or set aside the Appellate Court's said Judgment delivered on 10th March, 1998 in Nairobi Civil appeal No. 276 of 1997.

65. The Court of Appeal first dealt with the prayer for certification, and rendered itself thus [pages 14-16]:

> "Applying these principles, can it be said that the issues involved in the intended appeal by Benjoh and Muiri relate to a matter of general public importance to warrant certification under Article 163(4) (b) of *the Constitution*? For starters, the substratum of the intended appeal is the validity of a consent Order and whether there was evidence on the basis of which it could be said not to bind Benjoh and Muiri and therefore justify its being set aside. These issues are not issues that transcend the interest of the parties in the litigation, nor do they impact in any way on society, much less bear on public interest. Clearly, the issues affect only the parties to the dispute. They are not unique. They are commonplace in litigation. It is our holding that they do not amount to a matter of general public importance. Clearly, it would be remiss of us to certify that the intended appeal involves a matter of general public importance. We therefore decline to issue a certificate under article 163(4)(b) of *the*

Constitution. We observe that counsel for the applicants did not show any enthusiasm with regard to the prayer on leave to appeal to the Supreme Court and perhaps this is why there was paucity of submissions on this point."

66. The above finding was not contested before this Court on review; and so we need not consider it on merits. However, we note the gist of the subject matter as underlined by the Appellate Court: the substratum of the intended appeal is the validity of a consent Order, and whether there was evidence on the basis of which it could be said not to bind Benjoh and Muiri, and so it should be set aside. This appears, prima facie, to be a different issue altogether from the one that was subsequently certified as being of general public importance, in Application Sup. 20 of 2013: that is, the importance of a Court record. However, caution may be drawn from the decision in the case, E.T v. Attorney-General & Another, where it was held that: "the Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court."

67. Though differently framed, we note that the cause of action in this matter is the same. Same also is the relief that was sought in the two applications: leave to appeal before the Supreme Court on the basis that the evidence of the consent recorded, or the record containing the consent, is missing! In a largely semantical scheme, the respondent in Application Sup. No. 20 of 2013 is concerned with 'record of the Court', while in Application Sup. No. 16 of 2012 it adopts different phraseology: 'lack of evidence of the consent'. It is of no materiality that in the subsequent application, the parties changed, with the dropping of Benjoh Amalgamated Limited, and the introduction of Bidii Kenya limited. The cause of action remains the same and so is the relief sought. (See Hon. Norbert Mao v. Attorney-General above).

68. It is our finding, in the circumstances, that by bringing Application Sup. No. 20 of 2013, after the Court of Appeal had heard and dismissed Application Sup. No. 16 of 2012, the respondent had not complied with the doctrine of res judicata. The effect, in law, is that the Appellate Court erred in admitting and determining that application.

69. It is in this context that we perceive the Appellate Court's decision, of 'disregarding' its Ruling in Application Sup. No. 16 of 2012, and reaching a different finding on the same subject-matter. We agree, with respect, with the applicants that this is precisely the danger this Court had earlier signalled in the Nathif Adam (supra) case (paras. 94-95).

> " We note the concern raised by counsel for the appellant and for the 3rd and 4th respondents, regarding the different conclusions arrived at by two different Benches of the same Court of Appeal, on the very same irregularities which arose within Balambala Constituency. The trial Judge had arrived at similar conclusions in respect of the two electoral matters. But in this case, regarding the gubernatorial election, the Court of Appeal held, contrariwise, that the irregularities arising in this Constituency's polling stations had affected the election results; whereas a different Bench of that Court, in Mohamed Mahamat Kuno v. Abdikadir Omar Aden Nairobi Civil Appeal No. 298 of 2013, held that the irregularities were not so substantial as to affect the results of the election of the Member of the National Assembly for Balambala Constituency.
>
> "Such a difference carries the demerit that it will tend to undermine the public confidence, that the judicial arm of the State is a truly impartial arbiter, governed by the objective realities occasioning dispute, and committed to fair and objective criteria of justice. Such a concern clearly falls within the agenda of this Court, firstly, to 'assert the supremacy of *the Constitution*' [The *Supreme Court Act*, 2011 (*Act No. 7 of 2011)*, Section 3(a)]; and secondly, to ensure that 'justice shall be done to all, irrespective of status' [*The Constitution* of Kenya,

2010, Article 15992)(a)]. We call upon all Courts to discharge their responsibilities not only by applying the best criteria in ascertaining the evidentiary premises of matters before them, and by the professional interpretation and application of relevant law, but also by keeping abreast of the proper findings and determinations of other Courts considering subject-matter common to separate causes."

70. In the Nathif Adam(supra) case we urged Courts to keep abreast of the findings and determinations of other Courts on subject-matters common to separate causes; and we would signal, especially for the Appellate Court with its different Benches constituted for different matters, the singular importance of ensuring jurisprudential consistency among those Benches.

71. Finality of Litigation: Were Matters in Question Resolved Prior to the Promulgation of *the Constitution*?[71.

The applicants also challenged the certification granted by the Appellate Court on the ground that it seeks to re-open matters concluded before the promulgation of *the Constitution*, 2010. This raises the question as to the constitutional time-frame limits of the appellate jurisdiction sought to be involved in the instant matter.

72. The respondent (which has already filed an Appeal No. 35 of 2014) invokes this Court's appellate jurisdiction. Before an appeal passes the test of "matter of general public importance", it has to come from the Court of Appeal, as provided by Article 163(3)(b)(i) of *the Constitution*. The matter coming on appeal must have been canvassed before the High Court, then proceeded on appeal to the Court of Appeal, before ending up before the Supreme Court.

73. A party who has duly complied with the foregoing threshold conditions, is thereafter to comply with the terms of *the Constitution* as specified in Article 163(4)(a) or (b): that is, to come as of right, if it involves the application or interpretation of *the Constitution*; or to obtain certification that the question involves a matter of general public importance. In Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. and J. Harrison Kinyanjui & Co. Advocates, SC Petition No. 3 of 2012, this Court held that only two categories of appeal lie to the Supreme Court (para. 20-21):

At the outset, we consider it crucial to lay down once again the principle that only two types of appeal lie to the Supreme Court from the Court of Appeal. The first type of appeal lies as of right, if it is a case involving the interpretation or application of *the Constitution*. In such a case, no prior leave is required from this Court or the Court of Appeal.

> " The second type of appeal lies to the Supreme Court not as of right, but only if it has been certified as involving a matter of general public importance. It is the certification by either Court, which constitutes leave. This means that where a party wishes to invoke the appellate jurisdiction of this Court.......then such intending appellant must convince the Court that the case is one involving a matter of general public importance."

74. The foregoing conditions are attended with certain principles now well recognised by the Superior Courts. The Supreme Court of Kenya was created upon the promulgation of *the Constitution*, 2010. Before then, the Court of Appeal was the final Court of the land. It has been held that the Supreme Court of Kenya, in exercise of its appellate jurisdiction as provided in *the Constitution*, is forward-looking: the Court will only hear appeals from the Court of Appeal in matters that were not concluded before 27th August, 2010. Any matters that had been determined by the Appellate Court before that time, had attained their finality, and are not appealable to the Supreme Court.

75. This principle was stated by this Court in one of its inaugural decisions, the S. K. Macharia (supra) case, in the following terms [para.63]:

> "In the matter before us, the sole issue is to consider whether the applicants can reopen a case that was finalized by the Court of Appeal (by then the highest Court in the land) before the commencement of *the Constitution* of 2010. Decisions by the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the Judgments of that Court. If this Court were to allow appeals from cases that had already been finalized by the Court of Appeal before the commencement of *the Constitution* of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of citizens."

The Court proceeded to further hold (paragraph 65) thus:

> "Article 163 (4) (b) is forward-looking, and does not confer appellate jurisdiction upon the Supreme Court to entertain matters that had been finalized by the Court of Appeal before the commencement of *the Constitution*."

76. Subsequent decisions of the Court have, in the spirit of the doctrine of stare decisis, upheld that position. In Omega Chemical Industries Limited v. Barclays Bank of Kenya Limited, Application No. 6 of 2013 the Court further buttressed its position on this question, as follows:

> "The appellate jurisdiction of this Court is clearly outlined in theMacharia case. In summary, this Court will not entertain cases that were already heard and determined before it came into existence. The appellate jurisdiction of this Court, in its essential character, does not look back in time to early years predating *the Constitution*..."

On that occasion, this Court further remarked (paragraph 38):

> "...[the] cases appealed to finality in the apex Court, prior to the promulgation of *the Constitution* of Kenya, 2010 are not for re-opening before this Supreme Court."

