REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ.)

CIVIL APPLICATION NO. 4 OF 2014

-BETWEEN-

MENGINYA SALIM MURGANI.....APPLICANT

-AND-

KENYA REVENUE AUTHORITY..... RESPONDENT

(An application for review of the Ruling of the Court of Appeal, denying leave for further appeal to the Supreme Court)

RULING

A. INTRODUCTION

[1] This is an application by way of a Notice of Motion dated 18th March, 2014 for review of the denial of leave to appeal to the Supreme Court, by the Court of Appeal in Nairobi Civil Application No. Sup. 4 of 2014 (delivered on 14th March, 2014). Though the application comes under Article 163 (4) b of the Constitution, the correct provision should be Article 163 (5). The Orders sought by the applicant can be summarised as follows:

(a) that this Court be pleased to set aside the decision of the Court of Appeal in Civil Application No. Sup. 4 of 2013, in its entirety, and instead declare that Civil Application 189 of 2010 was properly filed in the Court of Appeal registry;

(b) that this Court do take into account the fact that the Court of Appeal held the matter to be one of general public importance;

(c) that this Court do review and set aside the Court of Appeal's Ruling dated 14th March, 2014.

(d) that this Court do issue such further Orders as may serve the ends of justice.

[2] The application is premised on the grounds set out in the Notice of Motion, and the supporting affidavit of the applicant, Menginya Salim Murgani. The respondent filed grounds of objection pursuant to Rule 11 of the Supreme Court Rules, 2012 and through its learned counsel, Mr. Amoko, contested the application as misconceived, and deficient on account of its legal basis not meeting the threshold set out in Article 163(4) b of the Constitution.

B. BACKGROUND

[3] The pleadings and proceedings before the High Court and the attendant Judgment are not part of the record herein, an element also noted by the learned Judges of the Court of Appeal, in their Ruling. The sequence of events in the course of litigation, however, may be out as follows:

(a) The matter before the High Court

[4] The applicant entered into a contract of employment with the respondent on or about 7th June, 1996 being employed as a Senior Research Officer on permanent and pensionable terms, and contributing 7.5% of his basic salary to the respondent's pension scheme. The applicant continued to work for the respondent in that capacity until 2001, when he was promoted to the rank of Senior Assistant Commissioner, earning a monthly salary of Kshs. 125,187. In

March, 2001 the respondent dismissed the applicant from employment, with loss of all his benefits.

[5] The applicant, being aggrieved by the decision of the respondent to terminate his employment, filed at the High Court Civil Suit No.1139 of 2002. He contended that he was entitled to general damages for wrongful termination, exemplary damages for destruction of his career and injury to his dignity, and special damages comprising pension contributions, leave allowance, six months' pay in lieu of notice, and costs and interest.

[6] The High Court *(Ojwang J.,* as he then was) in its Judgment dated 22nd September, 2008 held that the applicant's dismissal was unlawful and awarded the following:

(i) from date of termination of service (9th March, 2001) to date of Judgment (22nd September, 2008)—the pension amount falling due to the plaintiff, to be calculated, and paid with interest at Court rates;

(ii) from date of termination of service (9th March, 2001) to date of Judgment (22nd September, 2008)—leave allowance falling due to plaintiff, to be calculated, and paid with interest at Court rates;

(iii) from date of termination of service (9th March, 2001) to date of Judgment, (22nd September, 2008)—plaintiff's gross salary at the figure of Kshs. 125,081 per month, to be calculated, and paid with interest at Court rate;

(iv) exemplary damages in the sum of One Million Kenya Shillings, payable with interest at Court rate with effect from the date of the Judgement;

(v) *costs of the suit to the plaintiff, payable with interest at Court rate as from 5th July, 2002.*

[7] Following the High Court's decision directing the Registrar of the High Court to calculate the damages under the other heads, the Registrar assessed the damages payable to the applicant and arrived at a total of Kshs. 28,883,812.

(b) The matter before the Court of Appeal

[8] Aggrieved by the High Court's decision, the respondent lodged an appeal in the Court of Appeal—Civil Appeal No.108 of 2009. The applicant also filed a cross-appeal, contending that the trial Court was wrong in awarding damages in the total sum of Kshs. 28,883,712, instead of Kshs. 91,629,856.

[9] Upon consideration of the submissions by the parties, the Court of Appeal addressed itself to the following questions:

(i) *whether the contract of service between the parties was determinable and if so, by what period of notice, and if the same was on permanent and pensionable terms, whether it could be terminated by the giving of a reasonable notice?*

(ii) *in the circumstances, was the contract properly terminated and if so, what are the legal consequences of such termination; and if wrongly terminated, what were the legal consequences of such termination?*

(iii) *was the High Court justified in law, in awarding general damages in respect of a contract of employment in lieu of the award of salary for the period of notice?*

(iv) was the High Court justified in law in awarding exemplary damages?

(v) was the High Court correct in law in awarding only one head of damages, namely exemplary damages in the sum of Kshs. 1 million, and directing the calculation of the other heads to be done by the Deputy Registrar, and what is the effect of the Court's directions?

(vi) was the High Court justified in holding that in the circumstances, the appellant had committed an actionable wrong known as misfeasance in public office?

[10] The Court of Appeal in its Judgement delivered on 16th July, 2010 allowed the appeal. It set aside the High Court's Judgment, and substituted it with an award of 6 months' salary in lieu of notice, in the sum of Kshs. 527,794.20 together with the respondent's own contribution to the pension fund in the sum of Kshs. 1,387,658.80.

[11] The Court of Appeal was of the view that the trial Court erred in its Judgment principally by wrongly importing the rules of natural justice, and the provisions of Section 77 of the 1969 Constitution regarding fair trial, into the contract of employment. The learned Judges considered the provision inapplicable to the disciplinary organs specifically provided for in a contract of service. Further, the learned Judges of Appeal held that the introduction of a constitutional dimension concerning the right to a fair hearing in a contractual setting was a misapprehension of the law.

[12] The learned Judges of the Court of Appeal held that the applicant's dismissal was effectuated pursuant to a contractual provision; and if the reasons for his dismissal were wrong, then the measure of damages ought to have been in respect of the period of notice specified in the contract, or in the alternative, based on reasonable notice. The Court went on to hold that the

concept of destruction of the applicant's career, and the application of the tort of misfeasance in public office by the trial Judge, had no basis. It further held that the findings by the High Court that the applicant was entitled to a salary from the date of his dismissal from employment to the date of Judgment was arbitrary, and violated the principles on which damages for wrongful dismissal, or termination of employment, are awarded. With regard to the role of the Deputy Registrar, the Appellate Court held that the trial Judge erred in converting a judicial function into a ministerial one by directing the Registrar of the High Court to calculate damages.

(c) Subsequent applications in the Court of Appeal and in the Supreme Court

[13] Aggrieved by the Court of Appeal's decision, the applicant filed several applications in the Court of Appeal and the Supreme Court, namely:

(a) Court of Appeal Civil Application No. 189 of 2010—***Menginya Salim Murgani v. Kenya Revenue Authority***, an application asking the former Chief Justice to constitute a five-Judge Bench, to review the Judgment and Order of the Court of Appeal delivered on 16th July, 2010. This application was subsequently withdrawn under Rule 52 of the Court of Appeal Rules, upon the applicant's request (Court Order dated 19th March 2013). It was withdrawn upon realization by the applicant's counsel that the Court of Appeal had no jurisdiction to review its own Judgment.

(b) Court of Appeal Civil Application No. 262 of 2011—***Menginya Salim Murgani v. Kenya Revenue Authority,*** an application in the Court of Appeal for grant of leave to appeal to the Supreme Court, under Rule 22(1) of the Supreme Court Rules, (Judgment and

Order of the Court of Appeal, in Civil Appeal No. 108 of 2009 delivered on 16th July 2010).

(c) Supreme Court Petition No. 6 of 2012—***Menginya Salim Murgani v. Kenya Revenue*** **Authority**, a petition for review of the Judgment of the Court of Appeal in Civil Appeal No. 108 of 2009 delivered on 16th July 2010.

(d) Court of Appeal Civil Application No. Sup. 4 of 2013—***Menginya Salim Murgani v. Kenya Revenue Authority,*** an application seeking leave to appeal to the Supreme Court under Article 163(4) (b) of the Constitution, against the Judgment and Order of the Court of Appeal in Civil Appeal No. 108 of 2009. This application was heard and dismissed by the Court of Appeal on 14th March, 2014. The applicant, aggrieved by the decision of the Court of Appeal to decline certification under Article 163(4) (b) of the Constitution, filed the instant application seeking a review of the Ruling.

C. PARTIES' RESPECTIVE SUBMISSIONS

(a) Applicant's Submissions

[14] Learned counsel for the applicant, Mr. Kurauka stated that the application before the Court was for a review of the Court of Appeal Ruling dated 14th March, 2014 declining to grant leave to the applicant to appeal to this Court, on the ground that the substantive appeal had been heard and determined before the promulgation of the current Constitution on 27th August, 2010.

[15] Counsel submitted that the applicant, being dissatisfied with the Court of Appeal's Judgement in Civil Appeal No. 108 of 2009, filed a Notice of Motion

(Application No. 189 of 2010) on 2nd August, 2010 in which he petitioned the then Chief Justice to constitute a five-Judge Bench to review the Judgment. The application sought Orders as follows:

(i) *the Chief Justice to constitute a five-Judge Bench to review, vary or overrule the Judgment of the Court of Appeal (Omollo, Nyamu and Waki) delivered on the 16th of July 2010;*

(ii) *the constituted Bench of five-Judges of the Court of Appeal be pleased to review, vary and overrule the Judgment of the Court of Appeal delivered on 16th July 2010.*

(iii) *if the Bench of five Judges decides that the Judgment is flawed, or followed the wrong principles of the law and should be reviewed, the Court do determine the remedies to which the applicant herein is entitled.*

[16] Counsel submitted that at the time the Court of Appeal Judgement was delivered, and Application No. 189 of 2010 filed, the Court of Appeal was the highest Court in Kenya. He urged that the Constitution promulgated on 27th August, 2010 established the Supreme Court, with the mandate to exercise appellate jurisdiction in appeals from the Court of Appeal.

[17] Counsel submitted that, since Application No. 189 of 2010 was filed before the promulgation of the new Constitution, a three-Judge-Bench of the Court of Appeal would not have entertained it on the 28th March, 2013 if it were not properly filed before that Court; and consequently, the Court of Appeal could not have issued orders for constituting a five-Judge Bench of that Court. Counsel submitted that, allowing the parties to canvass the application meant that it was properly before the Court of Appeal, and was capable of being heard and determined. Learned counsel urged, for greater effect, that the subject-matter of the appeal was live, as the applicant herein

had duly filed the application for review of the Court of Appeal's Judgment. Mr. Kurauka urged that the matter herein was distinguishable from other matters of this nature, where appeals had already been determined.

[18] Counsel submitted that the filing of Civil Application No. 4 of 2013 seeking leave to appeal to the Supreme Court was a direct derivative of the Orders of the five-Judge Bench of the Court of Appeal, in Application No.189 of 2010. He submitted that by the time the new Constitution was promulgated (27th August, 2010), the subject-matter of appeal was live, as the application for review had already been filed; and consequently, the matter herein was distinguishable from other cases where appeals had already been determined, by the date of inauguration of the new Constitution.

[19] Counsel submitted that the case of ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others,*** Civil Application No. 2 of 2012 was distinguishable, insofar as it had already been determined, and there was no application for review pending before the Court, as in the instant case. Learned counsel urged that the matter before the Court was one of a constitutional nature, touching on fundamental rights, and was distinguishable from other matters; as it touched on specific rights of the applicant, and merited the application of relevant principle.

[20] Counsel submitted that as the Court of Appeal Ruling of 14th March, 2014 had stated that justice is a principle enshrined under the Constitution, close scrutiny of such signal highlights an affirmation that the applicant had a right to move the Supreme Court. He urged the Court to allow the application.

(b) Respondent's Case

[21] The respondent, through learned counsel Mr. Amoko, contested the application. Counsel submitted that the application was premised on a misapprehension of the law, and of the powers of this Court.

[22] Counsel submitted that the applicant's case was essentially concerned with matters of internal management of the Court's registry, and that these provided no basis for seeking a review of the Court of Appeal's decision.

[23] Learned counsel typified the applicant as "an overzealous litigant", who had to date filed four applications which were later withdrawn. Counsel submitted that a final determination of the rights of the parties had already been made, and that no error could be attributed to the Court of Appeal for following a binding decision of this Court, the ***S.K Macharia Case.***

[24] As to whether the matter herein was constitutional in nature, counsel submitted that had it been a constitutional matter, then the applicant would not need certification, but would approach the Court under Article 163(4)(a). He relied on the case of ***Peter Oduor Ngoge v. Francis ole Kaparo & 5 Others*** [2012] eKLR, for the proposition that one cannot transform an ordinary matter into a constitutional one.

[25] Counsel further relied on the cases of ***Malcom Bell v. Daniel Toroitich Arap Moi and Another*** S.C Application No. 1 of [2013] eKLR, and ***Hermanus Phillipus Steyn v. Giovanni Gnecci-Ruscone*** [2013] eKLR, for the principle that, by Article 163(4)(b) of the Constitution, appeals lie to the Supreme Court from the Court of Appeal where a matter of general public importance is involved.

[26] Counsel asked this Court to dismiss the Notice of Motion of 18th March, 2014 with costs, on the ground that the application did not meet the threshold of certification for a matter of general public importance; and that the Court had no jurisdiction to hear and determine appeals from the Court of Appeal in respect of decisions rendered by the Appellate Court prior to the date of promulgation of the 2010 Constitution.

D. ISSUES FOR DETERMINATION

[27] There are two principal issues for determination by this Court, namely:

(a) *whether this Court has jurisdiction to hear and determine the intended appeal, in view of the* ***S. K. Macharia case;***

(b) *whether the matter is one of general public importance, under Article 163(4) (b) of the Constitution, and thus, on this account, merits a hearing before the Supreme Court.*

E. ANALYSIS

(a) Is the S. K. Macharia Case distinguishable?

[28] Counsel for the applicant submitted that this matter was distinguishable from the ***S. K. Macharia case,*** as at the time of the promulgation of the 2010 Constitution, the subject matter was still live. It was urged that the applicant's application for review was pending in the Court of Appeal. The respondent, on the other hand, submitted that the principles set out in the ***S. K. Macharia case*** were applicable to this matter, as the Court of Appeal had already delivered its Judgement, by the time the new Constitution was promulgated.

[29] This Court, in the ***S. K. Macharia case*** (paragraph 67), observed that:

> ***"The Supreme Court is a creature of the new Constitution. Before then, decisions of the Court of Appeal were final. The parties to the appeal derived rights and incurred obligations from the judgments of that Court. If this Court were to allow appeals from the cases that had been finalized by the Court of Appeal before the commencement of the Constitution of***

2010, it would trigger a turbulence of unmanageable proportions in the private legal relations of the citizens of this country. Every party against whom the Court of Appeal delivered judgment in the past, however far in history, would be entitled to approach the Supreme Court and seek a reversal of the same."

[30] This position is reflected in the case of ***Daniel Shumari Njiroine v. Naliaka Maroro,*** Supreme Court Civil Application No. 5 of 2013, in which the Court cited the ***S. K. Macharia case,*** and further stated (paragraph 37) that :

"Consequently, the Supreme Court upon its establishment became functional with effect from 23rd June 2011 when the Supreme Court Act entered into force. The Court will not reopen matters that were finalised under the valid judicial structures in place before the promulgation of the Constitution 2010. We agree with counsel for the respondent that, in the spirit of the principle of finality to litigation, the Supreme Court is not to embark upon a journey of reopening matters closed by the apex Court of the earlier period."

[31] The Court of Appeal, while dismissing the instant application, held as follows:

"We are not persuaded that the decision of this Court rejecting the applicant's application for review from the decision intended to be appealed has the effect of bringing the intended appeal within the scope of the jurisdiction of the Supreme Court. If there was a right of appeal from the decision of this Court given on 16th July 2010,that right accrued from the date of delivery of that judgment, and not from the date when revision of that judgment was rejected.

The Supreme Court did not exist on 16th July 2010. When it was eventually created upon the promulgation of the Constitution, there was no provision conferring on it the power to entertain appeals from decisions made prior to its existence."

[32] In determining whether the ***S. K Macharia case*** is distinguishable, an issue for consideration is *whether indeed this matter had been finalised by the apex Court at the time, and whether the application for review had the resultant effect of keeping the matter alive*. It is not clear under what provisions of the law the applicant had filed the application for review of the Court of Appeal Judgement, as none of the parties provided this Court with a copy of that application.

[33] It is a general principle of law that a Court after passing Judgment, becomes *functus officio* and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law. In ***Lakhamshi Brothers v. Raja & Sons*** [1966] EA 313 the then Court of Appeal held as follows:

"This court is now the final Court of Appeal and when this court delivers its judgement, that judgement is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject as I have said to the limited application of the slip rule."

[33] In ***Rafiki Enterprises Ltd. v. Kingsway & Automart Ltd.,*** Civil Application No. 375 of 1996, the Court of Appeal reaffirmed the decision in ***Lakhamshi Brothers,*** and held that it had no jurisdiction to review its own decisions. In ***Musiara Ltd. v. William Ole Ntimama,*** Civil Application

No. 271 of 2003, the Court of Appeal held that *it had jurisdiction* to review its own decisions. However, this decision was subsequently overturned in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others;*** [2013] eKLR where a five-Judge Bench of the Appellate Court unanimously held that the Court did not have jurisdiction to review its own decisions. *Bosire J.A* in his concurring decision observed thus:

> ***"The appellate jurisdiction Act and Rules made thereunder do not provide for review of decisions of the Court relating to appeal except pursuant to the proviso to rule 99(1) of the rules, which provides for an application for an order restoring to the hearing list a dismissed appeal under rule 99(1) of the Rules. Rule 55(3) makes provision for the restoration to the hearing list of dismissed applications for non-attendance to the applicant. These provisions are intended to assist parties whose appeals or applications have been dismissed for their non-attendance and who for good cause were not able to attend the hearing. It will be straining the interpretation of Section 3 of the Appellate Jurisdiction Act, to say that it donates power to this Court to reopen concluded proceedings outside those provided under rules 99(1) and 55(3) above."***

[35] Rule 56(3) of the current Court of Appeal Rules is similar to Rule 55(3) of the repealed Rules.

[36] In ***Benjoh amalgamated Ltd. & Another v. Kenya Commercial Bank Ltd.*** (2014) eKLR, the Court of Appeal comprehensively analysed the Court's jurisdiction to review its decisions before and after the date of promulgation of the 2010 Constitution. The Appellate Court held that prior to the promulgation of the new Constitution, it had no jurisdiction to review its

decisions, except in the application of the slip rule under Rule 35 of the Court of Appeal Rules. As to the position after the promulgation of the 2010 Constitution, the Court held that as it was not the final Court in the land, it had a residual jurisdiction, where there was no appeal to the Supreme Court, to correct errors of law that had occasioned real injustice, or failure, or miscarriage of justice. Such a position notwithstanding, the Court held that it would not entertain applications for the review of decisions made before the 2010 Constitution came into being.

[37] It is noteworthy that upon the empanelling of the five-Judge Bench, the applicant was asked to address the Court, on the question of jurisdiction to entertain the application. The applicant conceded that the Appellate Court had no jurisdiction to review its own decisions, and made an application to withdraw the same which prayer was granted.

[38] Therefore, in essence, there was no appeal pending before the Appellate Court, at the date of promulgation of the new Constitution; as the subject-matter of the appeal in question had been heard and determined on 16th July, 2010, and the application pending was one for the Court to re-open and re-hear the appeal. To grant the said application would have meant the Court of Appeal quashing and setting aside its own decision. This, in our view, would be going beyond the scope of the powers of review, as conceived in legal parlance.

[39] Consequently, the instant matter is not distinguishable from the ***S.K Macharia case,*** as it is evident that the rights of the parties to the dispute had been determined in a Judgment of the Court of Appeal, which was the apex Court prior to the promulgation of the 2010 Constitution.

(b) Is this a matter of general public importance under Article 163(4) (b) of the Constitution?

[40] The applicant submitted that the intended appeal raised issues of public importance, and that this had been acknowledged by the Court of Appeal in its Ruling. The respondent on the other hand, contended that this matter did not raise any constitutional issue and if it did, then the applicant would not need to seek certification.

[41] Article 163(4) further confers jurisdiction on the Supreme Court to hear appeals from the Court of Appeal—

> ***(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)."***

[42] The instant application was lodged by virtue of the foregoing provision. Our task is to determine whether the intended appeal falls within the threshold of Article 163(4)(b).

[43] The Supreme Court, in ***Hermanus Philipus Steyn v. Giovanni Gnecchi- Ruscone;*** [2013] eKLR set out the following broad principles to be considered when determining whether an intended appeal to this Court raises a matter of general public importance:

> ***"(i) ...the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances***

of the particular case, and has a significant bearing on the public interest;

(ii) Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

(iii) Such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

(iv) Where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

(v) Mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4)(b) of the Constitution;

(vi) The intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought;

(vii) Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

[44] In its Ruling, the Court of Appeal observed as follows (para 22):

> ***"In light of those constitutional provisions, we think that the question whether the principles of natural justice enshrined in the Constitution are applicable to disciplinary proceedings in employment relations is an arguable question and one that transcends the circumstances of this particular case and has a significant bearing on the public interest. If that were the only consideration for us in this application, we would have had no difficulty in certifying that the matter is of great public importance."***

[45] The foregoing observation by the Appellate Court, in respect of the interplay between natural justice and disciplinary proceedings in employment relations, especially in circumstances such as those obtaining in this case, in which the employer is the State's foremost agency of financial power, is in our view, eminently meritorious.

[46] However, in the context of the facts and the history of the instant matter, the binding effect of the ***S. K. Macharia case,*** as regards Appellate Court determinations made before the promulgation date of the current Constitution, has not been distinguished; and on this account, the application cannot succeed.

F. ORDERS

[47] The foregoing analysis of the issues raised, in the context of the relevant law, leads us to a set of Orders, as follows:

(i) The Notice of Motion dated 18th March, 2014 is hereby disallowed.

(ii) The Ruling of the Court of Appeal dated 14th March, 2014 is hereby upheld.

(iii) The costs of this application shall be borne by the applicant.

DATED and **DELIVERED** at **NAIROBI** this **19th Day of December, 2014.**

.....	.....
P. K. TUNOI **JUSTICE OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
J. B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**

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S. N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA