IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU, MWERA, GBM KARIUKI & MWILU, JJ.A)

CIVIL APPLICATION NO. NAI. 224 OF 2006

BETWEEN

STANDARD CHARTERED FINANCIAL

SERVICES LIMITED…….1ST APPLICANT

A.D. GREGORY ……..……..……2ND APPLICANT

AND

MANCHESTER OUTFITTERS (*Suiting Division*) LIMITED (now

known as KING WOOLLEN MILLS LIMITED…..…..1ST RESPONDENT

GALOT INDUSTRIES LIMITED……..……..…..……2ND RESPONDENT

C. D. CAHILL…….....……...….3RD RESPONDENT

(*An application for setting aside in total the judgment and order made by the Court on the 4th October, 2002*

in

***Civil Appeal No. 88 of 2000*)**

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RULING OF THE COURT

Introduction

[1] What is before us is a notice of motion brought under **sections 64** and **79(9)** of the former **Constitution** *(now repealed*); **section 3** of the **Appellate Jurisdiction Act**; **section 3** of the **Judicature Act** and **Rule 1(2)** of the **Court of Appeal Rules**. It is a rare application in which the applicants seek to have the judgment of this Court re-opened, re-examined, declared a nullity, set aside, and the appeal heard afresh. The applicants are Standard Chartered Financial Services Limited and A. D. Gregory (hereinafter the **1st and 2nd applicants** respectively). The two, together with one C.D. Cahill, were the

respondents in the appeal, whilst Manchester Outfitters (*Suiting Division*) Limited (now known as *King Woollen Mills Limited*) and Gallot Industries Limited, (now the respondents to the present application), were the appellants

Background

[2] The concatenation of events leading to the appeal was sparked off by a suit that was filed in the High Court by the respondents in which they contended that the appointment of the 2nd applicant by the 1st applicant as receiver-manager of the 1st respondent was made in bad faith, was null and void, and should be revoked. The respondents sought an injunction restraining the applicants, their servants or agents from interfering with the operations of the 1st respondent; as well as seeking damages and costs of the suit. The substantive issue raised in the respondents' suit was the propriety of a loan agreement and a debenture signed by the 1st respondent pursuant to which the 1st applicant appointed the 2nd applicant as receiver-manager of the 1st respondent. The applicants filed a defence denying the respondents' claim, and also raised a counter-claim against the 1st respondent for Kshs 24,837,999/= plus interest at 19% per annum, and a declaration that the debenture issued by the 1st respondent to the the 1st applicant is a valid and subsisting security for the 1st respondent's indebtedness to the 1st applicant

[3] Githinji, J. having heard the suit, dismissed the respondents' claim and gave judgment in favour of the 1st applicant on their counter-claim. The learned judge also gave an order declaring that the debenture dated 5th April, 1982 executed by the 1st respondent in favour of 1st applicant, was a valid and subsisting security for the indebtedness of the 1st respondent to the 1st applicant; and that the appointment of the 2nd applicant as a receiver manager of the 1st respondent was valid.

[4] Being aggrieved by the judgment of the High Court, the respondent lodged Civil Appeal No. 88 of 2000 against that judgment. The respondents also filed an application for interlocutory orders in the High Court but their application was dismissed. The respondents filed another application to restrain the sale of their assets, but that application was also dismissed. Subsequently, the 2nd applicant in exercise of his powers as receiver manager under the charge and debenture sold the respondents' property and assets.

[5] Civil Appeal No. 88 of 2000 was subsequently heard and judgment was delivered on the 4th October 2002, when by a majority decision (**Lakha**, and **Owuor**, **JJ.A**), the appeal was allowed and orders made setting aside the judgment of the High Court and substituting thereto the following orders:

i. **The receiver appointed by the bank is declared null and void;**

ii. **There is no valid debenture or one in existence;**

iii. **The 1st defendant shall pay to the plaintiff the balance sum of Kshs 251 million with interest at 14% p.a. from 1st August 2002 until payment within 30 days failing which execution may issue; and**

iv. **The 1st defendant shall also pay to the plaintiffs the costs of the suit before the superior court.**

The Applicant's Motion

[6] The applicants who were aggrieved by the judgment in Civil Appeal 88 of 2000, filed the current motion contending that the judgment was a nullity as the Court acted outside its jurisdiction; that the majority decision was anchored on a cause of action which arose after the decision in the superior court had been made and the appeal lodged; that the applicants were not given a fair hearing; that the rules of natural justice were not complied with; and that Hon. Lakha, J.A. who presided over the hearing of the appeal was biased in favour of the respondents.

