**Teachers Service Commission v Kamau & 19 others (Application 38 of 2014) [2015] KESC 35 (KLR) (9 December 2015) (Ruling)**

*Teachers Service Commission v Simon P. Kamau & 19 others [2015] eKLR*

Neutral citation: [2015] KESC 35 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**APPLICATION 38 OF 2014**

**KH RAWAL, DCJ & VP, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ**

**DECEMBER 9, 2015**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPLICANT**

**AND**

**SIMON P KAMAU ..... 1ST RESPONDENT**

**PATRICK W MWANGI ..... 2ND RESPONDENT**

**JOSEPH MN MWENJA ..... 3RD RESPONDENT**

**AMOS KIMANI THUO ..... 4TH RESPONDENT**

**DAVID KAMAU KIMANI ..... 5TH RESPONDENT**

**GEDRAPH M KIMATTA ..... 6TH RESPONDENT**

**MARY TN WAINAINA ..... 7TH RESPONDENT**

**ROBERT KARUMA GITAU ..... 8TH RESPONDENT**

**MARY W NDUNGU ..... 9TH RESPONDENT**

**KENNETH A. NDUNGU WANGOMBE ..... 10TH RESPONDENT**

**MAGDALENE A OMONDI ..... 11TH RESPONDENT**

**WAWERU KARANJA ..... 12TH RESPONDENT**

**LINNAH FC MARTIN ..... 13TH RESPONDENT**

**CYRUS WG WAMBIA ..... 14TH RESPONDENT**

**ROP ELMOI DICK ..... 15TH RESPONDENT**

**MATHEW NAIBEI ..... 16TH RESPONDENT**

**GEORGE KHADI KIBIDI ..... 17TH RESPONDENT**

**JOHN KIMANI NJOROGE ..... 18TH RESPONDENT**

**STEPHEN G KANAI ..... 19TH RESPONDENT**

**ANN TUMOM LIVINGSTONE ..... 20TH RESPONDENT**

***(Being an Application under Article 163(4)(b) & (5) of the Constitution, for review of the Court of Appeal's decision (Mwera, Kairu & Mohammed JJ.A) delivered on 23rd May, 2014 in Civil Application Sup. No. 18 of 2013 denying leave to appeal to the Supreme Court)***

**Jurisdiction of the Supreme Court to determine appeals from the Court of Appeal for decisions rendered before the establishment of the Supreme Court**

Reported by Teddy Musiga

***Jurisdiction*** *– appellate jurisdiction of the Supreme Court – whether the Supreme Court has jurisdiction to hear an application appealing the decision of the Court of Appeal which was delivered before the establishment of the Supreme Court – article 163(4) (b); article 163 (9) Constitution of Kenya, 2010*

***Jurisdiction*** *– jurisdiction of the Supreme Court – jurisdiction of the Supreme Court on matters of general public importance – whether the fact that a judgment debt is to be paid from public funds can make such a claim to be matter of general public importance – Constitution of Kenya, 2010 article 163(4) (b)*

***Jurisdiction*** *– contempt of court proceedings – jurisdiction of the Supreme Court to punish for contempt of court – whether the Supreme Court can grant orders of stay of execution against contempt orders – Judicature Act, section 5; Supreme Court Act, 2011 section 28(4)*

***Civil Practice and Procedure*** *– pleadings – procedure for filing appeals to the Supreme Court – importance of filing notice of appeal – whether the delay in filing notice of appeal before the Supreme Court is inordinate or excusable – article 159 Constitution of Kenya 2010; Supreme Court Rules, 2012 Rule 53*

**Brief facts**

The instant application sought to invoke the Supreme Court's review jurisdiction. It sought a reversal of the Court of Appeal's Ruling in Civil Application Sup. No. 18 of 2013 delivered on 23rd May 2014 which dismissed its application for certification of an intended appeal to the Supreme Court against a judgment of the appellate Court delivered on the 12th November, 2010. The applicant also prayed that the matter be certified as an appeal that raised matters of general public importance. The dispute revolved around the undertaking by the government to increase the teachers' salaries – in particular, what element crystalized as pension, and falling due to the affected retired teacher.

**Issues**

i. Whether the Supreme Court has jurisdiction to hear an application appealing the decision of the Court of Appeal which was delivered before the establishment of the Supreme Court.
ii. Whether the delay in filing notice of appeal before the Supreme Court is excusable or inordinate.
iii. Whether the fact that a judgment debt is to be paid from public funds can make such a claim to be a matter of "general public importance" hence falling within the jurisdiction of the Supreme Court.
iv. Whether the Supreme Court can grant orders of stay of execution against contempt of court orders.

**Held**

1. Article 163(4) (b) of the Constitution of Kenya, 2010 was forward looking, and did 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 of Kenya, 2010. Thus, the Supreme Court could decline to hear any appeal that had the effect of re-opening a matter that was concluded

before the Constitution came into existence, at a time when the Court of Appeal was the final court in the land.

2. Under article 163(9) of the Constitution, there was need to enact legislation to operationalize the Supreme Court. By the time of delivery of the Court of Appeal judgment on 12th November, 2010, such new legislation had not yet been enacted. The Supreme Court Act was enacted on 22nd June, 2011 and began operations on 23rd June, 2011.

3. The sixth schedule to the Constitution (section 2) enumerated those provisions which would not come into operation until the results of the first elections had been announced. Chapter ten, on the Judiciary, was not included among the suspended provisions. The inference to be drawn was that the chapter on the Judiciary entered into force immediately upon promulgations. Thus, before the Supreme Court became operational, its jurisdiction devolved to the Court of Appeal, and was duly exercisable.

4. As the Court of Appeal's decision was delivered after the establishment of the Supreme Court, it followed that the Supreme Court had jurisdiction in the relevant matters. The applicant could properly have moved to the Court of Appeal, which had already recognized its constitutional mandate to sit as the Supreme Court. After the promulgation of the Constitution of Kenya, 2010, a litigant would have brought any matter without delay before the Court of Appeal sitting as the Supreme Court. However, the applicant failed to use that opportunity.

5. When the applicant filed its notice of appeal on 9th September, 2014, the law required it to do so within 14 days of the decision of the Court of Appeal. But the applicant failed to observe the timelines; which necessitated an application for extension of time to file a belated notice of appeal, under Rule 53 of the Supreme Court Rules, 2012. No such application was made even though the applicant curiously mentioned a need for the court to extend time within which to file the notice of appeal. Thus, the notice of appeal on record was clearly irregular, and of no consequence in law.

6. The notice of appeal, as a prelude to the filing of an appeal was a requirement both in the 2011 rules, and under the current (2012) rules of the Supreme Court; and that the Appellate court while it acted as the Supreme Court, had long standing practice as regards notice of appeal. The applicant did not file the notice of appeal, until late in 2014 and then without leave of the court.

7. By practice, the Supreme Court had not favored the practice by parties of filing a document improperly, and then seeking *ex post facto* endorsement by the Court. Consequently, the notice of appeal purportedly filed on 9th September 2014 was thereby struck out as it was filed without leave. The effect was that there was no notice of appeal on record, and therefore the application was fatally flawed. In view of the importance of a notice of appeal as a jurisdictional requisite, the lack of it could not be bailed out by the invocation of article 159 of the Constitution.

