REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli. Nai 307 of 2003 (154/2003 UR)

JASBIR SINGH RAI …….. 1ST APPLICANT

IQBAL SINGH RAI ……..…….. 2ND APPLICANT

DALJIT KAUR HANS …….. 3RD APPLICANT

SARJIT KAUR RAI ……..…….. 4TH APPLICANT

AND

TARLOCHAN SINGH RAI …….. 1ST RESPONDENT

JASWANT SINGH RAI …….. 2ND RESPONDENT

SARBJIT SINGH RAI ……..…… 3RD RESPONDENT

RAI PLYWOODS (KENYA) LIMITED …….. 4TH RESPONDENT

SATJIT SINGH & RAM SINGH (ESTATE OF)… 5TH RESPONDENT

(*Application for the setting aside in toto of the judgment and order made on the 30th day of September, 2002*

In

H.C. C. A. No. 63 of 2001)

****

RULING OF OMOLO, JA

I must start this Ruling by pointing out that two conflicting principles, both of great importance to those who seek the decisions of the courts on various issues, are involved in the decision we are called upon to make in the application before us. Those two principles are:-

1. *That there ought to and must be an end to litigation; and*

2. That justice must be done and be seen to have been done in each case that comes before the courts for determination.

The courts in the Commonwealth have readily recognized that the two principles must somehow be harmonized in each particular litigation in which their application is brought into issue. In TAYLOR & ANOTHER VS. LAWRENCE & ANOTHER [2002] 2 ALL E.R. 353, the Lord Chief Justice Woolf, tracing the origins of the two principles, cited the speech of Lord Wilberforce in AMPTHILL PEERAGE CASE [1976] 2 ALL E.R. 411 and there Lord Wilberforce is recorded as saying:-

"*English law, and it is safe to say, all comparable systems, place high in the category of essential principles that which requires that limits be placed on the right of citizens to open or to reopen disputes. The principle which we find in the (Legitimacy Declaration Act 1858) is the same principle as that which requires judgments in the courts to be binding , and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognizes, be imperfect; the law aims at providing the best and safest solution compatible with human fallability and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so; these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: So the law allows appeals; so the law, exceptionally, allows appeals out of time; so the law still more exceptionally allows judgments to be attacked on the ground of fraud; so limitation periods may, exceptionally be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases where the facts justifying them can be strictly proved."*

In my view and with great respect, this citation sets out the basis for the long established principle that there ought to and must be an end to litigation over a particular issue. The courts expressly recognize that they are manned by human beings who are by nature fallible and that a decision of a court may well be shown to be wrong, either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made might well have made the decision go the other way. The Civil Procedure Act and the rules made thereunder expressly recognize this factor and has provided for the principle of review which is available to litigants under and within certain set limits. The Court of Appeal of Kenya, however, does not have a statutory provision similar to the one contained in the Civil Procedure Act. The absence of an express statutory provision in the Appellate Jurisdiction Act, *Cap 9* Laws of Kenya, similar to that contained in *section 80* of the Civil Procedure Act, does not and cannot mean that the law assumes and surrounds the Judges who sit in the Court of Appeal with an aura of infallibility when pronouncing on matters justiciable. I had occasion to remark in the case of REPUBLIC VS. MAKALI & OTHERS, Criminal Application No. 4 of 1994 that unlike the Popes of ancient times, Judges have never laid any claim to infallibility when they make pronouncements on law. The then Court of Appeal for East Africa accepted this position in DODHIA VS. NATIONAL & GRINDLAYS BANK LTD. & ANOTHER [1970] EA 195 when the Court declared the circumstances and conditions under which it would depart from its previous decisions, though the latter case, of course, dealt with the principle of *stare decisis*. But it is clear that even a final court of appeal can and does make a wrong decision on law and the issue is how such decisions are to be handled. The issue of how to handle an impugned decision is the subject of the dispute before us and I believe I have sufficiently shown that the first principle in contention, namely that there ought to and must be an end to litigation, is an ancient principle and derives its authenticity from a public policy basis. Yes, a party may be able to show that a decision is wrong either in law or upon some other reason. But for the interest of peace, in the interest of certainty and security, such a party might and is often told:

"*Even if all that you say is correct, yet the decision has been made and you must learn to live with it.*"

In 2000, there was a disputed presidential election in United States of America and the present President, Mr. George W. Bush won against the then Vice President Mr. Albert Gore. Mr. Gore challenged the

result of the election in the Supreme Court but he lost. He was not satisfied with the decision of the Supreme Court but he nevertheless accepted it, obviously because one could not imagine the United States of America being without a President while the matter was endlessly litigated in the Court. Gore did not ask the Supreme Court to review its decision. In my view, that is an illustration of the concept of litigation being brought to a finality for the sake and benefit of the public – see the case SUPREME COURT OF THE UNITED STATES NO 00-949 GEORGE W. BUSH et al., PETITIONERS VS. ALBERT GORE, Jr; et al on writ of certiorari to the Florida Supreme Court.

I now turn to the second principle in contention, namely that justice must be done and be seen to have been done in each and every litigation that comes before the courts. That principle, once again, is based on public policy – that the public must have confidence in the courts and their decisions, i.e. the public must have confidence in the judicial system itself and if issues such as bias on the part of a judicial officer is not dealt with and corrected, the public will lose confidence in the judicial system. Mr. Justice Gaudron of the Australian High Court remarks thus:-

"*Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system. -------"*

see CLENAE PTY LTD & OTHERS VS. AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED – a copy of which was made available to the Court.

So the second principle is equally important, if not more important than the first principle and it is the two of them that we are called upon by the present motion to balance and see whether both of them can be applied in Kenya at this stage of our development.

What is the relevance of these remarks to the dispute in hand? It is this: On 30th September, 2002, this Court, constituted by the now retired Mr. Justice of Appeal Shah, Mr. Justice of Appeal Ole Keiwua and Mr. Justice of Appeal O'Kubasu, delivered three separate judgments in Civil Appeal No. 63 of 2001 in which Jashbir Singh Rai, Iqbal Singh Rai, Daljit Kaur Hans and Sarjit Kaur Rai were the appellants while Tarlochan Singh Rai, Jaswant Singh Rai, Sarjit Singh Rai Investments Ltd., Rai Plywoods (Kenya) Ltd., Rai Products Limited, Rai Holdings Ltd., Tulip Properties Ltd., The Rai Expo Park Ltd., Tarlochan Singh Rai Ltd. Sarjit Singh and Ram Singh (Estate of)PBM Nominees Ltd, Kabarak Ltd. and Suwesh Kumar Bechor were the respondents. We need not concern ourselves with what the dispute in the appeal was; it is sufficient for us to state that the three learned Judges who sat on the appeal ordered that the appeal was to be and was dismissed on certain conditions; again we need not concern ourselves with those conditions. Shah, J.A who presided over the appeal wrote the leading judgment running into some fifty typed pages; Ole Keiwua, J.A's judgment which basically agreed with that of Shah, J.A ran into some seventeen typed pages. O'Kubasu, J.A simply agreed with the two judgments and had nothing useful to add to them. That, as we have said, was on 30th September, 2002. Matters rested there until 12th November, 2003, when the four appellants in the dismissed appeal filed a notice of motion stated to be pursuant to *sections 64* and *77 (9)* of the Kenya Constitution, *Section 3* of the Appellate Jurisdiction Act, and or *Rule 1 (2)* of the Court of Appeal Rules. The motion, apart from seeking an order for costs sought two basic orders, namely:-

"*1.the judgment of this Honourable Court delivered on 30th September, 2002 be set aside in toto and that the Appellants'/Applicants' appeal filed on 12th April 2001 be heard afresh before a differently constituted bench.*

3. all further proceedings in the High Court in winding up Cause No. 44 of 1999 (including the taxation of the principal Respondent's bill of costs) both in the High Court and the Court of Appeal be stayed pending the hearing of the said appeal."

The grounds stated on the face of the motion for seeking these very drastic orders were that:-

"*(a) Mr. Justice A. B. Shah who presided on the hearing was biased in favour of respondents, 1, 2, 3*

and 5 (in the said Appeal)

(b)the Court was not independent nor (sic) impartial.

(c) the appellants were not given a fair hearing.

(d)there was actual bias.

(e) rules of natural justice were not observed.

(f) Justice was perverted."

The motion was then supported by the affidavits of :-

(a) Jasbir Singh Rai sworn on 12th November, 2003;

(b)Josam Cheti Atwete sworn on 12th November, 2003;

(c) Indravadan Tribhorandas Inamdar sworn on 12th November, 2003.

The affidavit of Jasbir Singh Rai was in these terms:-

"1. I am the 1st Appellant herein and have authority from the other three Appellants to make and swear this affidavit. This affidavit is made in support of the Notice of Motion filed herein on even date.

2. I am a shareholder of Rai Plywoods (K) Ltd., the 4th respondent, herein (The Company) – The Company is essentially a family business concern based in Eldoret. I was a director of the Company from its inception in 1971 upto 1993. The Appellants own 38.5% of the equity of the Company.

3. In the year 1993, Tarlochan Singh Rai (my father) and Jaswant Singh Rai (my brother) the controlling shareholders in the Company and the Principal respondents herein removed me from the board of the company and I went to Uganda to start my own business.

