THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS v THE ATTORNEY-GENERAL & 2 others [2012] eKLR

REPUBLIC OF KENYA

Supreme Court of Kenya

Criminal Appeal 1 of 2012

THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS.....APPELLANT

-VERSUS-

1. **THE ATTORNEY-GENERAL**
2. **THE MINISTER OF STATE FOR PROVINCIAL**

ADMINISTRATION AND INTERNAL SECURITY.....RESPONDENTS

3. **KENYANS FOR JUSTICE AND DEVELOPMENT**

RULING

A. OBJECTION ON ISSUE OF REPRESENTATION: BACKGROUND, AND COURT OF APPEAL'S RULING

[1] This Ruling has its background in the decisions rendered by two superior Courts: the High Court Ruling [in *Misc. Crim. Application No. 685 of 2010]* by Ombija, J on 28 November, 2011 and that of the Court of Appeal (O'Kubasu, Githinji and Onyango Otieno, JJ.A.) [in *Civil Appl. No. Nai. 275 of 2011 (UR 179/2011*] (of 17th February 2012) in which the appellant herein was the applicant. The matter before the Court of Appeal was an interlocutory one: the appellant herein raising a preliminary objection as to the appearance of the Attorney-General as a party before that Court. The Ruling of the Court of Appeal on the objection, which turned against the objector, is the subject of appeal now lodged before the Supreme Court.

[2] The relevant passage in the Court of Appeal's Ruling reads as follows:

"It was Mr. Nderitu's submission that as these are criminal proceedings then under the Constitution the respondent should have been the Director of Public Prosecutions and not the Attorney-General. Our simple answer to that contention is that in the High Court it was the applicant who named the Attorney-General as a respondent and the Attorney-General responded to the summons accordingly. It is therefore rather interesting that the same applicant should be objecting to the participation of the Attorney-General in this matter. The subject-matter in these proceedings is a warrant of arrest in respect of President Omar Ahmad Hassan Al Bashir....The respondents are neither accused persons nor suspects. The proceedings are in respect of the enforcement of the warrant of arrest by the Minister of State for Provincial Administration and Internal Security. Apart from being named as the first respondent, the Attorney-General is the principal legal adviser to the Government of Kenya [in terms of Article 156(4) (a), (b) of the Constitution]."

[3] On the foundation thus set up, the Court of Appeal proceeded to determine the question as follows:

"....[W]e are satisfied that the Attorney-General is a proper party to these proceedings and we accordingly find no merit in the preliminary objection. As the proceedings are neither criminal nor civil, we see no wrong in bringing the application under Rule 5(2)(b) [of the Court of Appeal Rules]. We therefore dismiss the objection."

[4] Before the Supreme Court, the appellant's counsel, Mr. Nderitu submits that the Court of Appeal failed to "adopt a normative, purposive, broad and liberal approach to the interpretation of Article 156(4)(b) and clause 31(5) of the Sixth Schedule [to] the Constitution of Kenya, 2010". Primarily on this account, the appellant asks this Court to quash the Court of Appeal's order dismissing the preliminary objection.

B. APPEALING FROM COURT OF APPEAL'S RULING: IS THERE JURISDICTION IN THE SUPREME COURT?

[5] It is not, however, the merits of such a challenge to the Court of Appeal's Ruling that falls for determination on this occasion. We are concerned with a preliminary objection to the appeal, coming from the Attorney-General. This objection is set out as follows:

(i) the Supreme Court lacks jurisdiction in the matter, insofar as the preliminary objection proceedings in the Court of Appeal did not involve a question of interpretation or application of the Constitution;

(ii) the question before the Court of Appeal was no more than a preliminary objection with regard to the ***representation of the applicants*** *before that Court;*

(iii) consequently, any appeal from the Ruling of the Court of Appeal required the ***leave*** *of that Court, in the terms of s.15(1) of the Supreme Court Act, 2011 (Act No. 7 of 2011);*