[7] The applicant's motion was supported by an affidavit sworn by the 2nd applicant and a second affidavit sworn by Peter Le Pelley SC. Mr Le pelley who was the applicants' counsel in Civil Appeal No 88 of 2000, deponed that during the hearing of the appeal, the respondents' counsel, Mr. Nowrojee, submitted *inter alia* that since the property of the respondent had been sold after Civil Appeal No 88 of 2000 had been filed, it was only proper for the Court of Appeal to assess the respondents' loss; that Mr. Nowrojee submitted to the Court, valuation reports on the cost of replacing the respondents goods that were sold after the filing of Civil Appeal No 88 of 2000; that notwithstanding Mr Le Pelley's objections, the documents were purportedly produced and admitted by the court *de bene esse* under Rule 29 of the Court of Appeal Rules that allows the Court to take additional evidence; that there was no assessment of damages by the High Court and so the Court of Appeal had no jurisdiction to reassess damages under **Rule 29**; and that in any case the additional evidence was not taken in accordance with the Evidence Act as the applicants had no opportunity to cross-examine the makers of the documents. Further, Mr. Le Pelley averred that in 1995, the then Chief Justice, (**Cockar, C.J**), had to reconstitute the bench hearing an interlocutory appeal arising from the High Court suit by removing Lakha, J.A, when it was brought to the Chief Justice's attention that the Judge had been the 1st respondent's legal consultant while he was in private practice; and that the failure by the learned Judge to disqualify himself from hearing the appeal was a breach of the rules of natural justice.

Reply to the Motion

[8] The respondents replied to the applicants' motion through an affidavit sworn by their then advocate, Mr. Meshack Odero. The 64-paragraph affidavit is lengthy and depones to many issues. Suffice to note that the matters deponed to by Mr. Odero include his belief that the applicants' motion was filed after an inordinate and unexplained delay; that the decision of the Court in Civil Appeal No 88 of 2000 allowing the appeal, was not just anchored on the Court's finding regarding the cause of action that arose after the decision of the superior court and after the appeal had been lodged, but was also based on the ground that the four year delay in the delivery of the superior court judgment was inordinate delay that vitiated the judgment; that the applicants were given a fair hearing; that the applicants' counsel, Mr. Le Pelley, neither objected to the admissibility of the valuation reports nor applied to cross examine the maker of the reports, nor did the applicants take advantage of the opportunity given to them by the Court to produce their own valuation reports; that with regard to the alleged previous disqualification, Mr. Le Pelley did not raise the issue nor is there any evidence that Lakha, J.A. had actually previously disqualified himself; and that Lakha, J.A. never had any brief from the respondents as he declined to accept the same.

[9] The 1st and 2nd respondents filed a notice of preliminary objection to the applicants' motion seeking to have the motion struck out on the grounds, *inter alia* that the Court had no jurisdiction to entertain the motion; that the motion was seeking to have the Court sit in judgment on its own previous decision; that the application is an abuse of the Court process as the judgment of the Court was final and no exceptional circumstances had been demonstrated to justify the application. During the pendency of the applicants' motion and the respondents' preliminary objection, this Court in a 5-bench decision made in **Jasbir Singh Rai and 2 Others v Tarlochan Singh Rai and 4 Others** [2007] eKLR (the **Rai case**), held, *inter alia* that it was only mandated to hear and determine appeals from the High Court, and could not revisit its own previously concluded decision; nor did it have powers to re-open and re-hear a finally concluded matter. In light of the decision in the **Rai case**, it was deemed appropriate that since this matter raises similar issues, it be similarly heard by a 5-Judge Bench, hence the unusual composition of this Bench.

The Hearing

[10] During the hearing of the appeal, Mr. George Oraro, SC assisted by Mr. Paul Chege, represented the applicants, while Mr. Nelson Havi and Ms Melisa Ng'ania represented the respondents, and Mr. Munyaka represented the 3rd respondent. Following directions given by the Court, written submissions were duly filed together with authorities, and these were highlighted before us. We are grateful to Counsel for these submissions and authorities that we found extremely useful. We summarize the same herein as considered expedient.

Applicants' Submission

[11] For the applicants, it was noted that since the filing of their motion, a new Constitution had been promulgated, whose **Articles 25** and **50** placed fair hearing and impartiality at the centre of the exercise of judicial functions. It was submitted that contrary to the Court's previous position in the **Rai case** where it placed premium on finality, the Court had, in a more recent decision of, **Nguruman Ltd vs Shompole Group Ranch & Another [2014] eKLR** (**Nguruman case**), placed fair hearing as the anchor of its discharge of judicial function and, therefore, ruled that it had the right to

revisit its past decisions. The Court was urged that the matter before it was appropriate for a similar intervention because the majority decision acted without jurisdiction and denied the applicant a fair hearing; and that the decision was vitiated by apparent bias on the part of at least one of the judges.