77. One particular case stands out in the explication of the foregoing principle. In Menginya Salim Murgani v. Kenya Revenue Authority, Civil Application No. 4 of 2014 the Court was urged to grant leave to appeal to the Supreme Court. However, despite the Court reaching a finding that the issues raised by the applicant were indeed meritorious, as to fall within the scope of "matters of general public importance", warranting certification and grant of leave, on the principle that the Appellate Court decision in question had been rendered pre-Constitution 2010, the Supreme Court declined to grant leave, as it had no jurisdiction. The Court held [paragraphs 45 & 46]:

> "The foregoing observation by the Appellate Court, in respect of the interplay between natural justice and disciplinary proceedings in employment relations, especially in circumstances such as those obtaining in this case, in which the employer is the State's foremost agency of financial power, is in our view, eminently meritorious.
>
> However, in the context of the facts and the history of the instant matter, the binding effect of the S. K. Macharia (supra) case, as regards Appellate Court determinations made before the promulgation date of the current Constitution, has not been distinguished; and on this account, the application cannot succeed."

78. Thus, despite the Supreme Court appreciating, in the Menginya (supra) case, that the issues therein involved "matters of general public importance", the Court none-the-less did not admit the matter,

on the sole principle that the Court of Appeal had determined it before the promulgation of *the Constitution*; this Court, in the circumstances, lacked jurisdiction.

79. Were the issues in the instant matter determined before *the Constitution* of 2010, so as to be barred by the finality principle? This calls for an examination of the litigation career of this matter since it first came before the High Court, and until the application now before us.

80. The first case in this matter was HCCC 1219 of 1992, Benjoh Amalgamated Ltd. & Muiri Coffee Estate Ltd. v. KCB Limited filed on 4th March, 1992. It is in this case that, apparently on 4th May, 1992 a consent was entered for payment by 31st July, 1992. There was a default, and KCB instructed auctioneers to move and re-advertise the properties for sale. Meanwhile, Muiri Coffee and Amalgamated Co. filed some other cases, seeking an injunction restraining the sale. Those suits were dismissed.

81. The two parties then reverted to HCCC No. 1219 of 1992, and filed an application thereunder, seeking to set aside the consent. This application was heard and allowed on 31st October, 1997. KCB was aggrieved by this decision setting aside the consent, and appealed to the Court of Appeal, in Civil Appeal No. 276 of 1997. The Appellate Court allowed the appeal on 10th March, 1998, thereby reinstating the consent. At this point, it cannot be gainsaid that the highest Court of the land had made a final factual and legal determination, that was not appealable before any other Court.

82. Contrary to expectation, however, the dispute between the two sets of parties continued, resulting in yet other suits. In HCCC No. 1576 of 1999, one of the prayers was:

> " that the consent Order in HCCC No. 1219/92 be declared unenforceable because it is ambiguous"

83. The High Court, (Lenaola, J), after taking into account the Appellate Court's determination, thus held (paragraphs 37, 38):

> " Without saying more than has already been said with regard to this consent Order, the Court of Appeal upheld its validity in C.A. No. 276 of 1997 when it stated as follows:
>
> '... we allow this appeal, set aside the Ruling and Order of Githinji, J and in lieu thereof substitute an Order dismissing the... application for the review...'
>
> "The net effect of all the statements that I have cited above is as follows:
>
> ...
>
> (iii) the consent Order of 4th May,1992 is in place and the plaintiffs are bound to abide by it and to pay the outstanding sums in default of which the defendant would realize the securities."

84. It emerges that even the Appellate Court's Ruling on the consent, of 10th March, 1998 had been challenged in 1999; and in a decision rendered in 2004, the High Court recognized the question was now res judicata, having been resolved by the highest Court of the land in 1998.

85. The said High Court determination was appealed before Court of Appeal, in Civil Appeal No. 239 of 2005. The Court of Appeal (Omolo, Waki and Deverell, JJA), on 31st March, 2006, held that all the issues that had been raised in HCCC No. 1576 of 1999 were res judicata. It thus stated:

> " Having held that all the issues raised in HCCC No 1576 0f 1999 were res judicata, we do not think it is necessary for us to consider whether that suit was an abuse of the Court and

whether it was filed outside the period of limitation. In any case a party who brings for the decision of the Court matters which have already been determined can truly be said to be abusing the process of that Court..."

The Appellate Court continued thus:

> "We have said enough, we think, to show that the appeal cannot succeed. We think the appellants will not like it but we also must point out to them that irrespective of how many cases they may wish to bring on the same issues, the answer will and can only be one and they already know what the answer shall be. The appeal fails and we order that it be and is hereby dismissed with costs thereof to the Respondent"

86. From the foregoing, it clearly emerges that the issue of the consent as between the parties in the matter currently before this Court, was determined by two separate Benches of the final Court (Court of Appeal) on 10th March, 1998 and on 31st March, 2006. The two decisions were rendered before thepromulgation of *the Constitution* 2010, that is, before the establishment of the Supreme Court. Consequently, they were final and binding and they cannot be re-opened by this Court.

87. It is evident to us that the Court of Appeal, in considering Application No. Sup. 20 of 2013, erred in not taking note of the earlier decision in Application No. 16 of 2012. Had the subsequent Bench considered the earlier decision, it would have noted that the vital principle was well sounded in the earlier decision in Application No. 16 of 2012, thus (paragraph 19):

> "Moreover, the Ruling of Githinji, J, as he then was, was delivered on 31st March, 1998 and the ensuing Judgment from its appeal was delivered on 10th October, 1998, long before the Supreme Court was brought into being by Article 163(1) of the 2010 Constitution which was promulgated on 27th August, 2010. In the case of Samuel Macharia & Another v. Kenya Commercial Bank Limited & 2 Others (Supreme Court Application No. 2 of 2012 (unreported)), the Supreme Court posed the question: "Can the Supreme Court entertain an appeal from cases that had already been heard and determined by the Court of Appeal before it came into existence?" The Supreme Court then proceeded to answer that question in the negative by stating that decisions of the Court of Appeal made before 27th August, 2010 cannot be reopened through an appeal to the Supreme Court as a certification to appeal to the Supreme Court cannot issue even if the intended appeal raises a matter of general public importance."

88. We agree with the Court of Appeal, and reiterate the foregoing statement of principle. The issue as to the point in time when the Supreme Court was established, and whether it can take matters finalised when it was not in existence and re-open them, is an issue that goes to the Court's jurisdiction; the Court lacks jurisdiction to do that. The issue at the core of the intended appeal before us, flows from decisions of the Court of Appeal that were rendered as far back in time as 1999 and 2006, well before *the Constitution* of 2010, and by virtue of which the Supreme Court was established. However meritorious or germane the issue might be, this Court lacks jurisdiction to reopen it.

89. As the issue of the consent in this matter was determined by the final Court of the time, namely the Court of Appeal, and before the establishment of this Court, we have no jurisdiction to reopen it by granting certification in this matter.

**Had the Relevant Issues Progressed through the Court Hierarchy?**

90. As already remarked earlier on, the Supreme Court's role is mainly an appellate one: and therefore, it is generally to be moved only on matters that have already progressed through the judicial hierarchy. In determining whether the issues before this Court are issues already canvassed before the superior Courts, we ask ourselves the following question: what is the Court being asked to determine?

91. It is plain to us that the decision of the Court of Appeal of 26th April, 2013, in the consolidated appeals which is the subject of the intended appeal before this Court, was not concerned with the status of the High Court as a Court of record. The main issue in the Appellate Court's Judgment was whether the matter in HCCC 505 of 2008 was res judicata, and whether the High Court could, in law, grant the interim Orders it had granted in the interlocutory injunction application filed under HCCC 505 of 2008.

92. Upon being granted leave by the Court of Appeal, the respondent filed their appeal before this Court, which now awaits the Ruling by this Court herein. In framing issues said to entail matters of general public importance, in Petition 35 of 2014, (a petition attached to the replying affidavit of Ngengi Muigai in the instant application), it is thus stated:

> " 6.9 This Petition raises matters of general public interest as the same raises fundamental constitutional and legal matters including:
>
> a The role and responsibility of the High Court of Kenya as a Court of record.
>
> b The effect of an incomplete Court record.
>
> c The integrity of adjudicative processes of Courts in the Republic of Kenya.
>
> d The obligations of a banker to a customer to keep proper cogent accounts.
>
> e The obligation of a secured lender to exercise due diligence in the management of its clients' account.
>
> f The extent of liability under guarantees offered to lenders to secure advances to third parties.
>
> g The right to have disputes determined conclusively on merits before a competent....
>
> h The duty of a chargor to ensure that in realizing any security held, the interests of the party offering the security are observed."