(iv) an appeal lodged in the prevailing circumstances will amount to an ***abuse of the process of the Court****: in particular as, all along in the Court of Appeal the alleged grievance had been canvassed as an issue in* ***criminal proceedings****, but now it is claimed to be an issue of the* ***interpretation or application of the Constitution;***

(v) if the appeal truly belongs to the category of interpretation or application of the Constitution, then it is devoid of a substratum, for the ***Attorney-General would be a proper party to proceedings entailing the interpretation or application of the Constitution.***

[6] The learned Senior Deputy Solicitor-General, Ms. Kimani submitted that the Supreme Court's appellate jurisdiction had been improperly invoked, for the proceedings before the Court of Appeal "did not involve the interpretation or application of the Constitution"; and, representation of parties is an interlocutory matter falling "outside the jurisdiction of the Supreme Court as defined under Section 19 of the Supreme Court Act." She submitted that the appeal herein "did not arise from any case relating to the interpretation or application of the Constitution that came up before the Court of Appeal upon which the appellate Court had ruled, so that a further appeal may now lie to the Supreme Court." Noting that the matter is arising from an interlocutory order of the Court of Appeal where the substantive appeal remains outstanding, counsel urged that the appellant "ought to have sought *leave* before filing the present appeal."

[7] Learned counsel submitted that her line of submissions was consistent with principles set out in earlier decisions of the Supreme Court: (i) ***In the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Constitutional Application No. 2 of 2011; (ii) ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board***, Sup. Ct. Petition No. 5 of 2012; (iii) ***Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & Five Others,*** Sup. Ct Petition No. 2 of 2012; (iv) ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & Two Others,*** Sup. Ct. Appl. No. 2 of 2011.

[8] Learned counsel Mr. Nderitu, for the appellant, reiterated his client's objection raised first before the Court of Appeal: that "the proceedings it commenced in the High Court [High Court Misc. Crim. Appl. No. 685 of 2010].....were *criminal* proceedings," inasmuch as: (i) the applicant had invoked the criminal jurisdiction of the High Court; (ii) the proceedings related to a named accused; (iii) the proceedings related to the application of the International Crimes Act, 2008 (Act No. 16 of 2008); (iv) the proceedings related to the arrest and surrender of a person to the International Criminal Court, a Court having criminal jurisdiction; (v) the proceedings related to the issuance of a warrant of arrest against the accused person, as opposed to a contemnor or a civil debtor; (vi) the warrant of arrest issued was issued in furtherance of criminal proceedings before the International Criminal Court; (vii) an appeal arising out of the High Court's criminal proceedings was, in fact, an appeal against a decision made in criminal proceedings.

[9] Counsel urged that the Attorney-General's objection did not take into account the fact that "criminal proceedings and constitutional issues can co-exist" – and that such co-existence is the mark of this case. He submitted it was a constitutional question meriting appeal to the Supreme Court: "whether the [Attorney-General] could, after the establishment of the office of the Director of Public Prosecutions…under the new Constitution, file a notice of appeal and make an application for stay of execution and stay of proceedings." Counsel submitted that one of the questions canvassed in the Court of Appeal was "the effect of Section 31(5) of the Sixth Schedule on Article 156(4) of the Constitution in relation to whether the [Attorney-General] still retained power to represent the Minister of State for Provincial Administration and Internal Security in criminal proceedings, once the [Director of Public Prosecutions] was appointed."

[10] Mr. Nderitu urged that there was no significance to the fact that the issues on appeal emanated from a *preliminary objection* in the Court of Appeal: for the question none-the-less, remained a constitutional one and thus, fell within the category of matters appealable to the Supreme Court *as of right*. In this regard counsel underlined Article 156(4)(b) of the Constitution which provides that the Attorney-General:

"shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings....."

Counsel submitted that the issue of the representation of the appellants before the Court of Appeal "necessarily involves the interpretation or application of the Constitution."