[12] In regard to jurisdiction, the Court's attention was drawn to **section 64(1)** of the repealed Constitution and **section 3(1)** of the **Appellate Jurisdiction Act** as well as the judgment of Omolo, J.A. in the **Rai case** for the proposition that this Court has only the appellate jurisdiction and neither the power nor the jurisdiction to originate a matter except in respect of interlocutory matters on an appeal filed before it; that in considering the issue of assessment of damages that had arisen after the decision of the superior court, the majority decision acted without jurisdiction as there was no appeal before it in that matter. Various authorities were cited in support of that proposition including the **Owners of the Motor Vessel "Lillians" vs Caltex Oil Kenya Limited [1989] KLR 1**; **Omega Enterprises (Kenya) Limited & Kenya Tourist Development Corporation & Others UR Civil Appeal No. 59 of 1993.**

[13] As for the fair process, it was submitted that the matters addressed by the majority decision violated the applicants' rights because the majority judges entertained and awarded damages in respect of a claim that was not pleaded and that was being raised for the first time in the Court of Appeal. It was argued that additional evidence in respect to the claim for damages could only arise where the claim had been raised in the lower court and subsequent intervening circumstances arose while the appeal was pending, which was not the position in the appeal. Thus the admission of additional evidence in the appeal neither met the requirement of **section 48** of the **Evidence Act** nor did it comply with the requirements of **Rule 29** of the **Court of Appeal Rules**.

[14] Relying on the judgment of Omolo, J.A. in the **Rai case**, it was contended that the applicants were not given a hearing on the issue of damages, and that where a party has not been heard through no fault of his own, there cannot be any finality in the judgment. The Court was urged to find that the lack of hearing rendered the majority decision a nullity.

[15] On the existence of apparent bias, the Court's attention was drawn to annexture M5 to Mr. Odero's affidavit, which showed that while practising as an advocate, Lakha, J.A. had been briefed by the respondents but had declined to take up their brief. Also referred to, is a note by the Chief Justice on the issue. It was asserted that by admitting expert evidence from the bar in a matter that was being raised before the Court for the first time, there was reasonable apprehension of lack of impartiality on the part of the judge. Further, the applicants took issue with the adverse inference drawn by the learned judge in regard to Mr. Le Pelley's failure to produce valuation reports or apply for cross-examination, contending that the judge was not impartial nor did he independently exercise his jurisdiction.

[16] The Court was urged to find that in its majority decision in **Civil Appeal No. 88 of 2000,** the Court exceeded its jurisdiction by addressing and determining matters and cause of action that arose for the first time in the Court of Appeal, and therefore the decision was a nullity. In addition, we heard that the applicants were not granted a fair hearing and therefore there was justification for the applicants' motion to be allowed with costs.

Respondents' Submissions

[17] For the 1st and 2nd respondents, it was reiterated that the applicants' motion was incompetent for want of jurisdiction; it was an abuse of the court process and also lacked merit. It was pointed out that in effect the applicants' motion was one for review; that review was only provided for under **section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**, neither of which was applicable to

matters before the Court of Appeal. It was argued that there was no provision in the Court of Appeal Rules for review of a final judgment of the Court, and therefore there was no jurisdiction to entertain the applicants' motion. The **Rai case** and the case of **Patrick Gathenja vs Esther Njoki Ruigi & another Civil Application No. 290 of 2005,** were cited in support of that proposition.

[18] The **Nguruman** case (*supra)* was distinguished on the basis that in that case, the Court reviewed its previous order relying on the specific provisions of **Rule 57(2)** of the **Court of Appeal Rules** that provides for variation and rescission of orders made by the Court, which is not the same thing as review of orders. In addition it was said that in the **Nguruman case**, the Court of Appeal did not take into account the Supreme Court's decision in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, in which the Supreme Court noted that the decisions of the Court of Appeal were final, and that parties to an appeal derived rights and incurred obligations from such judgments, such that if the Court or the Supreme Court were to allow the re-opening of such appeals, it would trigger "***a turbulence of pernicious proportions in the private legal relations of the citizens***".

[19] Further, it was submitted that even assuming that the Court had jurisdiction to review its previous judgments, the applicants' motion could not succeed on merit, because there was no error apparent on the face of the record or new evidence upon which a review could be entertained; and that the motion was brought after an inordinate delay of 4 years which delay could not be excused by the applicants' attempts to seek redress in the COMESA Court.

[20] On the issue of illegality, it was submitted that the order to admit the valuation reports was made by the Court pursuant to an application made by the respondents; that **section 3(2)** of the **Appellate Jurisdiction Act** vests in the Court of Appeal powers equal to those of the High Court, hence the order made by the Court was one that could be varied or rescinded under **Rule 56(2)** of the **Court of Appeal Rules** but the applicants did not exercise that option. In addition, **Rule 29** of the **Court of Appeal Rules** empowered the Court to take additional evidence, and that the applicants' advocate did not challenge the evidence of loss suffered from the sale of the respondents' assets; that the Court of Appeal had powers to assess damages and that all the parties' counsel agreed to the Court exercising that power. Regarding allegations of bias, it was pointed out that the holding that the appointment of the receiver was null and void was not a decision of a single judge but a unanimous decision; and that no bias was demonstrated during the hearing nor was a request for disqualification of Mr. Justice Lakha, J.A. made.

[21] Relying on the case of **Musiara Limited vs William ole Ntimama [2004] eKLR**, it was submitted that there was necessity for extreme caution in exercising the limited jurisdiction to reopen a case on account of bias; and that the complaint of bias raised by the applicants was an afterthought and not a genuine complaint to warrant the reopening of the concluded appeal. Finally, the Court was urged to dismiss the applicants' motion for want of jurisdiction.

Reply to Respondent's Submissions

[22] In reply to the respondents' submissions, the applicants, citing **Somani's vs Shirinkanu No. 2 EA [1971] 79;** and the Tanzanian Supreme Court decision of **Transport Equipment Limited vs Valambhia (1994) 1 KRC 114,** reiterated that the jurisdiction of the Court to revisit a decision that is a nullity was not in doubt; that in **Civil Appeal No. 88 of 2000** the Court considered events that occurred after the judgment of the High Court thereby going outside its jurisdiction of consideration of matters of appeal as provided under **section 64** of the repealed Constitution. Besides, that in accordance with **Articles 20, 25, 50** and **259** of the current **Constitution,** fair hearing is at the core of judicial dispensation; and that although the applicants' motion was filed on 18th August 2006, it was still pending at the commencement of the new **Constitution** and therefore under the transitional provisions provided under **Schedule 6 section 7,** the existing laws have to be applied in a manner that brings it into conformity with the current **Constitution.**

[23] The applicants' distinguished the case of **Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR** on the grounds that in that case, nothing was pending before the Court at the time of promulgation of the **Constitution**, and that the application to have

the matter re-opened was brought under **section 14** of the **Supreme Court Act**. On the issue of delay, it was submitted that upon delivery of the judgment, the applicants immediately filed proceedings before the COMESA Court, but later withdrew the application filed in that Court after encountering difficulty in having a bench constituted; and that upon withdrawing the application on 20th July 2006, the applicants' filed the current motion on 18th August, 2006. Accordingly, we were told, the delay had been satisfactorily explained.

[24] It was maintained that the issue of legality was not one of the issues raised or addressed by the applicants in their motion as the applicants only raised the issue of jurisdiction and bias. Further, that the respondents did not plead for loss or damages arising out of the sale of their assets, but claimed special damages for damage to its machinery, which by the date of the High Court judgment, had not been sold; and that the consent by the parties' advocates to the assessment of damages, could not confer jurisdiction on the Court to assess damages for loss arising from the sale of the machinery that took place after the judgment subject of the appeal. The case of **Great Lakes Transport Co. (U) Limited vs KRA [2009] eKLR** was distinguished on the ground that damages were pleaded in the superior court and evidence adduced thereon, unlike the applicants' case where the Court of Appeal awarded damages that were occasioned after the judgment of the superior court and were therefore not part of the proceedings in the superior court. In addition the Court was urged to find that the applicants were not given a fair hearing and that there was bias.

The Issues for Determination

[25] We have considered the submissions and the supporting authorities that have been cited to us by counsel. The main issue that arises in this appeal is one concerning the jurisdiction of this Court to hear the applicant's motion. It was stated in the **Owners of Motor Vessel "Lillians"** (*supra*), that:

> ***"Jurisdiction is everything. Without it a Court has no power to take one more step, where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending the evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

[26] Needless to state, we must first determine the issue of jurisdiction. In addressing this issue, the main consideration is whether this Court has jurisdiction to re-open and review its decisions in a concluded appeal and if the Court has such jurisdiction, what the extent and threshold of such jurisdiction is, and whether the applicants' motion meets that threshold.

[27] The issue whether the Court of Appeal is vested with powers to recall, re open and review or reconsider its own decision is a recurrent question that has been dealt with by this Court time and again. Over the years the Court has made several decisions some of which appear to be conflicting. In considering this matter we shall focus on 3 major previous decisions of this Court. These are the **Rai case** and the **Nguruman case**, which were cited by the parties before us, and **Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited, [2014] eKLR** (**Benjoh case**) which though not referred to by the parties, is an equally relevant and important decision of this Court. We have zeroed in on these 3 cases because they are the most recent decisions in which this Court has had occasion to address and pronounce itself on the pertinent issue of its jurisdiction to re-open and review concluded matters, which is the subject of the motion before us. Secondly, the three cases have a rich exposition of previous local and international cases that have dealt with the same issue, and this is germane to the determination of the motion before us.

Jurisdiction of the Court

[28] We begin our analysis by putting the matter in its right perspective by first examining the extent of the jurisdiction of the Court of Appeal as well as the source of such jurisdiction as provided by law. In this regard, the starting point is **section 64(1)** of the former **Constitution**, **Section 3(1)** of the **Appellate Jurisdiction Act Cap 9 of the Laws of Kenya,** and **Section 3 of the Judicature Act** which were the provisions applicable in deciphering the Court's jurisdiction as at 18th August 2006, when the applicants

filed their application.

[29] **Section 64(1)** of the former **Constitution** provided as follows:

> **"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 <u>may be conferred on it by law</u>". (*emphasis added*).**

[30] **Section 3** of the **Appellate Jurisdiction Act Cap 9** confers jurisdiction on the Court of Appeal as follows:

i. ***The Court shall have jurisdiction to hear and determine appeals from the High Court and any other court or tribunal <u>as prescribed by an Act of Parliament in cases in which an appeal lies in the Court of Appeal under law;</u>(emphasis added).***

ii. ***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 conferred by this Act, the power, authority and jurisdiction vested in the High Court.***

iii. ***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.***

[31] **Section 3(1)** of the **Judicature Act** also provides for the exercise of the jurisdiction of the Court of Appeal as follows:

"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".

[32] In the **Rai case**, Omolo, J.A. in the leading judgment having considered the above provisions had this to say:

> ***"I have set out the provisions (sic) 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.***

[33] Both **Bosire, J.A.** and **Githinji, J.A.** concurred with **Omolo, J.A.** each reiterating that the Court of Appeal is a creature of statute and can only do that which the law empowers it to do which is to hear appeals from the High Court. It is noteworthy that the **Rai case** was determined under the former

constitutional regime. A plain reading of the cited constitutional and statutory provisions reveals two things. First, that under the former constitutional regime, this Court had jurisdiction only where such jurisdiction was specifically conferred on it by law. Secondly, that the Appellate Jurisdiction Act, which was the primary legislation conferring jurisdiction on the Court of Appeal, only conferred on the Court appellate jurisdiction in matters where a right of appeal is conferred and an appropriate appeal or notice of appeal had been lodged before the Court. This Court has reiterated this position time and again. For instance in the case of **Anarita Karimi Njeru vs Republic (No.2) [1979] KLR,** it was held that the Court of Appeal is a creature of statute and as such can only exercise such jurisdiction as conferred on it by statute. Conversely, that the Court cannot assume jurisdiction that has not been conferred on it by statute. Thus it is clear beyond peradventure that under the former constitutional dispensation, the Court of Appeal could only be properly seized of a matter if there was an appeal filed or an intention to file such an appeal had been manifested through the filing of a Notice of Appeal.

Jurisdiction of the Court to review its decisions

[34] Nevertheless, the crux of the matter in the **Rai case** was not just the issue of the jurisdiction of the Court of Appeal *per se*, but jurisdiction to reopen and rehear an appeal. In this regard **Omolo, J.A.** rendered himself categorically thus:

> ***"The power to re-open and re-hear 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.***

[35] In our view, the decision in the **Rai case** is based on the letter of the law as it was then, and this, as explicitly stated by **Omolo, J.A.** did not provide express power to this Court to review its concluded decisions. The second ground upon which the decision in the **Rai case** was anchored is the principle of finality. **Omolo, J.A.** appropriately explains the rationale behind this principle as follows:

> ***"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."*

[36] Although the learned judges in the **Rai case** were alive to the second competing principle, which is, that justice must not only be done, but also seen to be done in every litigation that comes before the court, their preference for the principle of finality was as reflected in the following excerpt from the judgment of **Bosire, J.A.**, influenced by the fact that the Court was then the final Court:

> ***"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."

[37] The amendment to the Appellate Jurisdiction Act vide **Act No 6 of 2009** brought in **section 3A** that provides the overriding principle objective of the Act as "*to facilitate the just, expeditious, proportionate and affordable resolution of the appeals*." This new provision coupled with the promulgation of the **Constitution of Kenya 2010**, changed the equation by bringing in a new constitutional dispensation, creating a different environment in which the Court of Appeal is no longer the final Court, and in which the letter of the law goes hand in hand with the spirit of the law. Both the **Benjoh case** and the **Nguruman case** were decided under this new constitutional dispensation.

[38] In the **Benjoh case** the new provisions conferring jurisdiction on the Court of Appeal were considered as follows:

"22. … The jurisdiction of the Court of Appeal, like that of other courts, must be traced from statute. First, Article 164(3) of the 2010 Constitution confers jurisdiction to the Court of Appeal as follows:

"164(3) **The Court of Appeal has jurisdiction to hear appeals from—**

(a) The High Court; and any other court or tribunal as prescribed by an Act of Parliament."

23 The Appellate Jurisdiction Act, Cap 9, is the Act of Parliament that reiterates the conferment on the Court of Appeal of jurisdiction to hear appeals from the High Court and for purposes incidental thereto. In section 3, the Act stipulates: (Reproduced at paragraph 30 above)

24 Rule 1(2) of the Court of Appeal Rules (which are made by the Rules Committee pursuant to Section 5 of the Appellate Jurisdiction Act) stipulates that 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 shall not be limited or affected by the Rules. What is the extent of the inherent power? Does it include power to review judgments?

25 What emerges from these provisions of the law is that this Court has only appellate jurisdiction which arises and crystallizes once an appeal is filed or a Notice of appeal is lodged manifesting intention to appeal. The Court has in addition inherent power re-echoed in rule 1(2) of the rules of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Can this inherent power be invoked outside the purview of an appeal? Does this Court have jurisdiction to review its decisions? Exactly what is the amplitude of this Court's judicial power? If it has power to review its decisions, have the applicants made out a case for review of the judgment?"

[38] The **Constitution of Kenya 2010** also introduced interpretive provisions as we shall presently see, that obligate the Court to go beyond the letter of the law, by interpreting the Constitution in a manner that promotes the purpose, values, and principles espoused in the Constitution. In both the **Benjoh case** and the **Nguruman case** the learned judges capitalized on this development.

[39] The following excerpt from the judgment in the **Benjoh case** shows that the learned Judges

appreciated the jurisdiction of the Court in the previous constitutional order but were explicit on the impact of the new development:

> ***"39. It seems clear that prior to the 2010 Constitution, this court took the position that the court did not have jurisdiction to review its own decisions and that the only power it had with regard to review was in relation to the slip rule under rule 35 as aforestated and further that its inherent power under rule 2(1) is exercisable in hearing appeals. In effect, therefore, the court in a Bench of five reiterated the law as stated in Rafiki Enterprises Ltd. v. Kingsway & Automart Ltd (supra). The above exposition of the law shows clearly that this Court held that it lacked jurisdiction to review its decisions prior to the current 2010 Constitution when it was a Court of final resort.***

[40] Has the position changed after the promulgation of the 2010 Constitution? What is the jurisprudence in other democracies or jurisdictions in Africa, India or England which share common law values with us? Is there any difference in stance in relation to the power to review where the Court of Appeal is a court of final resort as opposed to when it is not, bearing in mind that prior to the promulgation of the 2010 Constitution, this court was the final court because the Supreme Court was created by the 2010 Constitution? **……**

> 45.***For starters, the 2010 Constitution expressly provides that the Judiciary as a state organ is enjoined under Article 10 to apply national values and principles which include the rule of law, equity, social justice, human rights and good governance. Article 20(3) enjoins Courts to develop the law to the extent that it does give effect to a right or fundamental freedom and adopts the interpretation that most favours the enforcement of a right or fundamental freedom while Article 159(1)(d) enjoins courts to be guided by the principle that justice must be administered without undue technicalities. In addition, Article 50 of the Constitution vests in every person the right to a fair hearing which under Article 25(c) cannot be limited."***

[41] Equally in the Nguruman case the new constitutional dispensation was central in the judgment of Nambuye JA as evident from the following extract of her judgment:

> ***"56. The mandate of the Court donated under Section 3 and 3A of the Act cannot however be considered in isolation with constitutional provisions donating the same power. Article 164(3) of the Kenya Constitution 2010 provides as follows:-*** (Reproduced at paragraph 37 above)
>
> ***In interpreting the extent of this mandate, I cannot lose sight of the prescription in Article 259(1) and (3) thereof. This provide*** *(sic)* ***that the Constitution should be interpreted in a manner that: Promotes its purpose, values and principles, Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights and Permits the development of the law, and in accordance with the doctrine of interpretation that the law is always speaking.***
>
> ***57. The purpose, principles and values of concern to me in the interpretation of this mandate are only those that deal with the core mandate of the court namely dispensation of Justice. There is Article 48 which gives an open ended access to Justice which may include an access to Justice to ask this Court to re-open, re-hear and re-determine its finally concluded matter; Article 20(3)(a) (b) which enjoins the Courts to interpret the law in such a way or*** *(sic)* ***so as not to withhold a right i.e the right to access to the relief the applicant seeks; and Article 159(2) (d) which provides that "Justice shall be administered without undue regard to procedural technicalities".***

[42] There was thus a clear major distinguishing feature between the **Rai case** and the other two cases in so far as the constitutional basis for interpretation was concerned. In the **Nguruman case** and the **Benjoh case** the former Constitution is merely mentioned in passing, and the constitutional provisions that were formally providing jurisdiction to the Court of Appeal were not really addressed. Although **Article 164(3)** of the current Constitution is not substantially different from **section 64** of the previous Constitution, the current Constitution, as noted in the two decisions has added provisions concerning the exercise of the Court's jurisdiction. These provisions include **Articles 10, 20, 25, 159, and 259** that obligate the Court to

apply the law in a manner that ensures that justice is achieved. The Court is also obliged to ensure that justice is administered without undue regard to procedural technicalities.

[43] Therefore the focus in the **2010 Constitution** is on justice, and in order to give effect to the objective and purpose of the Constitution, this Court must, in interpreting its jurisdiction, go beyond the letter in the Constitution and legislative provisions and apply the spirit of the Constitution. While the decision in the **Rai case** laid stress on the letter of the law as it was then, and the need for finality in litigation, the position has now changed as this Court is obligated not just to follow the letter but also the spirit of the **Constitution** which stresses on justice being done. Thus where appropriate as in this case, the principle of fairness and justice must take priority over the principle of finality.

[44] Further, while in the **Benjoh case** the issue for consideration was similar to that in the **Rai case,** to wit, whether the Court had jurisdiction to review its previous decision, the **Nguruman case** had a different slant. **Nambuye, J.A.** identifies the issue for consideration in paragraph 24 of her judgment as follows:

> ***24. The core issue for our determination is whether the applicant has brought itself within the ambit of the prerequisite set by the parameters in rule 35(1) (2) of this Court's Rules."***

[45] **Rule 35** of the **Court of Appeal Rules** commonly known as the '***Slip Rule***' provides a limited power of review for correction of simple errors in order to give effect to the intention of the judges as manifested in the substance of the ruling. **Nambuye, J.A.** had no difficulty in coming to the conclusion that the motion before her could not succeed under **Rule 35** of the Court Rules as no clerical or arithmetic error was alleged, nor was review sought in the motion for the purpose of giving effect to the intention of the Court.

[46] Both **Nambuye, J.A.** and **Musinga, J.A.** found that the motion in the **Nguruman case** could be granted under **Rule 57 of the Court Rules**. This is another Rule that provides for a limited power of review through variation or rescission of an order made by a single judge of the Court. That rule states as follows:

> **"57. (1) An order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge by 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 in the matter.**
>
> 2. **An order made on an application to the Court may similarly be varied or rescinded by the Court,"(*emphasis added*).**

[47] A reading of **Rule 57** shows that this rule is also limited in its scope (as shown from the emphasis added), as it can only be applied where the order being varied or rescinded is, first, an order made pursuant to an application. Secondly, that the order is either for extending time or an order permitting the doing of some act without specifying the date by which the act is to be done and the defaulting party has failed to show reasonable diligence in the matter. With due respect to the view expressed in the **Nguruman case** that **Rule 57(2)** may provide an avenue for reviewing previous orders of the Court, the word 'similarly' in **Rule 57(2)** limits the application of the rule to situations similar to those provided under **Rule 57(1)**. In addition, **Rule 57(2)** is also only applicable for review of orders made in applications and not for final orders in a judgment following the hearing of an appeal.