4. The 2nd, 3rd & 4th Applicants (who are my brother, sister and mother respectively) and I were unsuccessful in the said appeal, namely Civil Appeal 63 of 2001 (Cor: Coram Shah, O'kubasu, and Ole Keiwua, JJ.A).

5. I have read and understood the Affidavit of JOSAM CHETI ATETWE herein sworn and filed contemporaneously herewith and by this my affidavit affirms (sic) that the matters deponed to therein did not come to my knowledge until well after the judgment of the court in this Appeal.

6. The following further incidents corroborate Mr. Justice Shah's ("the Judge") bias in favour of the principal respondents and the fact that the Court was not independent or impartial as a result of which the appellants did not receive a fair hearing:-

(a) I was in Court on 11th February, 2002 when the appeal was originally listed for hearing. As my lead counsel Mr. I. T. Inamdar was indisposed the Court (comprising of the same Coram as is mentioned in paragraph 4 hereof) adjourned the appeal but in an unusual move fixed fresh dates in Court and specifically assigned the appeal to be heard <u>only</u> by themselves;

(b) Throughout the hearing of the said appeal Mr. V.R. Goswami led by Mr. George Oraro represented the principal respondents.

(c) The Judge did not at any time before or during the hearing of the appeal disclose the personal relationship and friendship existing between him and Mr. Goswami as alluded to in the said affidavit of

Josam Cheti Atetwa despite the fact that at all times material to the suit and the appeal Mr. Goswami was a director and alternate acting Chairman of the company and had actually played an important role in many of the matters which were impugned in the proceedings.

(d) The Judge also did not disclose the relationship of client/advocate existing between him and Mr. Goswami as disclosed in the said affidavit of Josam Cheti Atetwe.

(e) Nor did the Judge disclose his role as Mr. Goswami's legal adviser and draftsman whilst occupying the position of a Judge of this Court;

(f) The Judge also did not disclose the fact that Mr. Goswami had rendered or rendered or was rendering legal services to him without charging him any fees.

(g) Throughout the hearing of the said appeal the Judge interrupted, hectored, shouted down and humiliated Mr. Inamdar. At one stage, Mr. Inamdar withdrew from the Court on the ground of the Judge's behaviour towards him.

7. I annex hereto as exhibit of a trued (sic) copy of a statement recorded and given to the Kenya Anti-Corruption Commission by Mr. Goswami which gives details of :-

(a) his personal friendship and relationship with the Judge.

(b) the relationship of client/advocate respectively between the Judge and Mr. Goswami;

(c) *their membership of (sic) and* played by each of them in the Masonic Lodge, Nyerere Road, Nairobi, viewed in the light of the 'broderhood' oath that binds them to help one another at all times; and,

(d) the "advisory" or "helping" role of the Judge towards Mr. Goswami in matters before the Court of Appeal inclusive of the appeal herein;

(e) the reference to the payment of a 'fee'.

8. The case of *The Express Limited V Manju Patel* cited by Mr. Goswami in the said statement is the notorious Civil Appeal No. 158 of 2000 where three sitting Judges (including the Judge) went public in court and in the media with altercations related to events preceding the delivery of the judgment therein. I set out in extenso Mr. Justice Kwach's opening statement in the said judgment:-

.....

9. Remarkably, Mr. Goswami was Counsel for the successful respondent Manju Patel in Civil Appeal Number 158 of 2000.

10. Save where otherwise stated the facts deponed to hereinabove are true and within my own knowledge."

The affidavit of Josam Cheti Atetwe consisted of a total of twenty-two paragraphs. Atetwe was a court clerk in Mr. Goswami's office and says he was in that office for ten years and left on 1st October, 2003. He did not say the circumstances which led to his leaving the office. But he swore about the close friendship and relationship between Mr. Justice Shah and Mr. Goswami, the visits to the Judge's Chambers by him and Mr. Goswami and the visits by the Judge to their offices, the dealings between the Judge and Mr. Goswami not only in this appeal but also over other cases, the lunches involving Mr. Justice Shah and Mr. Goswami, and Atetwe darkly hinted that money might have changed hands in respect of the appeal the subject matter of the dispute before us.

The affidavit of Mr. Inamdar, who was the advocate for some of the losing parties in the appeal, dealt almost exclusively with what he thought was the unfair treatment of him by Mr. Justice Shah during the

hearing of the appeal. In fact, he at some stage withdrew from conduct of the appeal and only returned after the matter was sorted out between him and the bench in the Chambers of Mr. Justice Shah.

Mr. Goswani also swore an affidavit denying any improper conduct between him and Mr. Justice Shah. His affidavit dated 18th May, 2003 ran into some 36 paragraphs. There were other affidavits but, fortunately for us, the Court does not have to consider the truth or otherwise of the contents of all the affidavits - at least not in this ruling.

Why do I say that the Court does not have to consider the truth or otherwise in the contents of the affidavits?

The answer is that on 20th November, 2003, one week after the motion was filed, the 1st, 2nd and 3rd respondents, namely Tarlochan Singh Rai, Jaswant Singh Rai and Sarbjit Singh Rai, through their advocates on record M/s Ochieng', Onyango, Kibet & Ohaga Advocates, filed what they designated as "NOTICE OF PRELIMINARY OBJECTION AS TO JURISDICTION AND POINTS OF LAW". That document had four grounds of objection, namely:-

"(i) THAT the Honourable Court of Appeal has no jurisdiction to hear and grant relief on the Application as drawn and filed.

(ii) THAT the Notice of Motion dated 12th November, 2003 is contrary to the Constitution of the Republic of Kenya.

(iii) THAT the Notice of Motion dated 12th November, 2003 is contra statute, i.e. the Appellate Jurisdiction Act; and

(iv) THAT the Notice of Motion dated 12th November, 2003 is based on evidence that has been obtained illegally and has been presented in breach of section 33 of the Anti Corruption and Economics (sic) Crimes Act, 2003."

When the hearing of the motion opened before us on 30th January, 2007, it was the notice of preliminary objection that took the centre stage and the present ruling deals exclusively with the grounds raised in the objection. Mr. Ochieng' Oduol opened the arguments before us. He told us that the motion violates the provisions of the Constitution and those of the Appellate Jurisdiction Act. According to Mr. Ochieng Oduol, the High Court and the Court of Appeal are creatures of the Constitution. The High Court is created under *section 60* of the Constitution and the jurisdiction and powers it has are set out under that section. The section falls under *CHAPTER IV*, headed "*THE JUDICATURE*" and *PART I* of that part is sub-titled "The High Court and Court of Appeal." The marginal note to *section 60* is "Establishment of the High Court." The section then provides as follows:-

"60 (1) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

(2) The judges of the High Court shall be the Chief Justice and such number, not being less than eleven, of other judges (hereinafter referred to as puisne judges) as may be prescribed by Parliament.

(3) The High Court shall be duly constituted notwithstanding a vacancy in the office of a judge of that Court.

(4) The office of a puisne judge shall not be abolished while there is a substantive holder thereof.

(5) The High Court shall sit at such places as the Chief Justice may appoint."

Then *section 64* concerns itself with the Court of Appeal and once again the marginal note to the section

is "Establishment of Court of Appeal." The section then provides:-

64 (1) There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.

(2) The judges of the Court of Appeal shall be the Chief Justice and such number, not being less than two of other judges (hereinafter referred to as judges of appeal) as may be prescribed by Parliament.

(3) The foregoing provisions of this Part shall apply in respect of the judges of appeal as they apply to puisne judges.

(4) Where a puisne judge has been appointed as a judge of appeal he may continue to exercise the functions of a puisne judge to enable him to complete proceedings in the High Court that were commenced before him prior to his being so appointed."

Basing himself on the provisions of *section 64(1)* of the Constitution, Mr. Ochieng Oduol submitted before us that the jurisdiction and powers possessed by the Court of Appeal can only be exercised in relation to appeals from the High Court and that such jurisdiction and power must be conferred on the Court of Appeal by law. Unlike the High Court, the Court of Appeal, contended Mr. Ochieng Oduol, has only appellate but no original jurisdiction. The motion under consideration alleged a violation or a breach of fundamental right which was not a matter dealt with either by the High Court whose decision was the subject of Civil Appeal No. 63 of 2001 or by the Court of Appeal in its decision on that appeal. Even if the matter being complained about is the violation of a fundamental right, Mr. Ochieng Oduol submitted that such an issue can only be dealt with by the Court of Appeal on an appeal from the decision of the High Court. *Section 84(7)* of the Constitution itself expressly provides for an appeal to the Court of Appeal from a determination of the High Court.

Mr. Oraro then took over from Mr. Ochieng Oduol and Mr. Oraro submitted that the motion before the Court does not seek the interpretation of a section of the Constitution as was the case in ***RAFIKI ENTERPRISES LTD VS. KINGSWAY TYRES & AUTOMART LTD*** *– Civil Application No.. NAI. 375 OF 1995* (unreported).

In the ***RAFIKI ENTERPRISES*** case, the motion was, as in the present application, brought long after the subject appeal had been determined. The motion sought the interpretation of the constitutional provision dealing with the appointment of acting judges and it was being contended that one of the Judges who had presided over the dismissed appeal had been appointed to act as a Judge of appeal contrary to the provisions of the Constitution. The Court heard the application and held that the Judge in question had been appointed in accordance with the provisions of the Constitution. This decision was made despite the fact that at the time the application was filed and at the time the decision was rendered there was no pending appeal. The position is exactly the same in the motion under consideration. I had the privilege of presiding over the ***RAFIKI ENTERPRISES*** Case. No issue of jurisdiction of the Court to hear and determine the motion was ever raised at any stage in the ***RAFIKI ENTERPRISES*** Case and at no portion of the Court's ruling was the issue of jurisdiction ever touched upon. In the present motion, the issue has been squarely raised. In my view, we must deal with it now as it was never dealt with in the RAFIKI ENTREPRISES Case.

Mr. Oraro submitted that in the RAFIKI Case an interpretation of the Constitution was asked for; in the present motion the Court is being asked to determine whether the constitutional rights of the applicants were violated during the hearing of Civil Appeal No. 63 of 2001. According to both Mr. Ochieng Oduol and Mr. Oraro, that question cannot be determined by this Court in the present motion. According to them the fundamental right allegedly breached by the bench which heard Civil Appeal No. 63 of 2001 is to be found in section 77 (9) of the Constitution which provides thus:-

" *77 (9) A court or other adjudicating authority prescribed by law, for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before a court or*

other adjudicating authority the case shall be given a fair hearing within a reasonable time."

This section falls under CHAPTER V of the Constitution and the heading for that chapter is:-

"*PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL".*

The applicants' complaint is that Mr. Justice of Appeal Shah who presided over the hearing of Civil Appeal No. 63 of 2001 was not impartial and if that was so, the applicants were denied their fundamental right to an independent and impartial adjudication and their appeal was not given a fair hearing . Both Mr. Ochieng-Oduol and Mr. Oraro submitted that even if that was the case, this Court cannot deal with that issue in this application. Section 84 of the Constitution which also falls under Chapter V provides the remedy and procedure to be followed where it is alleged that a fundamental right or freedom has been violated. Section 84 provides as follows:-

"*84 (1) Subject to subsection (6) , if a person alleges that any of the provisions of section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action in respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.*

(2) *The High Court shall have original jurisdiction to hear and determine an application made by a person in pursuance of subsection (1) –*

(a) to hear and determine ------

(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).

(3) If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.

(4) Where a question is referred to the High Court in pursuance of subsection (3), the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.

(5) ----------

(6) ----------

(7) A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal as of right."

If I correctly understood both Mr. Ochieng Oduol and Mr. Oraro, their contention appeared to be that where a person alleges a violation of a fundamental right or freedom the remedy provided by the Constitution itself is the unhindered access to the High Court, and any party aggrieved by the determination of the High Court has a right to appeal to this Court. Accordingly, the two learned Counsel submitted, the applicants have no right to raise that issue in this Court when the appeal in which they allege their rights were violated is no longer in existence. When we asked what would happen to the decision of this Court if the High Court were to find that the Court had violated a fundamental right of one of the parties to the dispute, we did not get a very clear answer.

In such a situation, would the High Court be at liberty to set aside the decision of the Court of Appeal,

which, it is to be remembered, was made pursuant to an appeal from the High Court itself?

I think I have sufficiently set out the arguments advanced in support of the preliminary objection that the motion before the Court does not lie, even if we were to assume that the facts as stated in the motion were true. That is the basis on which preliminary objections are taken-

"*Even if all the things you allege are true they do not entitle you to the relief (s) you seek"*

See MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DITRIBUTORS LTD [1969] EA 696.

I must now set out the submissions of the other side and I start with those of Mr. Inamadar, for the applicants. He first took issue with part of the decision in the RAFIKI Case where it was held that once the Court of Appeal has determined an appeal, it has no residual jurisdiction to re-open the appeal. He submitted that that holding is in conflict with the subsequent decisions of the Court in MUSIARA LTD vs. WILLIAM OLE NTIMAMA Civil Application No. 271 of 2003 (unreported) and CHRIS MAHINDA t/a NYERI TRADE CENTRE vs. KENYA POWER & LIGHTING CO. LTD, Civil Application No. Nai. 174 of 2005. In the case of Musiara Ltd., the Court was asked for two substantive orders and a third order in the alternative. These were for:-

"*1. Declaration that the Ruling or Order made*

by this Honourable Court on 3rd October,

2003 in Civil Application No. NAI. 228 of

2003 (UR 112/03) is null and void and/or

invalid.

2. That the said invalid Ruling or Order be recalled and cancelled.

3. Alternatively that the said Ruling and Order in Civil Application No. Nai 228 of 2003 (UR. 112/03) made on 3rd October 2003 be rescinded."

That motion was brought pursuant to *Rules 1 (2) , 56(2*) and *42(1)* of the Court of Appeal Rules. *Rules 1 (2)* provides:-

"*Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".*

Rule 56 provides:-

"*56 (1) An order made on application heard by a single Judge may be varied or rescinded by that Judge or any other Judge or by the Court on the application of any person affected thereby, if*

(a) the order was one extending the time for doing any act, otherwise than to a specific date; or

(b)the order was one permitting the doing of some act, without specifying the date by which the act was to be done, and the person on whose application the order was made has failed to show reasonable diligence.

(2) An order made on an application to the Court may similarly be varied or rescinded by the Court."

Rule 42 (1) merely sets out the method of bringing applications to the Court. In the body of the ruling,

the court considered various authorities among them RAFIKI ENTERPRISES LTD, LOCABAIL LTD VS BAYFIELD PROPERTIES LTD & ANOTHER [2002] ALL E.R. 63, LADD VS MARSHALL [1954] 3 ALL E.R 145, TAYLOR & ANOTHER vs. LAWRENCE & ANOTHER [2002] 2 ALL E.R. 353, R. V BOW STREET METROPOLITAN STIPENDIARY MAGISTRATE, EX parte Pinochet Ugarte (No. 2) [1999] 1 ALL E.R. 577. Having considered all these authorities, the Court in the MUSIARA LTD. Case made the following remarks:-

"*The present application raises the question of whether the Court of Appeal has jurisdiction to reopen an appeal (or indeed an application) if an appearance of bias can be demonstrated on the part of one of the members of the Bench that had determined the appeal. We think it does. The House of Lords held so in R. V BOW STREET METROPOLITAN STIPENDIARY MAGISTRATE Ex parte Pinochet Ugarte ……..... Under section 77 of the Constitution, persons are accorded the right to a fair trial by an independent and impartial court established by law. If bias is indeed established, there has been breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this Court in taking the exceptional course of reopening proceedings which it had already heard and determined. Of course we hasten to add that the jurisdiction should be exercised with utmost care knowing that this is the final Court in Kenya at the moment. The Court should do so only after it has first ascertained all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger (the two being the same), the court was biased.*
----------"

Mr. Inamdar and also Mr. Nowrojee who argued the matter on behalf of the 5th Respondent relied on this authority. The CHRIS MAHINDA Case did not involve the issue of bias. There the Court thought the applicant was merely asking it to rescind its earlier decision because the applicant was of the view that the Court had not correctly understood and consequently wrongly interpreted the law. The Court rejected the application just as it had rejected the application in the MUSIARA Case. But the Court expressly approved the position taken earlier in the MUSIARA LTD. Case. The Court said in the MAHINDA Case:-

"*However that does not mean that there are no circumstances in which the Court of Appeal can review, vary or rescind its decision. Civil Application 271 of 2003 (Nairobi). MUSIARA Ltd. V. WILLIAM NTIMAMA ----------was a case in which Musiara Ltd sought orders for a declaration by this Court that the Ruling or Order of this Court previously made by a different Bench should be recalled or cancelled or alternatively rescinded.*

In the present case we consider that there are no exceptional circumstances such as the establishment of bias on (sic) of bench or any significant injustice having occurred. This is merely a case where the applicant disagrees with a decision on a matter of interpretation of statute law. It is not, therefore, a case in which the applicant should be permitted to re-open the argument."

Once again both Mr. Inamdar and Mr. Nowrojee relied on this decision. They also relied on other authorities such as LAKHAMISHI BROTHERS LTD. VS. RAJA & SONS [1966] EA 313 and SOMANI'S VS. SHIRINKHANU (NO 2) [1971] EA 79. They relied particularly on the statement of Law, J.A in the latter case where he says:-

"----------. *This court has always refused invitations to review its own decisions except so as to give effect to its intention at the time the judgment was written. To depart from this rule would in my opinion be to adopt a most dangerous course. The only exception I can envisage is where the applicant has been wrongly deprived of the opportunity of presenting his argument on any particular point, which might lead to the proceedings being held to be null and void, a consideration which is absent in this case."*

In this passage, Law J.A asserted the finality of this Court's judgment and according to that learned Judge the only exception he could think of for setting aside a decision of the Court would be where a party to the proceedings had, through no fault of his own, been deprived of the right to a hearing which situation would render the proceedings resulting in the judgment to have been null and void and hence the setting aside of the judgment. Mr. Inamdar and Mr. Nowrojee relied on this point and stressed that there are situations in which a final judgment of the Court can be set aside. The issue of bias on the part of a Judge would be another example, submitted counsel.

Perhaps before I go any further I ought to comment on the issue of failure to hear a party given by Law, J.A as a possible exception. I do not know what the state of the Court's rules was at the time Law , J.A gave his decision, but as of to-day, I do not think the failure to hear one party to an appeal, if it be shown there was one, would call for consideration of the issue of the decision being null and void. *Rule 99* of the Court's rules specifically provides for what is to happen in such a situation. That rule is in the following terms:

"*99(1) If on any day fixed for the hearing of an appeal the appellant does not appear , the appeal may be dismissed and any cross-appeal may proceed, unless the Court sees fit to adjourn the hearing:-*

Provided that where an appeal has been so dismissed or any cross-appeal so allowed the appellant may apply to the Court to restore the appeal for hearing or to re-hear the cross-appeal, if he can show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing.

2. If the appellant appears and the respondent fails to appear, the appeal shall proceed in the absence of the respondent and any cross-appeal be dismissed, unless the Court sees fit to adjourn the hearing:

Provided that where an appeal has been allowed or cross-appeal dismissed in the absence of the respondent, he may apply to the Court to re-hear the appeal or to restore the cross-appeal for hearing, if he can show that he was prevented by sufficient cause from appearing when the appeal was called on for hearing.

(3) ----------

(4) ----------"

It is clear to me from these provisions that when a party has not been heard through no fault of his own there cannot be any finality in the judgment and I do not imagine what other kind of situation Law, JA had in mind which would prevent a party from being heard, unless it be a situation where the Court itself goes berserk and simply prevents a party from addressing it. *Rule 55 (1) (2)* and *(3)* provide for applications which are dismissed without being heard on their merit.

Be that as it may, Mr. Inamdar and Mr. Norwojee relied on various other authorities from other jurisdictions showing that the courts in those jurisdictions have had no difficulty in re-opening a concluded appeal. The Court of Appeal in England is not the final court in that country but it is an intermediate court of appeal. At times its decisions may be final where, for example, it has refused to grant leave for a further appeal to the House of Lords and that House has also in turn refused to grant leave. Yet the Court of Appeal in England has held it has jurisdiction to re-open a concluded appeal. That was why the case of TAYLOR & ANOTHER VS. LAWRENCE & ANOTHER already cIted herein was made available to us. Again the House of Lords which is really the final court in the United Kingdom, has held without any difficulty that it has jurisdiction to re-open and rehear a concluded appeal. That was why the PINOCHET UGARTE Case already cited herein was made available to us. In that case Lord Browne-Wilkinson who delivered the leading judgment of the House had this to say on the question of jurisdiction:-

"*As I have said, the respondents to the petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment that concession was rightly made both in principle and on authority.*

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Cassell & Company Ltd. vs. Broome (No 2) [1972] 2 All E.R. 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.

However, it should be made clear that the House will not re-open any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought the first order is wrong."

These are the decisions and the principles upon which the applicants and the 5th respondent rely to rebut the preliminary objections raised by those respondents represented by Mr. Ochieng Oduol, Mr. Oraro, Mr. Gautama and Mr. Kingara. In addition Mr. Inamdar and Mr. Nowrojee cited the provisions of *section 3* of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya and also section 3 of the Judicature Act, Cap 8 Laws of Kenya. The latter section sets out the manner in which the High Court and the Court of Appeal are to exercise their respective jurisdiction. *Section 3* of the Appellate Jurisdiction Act is clearly relevant and I must set out those provisions.

"*3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.*

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."

It was submitted that these provisions support the contention being advanced on behalf of the applicants that though the Court's jurisdiction is appellate, yet in an appropriate case it may re-open and re-hear an appeal already concluded in the Court of Appeal and the House of Lords have done it in the United Kingdom. Mr. Oraro's answer to these submissions was basically that the Kenya Court of Appeal is a creature of the Constitution and that the Court of Appeal in England is not the final court there. Mr. Oraro submitted that the United Kingdom does not have a written constitution and one would be hard-put to point out any particular legislation in the United Kingdom which, as it were "creates" any court there, in particular the House of Lords. No doubt, there are statutes setting out the operations of the courts in the United Kingdom and how those courts exercise their power, but both Mr. Inamdar and Mr. Nowrojee were unable to point out to us any particular statute which "created" the House of Lords. That House, in my view, is part and parcel of the British constitutional history and development, unlike the situation in Kenya where the courts are established in the written Constitution or under legislation made pursuant to the Constitution.

For my part, I would start from this stand-point. The Court of Appeal in Kenya, just like the High Court and all other courts subordinate to the High Court, are all creatures of various written laws. The High Court and the Court of Appeal are created under the Constitution. The courts of the magistrates are created under the Magistrate's Courts Act, *Chapter 10* of the Laws of Kenya. The Kadhis' Courts are created under *section 66* of the Constitution which also sets out the qualifications of the Chief Kadhi and other Kadhis. The Kadhis Courts Act *Chapter 11,* Laws of Kenya, made pursuant to the provisions of the Constitution sets out the jurisdiction and powers of Kadhis' Courts. The Magistrates Courts are made pursuant to *section 65* of the Constitution which provides that:

"*Parliament may establish courts subordinate to the High Court and courts martial and a court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by law."*

Under this section of the Constitution, Parliament has created various adjudicating authorities, like the Rent Restriction Tribunal under the Rent Restriction Act , *Chapter 296* Laws of Kenya, the Business Premises Tribunal created under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, *Chapter 301*, Laws of Kenya, and the Industrial Court under the Trade Disputes Act, *Chapter 234* Laws of Kenya . These are but just a few examples. The point I am making is that the courts in Kenya, from the very lowest to the very highest, derive their very existence from some legislation. Indeed *section 77 (9)* of the Constitution upon which reliance is placed specifically provides that:-

"*A court or other adjudicating authority ---------- shall be established by law ------"*

In the United Kingdom on the other hand, no particular statute can be pointed out as being the creator, as opposed to being the regulator, of the House of Lords. As I have stated, the history of that ancient institution is clouded in the mist of time and is part and parcel of the history of that nation. In Kenya, the only court with unlimited original jurisdiction in civil and criminal matters is the High Court. Nevertheless, if the High Court wants to re-open a concluded determination, it has *section 80* of the Civil Procedure Act and *Order 44* of the Civil Procedure Rules. But I doubt whether even the High Court would have the jurisdiction to re-open a concluded criminal matter and this would cause no-one any hardship or injustice. There is the Court of Appeal on top of the High Court and the Court of Appeal can even extend time to enable an appeal to be lodged out of time. But there is no provision in the Appellate Jurisdiction Act similar to *section 80* of the Civil Procedure Act under which *Order 44* of the Civil Procedure Rules was made. I have set out the provisions on the Constitution relating to the establishment and jurisdiction and powers of the Court of Appeal. The Court can only hear appeals from the High Court. Though we are a court and have power to hear appeals, it would be unlawful for the Court to hear an appeal filed directly from a magistrate's court or a Kadhi's court or any other adjudicating authority. Those appeals must first pass through the High Court and only decisions of the High Court can be brought before this Court if, and only if, there is a right of appeal.

There can be no doubt from the material placed before us that on 13th November, 2003, when the present motion was filed, there was no appeal pending before the Court. The appeal in question had been concluded and decided on 30th September, 2002 , more than one year back. We are asked to re-open that appeal and re-hear it. The power to re-open and rehear an appeal is to be found nowhere in the Constitution. It is to be found nowhere in the Appellate Jurisdiction Act. *Section 77 (9)* of the Constitution which is cited as being the basis of the motion does not give the Court the power to re-open and re-hear an appeal. Nor does *section 64* of the Constitution. *Section 3* of the Appellate Jurisdiction Act says that when "*hearing and determining an appeal in the exercise of jurisdiction conferred on it by the Act, the Court has power, authority and jurisdiction vested in the High Court*." But that power, authority and jurisdiction is to be exercised.

"*For all purposes of and incidental to the hearing and determination of any appeal -----"*

Clearly that section cannot be the basis for concluding that the Court has the power to re-open and re-hear an appeal.

We cited a passage from the judgment of Lord Browne-Wilkinson in the PINOCHET UGARTE Case where both sides agreed the House of Lords had jurisdiction to re-open and re-hear an appeal. It was the judgment of Lord Browne-Wilkinson that the concession was rightly made both in principle and authority. He held that in principle it must be that the House of Lords as the ultimate court of appeal, have power to correct any injustice caused by an earlier decision of the House.

But compare that position with the stand which has always been taken by this Court and its predecessor. In LAKAMSHI BROTHERS VS. RAJA & SONS [1966] EA 313, Sir Charles Newbold, having stated at the opening of his judgment that:-

"*This is a motion to recall, review and set aside a judgment of this Court on grounds which make it quite clear the review asked for does not seek to substitute a new judgment carrying out the intention of this Court when it delivered the original judgment contrary to that intention ----------",*

concluded the matter as follows:-

"*This Court is now the final Court of Appeal and when this Court delivers its judgment, that judgment 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."*

At the time of this declaration Kenya had a written Constitution, and the issue of the Court re-opening and re-hearing an appeal under the provisions of the Constitution did not arise. Nor was it said the Court could do so under *section 3* of the Appellate Jurisdiction Act or under *Rule 1 (2)* of the Court's Rules. It is even difficult to imagine that Sir Charles Newbold would not be aware of issues such as bias on the part of the Court or fraud which might be perpetrated either on the Court itself or on one of the parties to the litigation. No exceptions were made to the situation. The other two members of the Court, namely Duffus, Ag. Vice President, and Law, J.A unanimously endorsed the views of the President of the Court. The matter was once again raised in SOMANI'S VS. SHIRINKHANU which we have already cited. There Ag. President of the Court Spry stated:-

"*On the more general ground, this court is not a court of unlimited jurisdiction. It is a creation of statute and enjoys only such jurisdiction as is conferred on it by statute. It has no inherent jurisdiction.*----------

This is an unfortunate situation and in the particular circumstances, I wish that we had the power to recall and review our judgment but I am satisfied that we have no such power. ----------"

Acting Vice President Law agreed and set out the exception with regard to the failure to hear a party which might result in the judgment being held to be a nullity. I have already dealt with that aspect of the matter. This decision was in 1971. The Constitution was already in place and no one ever suggested refuge could be had under the Constitution to enable the Court re-open and re-hear an appeal.

This was, once again, the position taken by the Court in the RAFIKI ENTERPRISES Case which Mr. Inamdar vigorously sought to persuade us was wrongly decided with regard to the issue of inherent jurisdiction. In my respectful view, the RAFIKI ENTERPRISES Case closely followed in the footsteps of the two earlier decisions and I would see absolutely no reason to change anything stated therein. It was merely contended that the decision was wrong as concerns the issue of inherent jurisdiction in the course of hearing an appeal on the basis that cases such as TAYLOR VS. LAWRENCE are not in agreement with it. With respect, that cannot be a reason for over-ruling a local decision based as it was on the local cases and local statutes.

That now brings me to a consideration of this Court's decisions in MUSIARA LTD VS. WILLIAM OLE NITIMAMA and the CHRIS MAHINDA Cases. I have already set out the views of the Judges who sat on those cases. One notable feature in those cases is that like in the case of RAFIKI ENTERPRISES, no one raised the issue of the Court's jurisdiction in any of the two cases. In the present application, the issue was raised in writing, was extensively argued and forms the basis of this Ruling. We cannot avoid dealing with the issue of jurisdiction on the basis that since it was not raised in the previous cases, it cannot now be raised in the present motion.

Again in both the MUSIARA LTD. and MAHINDA Cases, the ratio *decidendi* in each one of them was not that the Court of Appeal has the power to re-open a decided appeal. Such a decision was not necessary for the decision of the respective benches. The MUSIARA LTD. decision was based on *Rule 56(2)* of the Court's Rules which merely deals with rescission of orders made by a single Judge or by the whole Court with regard to the extension of time for doing any act otherwise than to a specific date or if the order was one permitting the doing of some act, without specifying the date by which the act was to be done. No-one could contend that *Rule 56(2)* could ever justify the re-opening and rehearing of a concluded appeal. Nor can *Rule 1 (3)* justify such a conclusion. It has never done so in the previous cases. The remarks made by the Court with regard to the re-opening and re-hearing of an appeal in the MUSIARA LTD Case, were, accordingly, made orbiter as they were not necessary for the

determination of the issue at hand . The MAHINDA Case merely repeated those remarks and must accordingly, be treated in the same manner.

I have said enough, I believe, to show that when one considers our statutory position and the authorities based on the statutes this Court still has no jurisdiction to re-open, re-hear and then recall its earlier decision and substitute it with another. Nor do I subscribe to the view expressed by Mr. Oraro that a party who feels that the Court, by its decision, has injured his or her fundamental right has the right to go to the High Court so that that court can, in effect , reverse the decision of this Court made on an appeal from a decision emanating from the very self-same High Court. It is to be remembered that there is an appeal from the decision made by the High Court pursuant to the provisions of the Constitution and in my view it would be an absurd situation to keep moving from the Court of Appeal back to the High Court and then back to the Court of Appeal again. I have always thought the law is no friend of absurdities.

In the end, I have myself come to the conclusion that this litigation ended on 30th September, 2002 when this Court gave its judgment. I recognize and appreciate that in some instances this position may create an injustice to a particular litigant and like Acting President Spry, I must also wish that we had power to recall and review our judgments. I am, however, not saying that I wish we had the power so as to re-open and review the judgment in this particular appeal, i.e. Civil Appeal No. 63 of 2001. I am wishing for that power in a generalized way. But the Court does not have that power. Perhaps I can at least hope that Parliament may, in its own good time, one day intervene in the matter. Until such time as such intervention would have come, this motion cannot proceed.

In the end I would myself uphold the preliminary objection raised on behalf of the 1st, 2nd , 3rd and 4th respondents and the consequence of my upholding the preliminary objection must be that the notice of motion dated 12th day of November, 2003 and lodged in this Court on 13th November, 2003 is incompetent and does not lie. I would myself order it struck out with the costs thereof to the 1st, 2nd, 3rd and 4th respondents to be paid by all the applicants and the 5th respondent. I had the advantage of reading in draft form the Ruling prepared by Bosire, J.A respecting one aspect of the matter. I entirely agree with that Ruling. The other members of the Court agree and those shall be the orders of the Court.

Dated & delivered at Nairobi this 7th day of December, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

RULING OF BOSIRE, J.A

The proceedings before us are not ordinary. The applicants, Jasbir Singh Rai, Iqbal Singh Rai, Daljit Kaur Hans and Sarjit Kaur Rai seek an order reopening Civil Appeal No. 63 of 2001, which was heard and finally determined by a bench comprising Shah, Keiwua and O'Kubasu, JJ.A more than one year before their application. There is no express provision in the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, or the Rules made thereunder to wit the Court of Appeal Rules providing for the reopening of concluded appeals save as provided under *rule 99*. Nor are there clear provisions in the Constitution and other statute law authorizing such an application. The applicants have however cited *sections 64* and *77(9)* of the Constitution, *section 3* of the Appellate Jurisdiction Act, and *section 3* of the Judicature Act, Cap 8 Laws of Kenya, and *rule 1(2)* of the Court of Appeal Rules as the enabling provisions, and on the basis of those provisions, prayed for orders that:

(a) The judgment of the Court in the aforesaid appeal delivered on 30th September, 2002 be set aside and the appeal to which it relates be heard afresh before a fresh differently constituted bench.

(b) All further proceedings in the High Court Winding-up Cause No. 44 of 1999 (including the taxation of the Principal Respondents' bill of Costs) both in the High Court and the Court of Appeal be stayed pending the rehearing of the aforesaid appeal.

(c) The costs of the application be provided for.

It is significant to note that only the named respondents were served with the application. These are Tarlochan Singh Rai, Jaswant Singh Rai, Sarbjit Singh Rai, Rai Plywoods (Kenya) Limited, and the Estate of Satjit Singh and Ram Singh. That notwithstanding, the grounds which were preferred for the application were, that Mr. Justice A.B. Shah, who presided over the hearing of the appeal was biased in favour of the appellants; the Court was neither independent nor impartial; the appellants were not given a fair hearing; there was actual bias; rules of natural justice were not observed and that justice was perverted. Clearly the grounds not only attacked the integrity of the Judges but also their independence.

Three affidavits were filed in support of the application, but although none of the Judges were served with the application, Mr. Justice Shah became aware of it and on 19th May 2006, about two and half years after it was filed, filed an affidavit, through his advocate, Patrick Kiage, responding to allegations which were made against him personally in the three affidavits. His advocate also filed a notice of appointment of advocate. These two documents became the subject matter of an objection which was raised, in *limine*, by Mr. Kigano, counsel on record for the applicants, who were the unsuccessful parties in the aforesaid appeal.

Mr. Kigano's objection which was supported by Messrs Gautama and Nowrojee for the 4th and 5th respondents respectively, was based on public policy. He urged the view that it is not the practice of the courts for Judges to defend their decisions even though commonly many things are said against them when their decisions are considered on appeal. Besides, he said, it was improper for the learned Judge and his counsel to file papers without the leave of the Court. Mr. Kigano, as also Mr. Gautama, did not think Mr. Justice Shah's affidavit should have been admitted at all. Mr. Nowrojee's position was slightly different. In his view, whether or not to admit such an affidavit was a matter within the discretion of the Court. He cited the English case of *Locabail Ltd. v. Byfield Properties [2000] 1 ALL ER 65* at 86 h, in support of his submission. That authority is quite persuasive though based on English practice. The English, unlike Kenyans, have no written Constitution, and therefore whether or not that decision can be applied to Kenya without modification is doubtful.

We heard Mr. Kiage on the matter. His submission was that allegations of impropriety having been made against his client, rules of fairness demanded that he be heard on these allegations. He pleaded with us to, at the very least, let his client's affidavit remain on record. He did not seriously press that he be heard orally on the matter.

We reserved a ruling which we delivered on 9th June 2006. In that ruling we held that it was not desirable to retain on record both Mr. Justice Shah's affidavit and his advocate's notice of appointment of advocate, and we accordingly expunged them from the record. We reserved our reasons for the ruling until after hearing a formal preliminary objection to the application. We heard the objection fully, and this ruling is in relation to that objection and includes reasons for expunging the two documents from the record of the application.

Mr. Justice Shah is a retired Judge of this Court. His role in the aforesaid appeal was that of a Judge. His desire to be heard in this application raises a serious conflict between two fundamental public policy principles, the first one being the rule of natural justice that no person should be condemned unheard. The second principle is that a litigant should be heard fairly by an independent and impartial court. Both principles are entrenched in *section 77(9)* of the Constitution, which in addition provides for the independence of Judges. *Section 77(9)*, above, provides thus:

"77 (9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

Mr. Justice Shah is seeking to be heard in the application because he believes that certain adverse findings are likely to be made against him. He wants an opportunity to clear his name. Yet the same sub-section provides that a court established by law should be independent. The term "independent" has a broad meaning. *Section 6* of the Judicature Act, and *section 129* of the Evidence Act, provide for immunity from actions and question at the suit of an individual. These aspects relate to the independence of Judges.

In *Garnett v. Ferrand (1827) 6B &C 611* at P. 625 Lord Tenterden CJ explained why such immunity is essential. He rendered himself thus:

"This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be."

In a more recent decision in the case of *Sirros v. Moore [1974] 3 WLR 459*, the Court of Appeal in England quoted the above excerpt with approval and itself said:

"If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment" it applies to every Judge whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: If I do this, shall I be liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction – in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable ….. He should not be plagued with allegations of malice or ill-will or bias or anything of the kind ….."

It is quite clear from the above quotation that the independence of Judges goes beyond immunity against suits. It extends even to aspects in which Judges may be made to feel so uncomfortable by allegations of impropriety being made against them as to make them want to defend themselves. The policy relating to independence of Judges ensures that Judges work without worrying about engaging counsel to draft documents to answer allegations of impropriety against them in matters they handle in the course of their work as Judges. It is a policy which enables the courts, in appropriate cases, to strike out or dismiss summarily motions aimed at undermining the independence of Judges. That is why a Judge enjoys the privilege of not being compelled to answer any questions as to his own conduct in court as such Judge or Magistrate, or as to anything which came to his knowledge in court as such Judge – see *section 129* of the Evidence Act.

However, that is not to say that allegations of bias or malice may not be raised at all against Judges. It all depends at what stage of the proceedings such allegations are made. I will return to this issue later on in this ruling.

In Kenya, this Court, in the case of *Davis & Shirtliff Ltd V. The Attorney General* [1978] KLR 272, re-echoed this principle of the independence of Judges. The Court held that the protection provided to judicial officers in general is to enable them to function freely and effectively, and to be free from harassment by litigious individuals.

As stated earlier, the principle that a person should not be condemned unheard is so fundamental that several decisions of various courts have been overturned for not complying with that public policy principle.

In the matter before us, the two principles above are in conflict. The applicants have made serious

allegations against a Judge concerning his judicial functions. No matter that he is a retired Judge. The learned Judge himself feels compelled to respond to the allegations which have been made against him. How should the two principles be dealt with in the circumstances?

In *Conway v. Rimmer [1968] AC 910*, Lord Reid, in considering a similar conflict rendered himself, in pertinent part, as follows:

"….. *courts have and are entitled to exercise a power and duty to hold a balance between the public interest as expressed by a Minister to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice."*

In balancing the conflicting rights, the court exercises judicial discretion. It is a discretion which the court exercises to obviate fundamentally undermining or weakening the advancement of justice. The court engages in a delicate balancing which may lead to one principle superseding the other, and by doing so, hardship and inconvenience may be caused to one party or several parties in the litigation, as the case may be.

It is quite clear that the applicants feel that they were not given a fair hearing in the appeal. It is also true that Mr. Justice Shah feels that in the interests of justice and fairness, he should be heard on the allegations made against him. But what will be the consequences of hearing him in this matter? Hearing him might provide a ready precedent to other Judges who will in future feel hurt by allegations of impropriety against them and they too will seek to defend themselves. That will fundamentally affect the administration of justice as several judicial officers are likely to be made to feel anxious as to the correctness or otherwise of their decisions and their independence will thereby be undermined. They will not feel independent. Yet the issue of the independence of judicial officers is so fundamental that anything which threatens it should be resisted. As I stated earlier, *section 129* of the Evidence Act protects Judges from answering any questions relating to matters they have handled or are handling. The policy of the law appears to me to be that a Judge should not be placed in the position Mr. Justice Shah finds himself at the moment. Nor should a Judge be allowed to enter into the arena of litigation concerning matters he is or was seised of. I do not want to be understood as saying that there are no instances in which a Judge may be called upon to respond to certain allegations of bias or other impropriety against him. *Section 129* of the Evidence Act does, as I stated earlier, provide for a higher court calling upon a Judge to answer certain questions on a matter before him which he has knowledge of. But these are the exceptions and arise in extreme cases, this not being one. In general the circumstances must be those envisaged by *section 129*, above. There may also arise situations where a litigant objects to a particular Judge hearing his matter on grounds of alleged prejudice or malice. However, these are raised before or in the course of hearing a matter. In such circumstances, the Judge concerned has the opportunity of considering the merits or otherwise of the objection raised, and if there be merit, then the Judge concerned would recuse himself from hearing the matter. For reasons which I will set out later in this ruling, I do not think allegations of bias should ordinarily be raised after judgment in a matter before this Court.

In the *Locabail case* (supra) in a passage cited to us by Mr. Nowrojee, the Court of Appeal in England held that the Court could and should accept a statement from a Judge as to his or her state of knowledge of facts relevant to a bias allegation. The court rendered itself thus:

"Mr. Mann, counsel for Locabail, submitted that there was no absolute rule as to whether or not the court should accept a statement from the Judge as to his or her state of knowledge of facts relevant to a bias allegation. He submitted that although the court could not investigate the Judge's motives, and so could not accept a statement from the Judge that he was not biased, the court could accept, and if necessary test by reference to the facts of the case, statements by the Judge as to what he knew or did not know at the relevant time. We think this is right and in accordance with authority." (see P. 86 h).

That was a decision of the Court of Appeal, which is not the final court in England. There is above that court the House of Lords. Besides, we have *section 129* of the Evidence Act (supra) which limits the matters upon which a Judge may be called upon to explain. The above decision is of little if any

assistance. The circumstances under which a Judge may be permitted to respond to certain matters are circumscribed and an affidavit as was filed by Mr. Justice Shah is not within the ambit of those circumstances. In my view, the affidavit was filed contrary to public policy. Having come to that conclusion, I do not think the issue of leave to file the affidavit arises.

Section 64 of the Constitution was cited as one of the enabling provisions for the application before us. The section establishes the Court of Appeal with jurisdiction and powers in relation to appeals from the High Court "as may be conferred by law." The law which confers jurisdiction on that Court is the Appellate Jurisdiction Act. The applicants cited *section 3* of that Act in support of their application, *sub-section (1) (a)* of which provides that "the Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law."

What is before us is not an appeal. This Court had heard and determined Civil Appeal No. 63 of 2001. The Appellate Jurisdiction Act and Rules made thereunder do not provide for review of decisions of the Court relating to appeals 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 of 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 the power to this Court to reopen concluded proceedings outside those provided under rules 99(1) and 55(3), above.

The parties to Civil Appeal No. 63 of 2001 were present when the appeal was heard. They presented submissions and a considered judgment was pronounced. In those circumstances, the applicants' case does not fall within either *rule 55(3) or 99(1)* of the Court of Appeal Rules.

The issue before us therefore is whether the applicants' appeal having been heard and determined, this Court has the jurisdiction to re-open the appeal. We were addressed at great length on this by counsel on both sides and my brother the Hon. Mr. Justice Omolo, J.A has dealt with those submissions. I have had the advantage of reading in draft form the conclusions he has come to and the reasons thereof and I agree with those conclusions and reasons he has given for them. I wish however, to state that the Court of Appeal is the final Court in Kenya. The appellate process ends there. Whatever decisions which emanate from the Court, except those I have stated above, are final and binding on the parties concerned. This application appears to challenge the doctrine of finality. This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down. It is a doctrine or principle based on public interest. As I stated earlier, there are instances where the public interest principles are in conflict and the courts must balance one aspect against another and decide which one supersedes the other, of course, depending on the facts and circumstances of each case. The conflict here is that the applicants feel they were not given a fair hearing by an impartial Court. The principle of finality requires that litigation should come to an end. On the basis of the existing rules of practice, the applicants were heard by this Court and judgment was pronounced.

In my view, the issue of bias raised here has to be considered in light of the provisions of the Constitution and more specifically *section 77(9)*. The wording of that sub-section presupposes that the issue of bias has to be raised before or during the hearing of a matter. The sub-section provides, in pertinent part, as follows:

"*…..the case shall be given a fair hearing within a reasonable time."*

In courts subordinate to this one, I think the issue may, in an appropriate case, be raised on appeal if bias is discovered after the matter is finally determined by those courts. However, in the case of this Court, unless the issue is raised before an appeal is heard, it will mean that it cannot be properly raised. The Court would have become *functus officio*. Moreover, as this Court has no original jurisdiction, the issue of bias cannot be properly raised for the Court to inquire into whether fundamental Constitutional rights have been breached. That will entail the calling of evidence and the examination and cross-

examination of witnesses which this Court cannot legally do. This Court may only handle such Constitutional issues as do not entail the reception of fresh evidence except as provided under *rule 29* of the Court of Appeal Rules.

In the circumstances, I do not think this Court has the jurisdiction to entertain this application. In the result, I would strike out the application dated 12th November 2003 and filed in Court on 13th November 2003 for want of jurisdiction. I would award the costs of the application to the 1st, 2nd, 3rd and 4th respondents to be paid by all the appellants and the 5th respondent.

Dated and delivered at Nairobi this 7th day of December, 2007.

S.E.O BOSIRE

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JUDGE OF APPEAL

RULING OF GITHINJI, J.A.

I have had the advantage of reading the Ruling of Omolo, J.A. in draft. His Lordship after an exhaustive analysis of the written law and relevant case law has reached the conclusion that this Court has no jurisdiction to re-call and re-open an appeal after it has been heard and conclusively determined.

On my part, I entirely agree with that decision. However, I will say a few things in view of the public importance of the matter and for the reason that we are departing from two recent decisions of this Court.

The four applicants herein, *Jasbir Singh Rai, Iqbal Singh Rai, Daljit Kaur Hans* and *Sarjit Kaur,* filed *Winding Up Cause No. 44 of 1999* in the superior court against the five respondents on or about 31st August, 1999. The applicants sought various orders including an order for disposal of shares owned by the applicants in *Rai Plywoods (Kenya) Limited* (4th respondent) and another company. They also sought as an alternative relief – an order for winding up of the 4th respondent. After the filing of the winding up cause, the applicants made a formal application seeking leave to join five other companies as additional respondents to the petition. The respondents on their part made an application for an order that the winding up petition be struck out as being an abuse of the process of the court.

The superior court heard the two applications together and dismissed the application for leave to join five other respondents. The superior court while not striking out the petition made a finding that the offer by *Tarlochan Singh Rai,* (1st Respondent); *Jaswant Singh Rai,* (2nd respondent) and *Sarbjit Singh Rai,* (3rd respondent) to purchase the shares held by the applicants in the two companies at a price to be agreed or in default of agreement by arbitration was in most respects reasonable. The applicants being aggrieved by the decision of the superior court filed – *Civil Appeal No. 63 of 2001* in this Court. The appeal was by a unanimous decision dismissed with costs by this Court (Shah, O'Kubasu and Ole Keiwua, JJ.A.) on 30th September, 2002. The Court in addition struck out the winding up petition and stayed all further proceedings in the superior court pending the conclusion of the arbitral proceedings as to valuation of applicants' shares for purchase by the 1st, 2nd and 3rd respondents.

On 13th November, 2003, the applicants filed a Notice of Motion in this Court under *sections 64; 77 (9)* of the Constitution; *section 3* of the Appellate Jurisdiction Act (Cap 9); *section 3* of the Judicature Act and *Rule 1 (1)* of the Court of Appeal Rules for the main order that:

"*1. The judgment of this Honourable court delivered on 30th September, 2002 be set aside in toto and that the Appellants/Applicants appeal filed on 12th April 2002 be heard afresh before a differently constituted bench".*

The application is based on six grounds, namely, that:

"*a. Mr. Justice A. B. Shah who presided on the hearing was biased and in favour of respondents 1, 2, 3 and 5 (in the said appeal).*

b. *The court was not independent or impartial.*

c. *The appellants were not given a fair hearing.*

d. *There was actual bias.*

e. *Rules of natural justice were not observed.*

f. *Justice was perverted".*

Those grounds are supported by affidavits.

The 1st, 2nd and 3rd respondents filed a notice of preliminary objection to the application on the ground of jurisdiction. The preliminary objection is simply that this Court has no jurisdiction to recall and to re-open a concluded appeal. We have been fully addressed on the preliminary objection by eminent counsel.

It is appropriate at the outset to quote fully and in seriatim the specific provisions of the law on which the application is founded.

First, *section 64 (1)* of the constitution provides:

"*There shall be a Court of Appeal which shall be a superior court of record and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law".*

Secondly, *section 77 (9)* of the Constitution provides in part:

"*A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial …..…".*

Thirdly, *section 3 (1)* of the Appellate Jurisdiction Act states:

"*The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under the law".*

Fourthly, *section 3 (1)* of the Judicature Act provides:

"*The jurisdiction of the High Court the Court of Appeal and all subordinate courts shall be exercised in conformity with –*

(a) *the Constitution.*

(b) *Subject thereto, all other written laws …..…..*

(c) *Subject thereto and so far as those written laws do not extend or apply, the substance of common law, the doctrines of equity and statutes of general application in force in England on the 12th*

August, 1897, and the procedure and practice observed in courts of justice in England at that date;

But the common law, doctrines of equity and statutes of general application shall apply so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary".

And lastly, *Rule 1 (3)* of the Court of Appeal Rules, states:

"*Nothing in these rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".*

Mr. Ochieng Oduol and Mr. George Oraro, learned counsel for 1st and 2nd respondents in support of the preliminary objection relied on the unreported decision of this Court in *Rafiki Enterprises Limited vs. Kingsway & Automart Limited – Civil Application No. Nai. 375 of 1996* dated 24th December, 1996.

In that case, the plaintiff (*Kingsway Tyres*) appealed to the Court of Appeal against the decision of the superior court setting aside the exparte judgment in favour of the plaintiff. This Court in unanimous judgment allowed the appeal and restored the exparte judgment. Thereafter, the aggrieved party (*Rafiki Enterprises Ltd*) filed a notice of motion in this Court for the main order that the judgment be recalled and be withdrawn.

The application was mainly based on *section 3 (2)* and *(3)* of the Appellate Jurisdiction Act, *Rule 1 (3)* and *42* of the Court of Appeal Rules. It is apparent that the application was founded on the ground that the court which determined the appeal had no jurisdiction as one of members of the Court was allegedly appointed as an Ag. Judge of Appeal in breach of the Constitution – that is, when there was no vacancy in the court.

The application was dismissed by the Court holding, *inter alia*, that it has no jurisdiction to recall and nullify a judgment already delivered. The Court observed in that case that the law only conferred jurisdiction on the Court to hear appeals from the High Court which jurisdiction can only be exercised during the hearing of the appeal and that the inherent powers conferred by *Rule 1 (3)* can only be exercised within and in the course of hearing an appeal. More importantly, the Court reiterated that a right of appeal must expressly be given by law and that such a right cannot even be implied or inferred.

The preliminary objection in this case was supported by Mr. Satish Gautama, learned Senior Counsel for the 4th respondent.

On the other hand, Mr. Inamdar, learned Senior Counsel for the applicants in opposing the preliminary objection relied on two more recent decisions of this Court, among others, namely, *Musiara Ltd vs. Ntimama* [2005] 1 E.A. 317 and *Chris Mahinda t/a Nyeri Trade Centre vs. Kenya Power & Lighting Co. Ltd., Civil Application No. Nai. 174 of 2005* (unreported).

In the *Musiara* case an application was made under *Rule 1 (2)*, *56 (2)* and *42 (1)* of the Court of Appeal Rules in this Court for a recall and cancellation of an earlier order of the Court on the ground that the order was null and void. It was contended that Shah JA who presided over the previous application for stay of execution was biased against the applicant therein. The impugned order was made in an application for stay of execution pending appeal made under *Rule 5 (2) (b)* of the Rules of this Court. The order reinstated the applicant as non-executive chairman and director of the company pending appeal.

It was contended in support of the applicant that because of the past advocate/client relationship between Shah JA (who presided over the previous application for stay of execution) and Ntimama, the Judge was automatically disqualified from hearing or continuing to hear the application and any decision thus reached would be set aside.

Mr. Oraro who appeared for the respondent in that case relying on *Rafiki Enterprises Ltd.* (supra)

raised a preliminary objection similar to the one raised in the present case. The preliminary objection was resisted by Mr. Gautama who appeared for the company in that case. After hearing the preliminary objection the Court made a finding that it had jurisdiction to re-open an appeal particularly if bias is established but upheld the preliminary objection and struck out the application on the ground that the past relationship between Shah JA and the respondent could not be regarded by a fair minded and informed observer as raising a possibility of bias or capable of affecting his approach and decision. The Court said in part at page 324 paragraph h:

"*The present application raises the question of whether the Court of Appeal has jurisdiction to re-open an appeal (or indeed an application) if an appearance of bias can be demonstrated on the part of one of the members of the bench that had determined the appeal. We think it does. The House of Lords held so in Republic vs. Bow Street Metropolitan Stipendiary Magistrate exparte Pinochet Ugarte (No. 2) [1999] 1 All ER 577"*.

The Court also relied on *Taylor vs. Lawrence* [2002] 2 All ER 353, a decision of the English Court of Appeal.

In *Chris Mahinda's* case, after the Court of Appeal struck out the appeal on the ground that the appeal documents were signed by a person who was not qualified to act as an advocate; the applicant filed an application under *section 3 (2)* of the Appellate Jurisdiction Act, *Rules 42* and *56 (2)* of the Court of Appeals Rules for the rescission of the orders under the courts inherent jurisdiction.

The Court while reiterating that it had residual jurisdiction to review, vary or rescind its decision in exceptional circumstances as held in *Musiara's* case nevertheless dismissed the application on the ground that there were no exceptional circumstances such as bias to warrant rescission of its decision.

Apparently, the decision in *Musiara* and *Chris Mahinda* is conflicting with the decision in *Rafiki Enterprises Ltd*. Indeed Mr. Inamdar submitted that the decision in *Musiara* and *Chris Mahinda* overruled the decision in *Rafiki Enterprises Ltd.* by implication.

This Court is free to depart from its previous decision. It is also entitled and bound to decide which of two conflicting decisions of its own it will follow (see *Dodhia vs. National & Grindlays Bank Ltd* [1970] EA 195; *Young vs. Bristol Aeroplane Co. Ltd* [1944] KB 718). Generally speaking, the Court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

Mr. Inamdar urged us to follow *Musiara* and distinguished *Rafiki's* case from this case. It was his view that since *section 3 (1)* of the Judicature Act required the court to exercise jurisdiction in conformity with the Constitution and since *section 77 (9)* of the Constitution required the court to be independent and impartial, then the decision in the present case where the court was allegedly not independent and impartial was a nullity, thus, requiring a fresh hearing. Mr. Nowrejee, learned Senior Counsel for the 5th respondent opposed the preliminary objection and pursued the issue of nullity espoused by Mr. Inamdar. He submitted, among other things, that where there has been a hearing which is not impartial, there is in effect no hearing as the purported decision is a nullity even before the court declares it to be so.

I do not, with respect, agree. If an appeal is determined by a court which is alleged not to be impartial the decision still remains a judicial decision unless and until it is set aside on the ground of bias by a court with jurisdiction. That begs the question whether this Court having conclusively determined the appeal has jurisdiction to re-call the decision and re-open the appeal by re-hearing it.

It is beyond contention that there is no statute conferring jurisdiction on the Court of Appeal to re-open a finalized appeal nor are the rules of the Court relied on in *Rafiki Enterprises Ltd*, *Musiara* and *Chris Mahinda* capable of conferring such jurisdiction on the Court.

In *Anarita Karimi Njeru vs. The Republic (No. 2)* [1979] KLR 162 (appearing in the 1st and 2nd respondents' list of authorities but not relied on in court), this Court had occasion to consider the history of the legislation conferring jurisdiction on the Court of Appeal and its predecessors. In that case, the

Court of Appeal rejected the contention that the Court of Appeal enjoys general supervisory role over the judicial process and that it could assume jurisdiction even when it is not conferred by statute and overruled *Munene vs. The Republic* (No. 2) [1978] KLR 105. The court nevertheless accepted the following passage in *Munene's* case (supra) at page 108 paragraph H as correct law:

"*It is well established that there is no right of appeal apart from statute, either it is expressly granted by statutory authority or it is not. There is no right of appeal by mere implication or by inference*".

In *Anarita Karimi*, the court recognized two forms by which a legislature can confer jurisdiction to a Court of Appeal. The first form is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear *all appeals* from the High Court which is the case in England as provided in the Supreme Court of Judicature Act 1875; India, Aden Tanzania where the respective Court of Appeal is conferred with jurisdiction to hear all appeals from the High Court. The second form of conferring jurisdiction to a Court of Appeal is where the legislature establishes a Court of Appeal expressly without jurisdiction and reserves the conferment of jurisdiction to other secondary Legislation like in Kenya where neither *section 64 (1)* of the Constitution nor *section 3 (1)* of the Appellate Jurisdiction Act confers jurisdiction but instead leaves it to particular statutes i.e. Civil Procedure Act and Criminal Procedure Code to confer jurisdiction on the Court (see *Anarita Karimi* – pages 165 from paragraph E – 167 paragraph E).

After tracing the history of the legislation conferring jurisdiction to the Court of Appeal, the Court said at page 107 paragraphs B – D):

"*This court was established by the Constitution of Kenya (Amendment) Act 1977 which replaced section 64 of the Constitution, the jurisdiction being identical to that of the old court. The appellate Jurisdiction Act was replaced in 1977 by Appellate Jurisdiction Act and again, the jurisdiction of this court is identical to that of the old court. That is, the establishment and jurisdiction of this court and its predecessors, has remained, in effect unaltered from 1902 until the present with the result that we can safely rely on authorities contained in our law reports going back to that date, all of which are authority for interpreting strictly the enactments conferring jurisdiction on this Court and its predecessors*".

The Court went on to construe the phrase "*under any law*" in *section 3 (1)* of the Appellate Jurisdiction Act to mean as consonant with "*statute*".

Although *Anarita Karimi's* case does not deal with the issue at hand, that is, the jurisdiction of this Court to recall and re-open its previous decision, the case does show that the establishment and jurisdiction of this Court and its predecessors has remained the same since 1902; that this Court is a creature of statute and can only exercise such jurisdiction as conferred on it by statute and that it cannot assume jurisdiction which has not been conferred on it by statute. It is clear then that *Rafiki Enterprises Ltd* is not only consistent with the Appellate Jurisdiction Act and previous similar statutes conferring jurisdiction on the predecessors of this Court but also consistent with previous decisions of the predecessors of this Court such as *Lakhamsh Brothers Ltd vs. R. Raja & Sons* [1960] EA 313 and *Somani's vs. Shirinkhanu* (No. 2) [1971] EA 79. In contrast, the statement of law in *Musiara* case that this Court had jurisdiction to re-open a concluded appeal, it was indeed, obiter. It was not necessary for the decision and the Court did not re-open the appeal. In the course of my research, I came across the case of *Vagnes vs. Public Prosecutor (No. 3)* [2004] 4 LRC 30 from Singapore where, like in Kenya, the Court of Appeal is a creature of statute. In that case, the accused was found guilty of drug trafficking and sentenced to death, a decision which was upheld by the Court of Appeal. The appellant's petition to the President for clemency was subsequently dismissed. By a criminal motion, the counsel for the appellant applied for retrial in the High Court on certain grounds. The High Court dismissed the motion and on appeal to the Court of Appeal, the Court of Appeal dismissed the appeal holding, *inter alia*:

"*(1) Where the court of Appeal has heard and disposed of an appeal …… it was functus officio and the case could not be re-opened. The authorities clearly established that there is no statutory provision conferring on the Court of Appeal jurisdiction to re-open such a case, even by admission of fresh evidence*".

That decision coming from a Commonwealth country, where, like in our case, jurisdiction is conferred on the Court of Appeal by statute, is highly persuasive.

The decision of the English courts – *R vs. Bow Street Metropolitant Stipendiary Magistrate exparte Pinochet* (Supra) and *Taylor vs. Lawrence* (supra) which this Court followed in *Musiara* case are persuasive. However, being in the nature of Judge made law, and, therefore, perhaps, now part of common law, they would not be followed in this country by virtue of *section 3 (1)* of the Judicature Act if firstly, they are inconsistent with either the Constitution or any written law or secondly, if the circumstance of Kenya and its legal system do not permit of their present application.

As the case of *Re Uddin* (a child) [2005] 3 All ER 550 shows after the decision of *Taylor vs. Lawrence* in February, 2002, the English Civil Procedure Rule Committee promulgated the Civil Procedure (Amendment No. 4) Rules 2003 which, among other things, provides in *rule 52.7* a procedure for the re-opening of final appeals, by the Court of Appeal or by the High Court. We do not have similar rules to regulate the re-opening of final appeals.

This Court did not in *Musiara* subject the two English decisions to the appropriate tests before adoption as law in this country. In my humble view, it is for the Parliament to decide, as a matter of policy, whether residual jurisdiction in addition to the statutory jurisdiction should be conferred on the Court of Appeal. It would be wrong to clothe the Court of Appeal with jurisdiction imported from another jurisdiction without the approval of the Legislature.

Inasmuch as the Court of Appeal is by law enjoined to exercise jurisdiction as conferred by our written laws, the two English decisions are at least inconsistent with our written laws conferring jurisdiction on the Court of Appeal. On my part, I would prefer the decision in *Rafiki Enterprises Ltd* which, as I have endeavoured to show, enjoys high pedigree in this country.

For those reasons, I would uphold the preliminary objection and strike out the application dated 12th November, 2000 with costs as proposed by Omolo JA.

Lastly, like Omolo JA, I agree with the part of the decision of Bosire JA dealing with the application of Shah JA (as he then was) seeking to be heard on the application for re-opening of the decision of the Court.

Dated and delivered at Nairobi this 7th day of December, 2007.

E. M. GITHINJI

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JUDGE OF APPEAL

RULING OF WAKI, J.A

I have had the advantage of reading in draft form the ruling of Omolo JA, Bosire JA and Githinji JA on the central issues raised in the application before us. I respectfully agree with the reasoning and conclusions reached in those rulings and I have nothing useful to add. I also agree with the proposed order as to costs.

Dated and delivered at Nairobi this 7th day of December, 2007.

P.N. WAKI

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JUDGE OF APPEAL

RULING OF DEVERELL, J.A.

I have had the advantage of reading in draft form the rulings of *Omolo J.A, Bosire J.A* and *Githinji J.A* in the application before us. I respectfully agree with their rulings including the proposed orders as to costs and I have nothing further to add.

Dated and delivered at Nairobi this 7th day of December, 2007.

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR