REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: *Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ)*

PETITION NO. 7 OF 2019

"BETWEEN"

1. **GEOFFREY M. ASANYO**
2. **MAKANA MOTORS**
3. **MULTIPLE SALES PROMOTERS LTD**
4. **WAKAM ENTERPRISES COMPANY LTD .....PETITIONERS**

AND

THE ATTORNEY-GENERAL.....RESPONDENT

(Being an appeal from Order of the Court of Appeal at Nairobi (Waki, Musinga and Gatembu, JJA) dated 22 January 2019, in Nairobi Civil Appeal No. 26o 0f 2014)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition of appeal before the Court is filed under Article 163(4) (a) and (7) of the Constitution, contesting the decision of the Court of Appeal dated 22 January 2019. Principally, the petitioners contest *the Court of Appeal's directions, which required them to file a formal application seeking compliance with a Supreme Court Order, with the respondents being given a right of reply*. They urge that the Court of Appeal's directions infringe on the doctrine of *functus officio,* in that they amount to a re-opening of litigation on a matter that has been heard with finality. The petitioners contend, further, that the Court of Appeal's directions contravene Article 163(7) of the Constitution, which requires all other Courts to comply with the decisions of the Supreme Court.

B. BACKGROUND

[2] This is not the first time the matter is being brought before this Court. The Petitioners herein had previously filed in this Court *Petition No. 21 of 2015* " challenging two decisions of the Court of Appeal, both arising from *Civil Appeal No. 260 of 2014*. On the one hand, the petitioners faulted the Appellate Court for declining to adopt a consent Order dated 18 September 2015. On the other hand, they sought to set aside the Judgment of that Court, which had disposed of the substantive matter in disregard of the consent

Order. Upon considering the matter, on 20 November 2018, *this Court held that the Court of Appeal should have adopted the consent of the parties. The Court also declared the Judgement of the Court of Appeal to be a nullity, and void* ***ab initio****, since one of the Judges failed to deliver his reasoning, yet such non-delivery did not fall within the regular legal exceptions.*

[3] Ultimately, the Court gave the following Order:

"(1) The Petition of Appeal dated 21 December 2015 is hereby allowed in the following specific terms:

(a) A declaration is hereby made that the Court of Appeal judgment dated 13 November 2015 in Nairobi Civil Appeal No. 260 of 2014 is null and void.

(b) The Ruling of the Court of Appeal dated 12 November 2015 in Nairobi Civil Appeal No. 260 of 2014 is hereby set aside.

(c) An order do hereby issue that this matter be remitted back to the Court of Appeal for the adoption of the consent filed by parties on 18 September 2015, on a priority basis.

"(2) Each party shall bear its own costs".

[4] Pursuant to the foregoing Order, on 21 November 2018, the petitioners wrote a letter to the President of the Court of Appeal, requesting him to constitute a three-Judge Bench, for purposes of *adoption of the consent Order filed by the parties before that Court* on 18 September 2015.

[5] The matter was first mentioned before the Court of Appeal on 14 January 2019. On that occasion, the *Attorney-General opposed the adoption of the consent. He urged that the consent was recorded during the term of the retired Attorney-General, a position that has since changed. After hearing the parties, the Presiding Judge adjourned the matter, so that he could familiarize himself with the case.*

[6] During the second mention of 22 January 2019, the Bench *(Waki, Musinga & Gatembu JJA)* rendered a Ruling in the following terms:

"After hearing brief submissions…it dawned on us that the matter was contentious and may not simply be a matter for a 'mention'. We made an Order for further mention today, with a view to giving further directions after the perusal of the record. We have done so, and even found a copy of the Judgment of *Kiage, JA* ***dated 13th November, 2015 which the Supreme Court found was non-existent. In our view, this compounds the matter. Considering the further contentions raised earlier by counsel on both sides, we think it is desirable that the respondents in this appeal (the petitioners herein) approach the Court with a formal application, with a right of reply by the Attorney-General. In view of those perceived complications, we also think the matter should be placed before the same Bench that dealt with the appeal, now that they are all based in Nairobi, that is to say,*** *Ouko (P), Kiage & Murgor JJ.A.****"***

[7] It is this *Ruling* that triggered the filing of the present appeal. The appeal is anchored on the following grounds:

(i) that the learned Judges of Appeal infringed the doctrine of ***functus officio,*** *when they purported to reopen the matter for a hearing of the adoption-of-consent, yet their Judgment had been declared null and void by the Supreme Court, and finality had been attained;*

(ii) that the respondent has changed his position as regards the said consent;

(iii) that the learned Judges of Appeal, in failing to allow the parties to adopt the consent as directed by this Honourable Court, violated the principle laid down under Article 163(7) of the Constitution, which provides that all Courts are bound by the decisions of the Supreme Court; and

(iv) that this Court has the requisite jurisdiction to hear and determine this matter under Article 163(4)(a) of the Constitution.

[8] The petitioners seek the following reliefs:

(a) The entire Order of the Court of Appeal *(Waki, Musinga & Gatembu JJA)* dated 22 January 2019, in Civil Appeal No. 260 of 2014, be set aside.

(b) This Court be pleased to adopt the consent letter dated 11th September 2015, and filed on 18 September 2015.

(c) Any other Order as this Court may deem fit, in the circumstances.

C. SUBMISSIONS BY LEARNED COUNSEL

(a) Petitioners

[9] By their written submissions dated 14 March 2019, the petitioners urge that this Court is clothed with the requisite jurisdiction to hear and determine this appeal, under Article 163(4) (a) of the Constitution. They submit that, by the terms of Article 163(7) of the Constitution, the decisions of this Court are binding on all other Courts in Kenya, and hence, the Court of Appeal was bound by this Court's Order which directed it to *adopt the consent as filed by the parties.* In the circumstances, it was submitted that the Court of Appeal is in contravention of the said Article 163(7) — thus bringing this appeal under the limb of *"appeals as of right,"* under Article 163 (4) (a).

[10] The petitioners urge that the Court of Appeal ought not to have ordered them to file a formal application, with a right of reply accorded the respondent: for, doing so amounts to a re-opening of litigation. In particular, they urge that the Appellate Court is *functus officio*, in so far as Civil Appeal No. 260 of 2014 is concerned, as it had already rendered its Judgment on merit, which Judgment was set aside. As such, when the matter was remitted to the Court of Appeal, as directed by this Court, the single action required of that Court, was to *adopt the consent*.

(b) Respondent

[11] The respondent submits that the purpose of the mention before the Court of Appeal was *not to adopt the consent,* but to give *directions on how the Judgement of this Court ought to have been dealt with*. Learned counsel thus urges that the Court of Appeal rightly directed that a *formal application for adoption of consent be filed.* It was submitted that the Court of Appeal had duly noted the Attorney-General's opposition to the consent — as, under Section 2 of the Government Contracts Act, the Principal Secretary in Ministry of Interior and Co-ordination of National Government had not given his approval.

[12] Submission was made for the Attorney-General, that stands in clear departure from the normative ultimacy of a Supreme Court directive: that the Appellate Court had rightly recognised that the procedural question was contentious, and should be canvassed before it, by way of a formal application.

[13] Even though the Supreme Court had already *required compliance* with the consent Order, the Attorney-General's position was that he was entitled to challenge it, and to seek its setting aside. Justification for such a stand was founded on the argument that the consent stood vitiated by the failure on the part of the Principal Secretary to give approval. It was further urged for the Attorney-General, that the consent-adoption question was *res judicata:* because it had already been in issue before the Supreme Court, and this Court had already taken a decision upon it. The Attorney-General, to support the *res judicata* argument, thus quotes from the terms of this Court's Judgment (para. 108):

"[W]e hold that justice in this matter is not for this Court to record the consent. …having found that the Court of Appeal should have recorded the consent, the matter should be remitted back to that Court to do that which it ought to have done in the first place."

[14] In conclusion, the Attorney-General urges that the appeal is premature, as the Court of Appeal has not made a determination on *whether or not the consent should be adopted*: and so, issues warranting the assumption of this Court's jurisdiction have not yet crystallized, and the Court lacks jurisdiction to hear and determine this matter. He seeks the dismissal of this appeal.

D. ISSUES FOR DETERMINATION

[15] The following are the main issues arising for determination, as drawn from the petition of appeal, the responses thereto, and the written and oral submissions:

(a) whether this Court has jurisdiction to determine the petitioner's appeal;

(b) whether the Court of Appeal Order of 22 January 2019 is at variance with Article 163(7) of the Constitution;

(c) what is the meaning and effect of this Court's Order made on 20 November 2018"

(d) what are the appropriate reliefs"

E. ANALYSIS

(a) The Question of Jurisdiction

[16] It is the petitioners' case that this Court is clothed with the requisite jurisdiction to hear and determine the matter at hand. In that behalf, learned counsel rely on the case of ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others,*** Supreme Court Petition No 10 of 2013 [2014] eKLR***,*** and ***Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board,*** Supreme Court Petition No 5 of 2012. It is contended that the present matter raises weighty issues of interpretation and application of the Constitution: specifically, whether or not the Appellate Court can *reject a determination by the Supreme Court*, in view of Article 163 (7), which ordains final pronouncement by the apex Court.