93. These are the issues at the core of the application certified by the Appellate Court as raising matters of general public importance. The respondent also attached the plaint in Civil Suit HCCC No. 505 of 2008: and this plaint is the foundation of the application now before us. In that plaint, the prayers of the plaintiff, Muiri Coffee Limited, were as follows:

> " (a) A permanent injunction to restrain the 4th defendant (Bidii Kenya Limited), its servants and/or employees from charging, encroaching upon, taking possession, leasing, trespassing, selling, disposing, wasting away, alienating

and/or interfering in any manner whatsoever with the plaintiff's occupation, user and possession of the said suit premises known as Land Reference No. 10075 Thika.

(b) A declaration that the transfer and sale of the plaintiff's suit premises known as Land Reference No. 10075 Thika is illegal, unlawful and therefore null and void and of no effect and an order for the re-conveyance thereof to the plaintiff in the register at Lands Office and a further declaration that the plaintiff stands discharged of any claims from the first defendant due to the material departure by the said defendant from the original agreement.

(c) Cancellation of the said transfer (i.e. Conveyance in favour of the 4th defendant) dated 6th August, 2008 in respect of the said suit premises known as Land Reference No. 10075 Thika and a cancellation of all entries in the title relating to the said suit premises known as Land Reference No. 10075 Thika in favour of the 4th defendant.

(d) A declaration that the charges enumerated in paragraphs 10, 11 and 12 herein (the plaint) are null and void and of no effect or enforcement against the plaintiff and that the plaintiff is released and discharged from the said charges and from any liability there-under, that the property purported to be charged thereby be discharged from the charge and that the plaintiff is entitled to the delivery up of its documents of title relating to L.R. No. 10075 Thika (the said property) freed, released and discharged from the said charges.

(e) A declaration that the 1st defendant's remedy and/or recourse is against the 2nd defendant.

(f) Damages for fraud as against the 1st, 3rd and 4th defendants.

(g) Costs of this suit.

(h) Such other and/or further relief as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter."

94. Accompanying this suit (No. 505 of 2008) was an application for interlocutory injunction which sought the following Orders:

"(i) The application be certified urgent and be heard ex parte in the first instance.

(ii) Pending determination of this suit, a temporary injunction be issued restraining the 1st and 4th defendant/respondent, their servants or agents, advocates or auctioneers or any other person acting for and/or on their behalf, from doing the following acts or any of them, that is to say from further advertising for sale, disposing of, selling by private treaty or otherwise howsoever charging, leasing, letting or otherwise howsoever interfering with the plaintiff's possession, occupation, use and or ownership of title to and/or interest in all that parcel of land known as L.R. No. 10075 of Thika.

(iii) This Honourable Court be pleased to issue temporary orders in terms of prayer 2 above pending hearing and determination of this application inter partes.

(iv) An Order be made under Section 52 of the Transfer of Property Act, 1882 of India (amended) that during the pendency of this suit, ALL Further Registration or change of registration in the ownership, leasing, sub-leasing, allotment, user, occupation or possession or in any kind of right, title or interest in all that parcel of land known as L.R. No. 10075, Thika with any Land Registry, Government Department, and all other registering authorities be and is hereby prohibited.

(v) The plaintiff be at liberty to apply for such further or other Orders and/or directions as this Honourable Court may deem fit and just to grant.

(vi) Costs of this application be provided for."

95. The foregoing prayers form the foundation of the case, as it was framed before the High Court. It is evident that the question of the importance of a missing record of a Court, has not been raised. To the application for injunction, a notice of preliminary objection was lodged, on the following specific grounds:

> The application is bad in law, incurably defective, incompetent and an abuse of Court process, and should therefore de dismissed with costs.The plaintiff has no locus standi in respect of the application and the entire suit.The application and the entire suit are sub judice and res judicata and should therefore be dismissed with costs.The Honourable Court has no jurisdiction to entertain the application and the entire suit.The supporting affidavit of Ngengi Muigai and the annextures thereto offends the mandatory provisions of Rule 9 of the Oaths & Statutory Declaration Rules, Cap. 15 of the Laws of Kenya."