8. From the record, it appeared that the applicant had no intention of appealing. The applicant did not take definitive steps towards implementing the judgment of the Court. The desire on the appellant's part to lodge an appeal was not evident; and hardly any initiative was taken to secure the rights of appeal. The three year period that elapsed was, in the circumstances, to be regarded as unreasonable delay, which was inconsistent with a quest for justice before the Supreme Court.

9. Taking up novel issues at the instant stage, which had not been adjudicated upon by the High Court and the Court of Appeal amounted to assuming the jurisdictional mandate of other judicial fora. The Supreme Court had been unequivocal in its respect for the hierarchy of courts in Kenya. For the precious element of orderly and dispute settlement, such a position was for sustaining. It is common place that the vital evidentiary turning points of a case are established in earlier courts; and so such foundations of merits had to be first settled at the right fora, before a cause founded upon them came up before the instant apex court.

10. The bare fact that a judgment debt was to be paid from public funds did not make a claim one of general public importance, and it remained so, even ever so large the amount could be. Thus, the intended

appeal did not raise matters of general public importance, and consequently, the further input of the Supreme Court was not warranted.

11. It was clear that the Superior courts interpreted section 10 of the Pensions Act in the context of the agreement that was in place, and the interpretation rendered was in relation to that agreement. It followed that, were there to be a likelihood of any uncertainty or ambiguity in law, as a result of that interpretation, its burden would only fall upon parties bound by the agreement. Such a perception made good sense, and it was not manifest that there was any uncertainty in the application of section 10 of the Pensions Act.
12. The jurisdiction to punish for contempt of court was provided for in section 5 of the Judicature Act. The Supreme Court too had such powers to punish for contempt as provided in section 28(4) of the Supreme Court Act, 2011. A plain reading of those provisions provided that the courts had been given the powers to punish for contempt, in order to uphold the dignity of the courts. An aggrieved party could appeal against the decision of the court which imposed penalty for contempt.
13. The Supreme Court was disinclined to issue an Order staying the High Court's finding of guilt of contempt. Parties ought to have ventilated the issue of contempt through the established court hierarchy, by first appealing to the Court of Appeal, before moving to the Supreme Court. There was no basis for granting stay, in a matter that was not live before the Supreme Court. It would have been tantamount to usurping the jurisdiction of the Court of Appeal.

*Application dismissed.*

***Orders***

i. *Application dismissed.*
ii. *The applicant was to bear the costs of proceedings before the Supreme Court.*

**Citations**

***East Africa***

1. *Bell, Malcolm v Daniel Toroitich arap Moi & another* Application No 1 of 2013 – (Mentioned)
2. *Hermanus Phillipus Steyn v Giovanni Gnecchi Ruscone* Application 2 of 2012 – (Mentioned)
3. *In Re the Matter of the Commission for the Implementation of the Constitution* Constitutional Application No 2 of 2011 – (Followed)
4. *Koinange Investments & Development Ltd v Robert Nelson Ngethe* Application No 4 of 2013 – (Mentioned)
5. *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] 3 KLR 199 – (Affirmed)
6. *Mathenge, Thuo & another v Nderitu Gachagua & 2 others* Election Petition No 1 of 2013 – (Explained)
7. *Menginya Salim Murgani v Kenya Revenue Authority* Civil Application No 4 of 2014 – (Mentioned)
8. *Ngoge v Ole Kaparo* [2012] 2 KLR 419 – (Affirmed)
9. *Njihia, Daniel Kimani v Francis Mwangi Kimani* Application No 3 of 2014 – (Followed
11. *Njiroine, Daniel Shumari v Naliaka Maroro* Motion 5 of 2013 – (Mentioned)
12. *Omega Chemical Industries Ltd v Barclays Bank of Kenya Ltd* Application No 16 of 2013 – (Mentioned)
13. *Republic v Minister for Agriculture & 2 others ex-parte W'Njuguna & 6 others* HC [2006] 1 KLR 351– (Explained)
14. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Application No 16 of 2014 – (Affirmed)

***United Kingdom***

1. *R (Crompton) v Wiltshire Primary Care Trust* [2009] 1 All ER 978 – (Affirmed)

**Statutes**

***East Africa***

1. Constitution articles 159(2) (b); 163 (3) (4) (b) (8) (9); 201; 203; 206; 207; 259 (8); sixth schedule to the Constitution sections 2, 21(2) – (Interpreted)

2. Judicature Act (cap 2) section 5 – (Interpreted)

3. Pensions Act (cap 189) section 10 (1) – (Interpreted)

4. Pensions Act Regulation (cap189 Sub Leg) 20(1) – (Interpreted)

5. Public Finance Management Act, 2012 (Act No 18 of 2012) section 12 (1) (a) (2) (b) – (Interpreted)

6. Supreme Court Act, 2011 (Act No 7 of 2011) sections 15, 16, 28(4) – (Interpreted)

7. Supreme Court Rules, 2011 (Act No 7 of 2011 Sub Leg) rule 30 of the 2011- (Interpreted)

8. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rules 31(2); 53 – (Interpreted)

## RULING

### A. Introduction

1. The applicant, by Notice of Motion dated 16th September, 2014, invokes this Court's review jurisdiction. It seeks a reversal of the Court of Appeal's Ruling in Civil Application Sup. No. 18 of 2013 delivered on 23rd May, 2014 which dismissed its application for certification of an intended appeal to the Supreme Court, against a Judgment of the Appellate Court delivered on 12th November, 2010. The applicant also prays that the matter be certified as an appeal that raises matters of general public importance.

2. The applicant, besides, seeks Orders of stay against the execution of the Judgment and Order of the Court of Appeal in Civil Appeal No. 300 of 2009, and the Judgment and Decree of the High Court in Nakuru, HCCC 65 of 2006. The applicant prays for an extension of time to file a notice of appeal, or in the alternative, an Order deeming the notice of appeal already on record as duly filed.

3. In response, the respondents filed grounds of opposition dated 14th January, 2015 stating inter alia, that:

   (a) the application is bad in law, as it was filed outside the statutory period;

   (b) Sections 15 and 16 of the *Supreme Court Act* do not apply retrospectively, and hence cannot be invoked;

   (c) the dispute concerns only employees and former employer, regarding a contract of salary-increment—and so is not a matter of general public importance that merits further appeal;the final Judgment was delivered in 2010, before the Supreme Court came into being, and so this Court has no jurisdiction to entertain the matter;the applicant unreasonably delayed in approaching this Court for relief.

### B. Background

4. In 1997, the Kenya National Union of Teachers and the Government entered into an agreement to increase salary for teachers. The increment was to be implemented in five phases, as from 1st July, 1997. By the time the respondents were retiring from service, only one phase of the increment had been effected. Consequently, pension-dues were calculated on the basis of their basic salary as it stood after only the first phase of increment.

5. The respondents instituted a suit in the High Court (Nakuru H.C.C.C. No. 65 of 2006), contending that their pension was wrongly calculated. Upon hearing the petition, the High Court (Maraga J)

held that they were entitled to full increment at the time of their retirement. It was held that the applicant should have advised the Pensions Department as to the respondents' correct salaries. The Court ordered that all retired teachers who had been covered by the 1997 agreement, were entitled to full retirement benefits based on the total agreed increment. The applicant was ordered to make payment, or to liaise with the Pensions Department, to ensure payment of those dues.

6. Aggrieved by that decision, the applicant filed an appeal, alleging that the computation and award of pension should not be based on salary that had not been earned. The Court of Appeal rejected the applicant's submissions, and upheld the Judgment of the High Court: to the effect that the respondents had an accrued contractual right to the additional salary.

7. This decision further aggrieved the applicant, and so it sought certification by the Court of Appeal for a further appeal, on the basis that "matters of general public importance" were involved. In its Ruling, the Appellate Court noted that the Supreme Court had previously outlined the relevant principles for such a category of certification: Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone, Sup. Ct. Application 2 of 2012, and Malcolm Bell v. Hon. Daniel Toroitich arap Moi & Another, Sup. Ct. Application No. 1 of 2013.

8. In a Ruling delivered on 23rd May, 2014, the Appellate Court found that the applicant, on basic criteria, would have satisfied the conditions for grant of certification: the case transcended the circumstances of the individual parties, in that the High Court had not confined its award to the 20 claimants who came before it, but had decreed that "all the other retired teachers covered by the agreement" would be entitled to salaries, allowances, and pension-dues, as provided in the agreement.

9. However, the Court of Appeal held that the implementation of the award would have a major impact on the taxpayer, as a substantial sum of money would have to be drawn from the public coffers. The Appellate Court ended with a "call upon the Supreme Court" to provide clarification on the interpretation of Section 10 of the *Pensions Act* (Cap 189 Laws of Kenya), with regard to the computation of pension. The Court, however, declined to grant certification, on grounds of inordinate delay in filing the application for the certification.

**C. Parties' Respective Cases**

**(i) Applicant**

10. Learned counsel, Mr. Njoroge, submitted that the appeal raises valid issues of general public importance admissible under Article 163(4)(b) of *the Constitution*. He submitted that the application satisfies all the conditions for certifying a matter as one of general public importance, invoking the expressed inclination of the Appellate Court on this very question.

11. Counsel urged the Court to determine whether an agreement can override an express provision of the law, submitting that Section 10 of the *Pensions Act* was plainly worded, and that the interpretation of it by the Appellate Court was contrary to the laws of statutory interpretation.

12. Counsel further submitted that the Judgment of the Court of Appeal has serious public-policy implications, as it touched on the application of the *Pensions Act*. He submitted that the *Pensions Act* affects thousands of civil servants, and hence the Supreme Court should make a determination as to the legality of the interpretation emanating from the other superior Courts. He urged that the contested Judgment substantially changes the principle upon which pension is computed henceforth; and so the Supreme Court should restate the law relating to the calculation of pensions, so as to bring this issue to rest.

13. It was counsel's further contention that the two superior Courts had gone contrary to the principle that an Act of Parliament ought to be construed according to the intention of Parliament, relying on the case of Thuo Mathenge & Anor v. Nderitu Gachagua & 2 Others [2013] eklr, and Samuel Muchiri W'Njuguna & 6 Others v. Minister for Agriculture [2006] eKLR, which had affirmed the doctrine of separation of powers in relation to the interpretation function of the Courts.

14. Counsel submitted that the two superior Courts had strayed into the domain of the Legislature, by delving into issues falling under the *Pensions Act*. He urged that the Appellate had given remedy that is unknown in law.

15. Counsel submitted that the Court being an active player in this society, is obliged to take into account the known practices, as well as the economic situation in the country, in relation to pensions awarded to retirees. The Court should, in that regard, consider the effect of the Judgments of the superior Courts, and whether the applicant would be able to make the payment, in the light of the current economic conditions.

16. On the issue of delay in commencing the appeal process, counsel attributed this to a myriad of factors which made it impossible to meet the set timelines. He submitted that the Court of Appeal delivered its decision on 12th November, 2010 when the Supreme Court had not been established, and that the very earliest sitting by the Supreme Court would have been between November 2011 and February 2012.

17. Counsel submitted that the delay was inevitable, as it was necessary to make consultation with relevant Government agencies and departments, on the interpretation and effects of the Judgment; and the consultations required the applicant to trace the data of all the affected retired teachers, a task which took a long period of time — as the data was not in a digital and consolidated form.

18. Counsel stated that upon compiling the relevant data, the same was delivered to the Director of Pensions, who again took a long time perusing and analyzing the claims.

19. Counsel also contended that there had been a misjoinder of parties, as a wrong party had been sued— an issue which had been raised at the High Court. He posed a question as to what should happen when a defendant is unable to pay a judgment debt. In this case, counsel submitted that it is the Director of Pensions who can make good the respondents' claim.

20. Counsel urged that the Supreme Court should take into account the several constitutional processes that have ensued, after the delivery of the Appellate Court's Judgment. He submitted that the office of Controller of the Budget, which is a creation of the 2010 Constitution, had not been in existence at the material time; but this office would have a crucial role in the implementation of the award. Counsel asked for this Court's guidance in dealing with such emerging issues, especially in view of the fact that the Controller of the Budget is not a party in the present suit.

21. Counsel urged the Court to allow the application, and to grant stay against the contempt Orders issued against the Secretary of the Teachers Service Commission (applicant).

**Respondents**

22. Learned counsel, Mr. Kimatta, submitted that in its High Court pleadings the applicant had raised no issue regarding the interpretation of Section 10 of the *Pensions Act*; and that, consequently, it was improper for the trial Judge to make a determination on an issue that was only introduced through submissions.

23. Counsel urged that there was no justification for the delay in seeking leave to appeal, especially as the applicant had taken implementation steps, following the delivery of Judgment: by way of providing for

budgetary allocation for the payment of accrued pension. He cited correspondence between various Governments agencies, which showed the intention to honour the Court's Judgment. This included a parliamentary directive to the Government, to pay the outstanding dues. Counsel submitted that there had not been an intention to appeal from the Judgment of the Court of Appeal, and it was only after the respondents filed contempt proceedings, that the applicant now filed a notice of appeal, signifying its intention to appeal. He submitted that even the said notice had been filed without the Court's leave.

24. Counsel submitted that the applicant had a one-year window-period within which to file an appeal, after the establishment of the Supreme Court; but that the applicant had waited for three years before lodging an appeal, without sufficient reasons.

25. Counsel also doubted that the application raises any matters of general public importance. He submitted that the case is a private employer-employee dispute, which does not affect any other group of civil servants, or the public at large. He urged that it was the Court's obligation to enforce the agreement between parties, but not itself to prescribe the terms of a contract between parties. Counsel submitted that the mere fact that the Judgment's award was to be apportioned from the taxpayers fund, did not make the issue one of general public importance.

26. Counsel contested the applicant's contention, that the Judgment upholding the respondents' rights would have the effect of amending the *Pensions Act*. He urged the Court to overlook the submission by the applicant, that there would be economic repercussions crippling the national economy, should the amount of money in issue be paid. He submitted that the applicant's estimate of the outstanding claim at 151 billion Kenya Shillings, was misleading, and that the respondents claim stood at only 42.3 billion Kenya Shillings.