[17] The respondent, taking a divergent view, argues that this appeal is only concerned with directions given during a mention before the Appellate Court, which Court is yet to take a decision regarding the adoption of the consent. It is contended that the petitioners' rights have not been infringed, and that it is, therefore, premature to invoke the jurisdiction of the Supreme Court under Article 163(4) (a) of the Constitution.

[18] The operative provision of the Constitution is Article 163(4) (a), which provides that an appeal lies from the Court of Appeal to the Supreme Court *"as of right in any case involving the interpretation or application of the Constitution"*. This Court has already determined the import, scope, and limits of its appellate jurisdiction under Article 163 (4) (a) of the Constitution in a number of cases: ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others*** [2012] eKLR; ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** [2012] eKLR; ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR; ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR; ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndung'u Waititu & 4 Others*** [2014] eKLR; ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** [2013] eKLR — among others.

[19] As we have observed in such decisions, the jurisdiction of this Court is limited, and flows from the terms of the Constitution and the relevant legislation. Occasionally, however, there will arise situations in which the jurisdiction of the Court is not quite so sharply defined, in which case it devolves to the Court to ascertain, on a case-by-case basis, whether jurisdiction may properly be assumed.

[20] It is to be noted that the present appeal does not stem from a subject-matter that was before the High Court; but it is the petitioner's case that the manner in which the Appellate Court has conducted itself not only goes against this Court's determination, and against its guiding principle under the law (specifically, Article 163 (7) of the Constitution), but also infringes the well-known doctrine of *functus officio*.

[21] We recall that when the matter first came up before this Court, we did address ourselves to the question of *jurisdiction*: and we duly noted that the appeal, in its essence, did not flow from the subject-matter that had featured before the trial Court. The grievance of the petitioners had its origin in the Appellate Court; and it was our perception, in such a context, that the Supreme Court would have to adopt a pragmatic approach in relation to the issue of jurisdiction.

[22] We recall our decision in the ***Joho*** case where we did emphasize that each case was to be evaluated on its own facts; and we observed that several factors, in that instance, merited consideration before we could assume jurisdiction under Article 163(4)(a) of the Constitution. We thus remarked (at para. 37):

"In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts, and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution. Indeed, ordinarily, in our view, a question regarding the interpretation or application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it."

[23] The petitioner herein raises the question as to the Court of Appeal being bound by the decision of the Supreme Court, so that the action taken by that Court would amount to reopening and rehearing the matter. Article 163(7) of the Constitution establishes the principle upon which rests the authority of judicial decisions as precedent in subsequent litigation, guiding Judges who are bound to follow the same. Courts and tribunals exercising judicial authority are duty-bound to follow this principle. In ***Geoffrey M. Asanyo & 3 Others v. Attorney-General, Sup. Ct.*** Pet. No. 21 of 2015 [2018] *eKLR,* we thus stated (at para. 61)**:**

*"**It thus emerges that a concise reading of the judicial principles in Article 159(2) of the Constitution would show that they are non-derogable, and have to be adhered to by all Courts and tribunals exercising judicial power/authority. Where there is, therefore, a** prima facie **case of derogation, it behoves this Court to intervene, so as to safeguard the Constitution, within its jurisdiction under Article 163(4) (a). This was well stated in the* **Joho** *case* [paragraphs 51 & 52] ***where the Court expressed itself thus:***

*'In defending the Constitution and the aspirations of the Kenyan people, this Court must always be forward-looking, bearing in mind the consequences of legal uncertainty upon the enforcement of any provision of the Constitution. **This aspect of defending the Constitution is replicated under Article 163 (4) (a), which allows appeals from the Court of Appeal to the Supreme Court as of right, in any case involving the interpretation or application of the Constitution.** Such is the approach that this Court in hearing this appeal must seek to apply.*

*'Applying a principled reading of the Constitution, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question. **However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court, in furtherance of the objects laid out under Section 3 of the Supreme Court Act, 2011 (Act No. 7 of 2011)'"*** [emphasis supplied].

[24] In that matter, we found that in spite of the fact that the issue before the Court had not been argued in the Court of Appeal, it devolved to this Court's inherent jurisdiction to set right any jurisdictional wrongs committed by other Superior Courts. We thus observed (para. 62 – 63):

"In that context, the appellants submitted that despite filing a consent which would have settled the matter in line with Article 159(2), on the constitutional principle of promotion of alternative forms of dispute resolution, the Court of Appeal disregarded it. We have no doubt that, whereas the issue before us may not have been articulated at the Court of Appeal, the inherent jurisdiction of this Court to right jurisdictional wrongs committed by the Superior Courts in executing their constitutional mandates, would necessitate that this Court should assume jurisdiction and interrogate those alleged wrongs. In stating so, we reiterate our holding in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others,*** Petition No. 6 of 2014; [2017] eKLR**:**

'The [Supreme] Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all.'

"We further reiterate that this Court should only depart from the principle that issues of constitutional interpretation must rise through the Superior Courts to this Court, in the clearest of cases, and the exception to that principle should be carefully considered by the Court in the manner we have expressed herein. …"

[25] We see no reason to depart from this reasoning, and are in agreement with the petitioners that the dispute herein would ordinarily raise questions as to the application and interpretation of the Constitution, warranting entertainment by this Court.

(b) Court of Appeal's Order of 22 January 2019: Does it offend Article 163(7) of the Constitution"

[26] Article 163 (7) of the Constitution provides that *"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."* The nature of that provision is absolute. This Court expounded this principle in the case of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR, as follows (para. 196):

"Article 163 (7) of the Constitution is the embodiment of the time-hallowed common law doctrine of ***stare decisis.*** *It holds that the precedents set by this Court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this Court:* ***Jasbir Singh Rai v. Tarlochan Singh Rai & Others,*** and quite recently, in ***George Mike Wanjohi v. Steven Kariuki & Others*** Petition No. 2A of 2014.

"In addition to the benchmark decisions to which this Court adverted in ***Wanjohi v. Kariuki*** *(supra), regarding the importance of the doctrine of* ***stare decisis,*** *we would echo the dictum in* ***Housen v Nikoaisen*** (2002) 2 SCR:

'It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced … should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all Judges are liable, we must maintain the complete integrity of relationships between the courts'."

[27] In ***Kidero & 5 Others v. Waititu and Others,*** Sup. Ct. Petition No. 18 of 2014(Consolidated with Petition No. 20 of 2014), *Njoki Ndungu, SCJ,* in her concurring opinion, made the following pertinent remarks (para. 236):

"The principle of *stare decisis* ***in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Court's vital essence and the decisions of this Court protect settled anticipations by ensuring that the Constitution is upheld and enforced, and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of Article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy, and to give jurisprudential guidance to the lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government, and the political disposition, particularly in the settlement of electoral disputes. As a Court entrusted with the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms."***

[28] In ***Dodhia v National & Grindlays Bank Limited and Another*** [1970] EA 195, Duffus, V.P. expounded the principle of *stare decisis* stating that;

"The adherence to the principle of judicial precedent or *stare decisis* ***is of utmost importance in the administration of justice in the Courts in East Africa, and thus to the conduct of the everyday affairs of its inhabitant; it provides a degree of certainty as to what is the law of the country, and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State."***

[29] We had thus recounted in another case, ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others*** Supreme Court Petition No. 4 of 2012, [2013] eKLR,

"Adherence to precedent should be the rule and not the exception ....; the labour of judges would be increased almost to breaking-point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure

foundation of the courses laid by others who had gone before him."

[30] We may draw from the comparative lesson: in Canada, the importance of the principle was clearly articulated by *Laskin, J.A.* of the Ontario Court of Appeal in ***David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.*** (2008), 244 O.A.C. 151 (CA);2008 ONCA 703, in the following terms:

"[t]he values underlying…*stare decisis* ***are well known: consistency, certainty, predictability, and sound judicial administration. Adherence to precedent promotes these values…Adherence to precedent also enhances the legitimacy and acceptability of judge-made law and by so doing enhances the appearance of justice. Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case."***

[31] In another case, the Canadian Supreme Court reiterated the principles it will apply in determining whether to overrule one of its own prior decisions, and affirmed that lower Courts are bound to follow decisions of the Supreme Court, regardless of their views as to the correctness of those decisions (***Canada v. Craig,*** 2012 SCC 43 of 1 August 2012).

[32] In the case aforementioned, a Federal Court of Appeal declined to follow the Supreme Court's 1977 decision in ***Moldowan v. The Queen*** [1978] 1 S.C.R. 480, instead, following its own decision in ***Gunn v. Canada,*** 2006 FCA 281, [2007] 3 F.C.R. 57.

[33] Speaking for a unanimous Court, *Justice Rothstein* confirmed that it is not open to a lower Court to purport to overrule a decision of the Supreme Court; in his words (at paras. 20 – 22):

"It may be that ***Gunn*** *departed from* ***Moldowan*** *because of the extensive criticism of* ***Moldowan.*** *Indeed, Dickson J. himself acknowledged that the section was 'an awkwardly worded and intractable section and the source of much debate'. Further, that provision had not come before the Supreme Court for review in the three decades since* ***Moldowan*** *was decided.*

"But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why ***Moldowan*** *was problematic, in the way that the reasons in* ***Gunn*** *did, rather than purporting to overrule it.*

"The Federal Court of Appeal, on the basis of its prior decision in ***Miller v. Canada (Attorney General),*** 2002 FCA 370 (CanLII), 2002 FCA 370, 220 D.L.R. (4th) 149, *in which that court reaffirmed the rule that it would normally be bound by its own previous decisions, followed* ***Gunn,*** *and not* ***Moldowan.*** *The application of* ***Miller*** *and the question of whether the Federal Court of Appeal should have followed* ***Gunn*** *simply did not arise, in view of the* ***Moldowan*** *Supreme Court precedent."*

[34] The objective scenario bears the lesson that there is need for fidelity to the principle of *stare decisis*, a bearing that ensures that Judges reach substantially the same legal conclusions that were reached in previous cases, when considering similar legal issues: this creates *certainty, clarity, predictability* and *legitimacy* within the law. On that basis, the decision of this Court in Petition 21 of 2015 was binding upon the Court of Appeal in Civil Appeal No. 260 of 2014.

[35] The other crucial question in this matter is the *functus officio* concept: has the Appellate Court's role become wholly redundant, and it may no longer entertain the relevant question"

[36] This Court, in ***Raila Odinga & 2 Others v. Independent Electoral & Boundaries Commission & 3 Others*** [2013] eKLR, had cited with approval a passage in an article by Daniel Mala Pretorius entitled "The Origins of the *functus officio* Doctrine, with Special Reference to its Application in Administrative Law", in ***South African Law Journal,*** Vol. 122 (2005), at p. 832, in the following terms:

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter…. The [principle] is that once such a decision has been taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision-maker."

[37] In determining whether the Appellate Court was *functus officio*, we need to ask ourselves whether that Court resolved the matter before it with *finality*. In our Order of 20 November 2018, we declared the Judgment of the Court of Appeal to be a nullity,

and void *ab initio,* since one of the Judges failed to render a judicial determination, and to furnish regular reasoning. That remains our position, as the said Judge's statement was *not on the record then.*

[38] We turn now to the standing of the consent filed by the parties before the Appellate Court. The pertinent question is: When does a consent by the parties transmute into an Order of the Court" What is the role of the Court in the adoption of the consent"

[39] In this Court's Order of 20 November 2018, we directed that the Appellate Court do adopt the consent of the parties.

[40] Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of *evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption.* This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only *once it has been formally adopted by the Court*. It is only from that stage, that the Court becomes *functus officio*. This Court having ruled that the Judgment of the Court of Appeal (dated 13 November 2015) was a nullity; and that Court having not *formally adopted the consent by parties,* was not yet *functus officio*.

[41] It follows, as we find, that the Appellate Court, in directing the parties, on 22 January 2019 to make formal application, was validly engaged in the *judicial process attendant upon the consent-adoption process,* entirely in line with the Orders emanating from this Court.

[42] From this standpoint, it is evident to us that the Appellate Court is at this stage engaged in the *lawful exercise of its jurisdiction*. It is under obligation to proceed on that basis; and so, this Court will not encroach on such a legitimate exercise of judicial remit.

F. CONCLUSION, AND FINAL ORDERS

[43] In the final outcome, we recall that the petitioner had contested the Court of Appeal's Order of 22 January 2019, an Order that directed the petitioner to lodge a formal application, to which the Attorney-General would have a right of reply. It devolves not to this Court to reckon on how the Appellate Court would have resolved such an application — as it was but a *procedural process for giving directions* on the specific terms of the consent. It is clear, then, as we have held, that the Court of Appeal was not *functus officio.*

[44] It follows, as is quite clear to us, that Petition No. 7 of 2019 is entirely *premature,* and is not a proper basis for invoking the jurisdiction of this Court. The Appellate Court's directions of 22 January 2019 stand in perfect consistency with the Orders of this Court of 20 November 2018.

[45] Consequently, our Orders are as follows:

(a) The petition of appeal dated 13 February 2019 is disallowed.

(b) Costs shall be borne by the parties respectively.

DATED and **DELIVERED** at **NAIROBI** this ***10th*** day of ***January, 2020.***

…….. **……..**

M. K. IBRAHIM **J. B. OJWANG**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……. **…….**

S.C. WANJALA **NJOKI NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…….

I.LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a

true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA