Ngoge t/a OP Ngoge & Associates Advocates & 5379 others v Simoni t/a Namada & Co Advocates & 725 others (Petition 13 of 2013) [2014] KESC 8 (KLR) (25 November 2014) (Ruling)

Peter Odiwuor Ngoge t/a O P Ngoge & Associates Advocates & 5379 others v J Namada Simoni t/a Namada & Co Advocates & 725 others [2014] eKLR

Neutral citation: [2014] KESC 8 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 13 OF 2013

KH RAWAL, DCJ & VP, PK TUNOI, MK IBRAHIM, JB OJWANG & N NDUNGU, SCJJ

NOVEMBER 25, 2014

BETWEEN

PETER ODIWUOR NGOGE T/A OP NGOGE & ASSOCIATES ADVOCATES ..... 1ST APPELLANT

MOHAMMED OMAR MUSA & 5378 OTHERS & 5378 OTHERS & 5378 OTHERS & 5378 OTHERS & 5378 OTHERS & 5378 OTHERS ..... 2ND APPELLANT

AND

J NAMADA SIMONI T/A NAMADA & CO ADVOCATES ..... 1ST RESPONDENT

MICHAEL KIMONYI ..... 2ND RESPONDENT

J HARRISON KINYANJUI T/A J HARRISON KINYANJUI & CO ADVOCATES ..... 3RD RESPONDENT

LOURENCE KYALO NDUTTU ..... 4TH RESPONDENT

KAPLAN & STRATTON ADVOCATES ..... 5TH RESPONDENT

KENYA BREWERIES LIMITED & 720 OTHERS & 720 OTHERS & 720 OTHERS & 720 OTHERS & 720 OTHERS & 720 OTHERS ..... 6TH RESPONDENT

(Being an Appeal arising from the Ruling and orders of the Court of Appeal at Nairobi (Githinji, Warsame & Musinga JJA) dated 19th November, 2013 in Civil Application No. NAI 51 of 2013)

The Supreme Court's jurisdiction to entertain appeals from the Court of Appeal where leave/ certification not been sought and it was not expressly stated that the appeal raised matters of constitutional interpretation and application.

The Supreme Court held that an omission to clearly invoke the Supreme Court's jurisdiction by expressly stating the provision under which jurisdiction was to be exercised by the court was not fatal. It additionally held that a document filed as a Petition of Appeal was one that sought to invoke the court's jurisdiction. However, under the circumstances, the Supreme Court found that constitutional issues were being raised for the first time on appeal and the proper forum was the court in which the issues arose. The court also held that the joinder of advocates as parties to a suit, at an appellate stage, where in the same suit the advocates had represented other parties, was inapt and incompetent and that the Supreme Court was not the proper forum for canvassing issues of professional negligence or malpractice in the first instance.

Reported by Beryl Ikamari

Jurisdiction *- jurisdiction of the Supreme Court - jurisdiction of the Supreme Court in matters of constitutional interpretation and application - the threshold required in establishing the existence of questions of constitutional interpretation and application - Constitution of Kenya 2010; article 163(4)(a).*

Jurisdiction *- jurisdiction of the Supreme Court - appeal to the Supreme Court with leave of court - certification that a matter of general public importance was involved - effect of failure to indicate whether the matter required certification or leave or was one involving constitutional interpretation and application, before lodging a Petition of Appeal at the Supreme Court – Constitution of Kenya 2010, article 163(4)(b); Supreme Court Act, No 7 of 2011, section 15.*

Civil Practice and Procedure *- joinder of parties - joinder of parties at an appellate stage - the appropriateness of joinder of parties who served as advocates in the lower court as litigants in the appellate court.*

Brief facts

The main suit concerned 6000 former employees, of Kenya Breweries Limited, whose employment contracts were terminated pursuant to a restructuring process. It was decided that the suit would be filed as a representative suit in which four plaintiffs were selected to prosecute the suit on behalf of all the other plaintiffs. At the time of filing the suit, the plaintiffs were represented by the firm of Ngoge & Associates Advocates and a notice, concerning the suit, was issued to all interested parties as per order 1 rule 8(2) of the Civil Procedure Rules 2010.

In response to the notice, some persons sought to be joined as plaintiffs and they appointed the firm of J H Kinyanjui & Co Advocates to represent them while others sought to appear in person.

Mr Ngoge of Ngoge & Associates Advocates raised an objection against Mr Kinyanjui's appearance in the suit. The High Court heard the objection and allowed Mr Kinyanjui to continue to offer legal representation in the matter. Mr Ngoge appealed against that decision at the Court of Appeal.

The remedies Mr Ngoge sought at the Court of Appeal included an injunction and a stay of execution. The Court of Appeal granted the stay of execution which was to be in effect until the dispute on legal representation was determined. In response, Mr Ngoge filed a Petition of Appeal at the Supreme Court.

In the Petition of Appeal at the Supreme Court, Mr Ngoge sought damages from the respondents, claiming that there had been violations of constitutional provisions at the High Court and the Court of Appeal. The respondents objected to the appeal on grounds that leave had not been sought and granted for the appeal to the Supreme Court and the Supreme Court lacked jurisdiction to entertain the matter.

In the Petition of Appeal at the Supreme Court, Mr Ngoge enjoined himself together with Mr Namada and Mr Kinyanjui (all of whom were acting as advocates for the parties to the suit), as parties to the Petition of Appeal. His basis for such a joinder of parties was that there had been breaches of his rights and his clients' fundamental rights and freedoms which involved those advocates.

Issues

i. What was the effect of filing a petition of appeal at the Supreme Court without seeking leave or certification and without expressly stating that the appeal raised matters of constitutional interpretation and application?

ii. Whether the Petition of Appeal raised issues of constitutional interpretation or application, which were within the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution of Kenya 2010.

iii. Whether, at an appellate stage, there could be joinder of an advocate as a party to a suit, where the advocate had been providing legal representation to a party to the same suit at the Court of Appeal.

iv. Whether the Supreme Court had jurisdiction in the appeal which was instituted without seeking certification/leave and without expressly stating that it involved matters of constitutional interpretation and/or application.

Relevant provisions of the Law

Constitution of Kenya 2010, article 163(4)

(4) Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

Held

1. The petitioner did not indicate the provision under which the Petition of Appeal had been filed at the Supreme Court. It was not indicated whether the petition had been filed as of right in a case involving the interpretation or application of the Constitution or had been filed as a suit involving a matter of general public importance, for which leave was necessary.
2. Given that jurisdiction was an integral element in any proceedings, the enabling provisions of the law ought to be cited. However, the omission was not fatal as the document filed was titled, 'Petition of Appeal' and it was clear that the Supreme Court's appellate jurisdiction was being invoked.
3. The Petitioner had not pleaded that the Petition of Appeal was one that would require leave as it was one involving a matter of general public importance.
4. As the matter was an appeal against an appellate court's exercise of discretion to strike out a Notice of Appeal, it was not an issue that involved constitutional interpretation or application. The Petition of Appeal did not meet the constitutional threshold provided for in article 163(4)(a) of the Constitution of Kenya 2010.
5. It was clear in article 163(4)(b) of the Constitution that for the Supreme Court to entertain an appeal from the Court of Appeal, the matter must have received certification as one that raised an issue of general public importance. However, an appeal could be filed at the Supreme Court as of right, without the requirement for leave or certification, where it concerned the interpretation or application of the Constitution.
6. While the Petition of Appeal at the Supreme Court raised constitutional issues, the matter from which the appeal arose at the Court of Appeal was not one that concerned interpretation or application of the Constitution.
7. The proper forum in which constitutional issues that were integrally linked to the main cause were to be heard, in the first instance, was the court in which such issues arose.
8. Article 163(4) of the Constitution of Kenya 2010 did not contemplate appeals to the Supreme Court in the form of fresh matters with new parties who were not previously parties to the suit.
9. Where a person appealed against a decision of a lower court to a higher court, it implied that the matter in dispute was originating from the lower court and it was the same matter that the higher court was being called to re-examine. It was not going to become a fresh matter as opposed to an appeal.

10. It was only in exceptional circumstances, and with leave of court, that persons who were not parties at the Court of Appeal could be parties to an appeal at the Supreme Court.
11. The new parties introduced in the Petition of Appeal were not parties but advocates who represented clients at the Court of Appeal. When an advocate represented clients in any matter, the advocate's position rested on a purely professional platform and such an advocate, as a player of a professional role, was not to be joined as a litigant whether in that matter or in an appeal, in respect of acts or omissions arising in the conduct of the suit.
12. The advocate, on the question of joinder, benefitted from a cover of privilege, while remaining amenable for professional negligence or malpractice, in a personal capacity, in a separate action in a relevant trial court.
13. In the Petition of Appeal, the petitioners claimed that there had been an infringement of their fundamental rights and freedoms by the respondents but did not raise issues of professional negligence or malpractice. However, the Supreme Court was not the proper forum for the prosecution of issues of professional negligence or malpractice in the first instance.
14. The joinder of advocates as parties to a Petition of Appeal at the Supreme Court, as had been done by the petitioner, was inapt and was incompatible with the provisions of the Advocates Act (Cap 16).

Petition of Appeal dismissed.

Citations

East Africa

1. *Erad Supplies & another v National Cereals & Produce Board* Petition 5 of 2012 –(Followed)
2. *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* Application No 4 of 2012 – (Followed)
3. *InRe The Matter of the Interim Independent Electoral Commission* Constitutional Application 2 of 2011 – (Followed)
4. *Macharia ,Samuel Kamau & Another v Kenya Commercial Bank Limited & 2 others,* Application 2 of 2011 –(Followed)
5. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Application No 5 of 2014 – (Followed)
6. *Nduttu ,Lawrence & 6000 others v Kenya Breweries Limited & Another* Petition 3 of 2012 – (Followed)
7. *Ngoge, Peter v Honourable Francis Ole Kaparo &5 others* Petition 2 of 2012 – (Explained)

Statutes

East Africa

1. Constitution of Kenya,2010 articles 1(3)(c); 10; 19; 20; 21; 22; 25; 27; 28; 42; 43; 47; 48 ; 50; 158 ; 159 (2); 163(2) (4) (a) (b) ; 258 – (Interpreted)
2. Court of Appeal Rules (cap 9 Sub Leg) rule 5 (2) (b) ; 81- (Interpreted)
3. Advocates Act (cap 16) section 55 – (Interpreted)
4. Civil Procedure Rules ,2010 (cap 21 Sub Leg) order I, rule 8 (2) – (Interpreted)
5. Supreme Court Act, 2011 (Act No 7 of 2011) sections 3(3); 15(1) (2) – (Interpreted)
6. Supreme Court Rules,2011 (Act No 7 of 2011 Sub Leg) rules 32 – (Interpreted)

Texts & Journals

1. Garner,B A., (Ed) (2009) Black's *Law Dictionary* St Paul Minnesota : West Group 9th Ed

International Instruments

1. African Charter on Human and People's Rights (1998) articles 3, 5, 7, 8 14 , 22

RULING

I. Introduction

1. This Ruling emanates from two Notices of Preliminary Objection: one filed by the 5th and 6th respondents, and the other by the 1st and 2nd respondents, in objection to the appellants' Petition of Appeal filed on 2nd December, 2013.

2. The appellants herein filed a petition in the Supreme Court, on 2nd December, 2013 seeking to appeal against the decision of the Court of Appeal.

3. The ruling of the Court of Appeal which is the subject of this petition emanated from an application for an order that the Notice of Appeal dated 16th December, 2011, filed on the same day, be struck out or be marked as withdrawn. The appellants herein had filed the Notice of Appeal intending to appeal against a Ruling of the High Court dated 16th December, 2011 (Ang'awa, J) that had allowed some parties joined in the suit as plaintiffs to be represented by the firm of M/s Kinyanjui & Co. Advocates, instead of M/s O.P. Ngoge & Associates who were representing all the plaintiffs jointly.

4. The Court of Appeal in allowing the application for withdrawal observed that this was, "a case where the applicants who filed a notice of appeal and obtained an order for stay of proceedings of their High Court suit had applied for the striking out or withdrawal of the notice of appeal on the ground that they do not intend to appeal against the ruling of the High Court and that the intended appeal is now time barred".

II. Background

5. This matter was first filed in the High Court by the firm of O. P. Ngoge & Associates Advocates in Nairobi H.C.C.C. No. 279 of 2000, on behalf of about 6000 former employees of Kenya Breweries Limited, whose contracts of employment were terminated pursuant to Kenya Breweries' restructuring process.

6. Due to their large number, and the fact that there existed a community interest in their suit, and for purposes of expediency and practicality, the High Court (Hon. Waweru, J) ordered that the matter proceed as a representative suit under Order I, Rule 8 of the Civil Procedure Rules. Four plaintiffs were chosen to prosecute the suit, on behalf of all the others. As at that time, all the plaintiffs were represented by the firm of Ngoge & Associates Advocates, and a notice to all interested parties was issued pursuant to Order I, Rule 8(2) of the Civil Procedure Rules.

7. Prompted by the notice, some persons who had an interest in the matter, sought to be enjoined as plaintiffs. Some of them appointed M/s J. H. Kinyanjui & Co. Advocates to represent them in the representative suit, while others filed notices to appear in person.

8. This development aggrieved Mr. Ngoge who was representing all of the "original plaintiffs". He raised an objection against Mr. Kinyanjui's appearance in the matter. The High Court heard the said objection and held thus:

> " M/s J.H. Kinyanjui & Co. Advocates are not to file a separate suit because representative action avoids the filing of multiplicity of suits but instead requires one suit to deal with the issue in question for determination...

I would therefore conclude and state that M/s J. H. Kinyanjui & Co. Advocates are correctly before this Court... I accordingly allow the advocate J. H. Kinyanjui to appear in this matter".

9. This ruling by the High Court aggrieved Mr. Ngoge and provoked him to file a Notice of Appeal on 16th December, 2011 and a Notice of Motion dated 23rd December, 2011, being an application under Rule 5 (2) (b) of the Court of Appeal Rules, for orders of injunction and stay of execution of the said orders, pending appeal. Rule 5 (2) (b) provides that the Court may:

> " in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just."

10. The Court of Appeal (Bosire, Karanja & Maraga, JJA) considered the grounds applicable to the granting of stay of execution, and held inter alia:

> " We are satisfied that the issue of the legal representation of the parties herein is a pertinent one and the same ought to be canvassed on appeal. It is regrettable that splitting this matter would defeat the very purpose of a just and expeditious determination of the suit in a manner that will not breed a multiplicity of suits arising from the same cause of action. In our view, however, and given the strong sentiments expressed by counsel, it will not be practically possible for the suit before the High Court to proceed before the issue of representation in this matter is sorted out. So if we do not grant the stay prayed for, there is the risk of the suit in the High Court being concluded without proper representation of some of the parties who have already come on record".

11. The upshot of the Court's decision was that the matter was to be stayed until the issue of legal representation would be sorted out. Mr. Ngoge was further aggrieved by this decision in as far as the Court of Appeal granted only the order for stay of execution and not the other prayers in the Notice of Motion.

12. Dissatisfied with the decision of the Court of Appeal, Mr. Ngoge filed Supreme Court Petition No. 3 of 2012, Lawrance Nduttu & 6000 Others v. Kenya Breweries Limited and Another [2012] eKLR seeking inter alia, a declaration that both the High Court and Court of Appeal violated various Articles of *the Constitution*; and he sought general damages against the respondents. He also sought an Order from this Court allowing his application of 23rd December, 2011 filed in the Court of Appeal, and further directions from this Court to the effect that High Court Civil Suit No. 279 of 2003 should be heard urgently and on a priority basis.

13. The respondents objected to the appeal by filing two Notices of Preliminary Objection, on grounds inter alia, that there was no leave sought and/or granted to appeal to the Supreme Court; and that the Court lacked jurisdiction to entertain the matter.

14. This Court, in a Ruling delivered on 4th October, 2012 declined to assume jurisdiction and held that:

> " In view of the reasons proffered, we decline jurisdiction in respect of this Appeal. The appellants would be well advised to take advantage of the stay granted by the Court of Appeal, which stay they themselves sought. They should seek a quick disposal of the issue of legal representation [as directed] by the Court of Appeal, so that proceedings in the main High Court Case No. 279 of 2003 can commence expeditiously. This is the only logical

course of action open to the appellants. We have no doubt in our mind that what all the appellants crave for in this matter is the quick conclusion of the main suit currently stuck at the High Court so that each of them can move on with life".

15. Meanwhile on 25th January, 2013 the firm of Namada & Co. Advocates filed a notice of change of advocates, so as to assume acting for some of the respondents. Subsequently thereafter, on 28th February, 2013, Namada & Co. Advocates filed a Notice of Motion to strike out the Notice of Appeal that had been filed by O.P. Ngoge & Co. Advocates. This is the application that led to the Court of Appeal's Ruling, striking out the Notice of Appeal dated 16th December, 2011, which forms the substratum of the current Petition before us.

III. The Petition

16. On 2nd December, 2013, the appellants filed their Petition to this Court in which they averred that the learned Judges of the Court of Appeal had contravened the provisions of Articles 10, 19, 20, 21, 25, 27, 28, 42, 43, 47, 48 and 50 of *the Constitution*, as well as Articles 3, 5, 7, 8 14 and 22 of the African Charter on Human and People's Rights. They cited 22 grounds in support of their Petition, outlining the various ways in which the Judges of Appeal erred in law and fact.

17. The appellants sought, in summary, the following orders:

    (i) that this appeal be allowed, and the Ruling and Orders of the Court of Appeal dated 19th November, 2013 be set aside ex debito justitiae;

    (ii) that the Deputy Registrar of the High Court be directed to supply the firm of O.P. Ngoge & Associates with certified copies of proceedings and Ruling in Nairobi HCCC No. 279 of 2003, dated 16th December, 2011 to enable him to lodge a Record of Appeal in the Court of Appeal;

    (iii) that legal fees be paid to Mr. Ngoge of M/s O.P Ngoge & Associates for work done;

    (iv) that general damages be paid to the appellants, for violation of their fundamental rights, as protected by the provisions of *the Constitution*; and

    (v) that costs be awarded to the appellants.

18. The respondents filed two notices of preliminary objection. The first one was filed on 17th December, 2013 by the 5th and 6th respondents. Their objection lay on the singular ground that no leave to appeal was applied for, or granted to the appellants by the appellate Court or the Supreme Court. The second one was filed on 13th January, 2014 by the 1st and 2nd respondents, citing three grounds of objection:

    (i) that the appellants did not seek and/or obtain leave;

    (ii) that the 1st respondent acting in his capacity as advocate for the 2nd respondent, cannot be made party to, and be prosecuted in proceedings to which he was not party in the High Court;

    (iii) that the petition does not meet the threshold for a matter to be adjudicated by the Supreme Court.

19. The matter was mentioned before the Deputy Registrar on the 15th January, 2014 for directions. Mr. Ngoge indicated his intention to move the Court for leave to file further documents, and to request for a full Bench of the Court. The Deputy Registrar indicated that the matter would be heard by a two-Judge Bench on the 23rd January, 2014.

20. On 23rd January, 2014 the matter was placed before a two-Judge Bench of this Court; but while the other parties were ready to proceed with the prosecution of the preliminary objections on record, Mr. Ngoge asked for more time to file a supplementary Record of Appeal, and that all parties be directed to file written submissions, to which he would respond, before the preliminary objections were heard.

21. The Court granted Mr. Ngoge's request for additional time, and the preliminary objections were canvassed before the Court on 13th March, 2014.

IV. Submissions

(a) Submissions for the 5th and 6th Respondents

22. Learned counsel Mr. Gachuhi, for the 5th and 6th respondents, opposed the petition solely on the ground that leave to appeal was not obtained by the appellant from the Court of Appeal or this Court. He relied on written submissions dated 27th January, 2014 and filed on the same date, and the bundle of authorities filed in Court on the 21st January, 2014.

23. Counsel submitted that, from the documentation filed in Court, it emerged that the question before the Court of Appeal was unrelated to the interpretation of *the Constitution*, and neither did it raise any issue of general public importance. Counsel perceived the motion as just a bare application by the 1st and 2nd respondents, to either strike out or withdraw the notice of appeal.

24. It was counsel's submission that this Court lacks jurisdiction to entertain the appeal; and he cited Section 15(1) and (2) of the *Supreme Court Act*, 2011 which requires that leave to appeal be obtained, before a person files an appeal to this Court —save for matters requiring the interpretation or application of *the Constitution*, for which leave is not required.

25. Counsel cited the decision of this Court in Lawrence Nduttu & 6000 others v. Kenya Breweries Limited & Another, Supreme Court Petition 3 of 2012 (paragraph 28):

> "The Appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of *the Constitution*. In other words, an appellant must be challenging the interpretation or application of *the Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of *the Constitution*, it cannot support a further Appeal to the Supreme Court under the provisions of Article 163(4)(a)."

26. Also cited was the case of Peter Ngoge v. Honourable Francis Ole Kaparo and 5 Others, Supreme Court Petition 2 of 2012 (Peter Ngoge case)in which the Court held that:

> "... the appellate jurisdiction of the Supreme Court is defined clearly enough under Article 163 of *the Constitution*, and S. 19 of the *Supreme Court Act* – and that the petitioner's case which has been brought without the leave of the Court of Appeal, falls outside the jurisdiction of this Court. At the preliminary stage, therefore, we dismiss the petition and order that the petitioner shall bear the incidental costs of the other parties."

27. Learned counsel, Mr. Gachuhi for the 5th and 6th respondents, submitted that no leave to appeal had been granted to the appellant as required under Section 15(1) of the *Supreme Court Act*, 2011; and he urged that Section 15(2) of the *Supreme Court Act*, 2011 did not apply, since the appellant's claim that

certain provisions of *the Constitution* were being violated, had not been raised in the Court of Appeal. He urged the Court to strike out the petition with costs, for being incompetent.

(b) Submissions for the 1st and 2nd Respondents

28. Learned counsel, Mr. Namada for the 1st and 2nd respondents, relied on his written submissions filed on 28th January, 2014. He had elaborated two major issues, as the basis for contesting the appeal: first, that leave to appeal was not sought and/or granted; and secondly, that the joinder of J. Namada t/a Namada and Company Advocates as the 1st respondent, is fatal, as it amounts to enjoiningan advocate in an appeal from a decision in respect of which he had not been a party, though he had been counsel for one of the parties.

29. Counsel submitted that the central issue in the appellate Court had been, whether the notice of appeal filed should be struck out, or withdrawn. He indicated that the 2nd respondent did not wish to appeal, but only to proceed with the main suit, pending at the High Court since 2003. Counsel urged that since an order of stay of proceedings at the High Court was in force, only a withdrawal or striking out of the appeal, would allow the High Court case to proceed. Counsel urged that his position was strengthened by the fact that, as of now, no steps had been taken to lodge an appeal in the Court of Appeal; and so, the Notice of Motion should not be allowed to stand, well after the 60 days specified in Rule 82 of the Court of Appeal Rules, 2010.

30. Moreover, learned counsel urged, the appellate Court had already struck out a notice of appeal, after which the applicants reverted to the High Court, seeking a hearing date for their matter.

31. Learned counsel, for greater effect, urged that the matter before the Court of Appeal was not one dealing with the interpretation or application of *the Constitution*, nor had it been certified as one of general public importance—and so it was a matter that, in every respect, did not fall within the Supreme Court's jurisdiction. He urged, besides, that the Court of Appeal could effectively resolve the question with finality. Counsel reinforced his argument with the findings of this Court in the Lawrence Nduttu Case, and the Peter Ngoge Case.

32. He submitted that the appeal was based on a matter that was before the Court of Appeal—a matter in which the 1st respondent acted as an advocate for some of the litigants in the matter. It is for this reason, he submitted, that no new action can be founded against the Advocate in person, so as to make the advocate a respondent, or party at the Supreme Court, a material departure from the cause that was litigated at the Court of Appeal. Learned counsel urged that it was a trite principle, that while advocates are conducting matters lawfully in Court, on behalf of their clients, they are insulated from personal joinder in such proceedings.

33. It was learned counsel's perception that his denomination as a party was meant to intimidate counsel, hamper their professional actions, and frustrate the cause of justice. Such an endeavour, counsel urged, amounts to abuse of process. He asked this Court to strike out the name of counsel from the proceedings, and to mulct Peter Ngoge (Advocate) in costs personally.

(c) Submissions for the 3rd and 4th Respondents

34. The 3rd and 4th respondents were represented by learned counsel, Mr. Kinyanjui, who supported all the preliminary objections to the petition. Counsel submitted that though he had opted not to file an independent objection, he associated himself fully with the objections pursued by the other respondents; and he prayed that the Petition of Appeal be dismissed with costs.

(d) Appellants' Response to the Preliminary Objections

35. Mr. Ngoge, the 1st appellant and counsel for the 2nd appellant, filed his submissions in response to the preliminary objections on 4th February, 2014 contending that the Supreme Court decisions being relied upon by the respondents (Lawrence Nduttu, and Peter Odiwuor Ngoge v. Francis Ole Kaparo and Five Others) "are currently under review by the African Commission on Human and People's Rights", as he has contested their validity before that Commission, on the basis that they were delivered by a Bench of two Judges, contrary in his opinion, to the provisions of Article 163(2) of *the Constitution*. Learned counsel, however, as we would remark, while attributing his contest to the framework of the African Charter on Human and People's Rights, and while averring that the Supreme Court's past Rulings are under review before a supra-national human rights entity, did not address the structural link between the domestic and the regional arbitral or adjudicatory agencies, such as could bear a hierarchical bond, with its essential operational dynamics, and with the decision-making process of the Kenyan Courts, founded upon the people's sovereignty (Article 1(3) (c) of *the Constitution* of Kenya, 2010).

36. Mr. Ngoge submitted that no leave was required for an appeal, since Articles 22 and 258 of *the Constitution* give every person the right to institute Court proceedings, claiming violation or infringement of a right or fundamental freedom in the Bill of Rights. He urged that under Article 163 (4)(a) of *the Constitution*, this Court is under an obligation to hear the petition, without any condition regarding the grant of leave. Learned counsel did not, however, demonstrate the manner in which his grievance fell under the rubric "fundamental rights and freedoms," or in which it presented an issue of constitutional interpretation or application falling within the terms of Article 163(4) (a) of *the Constitution*.

37. Mr. Ngoge submitted that the respondents' argument that the issues on appeal must also have been issues at the Court of Appeal, and must have revolved around the interpretation or application of *the Constitution*, for them to be canvassed before this Court in exercise of its jurisdiction under Article 163(4) of *the Constitution*, was not tenable—for being "unduly narrow", apart from having a "limiting effect on fundamental human rights."

38. As regards joinder of Mr. Namada Simoni (advocate) as a party, Mr. Ngoge submitted that an advocate is not immune from legal proceedings if, while representing his clients, he violates the fundamental Human Rights of other persons. He contended that Mr. Namada had curtailed the fundamental human rights of the appellants. And he submitted that the law permits any person dissatisfied with the proceedings and Ruling of the Court of Appeal, to apply and have it reviewed, or set aside, by the Supreme Court. He asked this Court to dismiss the preliminary objections with costs, and to grant him leave to lodge a supplementary record of appeal.

V. Issues For Determination

39. The case, as presented by the parties, raises the following issues for determination by this Court:

    (a) whether leave to appeal, as required by Article 163(4)(b) of *the Constitution*, was necessary;

    (b) whether the matter in issue is one of constitutional interpretation and/or application, hence falling within the jurisdiction of this Court under Article 163(4)(a) of *the Constitution*;

    (c) what is the implication of joinder of an advocate as a party to a suit in which he is representing a party?

    (d) does this Court have jurisdiction in this matter?

VI. Analysis

(a) Leave to Appeal: Was it necessary?

40. This Court's appellate jurisdiction is provided for in Article 163 (4) of *the Constitution* thus:

> " Appeals shall lie from the Court of Appeal to the Supreme Court–
>
> (a) as of right in any case involving the interpretation or application of this Constitution; and
>
> (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

41. The 5th and 6th respondents objected to the appeal solely on the ground that leave to appeal was not sought and/or granted. This was also the ground on which the appeal was contested by the 1st and 2nd respondents.

42. It is quite apparent that, in their submissions, counsel proceeded on the assumption that, the appellant may have premised his appeal on the argument that it involved a matter of general public importance.

43. It is noteworthy that the appellants have not indicated under which provision(s) of the law they have sought to move this Court. Had they indicated this on the face of their pleadings, then the respondents' arguments would have been of focused design, as they would have addressed the specific legal provisions invoked. This Court has held in Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone, Supreme Court Application No.4 of 2012, that:

> " It is trite law that a Court of law has to be moved under the correct provisions of the law".

44. The appellants tag their pleading "Petition of Appeal," and indicate that the same is brought under Rule 32 of the Supreme Court Rules. This Rule deals with service of appeal, and provides that:

> " (1) An appellant shall, within seven days of lodging a notice of appeal, serve copies of the notice of appeal on all persons directly affected by the appeal.
>
> (2) A person upon whom a notice of appeal is served shall—
>
> (a) within fourteen days of receiving the notice of appeal file a notice of address for service which shall contain that person's contact details including telephone numbers and email address, in the registry and serve the intended appellant with copies of the notice; and
>
> (b) within a further fourteen days serve a copy of the notice of address for service on every other person named in the notice of appeal."

45. Clearly, this Rule is a procedural one. It is not a substantive provision bestowing upon the appellants the entitlement to move the Court for the orders sought. A litigant who comes to Court, invokes a specific jurisdiction of that particular Court. It is imperative that he/she indicates the particular provision of *the Constitution* and/or statute that gives the Court the jurisdiction that he/she invokes. This is a vital foundation of all litigation: the suitor who seeks the constitutional good of rights-remedy, and considers himself or herself entitled to claim from the people's limited dispute-settlement

resources, is under obligation to come in good faith, with a case founded on conviction, and to comply with the law regarding the invocation of jurisdiction.

46. Therefore, it was incumbent upon the appellants to indicate in their petition which of the two prongs of this Court's appellate jurisdiction they invoke. Since the petition filed before this Court is titled "Petition of Appeal" we, by virtue of Article 159 of *the Constitution*, have considered that the failure by the appellants to indicate the provisions of *the Constitution* relied on, is not, in the circumstances of this case, a fatal omission, because we are aware that it is the appellate jurisdiction of the Court that is being invoked. This position, however, is qualified, insofar as jurisdiction is an integral element in any proceedings; and thus, the enabling provisions of the law ought to be cited in the pleadings, by the party moving the Court.

47. Upon perusal of the petition, there is no indication that the appellants had signalled that their appeal raises a matter of general public importance, so as to warrant grant of leave, before appealing to this Court. Had such an averment been made, then leave to appeal would have been an imperative condition.

48. This disposes of the first issue, as to whether or not leave to appeal was necessary. We hold that since the appellants had not pleaded that their appeal involves a matter of general public importance, the preliminary objection made in that regard fails.

(b) Is this a matter of Constitutional Interpretation and/or Application?

49. Having held that the appellant did not invoke the appellate jurisdiction under Article 163(4)(b) of *the Constitution*, we have to consider if the matter before us is one "involving constitutional application and/or application," such as gives the appellants a right of appeal under Article 163(4)(a) of *the Constitution*.

50. Counsel for the 1st and 2nd respondents submitted that it was beyond peradventure, that the question before the Court of Appeal was not one even remotely dealing with the interpretation or application of *the Constitution*. The question, it was urged, was purely procedural, and resting wholly within the ambit and confines of the mandate of the appellate Court. Counsel submitted that, it was a matter which the Court of Appeal was properly and effectively seized of, and could adjudicate upon with finality.

51. Counsel cited the decisions of this Court, Lawrence Nduttu, and Peter O. Ngoge v. Hon. Attorney-General & Others, in support of his argument that no amount of invocation of *the Constitution* could change the character of the case lodged with the Court of Appeal.

52. In response, counsel for the appellants submitted that their fundamental rights had been breached by the appellate Court, and that, by virtue of Articles 22 and 258 of *the Constitution*, they required no leave, to ventilate such breaches before the Supreme Court. Counsel contended that the appellants had a right under Article 22 of *the Constitution*, to institute proceedings at the Supreme Court, claiming that a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or is threatened. He submitted that the rights of the appellants having been breached at the Court of appeal itself, he could not then be called upon to revert to that Court, or the High Court which is a lower Court.

53. The scope of this Court's appellate jurisdiction was considered in the Lawrance Nduttu Case in which, coincidentally, the 1st appellant herein, Mr. Ngoge, was counsel on record for the applicants. He raised

the same arguments, that he brings up in this matter. We would adopt the holding in the Nduttu Case, which we affirm as representing the current state of the law (paragraphs 26-28):

> "(26) Mr.Ngoge has urged that whenever a citizen alleges in his pleadings before the Supreme Court that the High Court and Court of Appeal were complicit in facilitating violations of his fundamental Human Rights, the Supreme Court automatically assumes jurisdiction without the necessity of leave in order to uphold *the Constitution*, human rights and the rule of law. Anything to the Contrary would be unconstitutional and retrogressive. We understand Mr.Ngoge to be arguing that a mere allegation of a violation of human rights automatically brings an intended appeal within the ambit of Article 163 (4) (a) of *the Constitution* hence dispensing with the need for leave under Article 163 (4) (b) of *the Constitution*.
>
> (27) With respect, but firm conviction, we disagree with this contention. Such an approach as is urged by counsel if adopted, would completely defeat the true intent of Article 163 (4) (a) of *the Constitution*. This Article must beseen to be laying down the principle that not all intended appeals lie from the Court of Appeal to theSupreme Court. Only those appeals arising from cases involving the interpretation or application ofthe Constitution can be entertained by the Supreme Court. The only other instance when an appealmay lie to the Supreme Court is one contemplated under Article 163 (4) (b) of *the Constitution*. Towards, this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.
>
> (28) The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of *the Constitution*. In other words, an appellant must be challenging the interpretation or application of *the Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealedfrom had nothing or little to do with the interpretation or application of *the Constitution*, it cannotsupport a further appeal to the Supreme Court under the provisions of Article 163 (4) (a). If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in Article 163 (4) (a), the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in Article 163 (4) (a). It is the Court's duty as the ultimate custodian of *the Constitution* to satisfy itself that the intended appeal meets the constitutional threshold" [emphasis supplied].

In arriving at this decision, the Court reaffirmed its earlier decision in the Peter Ngoge case.

54. It is worth noting that these are the same cases that the respondents have cited as authorities in support of their objections, on the issue of jurisdiction. The decision in the Lawrance Nduttu case has been mentioned with approval by this Court, in the more recent case, Gatirau Peter Munya v. Dickson

Mwenda Kithinji & 2 Others, Sup. Court Application No. 5 of 2014, in which the Court stated, (paragraph 69) that:

> " The import of the Court's statement in the Ngoge case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application".

55. We agree with counsel for the respondents, since we find no reason not to apply the decisions being thus cited. This matter, we believe, has not taken a trajectory of constitutional interpretation or application. As set out earlier-on, this matter involved the exercise of the appellate Court's discretion under Rule 81 of the Appellate Jurisdiction Rules, to strike out a Notice of Appeal. That issue, clearly, involves no constitutional interpretation and/or application. We are persuaded that the issues raised by the appellants do not meet the constitutional threshold in Article 163(4)(a).

(c) Does the Supreme Court have Jurisdiction in this matter?

56. This Court has on numerous occasions pronounced itself on the nature of the appellate jurisdiction conferred upon it by *the Constitution*, which is the only appellate jurisdiction that it may exercise.

57. The said jurisdiction is enshrined in Article 163(4) of *the Constitution*, which stipulates that:

> " Appeals shall lie from the Court of Appeal to the Supreme Court –
>
> (a) as of right in any case involving the interpretation or application of this Constitution; and
>
> (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

58. Section 15 of the *Supreme Court Act*, 2011 provides that:

> "(1) Appeals to the Supreme Court shall be heard only with the leave of the Court.
>
> (2) Subsection (1) shall only apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of *the Constitution*"

59. In Re The Matter of the Interim Independent Electoral Commission, Supreme Court Constitutional Application 2 of 2011 this Court cited with approval, the decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited[1989] KLR 1, that "jurisdiction is everything. Without it, a Court has no power to make one more step." It observed that:

> " The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."

60. Similarly, the Court, in Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others, Supreme Court Application 2 of 2011 remarked (paragraph 68) that:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

61. It is vital to determine, at this preliminary stage, whether this Court has jurisdiction to entertain the appeal filed. It is clear from Article 163 (4) (b) of *the Constitution* that, before this Court entertains an appeal from the Court of Appeal, such a matter must have received certification as one that raises an issue of general public importance. However, as stipulated in Article 163 (4)(a) of *the Constitution*, if an appeal concerns the interpretation or application of *the Constitution*, no certification is required, and the appeal lies to the Supreme Court as of right.

62. Consequently, it is important for us to determine whether the intended appeal is one that invokes the appellate jurisdiction of this Court as stipulated under Article 163(4)(a), or (b) of *the Constitution*. Mr. Ngoge urged that the appeal raises constitutional issues, particularly as regards the rights and fundamental freedoms of the appellants.

63. In his response to the preliminary objections raised, Mr. Ngoge cited, albeit at differing moments, Articles 22, 25, 27, 43, 48, 50, 158, 258 of *the Constitution*, as the provisions contravened, hence giving rise to the appellants' right to appeal. He contended that it was in view of the alleged constitutional contraventions, that the appellants could appeal as a matter of right under Article 163(4)(a) —and hence leave to appeal was not required.

64. This Court has in the past signalled the need to exercise caution in admitting appeals, as a safeguard for the exercise of their proper jurisdictions by other Courts and tribunals. In the Peter Ngoge case, we thus held (paragraphs 29-30):

> "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."

65. In relation to the proper forum to raise constitutional issues that are integrally linked to the main cause, this Court held in Erad Supplies & Another v. National Cereals and Produce Board, Supreme Court Petition 5 of 2012 (paragraph 13A) that:

> "In our opinion, a question involving the interpretation or application of *the Constitution* that is integrally linked to the main cause in a superior Court of first instance, is to be resolved at that forum in the first place, before an appeal can be entertained. Where, before such a

Court, parties raise a question of interpretation or application of *the Constitution* that has only a limited bearing on the merits of the main cause, the Court may decline to determine the secondary claim if in its opinion, this will distract its judicious determination of the main cause; and a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court."

66. We recall also the decision of this Court in Lawrence Nduttu, in which we held that only those appeals arising from cases involving the interpretation or application of *the Constitution*, can be entertained by the Supreme Court under Article 163(4)(a), and "it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application." The appeal must have originated from a Court of Appeal matter in which the issues for determination related to the interpretation and application of *the Constitution*.

67. In the Peter Ngoge case, this Court held that, for a matter to be deemed as raising constitutional issues, hence invoking Article 163(4)(a) of *the Constitution*, the Court needs to satisfy itself that there has not been a transmutation of issues in the intended appeal, from ordinary issues to "weighty issues of constitutional interpretation". The Court thus remarked (paragraph 26):

> " In the petitioner's whole argument, we think, he has not rationalised the transmutation of the issue from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of *the Constitution* – such that it becomes, as of right, a matter falling within the appellate jurisdiction of the Supreme Court. On our own, we have also not appreciated how an interlocutory matter as to the representation of parties, could have prevailed over the petitioner's main cause in the High Court, and assumed the vitality now being ascribed to it."

68. Against such a background of analysis of jurisprudential dimensions, it is apparent to us that the cause does not came within this Court's appellate jurisdiction: especially as Article 163 (4) of *the Constitution* contemplates that the issues canvassed on appeal before this Court, will be the same as those that were canvassed at the Court of Appeal— but not fresh issues that have not arisen before the Courts below. We have made it clear that if any constitutional questions arise in the course of hearing the matter in the other Courts, they should be raised in those Courts in the first place, before they are referred to this Court on appeal. This principle entails that contested issues properly lodged before lower Courts, under recognized claim-heads, ought not to take on, improperly, new apparel, solely so as to fit them within the category of appealable matters before the Supreme Court.

(c) Joinder of Advocates to their suitor-clients: What Legal Implications?

69. Mr. Ngoge has enjoined himself, learned counsel Mr. Namada, and learned counsel Mr. Kinyanjui, as parties in this matter, by virtue of the fact that they were counsel for the parties in the Court of Appeal: he claims there were breaches of his and his clients' constitutional rights and fundamental freedoms, and that those in breach included those learned advocates.

70. Article 163(4) of *the Constitution*, which provides for the appellate jurisdiction of this Court as regards matters from the Court of Appeal, by no means contemplates "appeals" in the form of fresh matters, with new parties that were not parties at the appellate Court.

71. This Court has pronounced itself on what an appeal entails, in the Samuel Kamau Macharia case, in which we stated (paragraph 50) as follows:

> "(b) An appeal typically lies from a lower to a higher Court, and entails a reconsideration of a decision by the higher Court, with a view to reversing it either in part or in toto, or affirming it, either in part or in toto.
>
> (c) Depending on the structure of the Courts, appeals can lie in succession from the lowest Court to the highest.
>
> (d) An appeal against a decision of a lower Court is always commenced by a party who is aggrieved by that decision".

72. Black'sLaw Dictionary 9th Ed. (2009), defines the term "appeal" as "[t]o seek review (from a lower court's decision) by a higher court."

73. It follows, therefore, that a person appeals against a decision of a lowerCourt, and to a higher Court. This implies that the matter originating from the lower Court, is precisely the matter that the higher Court is called upon to re-examine— but not a fresh matter. It is clear to us that any substantial change to the configuration of the parties at the time of appeal, in effect, alters the design of the cause, thus creating a fresh matter, as opposed to an appeal. Such a matter, we hold, cannot be regarded as an appeal, and is not to be entertained by the Court, to which the purported appeal is preferred. Only in exceptional circumstances, will persons not parties at the appellate Court be parties on an appeal before this Court, and only with the special leave of this Court.

74. In this matter, not only are new parties introduced, but these parties are advocates who represented their clients, the parties, at the Court of Appeal. It is clear to us that, when an advocate represents his or her client in any matter, his or her position rests on a purely professional platform; and such advocate should not, as a player of a professional role governed by law, be enjoined as litigant, whether in that very matter, or on appeal, in respect of any acts or omissions in the conduct of the cause. The advocate, on the question of such joinder, will benefit from a cover of privilege, even though he or she remains amenable to suit for any professional negligence or malpractice, in a personal capacity, and in separate action, in the relevant trial Court.

75. In the current matter, the claims by the appellants, of infringement of their constitutional rights and fundamental freedoms by the respondents (their advocates included), have raised no issues of professional negligence or malpractice; and even if they did, this would not be the proper forum for the prosecution of the cause.

76. It is inapt, in our opinion, for counsel to be enjoined as parties in a case in which they are representing parties, or on appeal in such a matter. Action against an advocate in such a manner, in our perception, would not be tenable in law, nor would it be in the public interest, as it cannot be reconciled with the terms of the *Advocates Act* (Cap.16, Laws of Kenya), quite apart from the likelihood that it would tarnish the image of the advocates, and bring disrespect upon the legal profession generally. By Section 55 of the *Advocates Act*,

> "Every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof ..."

Learned counsel, Mr. Ngoge's attempt to transform advocates into litigants, in our opinion, would be harmful not only to the practising Bar, but also to the Courts, before whom such advocates hold their positions as officers.

77. The status of an advocate as an officer of the Court, is to be accorded high esteem, in view of the practising legal fraternity's special contribution to the course of the administration of justice, by facilitating the processes of dispute settlement in the Courts.

78. The proper forum for the resolution of the dispute between the parties is the High Court, which should in principle, set it for hearing and disposal on the basis of priority: in view of the fact that it has been pending for many years, and has on this account occasioned prejudice to the parties who had moved that Court.

79. We have been moved by the complexity of this matter, and by the concern that the innocent parties who had come before the Court have found no solution, for so long. We believe that the processes of the law are not designed merely to settle juristic equations, but to serve as a conveyance-setting for the satisfaction of claims of justice. In that spirit, we advise that counsel involved in this matter should engage one another in good faith, make reasonable concessions, and amicably settle the issue of representation, with a commitment to have the same timeously recorded by the Court, so that the hearing and determination of the case may proceed on the basis of priority.

VII. CONCLUSION

80. Courts of law are the embodiment of the people's legitimate expectation of access to justice. Parties come to Courts expecting an expeditious and impartial determination of their disputes—such resolution being vital in relation to their rights and obligations. Kenya's Constitution of 2010 embodies access to justice in its Bill of Rights; Article 48 provides:

> " The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

81. The substantive matter in this suit was filed in the High Court in the year 2000. This was an employment dispute between an employer and its employees. The employees are ordinary citizens in pursuit of their livelihood: they sought what they believe to be their hard-earned income. However, their legitimate expectation of a timely determination turned into a nightmare. It is unfortunate that their cause has degenerated into a legal tussle among advocates.

82. The judiciary is the ultimate custodian of *the Constitution*, in which the Bill of Rights is enshrined. This Court, as the apex Court is bound to ensure that the people's right to access to justice is not curtailed. The *Supreme Court Act*, 2011 in Section 3 (3) provides that—

> " The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things—
>
> ...
>
> (d) improve access to justice."

83. The jurisdiction to hear and determine the primary cause in this matter rests with the High Court. We are apprehensive however, that the case may be further protracted, unless counsel commit themselves to the principle of working together for the good of the parties, and in fulfilment of the terms of *the Constitution*. We do urge all counsel in this matter to work in co-operation, to the intent that the object of *the Constitution*, in regard to dispute settlement, be fulfilled.

84. On 17th July, 2014, while this Ruling was pending, this Court invoked Article 159(2) (c) of *the Constitution* and urged the parties to consider mediation as a last recourse. Article 159(2)(c) provides as follows:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> ...
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). . . ."

All counsel involved in this matter were present and agreed to the proposal; and on that basis, the Court referred this matter to the Law Society of Kenya (LSK) for mediation, in these terms:

So we direct that the matter goes to the Law Society for mediation and the Law Society files a report to us on or before 27th August, 2014 . . . and this matter shall be mentioned before this Court on 27th of August at 10.00 a.m."

85. As a follow-up, on 22nd July, 2014, Rawal, DCJ wrote to the LSK, through its chairman Mr. Mutua, informing him of the Court's proposal for mediation, and requesting the Society to take charge of the matter.

86. On 21st August, 2014, by letter dated 20th August, 2014, the Society informed the Court of the progress in the mediation process; and on 19th August, 2014 a meeting was convened, with all counsel present, or represented.

87. Subsequently, as earlier directed, the matter was mentioned before the Mutunga, CJ & P, and Ibrahim, SCJ on the 27th of August, 2014. The Court was informed that on the strength of LSK's letter of 20th August, 2014, the mediation process was on course. Parties sought more time to conclude the process, and the Court granted a one-month extension.

88. Before the lapse of the one-month extension, on 2nd September, 2014 the Court received two letters from the firm of M/s. O.P. Ngoge & Associates, dated 28th August, 2014 and 2nd September, 2014 respectively. In the first letter, Mr. Ngoge expressed his protest and disagreement with the contents of the LSK letter of 20th August, 2014. In particular he stated that at the meeting with the LSK, he had firmly signalled that he would not share the pleadings which he drew with other advocates unless his fee was first paid in full. In the second letter, Mr. Ngoge notified the Deputy Registrar of his intention to withdraw from the mediation process.

89. The matter was subsequently mentioned on 25th September, 2014, before Ibrahim, SCJ. The Court was informed of the deadlock in the mediation process. Mr. Ngoge informed the Court of his withdrawal from the mediation process. After hearing all counsel present Ibrahim, SCJ pronounced the mediation process aborted, and directed that the Court would formally deliver its Ruling.

VIII. Orders

90. We will make the following orders:

(a) The preliminary objection by the 5th and 6th respondents filed on the 17th December 2013, and that by the 1st and 2nd respondents, filed on 13th January, 2014are upheld.

(b) Supreme Court Petition No. 13 of 2013 is dismissed.

(c) The High Court shall schedule the substantive matter pending before it, for hearing on the basis of priority.

(d) The appellants shall bear the cost of this petition.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2014

.....

K.H. RAWAL

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

.....

P.K. TUNOI

JUSTICE OF THE SUPREME COURT

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

N.S. NJOKI

JUSTICE OF THE SUPREME COURT