C. LEAVE OF THE SUPREME COURT: REQUIRED?

[11] Counsel for the appellant submitted that it would be an unduly restrictive view of the scope of matters appealable to the Supreme Court, to hold that the appellant is to come only on the basis of the broad constitutional petition or reference originally lodged: "all that is required is for…..the appeal in the Supreme Court….to *involve* the interpretation or application of the Constitution." Counsel urged that the opening for appeals to the Supreme Court, "as of right in any *case* involving the interpretation or application of this Constitution" [Article 163(4)(a)] suggests that the word "case" therein can refer to *three* alternative situations: (i) a constitutional petition or reference in the High Court; (ii) *a limited issue* linked to the matter in the lower Court, which requires the interpretation or application of the Constitution; (iii) any *interlocutory matter* in the Court of Appeal which carries a question calling for the interpretation or application of the Constitution. His justification for such a broad range of matters appealable as of right to the Supreme Court, is that Article 259 of the Constitution requires interpretation "in a manner that……promotes [the Constitution's] purposes, values and principles, advances the rule of law, and permits the development of the law" [Article 259 (1)].

[12] On the basis of the foregoing reasoning, counsel submitted that leave was not required, before lodging the appeal.

D. THE SUPREME COURT'S EARLIER DECISIONS

[13] Of the Supreme Court's decision in ***In the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Constitutional Application No. 2 of 2011, Mr. Nderitu submitted that the Court had preferred a case-by-case approach to the elaboration of its jurisdiction, rather than a recourse to some general rule. This argument led counsel to seek to distinguish ***Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & Five Others***, Sup. Ct. Petition No. 2 of 2012 as a case raising a more general rule. But counsel urged that the matter herein was to be contrasted with the ***Ngoge*** case: the instant appeal "raises an issue of general public importance, whether the Attorney-General can represent the State in criminal proceedings." Counsel sought the application of certain principles of the ***Ngoge*** case, urging that "the current appeal…..raises a cardinal issue of law and is also of 'jurisprudential moment'." Counsel submitted that "the Court of Appeal has not or did not exhaust its jurisdiction to deal with the issue."

[14] Counsel submitted that there was no earlier decision of this Court which rendered the appeal untenable, and that two such decisions were distinguishable: ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board***, Sup. Ct. Petition No. 5 of 2012, and ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another,*** Sup. Ct. Petition No. 3 of 2012. Counsel urged that a passage in the ***Nduttu*** case shows the state of the law to be unsettled, as regards appeals to the Supreme Court from *interlocutory decisions*; as follows:

"Coming to the question whether Article 163(4) confers upon the Supreme Court the jurisdiction to entertain not just concluded cases but interlocutory orders from the Court of Appeal, all we can say at this stage is that even if it were to be assumed that the Court has appellate jurisdiction in appeals against interlocutory orders (which position we hesitate to declare at this stage), the interlocutory order the nature of which is being appealed against in the present case is not one that would inspire this Court to exercise jurisdiction in favour of the appellants."

[15] Counsel submitted that the instant matter provides "an opportunity to definitively state whether [the] exercise of its jurisdiction under Article 163(4)(a) includes an appeal…from a decision of the [Court of Appeal] on a preliminary point, where such preliminary point involves the application and interpretation of the Constitution."

E. THE SUPREME COURT'S APPELLATE JURISDICTION: AN EVALUATION

[16] Before the High Court, it is *the appellant* herein who had named the Attorney-General as respondent; the Attorney-General duly participated in the proceedings up to the end, when the Court's Ruling was delivered; the joinder of the Attorney-General did not become an issue. But it is the appellant's case now, that the Attorney-General should have ceased to be a party and been *substituted* with the Director of Public Prosecutions thereafter, when the appellant had lodged an appeal in the Court of Appeal – an appeal still pending – against the High Court decision. When this matter was raised before the Judges of Appeal, they rejected the appellant's contention, on this question of representation. The appellant *left the substantive appeal pending* in the Court of Appeal, and lodged an appeal in the Supreme Court on the *limited question* whether the Attorney-General, rather than the Director of Public Prosecutions should be the party appearing before the Court of Appeal. The appellant did not obtain leave to appeal from the Court of Appeal, taking the position that this is a matter of the interpretation or application of the Constitution and, consequently, a matter in respect of which an appeal lies *as of right*. Learned counsel for the appellant has argued that the question whether, "in a criminal matter", it is the Director of Public Prosecutions or the Attorney-General who should be representing the State, is a matter of the interpretation or application of the Constitution.

[17] The main theme under which this question falls is *jurisdiction*. Does the Supreme Court have jurisdiction to entertain the appeal? This Court's appellate jurisdiction is regulated by *the Constitution* and by *statute law,* but its

full dimensions have been the subject of interpretation in *case law,* over the last one year.

[18] The appellant contends that this Court has jurisdiction, on the supposition that the *point in dispute* is one entailing constitutional interpretation or application, even though it is not an appeal against a full-scale petition or constitutional reference or any full-range course of proceedings. The appellant urges that it does not matter how limited in scope a "case" is, for the purpose of bringing it on appeal to the Supreme Court, so long as, within its limited scope it involves the *interpretation or application of the constitution*: in which case, it is submitted, the Supreme Court *has* jurisdiction which may be invoked *without prior leave.*

[19] In ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another,*** Sup. Ct. Petition No. 3 of 2012 Tunoi and Wanjala SCJJ held, in relation to *interlocutory orders*, that it remained unsettled whether these are appealable to the Supreme Court; and that there will be *certain cases* in which the Supreme Court's jurisdiction will *exclude* such appeals.

[20] In ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board,*** Sup. Ct. Petition No. 5 of 2012 the appellant raised a *preliminary question* unrelated to the substantive cause, and contended that during a mention session in the Court of Appeal, an issue had arisen as to the interpretation and application of the Constitution which the Supreme Court should determine. The Supreme Court (Ojwang & Ndungu, SCJJ) declined jurisdiction, pronouncing itself as follows:

"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.....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; a collateral cause thus declined, generally falls outside the jurisdiction of the Supreme Court."

[21] In ***Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & Five Others,*** Sup. Ct. Petition No. 2 of 2012 the Supreme Court (Ojwang &

Ndungu, SCJJ) thus stated, as regards jurisdiction:

"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, [has] 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."

[22] The effect of the foregoing decisions is that: (i) appeals to the Supreme Court, in general, require grant of leave by the Court of Appeal – except where the Court of Appeal's refusal of leave has been reversed by the Supreme Court; (ii) in matters of interpretation or application of the Constitution, an appeal will be entertained by the Supreme Court as of right; (iii) the issue for interpretation or application of the Constitution coming on appeal to the Supreme Court, is not to be a *collateral question,* only minimally related to the substantive cause pending in the Court of Appeal, and if it is such, then *leave* of the Court of Appeal is required – unless the Supreme Court has reversed the refusal to grant leave by the Court of Appeal; (iv) subject to the foregoing principles, an appeal to the Supreme Court is ***not*** limited by the mere fact of the issue being *preliminary* or *interlocutory.*

[23] This guiding principle finds support from the Constitution itself, and from the terms of s.3 of the **Supreme Court Act** (Act No. 7 of 2011) which assigns to this Court the mandate to "assert the supremacy of the Constitution" – a task which requires that we prescribe the ultimate meanings and directions of all law that gives effect to the terms of the Constitution. By s.3(b) of the Supreme Court Act, it is this Court's responsibility to "provide authoritative and impartial interpretation of the Constitution"; and by s.3(c) it is the Supreme Court's mandate to settle the law on uncertain jural questions and to "develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth."