27. Counsel urged the Court to take into account the long wait for justice by the respondents, who are now in their twilight-years. It was submitted that non-payment in accordance with the Court's decree, would be a violation of the basic human rights of the respondents, as provided in *the Constitution*.

**D. Issues for Determination**

28. The following issues arise for determination:

    (a) whether the Supreme Court has jurisdiction to hear the application;

    (b) whether the delay in filing the application before the Court is excusable, or inordinate;

    (c) whether the applicant is seeking to introduce new unpleaded grounds in the intended appeal;

    (c) whether the proposed appeal raises a 'matter of general public importance?;

    (d) whether the Court can grant Orders of stay against the execution of contempt orders.

**E. Analysis**

**Jurisdiction**

29. It was submitted that this Court has no jurisdiction to entertain this application, since the Appellate Court's Judgment which is the subject of the intended appeal, was rendered before the Supreme Court came into existence. And it was submitted that the notice of appeal on record was filed outside the prescribed time-frame— and so, these proceedings are a nullity.

30. In the respondents' grounds of opposition filed on 17th January, 2015, the jurisdictional question is raised as follows:

(i) this application is bad in law, as it was filed outside the statutory period;

(ii) this Court lacks jurisdiction to deal with the matter;

(iii) the final Judgment having been delivered in 2010, before the Supreme Court came into being, the applicant could only have invoked the one-year window; but having failed to do so, the applicant cannot now seek the Court's indulgence, four years afterwards.

31. In the respondents' written submissions filed on 13th August, 2015 it is thus averred:

> "That there was no Notice of Appeal by the applicants in the year 2010, 2011, 2012 until year 2013 while the respondents instituted contempt proceedings in the High Court at Nakuru."

32. It was submitted that the application was not competent, as the decision against which an appeal is sought to be lodged, was delivered in November, 2010, before the Supreme Court came into existence; and in the circumstances, the provisions of Article 163(3) & (4) of *the Constitution* would not be available to the applicant under the law; and indeed, if they had been available, then the application for certification of the matter as fit for this Court, should have been instituted within 14 days.

33. The respondents submitted that, without the benefit of Articles 163, 159 and 259 of *the Constitution*, the applicant would have only the *Supreme Court Act*, and the Rules to rely upon. Such, however, is a questionable argument, as the statute and the Rules could not have been available but not Article 163 of *the Constitution*: for the Supreme Court Rules are made pursuant to Article 163(8) & (9) of *the Constitution*. It was further submitted that the applicant had a one- year window-period upon the Supreme Court coming into existence, to contest a previous Judgment; and that as the applicant failed to use that opening, the application had no basis under the 2010 Constitution, or under the Supreme Court Rules.

34. The applicant, by contrast, submitted that the Court of Appeal's Judgment was delivered in November 2010, at a time when the Supreme Court had been created, save that it had not been constituted. Counsel submitted that the first sitting of the Supreme Court took place in November 2011—and that is the earliest time when any litigant could have approached the Court.

35. The application is contested on the ground, firstly, that the Court has no jurisdiction, since the Appellate Judgment was rendered before the Supreme Court came into operation. It is also submitted that there was no notice of appeal filed within the time allowed. The question of notice of appeal, however, was accorded no more than cursory treatment. The respondents only say that a notice of appeal was not filed in 2010, 2011 or 2012, but was filed in 2013. However, the legality of this notice of appeal has not been the subject of an in-depth analysis.

36. On the jurisdictional question, linked to the commencement of operations by this Court, we thus observed on 23rd October, 2012 in Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 Others Sup. Ct. Appl. No. 2 of 2011:

> "We hold that 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*."

37. Thus, this Court held that it does not have jurisdiction to reopen matters which the Court of Appeal had decided with finality before the promulgation of *the Constitution*, in 2010. The principle in the S.K. Macharia case has been consistently restated in later decisions (see Daniel Shumari Njiroine v.

Naliaka Maroro [2014] eKLR; Menginya Salim Murgani v. Kenya Revenue Authority [2014] eKLR; and Omega Chemical Industries Ltd v. Barclays Bank of Kenya Ltd [2014] eKLR.).

38. We would, therefore, restate the same principle, in the instant matter. This Court will decline to hear any appeal that has the effect of re-opening a matter that was concluded before *the Constitution* came into existence, at a time when the Court of Appeal was the final Court in the land.

39. In the application before us, the Appellate Court's decision in question was delivered on 12th November, 2010. *The Constitution* of Kenya was promulgated on 27th August, 2010. The Supreme Court of Kenya is created by Article 163 of *the Constitution*.

40. Is the Supreme Court to be regarded as having been in effect on the promulgation date, and so the applicant could have access to it? Under Article 163(9) of *the Constitution*, there was need to enact legislation to operationalize the Supreme Court. By the time of delivery of the Court of Appeal Judgment on 12th November, 2010, such new legislation had not yet been enacted. The *Supreme Court Act* was enacted on 22nd June, 2011 and began operation on 23rd June, 2011. What appellate mechanism was available to litigants aggrieved by the Court of Appeal's decision delivered after the promulgation of *the Constitution*, but before the operationalization of the Supreme Court?

41. The Sixth Schedule to *the Constitution* (Section 2) enumerates those provisions which would not come into operation until the results of the first elections had been announced. Chapter Ten, on the Judiciary, was not included among the suspended provisions. The inference to be drawn is that the Chapter on the Judiciary entered into force immediately upon promulgation.

42. On this question, the position is further clarified by Section 21 of the Sixth Schedule, which relates to the establishment of the Supreme Court:

    (1) The establishment of, and appointment of judges to, the Supreme Court shall be completed within one year after the effective date.

    "(2) Until the Supreme Court is established, the Court of Appeal shall have jurisdiction over matters assigned to the Supreme Court" PARA emphasis supplied. .

43. It is clear then, that before the Supreme Court became operational, its jurisdiction devolved to the Court of Appeal, and was duly exercisable. Indeed, the first matter that this Court determined upon its establishment, had first been filed in the Court of Appeal, when that Court sat as the Supreme Court: Re the Matter of the Commission for the Implementation of *the Constitution* PARA 2011. eKLR. In that case, on 3rd March, 2011, the Commission for the Implementation of *the Constitution* filed an application by Notice of Motion, in "the Court of Appeal Acting/Sitting as the Supreme Court", under the provisions of Section 21(2) of the Sixth Schedule to *the Constitution*.

44. This necessitated the making of "The Temporary Practice Directions for the Court of Appeal acting as the Supreme Court— under Section 21(2) of the Sixth Schedule of *the Constitution*". These directions commenced on 14th March, 2011, their main object thus stated in Practice Direction No. 4:

> "The purpose of these Practice Directions is to assist the Court and the Parties in dealing with the issue of the jurisdiction of this Court acting as the Supreme Court pursuant to the request by the Commission on the Implementation of *the Constitution* or any such other requests for directions regarding advisory opinions under the provisions of Article 163(6) of *the Constitution* as read with Section 21(2) of the Sixth Schedule to *the Constitution*."

Evidently, the Court of Appeal was constitutionally mandated, and did re-constitute itself, and sat as the Supreme Court.

45. The Court of Appeal later sat as the Supreme Court, upon the appointment and gazettement of the Judges of the Supreme Court on 16th June, 2011, making a valedictory Order in the following terms:

In view of the fact that there now exists the Supreme Court of Kenya and Judges thereto have been appointed and gazetted, it is doubtful whether the Court of Appeal sitting as the Supreme Court is still seized of the jurisdiction to hear and determine this Application. In the circumstances, this application is stood over sine die."

46. The Court of Appeal noted that its temporary powers had ceased to exist, upon operationalization of the Supreme Court, and consequently passed on the case before it to the Supreme Court. In a Ruling delivered on 2nd November, 2011, a two- Judge Bench of this Court ( Ibrahim & Wanjala, SCJJ), observed as follows:

> "The question that remains is whether the Supreme Court can now adopt and/or take over the proceedings and proceed to determine the issues in question and, if so, in what manner?
>
> ...The Court of Appeal ... acted accordingly and promulgated Interim Rules for the said Court.... We have no doubt the Court of Appeal sitting as the Supreme Court was able and could have delivered their considered decisions/ruling."

47. The Supreme Court on that occasion, adopted the proceedings, making the following Orders:

1. This Court hereby adopts and takes over Advisory Opinion No. 1 of 2011, including all its pleadings, under the title shown here above.

2. This Court hereby adopts and takes over all the written submissions on record."

48. We would draw the inference, in the foregoing context, that it was by no means the case, that the applicant had no access to the Supreme Court, upon the promulgation of the new Constitution. The applicant could have moved to the Court of Appeal under Section 21(2) of the Sixth Schedule to *the Constitution*, filing an application akin to what is now before us. It is clear that the Court of Appeal would have re-constituted itself as the Supreme Court, and made Practice Directions to guide it in the exercise of the requisite jurisdiction.

49. As the Court of Appeal decision was delivered after the establishment of this Court, it follows that the Supreme Court has jurisdiction in the relevant matters. The applicant could properly have moved to the Court of Appeal, which had already recognized its constitutional mandate to sit as the Supreme Court. However, the applicant failed to use this opportunity.

50. We however, find no basis in law to the one-year window-period urged by the respondents; for the new Constitution left no lacuna. After the promulgation of this Constitution, a litigant would have brought any matter without delay, before the Court of Appeal sitting as the Supreme Court.

51. From the record, it is clear that no notice of appeal was filed in this matter until the 9th September, 2014, under Rule 30 of the Supreme Court Rules. Though not canvassed by the parties, this notice of appeal raises certain issues. First, when it was filed on 9th September, 2014, the only applicable Rules of the Court were the Supreme Court Rules, 2012. Under these rules, the filing of a notice of appeal, falls under Rule 31, which requires filing within 14 days following the delivery of the Judgment.

52. Before the Supreme Court Rules, 2012 came into force, there existed Supreme Court Rules, 2011. Rule 30 in the Rules of 2011 had provided for the filing of a notice of appeal, in the following terms:

(1) A person who intends to appeal to the Court shall file a Notice of Appeal, in Form B set out in the First Schedule, with the Registrar of the court or tribunal against whose decision it is desired to appeal.

"(2) Where an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall be necessary to obtain such leave or certificate before lodging the Notice of Appeal.

"(3) A notice under sub-rule (1) shall be lodged within fourteen days of the decision appealed from and under sub-rule (2), as the court may direct."

53. Rule 31 of the 2012 Rules departs from Rule 30 of the 2011 Rules: while in the 2011 Rules, where a matter is one that had to be certified as involving matters of general public importance, one had to get that certification first before filing a notice of appeal—under the 2012 Rules, that has changed, and the Rule 31(2) now provides:

31(2) where an appeal lies only on a certificate that a matter of general public importance is involved, it shall not be necessary to obtain such certification before lodging the Notice of Appeal" [ emphasis supplied] .

54. When the applicant filed its notice of appeal on 9th September, 2014, the law required it to do so within 14 days of the decision of the Court of Appeal. But the applicant failed to observe the timelines; which necessitated an application for extension of time to file a belated notice of appeal, under Rule 53 of the Supreme Court Rules, 2012. No such application was made even though, curiously, the applicant now mentions a need for the Court to extend time within which to file a notice of appeal. Already there is a notice of appeal on record, even though the applicant says it will be seeking the Court's indulgence, and the grant of extension of time to file a notice of appeal. The applicant did not, however, canvass this intention; and the notice of appeal on record is clearly irregular, and of no consequence in law.

55. We find that notice of appeal, as a prelude to the filing of an appeal, was a requirement both in the 2011 rules, and under the current (2012) Rules of the Supreme Court; and that the Appellate Court while it acted as the Supreme Court, had a long-standing practice as regards notice of appeal. The applicant did not file a notice of appeal, until late in 2014—and then without the leave of the Court. Clearly, the applicant did not appreciate the importance of the notice of appeal; for even this time, the applicant has not endevoured to make a case for extension of time to file the notice. By past practice, this Court has not favoured the practice by parties of filing a document improperly, and then seeking ex post facto endorsement by the Court. In the case of Nicholas Kiptoo Arap Korir Salat v. the Independent Electoral and Boundaries Commission & 7 Others, Sup. Ct. Application No. 16 of 2014, this Court thus stated its position in relation to such a practice:

> "To file an appeal out of time and seek the Court PARA extending. time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, PARA what. he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an

order of this Court extending time), is expunged from the Court's record" PARA emphasis supplied. .

56. Consequently, the notice of appeal purportedly filed on 9th September, 2014 is hereby struck out, as it was filed without leave. The effect is that there is no notice of appeal on record, and therefore, this application is fatally flawed. In view of the importance of a notice of appeal, as a jurisdictional requisite, the lack of it cannot be bailed out by the invocation of Article 159 of *the Constitution*.

57. We are of the conviction that we should not assume jurisdiction in a case such as this, marked as it is by undue delay in the exercise of the applicant's right of appeal.

**Delay in filing Appeal: What effect?**

58. The applicant's main reason for the delay in lodging an appeal, is that a number of persons and agencies had to be consulted, through intra- departmental and inter- departmental arrangements—notably, the office of the Controller of Budget; the Auditor-General; the Treasury; the Attorney-General's office; the Director of Pensions; and the Teachers Service Commission. The applicant after compiling basic data, had to deliver the same to the office of the Director of Pensions, which would examine these, and then make calculations as to the pension-amount payable.

59. It was submitted that the applicant needed to collate the data, as a basis for estimating the probable impact of the implementation of the Appellate Court Judgment; and that the Attorney-General had requested for the relevant data regarding: (i) the number of teachers who would benefit from the Court Order; (ii) their levels of earning at the time of retirement; (iii) the amounts they would have earned if the Court Order were implemented; (iv) the difference in earnings emerging; and (v) the mode of identification of each teacher.

60. The applicant had further explanations for the delay in getting the information thus required:

    (a) the applicant had not yet digitised the data on the retired teachers;

    (b) the applicant's employees were occupied in the delivery of other services, and were not available for tasks associated with the Court Orders;

    (c) the applicant was constrained by public service regulations on the hiring of extra labour, and on extra payment to serving government employees.

61. Counsel for the respondents contested the reasons given for the delay. He submitted that the applicant was, indeed, in the process of implementing the Judgment of the Court— in view of the correspondence that passed between the relevant Government agencies. He urged that the applicant had proffered no reasons for the three-year delay in filing an appeal.

62. The Court of Appeal dismissed the applicant's application for certification, on grounds of delay. The Court thus held:

> "The applicant sought to explain and to justify the delay in filing the present application on account of the many organs of State involved in the matter who had to be consulted. In short, the delay was attributed to government bureaucracy. In our view, that explanation is not satisfactory and does not explain why it took the applicant about 3 years to make the application. We think the applicant is guilty of unreasonable delay."

63. The Court of Appeal in its Ruling, correctly noted that there is no time- limit within which to apply for the certification of a matter as one "of general public importance". However, the Courts will consider,

on a case-by-case basis, whether there has been unreasonable delay in filing a particular matter. And if there is delay, the Courts will consider the merits of the reasons furnished by the parties.

64. The main reason for the delay in this instance, is that the applicant was collecting data, in consultation with several government agencies, in order to support its case before the Court. Was this data necessary for the application, and the prospective appeal before this Court? In essence, such data would relate to the identification of the number of the parties to be paid, as well as the amounts that would be paid out. It is significant, however, that the main issue before the superior Courts, and in the intended appeal, is not the amount payable to the retirees, but rather whether the respondents were entitled to payment.

65. An application seeking certification for leave to proceed to the Supreme Court, does not require a documentation of matters of fact, to support the case. The Supreme Court has already established guiding principles for determining whether an application raises 'a matter of general public importance.' But if we were to assume that the data in question here was relevant, we would still find the three-year delay to be unreasonable, for a litigant seeking justice. It is well known that equity comes in aid of the vigilant, and not the indolent. We cannot fail to take into account the pain of the successful respondents waiting for the fruits of the Judgment for as long as three years, only to be confronted with a fresh cycle of litigation. We would restate the wisdom of the old principle of the common law that litigation must come to an end: This has been adopted as a vital principle in constitutional and statutory laws that prescribe timelines to guide the pursuit of justice in the Courts.

66. Article 159(2)(b) of *the Constitution* cautions Courts against permitting injustice through delays, in the following terms:

> In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) .....
>
> (b) justice shall not be delayed."

67. Thus, the standpoint of *the Constitution* is that, delayed justice amounts to injustice: and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame. This is the context in which Article 259(8) of *the Constitution* is to be seen; it thus prescribes:

> If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises."

68. From the record, it appears to us that the applicant had no intention of appealing; the appellant did take definite steps towards implementing the Judgment of the Court. The desire on the appellant's part to lodge an appeal is not evident; and hardly any initiative was taken to secure the right of appeal. The three-year period that elapsed is, in the circumstances, to be regarded as unreasonable delay, which is inconsistent with a quest for justice before this Court.

**(c) Novel Issues before the Supreme Court?**

69. The respondents submitted that the contention that their rights-claims were inconsistent with certain statutes, was a new claim which had not formed part of the pleadings at any stage; and that there was no basis for delay in applying the Orders issued by the Court of appeal.

70. A perusal of the record shows that Justice Maraga, in his High Court decision, considered only two issues for determination, thus: "From these submissions and the pleadings in this case two main issues arise for determination. They are whether or not the defendant, having submitted the plaintiffs' documents to the Director of Pensions, is functus officio and therefore non-suited, and whether or not

the unimplemented phases should have been taken into account in calculating the plaintiffs' pension and retirement dues. The determination of the second issue will dispose of the first one".

71. Considering the terms of Section 10 (1) of the *Pensions Act*, the learned Judge thus held:

> "It is true that Section 10(1) of the *Pensions Act* and Regulation 20(1) thereof provide for a retiree's last pay as the basis for the calculation of his gratuity and pension. Section 10(1) of the *Pensions Act* reads:
>
> > 'A pension granted to an officer under this Act shall not exceed the full pensionable emoluments drawn by him at the date of his retirement.'
> >
> > Regulation 20(1)(a) thereof reads:
> >
> > > 'For the purpose of computing the amount of the pension or gratuity of an officer who has had a period of not less than three years' pensionable service before his retirement—
>
> (a) in the case of an officer who has held the same office for a period of three years immediately preceding the date of his retirement, the full annual pensionable emoluments enjoyed by him at the date in respect of that office shall be taken'...In this case Section 10(1) of the *Pensions Act* should therefore be interpreted as though it stated that 'the full pensionable emoluments drawn or supposed to be drawn by him at the date of his retirement.' To interpret it otherwise will obviously cause injustice to the plaintiffs."

72. The Court of Appeal, with regard to Section 10(1) of the *Pensions Act*, thus observed:

> "As regards what is to be regarded as 'the last salary', we repeat that it is up to the Commission to work it out and thereafter ask the plaintiffs and other affected retirees to present the proper working documentation to the Director of Pensions. We must however, point out that it is not the function of a Court of law to add additional words to a statute or an Act of Parliament whose provisions are ambiguous. The superior Court should not have added the words 'or supposed to be drawn by him at the date of his retirement'. It would have been sufficient to find that the Court was in the Circumstances, in its role of interpreting or construing the provision, entitled to impose fair standards of decision making"

73. The Appellate Court went on to uphold the terms of the agreement between the parties:

> "... to disregard the agreement between the parties would give rise to injustice to the respondents. The meaning of the phrase 'last salary' should include the effect of the agreement signed by the parties."

74. It is clear that the issue of Section 10 of the *Pensions Act*, is not new, as it was determined in the High Court, and subsequently in the Court of Appeal. But the position is different as regards other issues: Article 203 of *the Constitution*— in so far as it requires the national interest to be considered; Article 206 and 207, in so far as the Controller of the Budget would be required to approve the withdrawal of funds in the settlement of the claim; Section 12 (1) (a) of the *Public Finance Management Act*, as read with Article 201 of *the Constitution*—in so far as it requires the National Treasury to formulate, implement and monitor macro-economic policies involving expenditure and revenue; Section 12 (2) (b) of the *Public Finance Management Act* (*Act No. 18 of 2012)*, as read with Article 201 of *the Constitution*—which aims to ensure proper management and control of, and accounting for the finances of the National Government and its entities, as an aspect of the efficient and effective use of budgetary resources, at the national level.

75. It is not clear from the applicant's submissions, whether the several points which did not feature before the other Courts, are confined to the concept of "matter of general public importance", or are intended as substantive points of appeal before the Supreme Court. Such issues, as we find, had not been the subject of judicial determination in both the trial Court and the Appellate Court. These issues, it follows, are not for determination by this Court.

76. Such a position represents the consistent stand of the Supreme Court, as is well exemplified in case law. In Peter Ngoge v. Ole Kaparo, Sup. Ct. Petition No. 2 of 2012, this Court affirmed as follows:

The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals."

77. Thus, taking up novel issues at this stage, which have not been adjudicated upon by the High Court and the Court of Appeal, would amount to assuming the jurisdictional mandate of other judicial fora. This Court has been unequivocal in its respect for the hierarchy of Courts in Kenya. For the precious element of orderly and efficient dispute settlement, such a position is for sustaining (see our decisions in Malcom Bell v. Daniel Arap Moi & Another Sup. Ct. Application No. 1 of 2013; Koinange Investments & Development Ltd v. Robert Nelson Ngethe Sup. Ct. Application No. 4 of 2013).

78. The position is clearly stated in this Court's decision in Daniel Kimani Njihia v. Francis Mwangi Kimani Sup. Ct. Application No. 3 of 2014, as follows:

> "For a party to be granted leave to appeal to this Court, there must be a clear demonstration that such a question of law, whether explicit or implicit, has arisen in the lower tiers of Courts, and has been the subject- matter of judicial determination. It is clear to us that this Court had not been conceived as just another layer in the appellate - Court structure."

It is a commonplace that the vital evidentiary turning-points of a case are established in earlier Courts; and so we maintain that such foundations of merits should first be settled at the right fora, before a cause founded upon them comes up before this apex Court.

**(d) Is there a matter of general public importance?**

79. Counsel for the applicant urges that the intended appeal raises matters of general public importance. The basis of that assertion may be set out as follows:

(i) the impugned decisions pose a challenge to the application of the *Pensions Act*, which affects a great number of employees of Government who are paid from public funds;

(ii) technical complexities arise, in respect of compliance with the Court Order, as it substantially changes the principle upon which pension is computed;

(iii) compliance with the Order will occasion uncertainties in the application of the *Pensions Act*;

(iv) the law relating to pension should be clarified, so as to enable the Courts to administer it, not only as regards the question at hand, but future cases as well;

(v) the Judgment of the Court of Appeal if not reversed, sets precedent that is set to affect public authorities in general, in the future;

(vi) the Court's Order will have negative effects on the economy; will bring complications in the future implementation of the law of pensions—and so, public-interest considerations arise;

(vii) the public interest is involved, since enforcement of the Judgment of the Court will occasion the expenditure of large amounts of public funds, causing a setback in the national economy.

80. This Court has already ascertained the categories of questions that merit the further input of the Supreme Court, on the basis that there are 'matters of general public importance.' These governing principles are set out in the case of Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone, Application No. 2 of 2012, as further elucidated in the case of Malcolm Bell v. Hon. Daniel Toroitich arap Moi & Another, Sup. Ct. Application No. 1 of 2013.

81. In the instant matter, the Court of Appeal in its Ruling, identified three issues which it deemed to be "matters of general public importance." That Court held that the applicant raised weighty issues which required further clarification by the Supreme Court, in the following terms:

> "In our view, both this and the High Court having judicially determined the operation of s. 10 (above) which the applicant desires to argue on final appeal in the Supreme Court, indeed a matter of general public importance arises. To determine how s.10 ought to be read and applied, particularly as regards the basis from which one's pension should be computed and especially where an industrial agreement, usually referred to as Collective Bargaining Agreement (CBA) exists is a matter that warrants a certification to the Supreme Court. It is our view a matter that transcends the circumstances of this particular case."

82. The Court associated certain specific elements in the appeal matter with 'general public importance', thus:

> "We are also minded to say that considerable numbers of persons are involved here as litigants. The High Court did not confine its award only to some twenty claimants who were before it. It decreed that the respondent/plaintiffs 'and all the other retired teachers covered by the agreement' of 1997 would be entitled to salaries, allowances, pension dues as contained in that agreement. So those to be affected should be more, and scattered all over the Republic.... Then there is the public as tax-payers from whose taxes the sums claimed, whether KShs.111 billion or KShs.42 billion, will have to be drawn. Any of that sum is quite substantial and drawing any of it from the public coffers cannot be seen as trivial. It is a matter to be considered as important."

83. Was the Appellate Court duly guided, as a matter of law? And, has the applicant made a good case for the certification of its cause, for a further hearing?

84. The applicant submits that the Appellate Court's determination affects civil servants, and the public at large, who may feel aggrieved by the 'inconsistent' application of Section 10 of the *Pensions Act*. The applicant urges that the Appellate Court's award was not confined to the 20 respondents, but extended to all other retired teachers.

85. In the Hermanus case, this Court signalled one of the governing principles for grant of certification, as follows:

> "For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest."

86. The High Court noted in its Judgment that the present case was a representative suit, and the respondents had obtained leave to commence a class action (Nakuru HC Misc. Appl. No. 497 of

2005.) This is further restated at (paragraph 3) in the Court of Appeal' s Judgment, thus: "In the superior court, the twenty respondents instituted a suit against the appellant, H.C.C.C. No. 65 of 2006 and also sought leave to institute the suit on their own behalf and on behalf of all the other retired teachers."

87. The specific issue before the High Court was whether the unimplemented phases of payment should have been taken into account, in calculating the respondents' pension and retirement dues. Similarly in the Court of Appeal, the issue under consideration was, what was the entitlement of the respondents, in view of the applicable agreement? What was in issue, in our perception, was the undertaking by the Government to increase the teachers' salaries—in particular, what element crystallized as pension, and falling due to the affected, retired teacher? The superior Courts merely made a determination as to the pension payable to the respondents, in view of the agreements on record. The Judgment has no bearing on any other Collective Bargaining Agreement which did not come up for interpretation before the Courts. The determination, therefore, has no bearing on any other member of the public not affected by the said agreement. The superior Courts made their finding in the context within which the issue was framed.

88. Now it is to be noted that this was a representative suit. It thus followed that the Court Order would benefit all the members of the relevant class. The Courts' determination, therefore, does not transcend the parties, to warrant its elevation to the status of "a matter of general public importance."

89. Related to the foregoing point in contest, the applicant submitted that there are technical complications in achieving compliance with the Court Order, as the matter touches on various Government agencies that have to be involved in the implementation of the Order. Learned counsel also urged that any measures of implementation would result in great hardship, since the burden of cost will have to be borne by the tax-payers.

90. The Court of Appeal in its decision, noted that the sum of money claimed is substantial, ranging between 42 and 111 billion Kenya Shillings. But it was the respondents' position that any claim against the Government would have to be met through tax-payers' money, and it is a cost to the public, who have to bear such incidents of the rule of law.

91. This case has a bearing on the pension payable to the respondents, as well as other affected retired teachers. That a substantial sum of money will have to be expended by the Government, in fulfilling the Judgment debt, is not in doubt. Would that, by and of itself, transform the issue into "a matter of general public importance"?

92. Faced with such a broad claim of "the public interest", resting on large sums of money that would be paid out from the public coffers, we have to be alive to a question of principle: what would come to pass if this Court were to entertain the intended appeal, but then find in favour of the respondents? In that event, would the respondents' declared rights be all in vain? That cannot be—thanks to the design of justice under the legal process. It is a settled canon of equity that there is no wrong without a remedy. The law acts not in futility. The bare fact that a judgment-debt is to be paid from public funds does not make a claim one of general public importance, and it remains so, even ever so large the amount may be. The Judge is under but one obligation: to render a juristically sound decision, founded upon objective factors, and upon conviction. And so a decision resting on pillars of merit, emanating from the Courts, is to be sustained by the Supreme Court.

93. In that respect, the comparative judicial experience is relevant; in the case of R (Crompton) v. Wiltshire Primary Care Trust [2009] 1 All E.R. 978, it was held:

> "... the mere fact that a case happens to contain some topic of general importance, upon which the public as a whole may gain from a ruling, does not make the case one of general public importance. Similarly, it does not necessarily follow that, simply because an issue is raised which is of general public importance, the public interest requires it to be resolved" [emphasis supplied] .

94. The Court of Appeal in its Ruling agreed with the applicant's position, holding that the interpretation of Section 10 of the *Pensions Act*, with regard to the computation of one's pension, is a matter that warrants the further input of the Supreme Court. The question before us is to determine whether there exists a state of uncertainty in the law, with regard to the interpretation of Section 10 of the *Pensions Act*.

95. Section 10(1) of the *Pensions Act* provides:

> "A pension granted to an officer under this Act shall not exceed the full pensionable emoluments drawn by him at the date of his retirement."

The High Court held that the foregoing provision should be interpreted as though it stated, "the full pensionable emoluments drawn or supposed to be drawn by him at the date of his retirement" [emphasis supplied] .

96. The Court of Appeal, in its interpretation of the foregoing provision, thus observed:

> "We are of the view that since the last salary as appertains to the plaintiffs and others could not be ascertained in terms of Section 10 as at the date of retirement without reflecting the additional unpaid salary, which responsibility lay with the Commission as an employer, the starting point was to ascertain the last salary as per the agreement. For this to be done, the plaintiffs had to sue the Commission as the employer, for the award of lump-sum payment which is what the plaintiffs did. It was incumbent upon the Commission to reflect the increment in the pay slip as the last pay and release the pay slips to the Pensions Department to every entitled respondent retiree" [emphasis supplied].

97. It is clear that the superior Courts interpreted Section 10 of the *Pensions Act* in the context of the agreement that was in place, and the interpretation rendered was in relation to that agreement. It follows that, were there to be a likelihood of any uncertainty or ambiguity in law, as a result of that interpretation, its burden would only fall upon the parties bound by the agreement. Such a perception, in our opinion, makes eminent good sense; and it is not manifest that there is any uncertainty in the application of Section 10 of the *Pensions Act*.

98. We affirm the various standpoints of this Court that, determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court. It is clear to us, besides, that the involvement of various departments of Government in ensuring that a Judgment is implemented, does not elevate the matter from a dispute confined to parties, to one having a bearing upon the public interest.

99. It is our conclusion that the intended appeal does not raise matters of general public importance, and consequently, the further input of this Court is not warranted.

**(e) The contempt proceedings**

100. The applicant seeks stay of contempt Orders issued against its Secretary. These Orders were issued upon the respondents filing a Judicial Review Application, No 18 of 2012, which sought the commitment of the said Secretary to civil jail for contempt of Court, in relation to an Order of mandamus dated 23rd April, 2012. The jail term is for a period of six months.

101. On 16th May, 2014, the trial Court found the applicant's Secretary guilty of contempt, contrary to Section 5 of the *Judicature Act* (Cap 2 Laws of Kenya).

The Court declared (paragraph 30 and 310) thus:

> "The application herein was directed to the commission. The Commission being a juridical entity has no physical body which can be hauled into detention in prison. Like the common commercial corporation statutory or incorporated under the *Companies Act* (Cap 486, Laws of Kenya), it operates through human agents, the Commission Secretary and other officers. The holder of that office currently is one Gabriel Lengoiboni. I find him guilty of contempt of legitimate Court Orders by failing to pay the applicants salary arrears and consequential pensions based upon the last salaries accrued under the collective agreement of 1997, with the teachers union (KNUT), declared to be due and payable per the Court Orders, and sentence him to six months detention in Kamiti Maximum Prison for a period of six months."

102. The sentence was, however, suspended for a period of ninety days to enable the said Secretary to take all steps to comply with the Court Orders. In default of compliance, the Inspector General of Police was commanded to apprehend and escort Gabriel Lengoiboni, the then Secretary to the Teachers Service Commission, to Kamiti Maximum Prison for detention for a period of six months as aforesaid. The respondents admitted in Court that they are awaiting execution of the Court Order by the Inspector General of Police.

103. This is the Order that has now prompted the applicant to seek a stay Order. Upon viewing the record, it is clear to us that the finding of contempt of Court was directed specifically to the then Secretary of the Teachers Service Commission, Mr. Gabriel Lengoiboni, who we take judicial notice, has since retired from the Teachers Service Commission, and has been replaced by Ms. Nancy Macharia.

104. It is the applicant's contention that it has not refused to implement the Court Order, save that the implementation of the Judgment would involve other Government departments which are bound by various provisions of *the Constitution* that bar them from acting to implement the Judgment. Before this Court, it has not been shown that the committal warrants have been served. The sole issue before us is whether the Court can issue stay Orders on the execution of the committal warrant against the Secretary of the Teachers Service Commission.

105. Section 5 of the *Judicature Act* thus provides:

(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

"(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court."

The Supreme Court too has such powers, as provided in Section 28(4) of the *Supreme Court Act*, 2011 (*Act No.7 of 2011)*.

106. From a plain reading of the foregoing provision, the Courts have been given the powers to punish for contempt, in order to uphold the dignity of the Courts. An aggrieved party may appeal against the decision of the Court which imposes penalty for contempt.

107. In the instant case, the applicant has not initiated the process of contesting the determination of Emukule J on the issue of contempt of Court, by way of an appeal. Instead, it filed in this Court an omnibus application for certification that the matter is one of general public importance, and in it, includes a prayer for stay of the High Court's decision that found the former Secretary of the Teachers Service Commission guilty of contempt of Court. No definite application on the contempt matter, has been laid before this Court.

108. Is it a relevant question at this stage, whether this Court can grant the prayer for stay of execution of the High Court decision finding the applicant guilty of contempt of Court? In Peter Oduor Ngoge v. Francis Ole Kaparo and 5 Others, Sup. Ct. Application. No 2 of 2012, this Court (paragraph 29 and 30) gave clear indications regarding the invocation of its jurisdiction:

> "We draw analogies with the plurality of autonomous structures created by *the Constitution* of Kenya, 2010, which represents a progressive new trend of governance. The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.
>
> > "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."

109. That being the case, we are disinclined to issue an Order staying the High Court's finding of guilt of contempt. As stated in the foregoing paragraph, the parties ought to ventilate this issue through the established Court hierarchy, by first appealing to the Court of Appeal, before moving this Court. There is no basis for granting stay, in a matter that is not live before this Court; it would be tantamount to usurping the jurisdiction of the Court of Appeal.

**F. Orders**

110. Upon hearing the submissions of learned counsel, and conducting an analysis based on *the Constitution*, written and case law, we will now make the following Orders:

(a) The applicant's Notice of Motion dated 16th September, 2014 is hereby disallowed.

(b) The applicant shall bear the costs of proceedings before this Court.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2015**

**.....**

**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**

**.....**

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

**.....**

**S. N. NDUNGU**

**JUSTICE OF THE SUPREME COURT**