96. The application and the preliminary objection were heard, with the preliminary objection dismissed on 18th November, 2008; while the application for injunction was allowed in a Ruling of 2nd November, 2009¾and that defines the issues determined before the High Court. The applicants herein, who were aggrieved, proceeded to file two appeals before the Court of Appeal challenging the Rulings; and that is the origin of Civil Appeal No. 100 of 2010 and Civil Appeal No. 106 of 2010, which were consolidated, heard and determined, resulting in a Judgment of the Court of Appeal dated 26th April, 2013. The Court of Appeal allowed the preliminary objection that had been dismissed by the High Court; and the consequence that HCCC No. 505 of 2008 was struck out for being res judicata.

97. Accordingly, the proper question that, by the applicable procedure, could be brought up to the Supreme Court, having been determined by the High Court and the Court of Appeal, is whether HCCC No. 505 of 2008 was rightly dismissed by the Court of Appeal for being res judicata. Yet this Court is now faced with a 'new' set of issues that have no foundation in the suit filed by Muiri Coffee Estate Ltd. in HCCC. No. 505 of 2008. It is clear to us that the respondent, Muiri Coffee, has resorted to a drafting craft, to bring to us matters that had not come up before the other superior Courts. This, however, is not for allowing.

98. The guiding principle is in our decision in Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others, [2012] eKLR, in the following terms (para. 30):

> "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, 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 law or of jurisprudential moment, will deserve the further input of the Supreme Court."

**Determination**

99. It is evident that Court records are of great importance in the administration of justice, just as it is clear that the issues the respondent intends to raise on appeal are weighty issues. We also have no doubt that the question of missing Court records could be an arguable one, that could well transcend the circumstances of this particular case, and have a significant bearing on the public interest. Had that been the sole consideration in this application, we would have certainly considered whether, indeed, there exists a matter of general public importance, on its merits.

100. However, it must be noted that Courts, in their hierarchical setting, bear obligations, powers and competences to resolve issues of principle and of technicality of the law, before the same questions come up before the Supreme Court. Certification for ultimate appeal, based on the sole premise that records are of immense importance to Court users, falls outside the scheme of 'matters of general public importance', where there are crucial matters of law and principle that have not come up before the other Courts. In this case, the vital issues in the intended appeal had not been raised in the High Court, and had not been the subject of judicial determination at the High Court or the Court of Appeal.

101. The matter before the Court also detracts from a core legal principle embodied in the precedents of this Court. The appellant is inviting the Court to reopen a matter that was decided by the final Court at the time: the Court of Appeal¾before the promulgation of *the Constitution* that gave birth to the Supreme Court. It cannot, on that account, be entertained.

102. The Court of Appeal had, with respect, acted per incuriam, in certifying the cause as one involving a matter of general public importance, and granting leave to appeal to the Supreme Court, where a different Bench of that same Court had denied leave. This Court has indicated that, by the terms of *the Constitution*, it is not to serve as just another layer in the appellate court structure; it has specific functions that are well defined.

103. The foregoing principle is well reflected in the following statement of the Court of Appeal, at the time of granting leave:

> " ... 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 as 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."

104. A Court's Judgment and/or Ruling, in the perception of *the Constitution* and the law, is an edict that resolves a live issue of controversy, and is by no means an abstract pronouncement. In asking this Court to pronounce itself on the propriety of a missing record of the High Court, the Court is being called upon, in the very first place, to determine the question of the legality of the consent made by the parties herein in that missing record. That question was settled as far back in time as 1998. It is not conceivable that this Court should reopen that consent. Since that question was first determined with finality on 10th March, 1998, rights, obligations and interests have crystallized, and they carry all validity, and embody proper and legitimate expectations. The system of justice that is upheld by the Court of law, will not tamper with such rights and obligations, even where some parties may feel aggrieved.

**G. Orders**

105. We are inclined, in the light of the foregoing analysis of the differing propositions, to make Orders as follows:

The Originating Motion No. 42 of 2014 dated 21st November, 2014 as consolidated with Originating Motion No. 43 of 2014 dated 21st November, 2014 are hereby allowed.The certification of the Court of Appeal granted in Application Sup. No. 20 of 2013 on 7th November, 2014 is hereby set aside.For avoidance of doubt, the Petition of Appeal already filed by the respondent in this Court, being Appeal No. 35 of 2014, is hereby struck out, as its sub-strum, namely the certification granted by the Court of Appeal, is spent.Each party shall bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 19THDAY OF MAY,2016.**

**............................**

**W. MUTUNGA**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

**............................**

**K.H. RAWAL**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

**............................**

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

**............................**

**J.B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

**............................**

**N. S. NDUNGU**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**