[24] We recognize that, generally, the entry into the sphere of emerging jurisprudence is located at the High Court, which bears original jurisdiction to interpret the Constitution and which has an appellate jurisdiction from lower Courts that address the basic scenarios of fact that spawn issues of jural character. Such early stage of the pronouncement on critical ideas of law is also to be found in the special Courts having the same jurisdiction as the High Court – such as those on employment and labour relations; and on environment and land [Article 162(2)].

[25] The Supreme Court all by itself, and without the benefit of the works of such other Courts, would be insufficiently resourced and empowered to develop rich jurisprudence as provided for. The law-making chain, indeed, goes back to the Subordinate Courts, which constitute the "grassroots" entry-point into the varied intellectual dimensions of law that will guide the process of construction of legal ideas.

[26] It follows that the Supreme Court, to best situate itself so as to address the complexity of the construction of law, must safeguard the proper jurisdiction of the Courts below it.

[27] In the present instance, the substantive matter now pending before the Court of Appeal is the Attorney-General's appeal from the Ruling rendered by Ombija, J in Misc. Crim. Appl. No. 685 of 2010, and the

matters for adjudication include:

(i) whether the High Court misinterpreted its role in relation to the International Criminal Court;

(ii) whether the High Court should have applied international customary law;

(iii) whether the High Court properly appreciated the nature of the immunity accorded serving Heads of State;

(iv) whether the High Court appreciated the application of Article 98 of the Rome Statute as regards serving Heads of State;

(v) whether the High Court had jurisdiction to authorize the issuance of warrants of arrest in respect of the subject;

(vi) whether the High Court appreciated that the question before it related to the doctrine of "act of State".

[28] The appellant holds over such weighty issues on appeal, and instead questions the propriety of the Attorney-General appearing; the appellant receives a Ruling of the Court of Appeal which approves the appearance of the Attorney-General; the appellant moves the Supreme Court on appeal to resolve the constitutional question as to the appearance of the Attorney-General – even though, as the Court of Appeal records, it is indeed the appellant who had named the Attorney-General as a party. The appellant's case is that since the date of inclusion of the Attorney-General as a party, a new Constitution has come into effect which requires *criminal matters* to be handled only by the Director of Public Prosecutions. This point has been canvassed as one of special constitutional significance, justifying an appeal to the Supreme Court as of right. What are the merits of this contention? Learned counsel for the appellant did not suggest that the appeal now pending before the Court of Appeal will suffer prejudice, if the Attorney-General's appearance in the cause is not nullified.

[29] It is obvious, in these circumstances, that the main cause in the Court of Appeal will be justly disposed of, even with the Attorney-General remaining as a party.

[30] Certain matters meriting judicial notice, indeed, do shed more light on the role of the Attorney-General in the main cause before the Court of Appeal. In the common law tradition and in the general practice of countries sharing historical linkages with Great Britain, such as the United States, the Attorney-General is recognized as "[t]he chief law officer of a state" [***Black's Law Dictionary***, 8th ed. (2004), p.139]. Within this concept squarely falls the terms of Article 156(4), (6) of the Constitution of Kenya, 2010 which thus provides:

"(4) The Attorney-General –
(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

"(5)…..
"(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest."

[31] The meaning of "criminal proceeding", the category of mandate which Article 156(4)(b) excludes from the Attorney-General's remit, is in our view, much more restricted than learned counsel for the appellant urged it to be. What that provision refers to as criminal proceeding is clearly defined in ***Black's Law Dictionary***, 8th ed. (2004) [at p.1241]:

"***criminal proceeding***. *A proceeding instituted to determine a person's guilt or innocence or to set a convicted person's punishment; a criminal hearing or trial."*

[32] The foregoing signification of "criminal proceeding" is not, in our opinion, reflected in the mere intituling of the original High Court case as "*Miscellaneous Criminal Application No. 685 of 2010"*; indeed, when that matter came up before the Court of Appeal, leading to the issue now sought to be brought to this Court on appeal, it was re-intituled as "Civil *Application No. Nai. 275 of 2011 (UR.179/2011)*".

[33] Are we, in the instant matter, dealing with a *criminal case?* The Court of Appeal held otherwise, and that, in our opinion, was the correct position in law. The core question in the appeal pending in the Court of Appeal has to do with: the *relationship between the Kenyan judicial system and the International Criminal Court; the applicability in Kenya of international customary law; the law relating to the immunity of serving Heads of State; the functioning of the Rome Statute within national jurisdictions.* Such are matters of primary relevance to the mandate of the State Law Office, which is led by the *Attorney-General*; and it follows that no litigation in such matters can take place in which the Attorney-General is not intimately involved.

[34] There was, therefore, no *legitimate issue* of interpretation or application of the Constitution, regarding the role of the Attorney-General in the proceedings before the Court of Appeal, which merited an appeal to the Supreme Court. The issue raised before the Court of Appeal and which is now sought to be brought to the Supreme Court, squarely fell within the category of a *collateral case* – a matter not appealable save with the leave and certificate of the Court of Appeal. There being no such certificate, and there not having been a reference, leading to a differing position taken in this Court, this is the typical case in which no appellate jurisdiction lies in the Supreme Court.

F. THERE'S NO JURISDICTION: IS THERE ABUSE OF PROCESS?

[35] The objector, apart from seeking the termination *in limine* of the appeal, asked the Court to find it to have been an abuse of the process of the Court.

[36] The concept of "abuse of the process of the Court" bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice.

[37] The bottom line in a case of abuse of Court process is that, it "appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption..." [***D.T. Dobie & Company (Kenya) Ltd. v. Muchina*** [1982] KLR 1 – *per* Madan, JA at p.9]. Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process. As an example, the Court of Appeal held in ***Nishith Yogendra Patel v. Pascale Miraille Baksh & Another*** [2009] eKLR that:

"[W]e are of the view that the application before us is an abuse of....Court process...., by pursuing the same remedies in parallel Courts which are competent to deal with the application. Such conduct must be deprecated and discouraged. It is for that reason that we order that the notice of motion...is hereby struck out."

[38] How would the foregoing principles apply in respect of the instant matter? The record shows that counsel in this matter appeared before a two-Judge Bench on 19 September, 2012 and were called upon, pending the scheduled hearing, to reflect upon the Supreme Court's recent Rulings on appellate jurisdiction: (i) ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another***, Sup. Ct. Pet. No. 3 of 2012; (ii) ***Sum Model Industries Ltd. v. Industrial and Commercial Development Corporation,*** Sup. Ct. Civ. Appl. No. 1 of 2011; (iii) ***Peter Oduor Ngoge v. Hon. Francis Ole Kaparo & Five Others,*** Sup. Ct. Pet. No. 2 of 2012; (iv) ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board,*** Sup. Ct. Petition No. 5 of 2012. However, the appellant's counsel has canvassed his case in a manner that steers clear of the emerging principle that no collateral case should seek to introduce a "constitutional point", which does not form a vital aspect of the cause pending in the Court of Appeal.

[39] Does this amount to an abuse of the process of the Court? Upon careful reflection, we would not hold this to be a glaring abuse of Court process. The Supreme Court is only now in the process of clarifying its appellate jurisdiction, through interpretation of statute law in the context of varying case-scenarios. The appellant by lodging the appeal, has laid before the Court an opportunity to further consolidate the jurisprudential gains in the earlier decisions.

[40] Consequently, we will order as follows:

(i) The preliminary objection is upheld.

(ii) The costs of these proceedings shall abide the resolution of the matter pending in the Court of Appeal.

DATED and **DELIVERED** at **NAIROBI** this 15th day of November, 2012.

W.M. MUTUNGA

Chief Justice & President Supreme Court Court

J.B. OJWANG

Justice of the Supreme Court Supreme

I certify that this is a true Copy of the original

Ag. REGISTRAR
SUPREME COURT OF KENYA