[48] Therefore, the application of that rule remains restrictive and can hardly allow for reopening, reviewing and re-determining a judgment of the Court or a matter that has been closed unless the review

is for purposes of extending time for doing of a particular act or for dealing with a situation where a particular act is to be done and no time has been specified for doing the particular act, and no action has been taken within a reasonable time. The rule cannot apply where the review targets the substantive order or final judgment. Thus the rule could not be applicable in the **Benjoh case** where the review of the judgment of the court was sought because the validity of a consent order was questioned. Nor could it be applicable in the **Rai case** where the review was sought to reopen, rehear and set aside the concluded judgment of the Court on the ground that there was breach of rules of natural justice because the applicants were not given a fair hearing nor was the matter determined by an independent and impartial tribunal.

[49] In our view, the circumstances in the **Nguruman case** are distinguishable from the matter now before us, in that the review sought in that case was in regard to orders made pursuant to an application under **Rule 5(2)(b)** of the Court of Appeal Rules. In the present matter review is sought to reopen and rehear a concluded appeal on the ground that the judgment of the Court was vitiated by breach of rules of natural justice, and was a nullity as the Court acted outside its jurisdiction. To that extent the remarks made in the **Nguruman case** in regard to the general power of the Court to reopen and rehear its past decisions were made *obiter*.

[50] We take note that although the motion before us was filed under the old constitutional order, **section 7(1) of the Sixth Schedule** to the **Constitution of Kenya 2010** provides for transition as follows:

> **" 7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."**

[51] The above transition provision justifies an interpretation of the Court's jurisdiction in a manner that agrees with and promotes the principles and values espoused in the 2010 Constitution, bearing in mind the principle of justice and fairness. It is also important to take into account comparative jurisprudence in developing the law, and this was addressed in the **Benjoh case** in which the Court having analyzed jurisprudence from several countries on the issue of jurisdiction to review a court of appeal's decisions, came to the following conclusion:

> ***" The jurisprudence that emerges from the case law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to re open a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustices with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand , the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)."***

[52] We have deliberately quoted extensively from the **Rai case**, the **Nguruman case**, and the **Benjoh case** in order to bring out the position that this Court has taken in the past and the reason for any deviations. From the analysis it is evident that although the facts in the **Rai case** were similar to the **Benjoh case**, to the extent that in both instances there was a motion seeking to reopen a concluded judgment of the Court, the new constitutional dispensation justified a departure from the **Rai case** as it called for an interpretation of the Court's jurisdiction in a manner that brings it into conformity with the principles of the 2010 Constitution, and gives allowance for the development of the law. The exercise of the Court's residual jurisdiction under **section 3A** of the **Judicature Act** was therefore justified. This is to say that this Court has already pronounced itself in the **Benjoh case** in a way that evinces a clear intention of departing from the precedent set out in the **Rai case**. We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation. Indeed, the **Benjoh case** addressed this

point thus:-

> ***"This Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."***

The exercise of Residual Jurisdiction

[53] The next issue that we must address is whether the applicant's motion falls within this special category in which the exercise of the Court's residual jurisdiction with regard to revisiting its previous judgment is justified. In a nutshell, the grounds upon which the appellant sought to have the judgment of the Court in Civil Appeal No 88 of 2000 reopened and reheard, can be collapsed into two. First, jurisdiction, that is, that the judgment sought to be reviewed was a nullity as the Court acted outside its jurisdiction by considering and awarding damages in regard to a claim that arose after the decision of the High Court. Secondly, breach of the rules of natural justice characterized by lack of fair hearing and bias on the part of one of the judges. The question is whether these grounds were established, and if so whether they meet the threshold for the exercise of the Court's residual jurisdiction.

[54] On the issue of jurisdiction, in line with the foregoing analysis made herein on the Court's jurisdiction, it follows that in hearing the respondent's appeal in Civil Appeal 88 of 2000, the Court's mandate was restricted to considering the judgment of the High Court, and analyzing the same in reference to the issues raised by the parties in the High Court, the memorandum of appeal and the law applicable. In this regard the following extract of the issues as summarized in the judgment of the High Court is important:

> ***"It is apparent from the pleadings and counsel's submissions that many issues arise in this dispute but the primary and broad issues on which the decision of the court depends are:***

1. ***Was the drafting and the execution of the Debenture dated 5· 4. 82 in the present form authorized and approved by the first plaintiff?***

2. ***Is the 1st plaintiff estopped from asserting that the said Debenture was executed without its authority or denying that the Debenture did not cover excess security?***

3. ***Is the plea of 'non est factum' mutual mistake, unilateral mistake, ultra vires, lack of authority and rectification barred by limitation of actions Act?***

4. ***Did the 1st defendant breach the banking Act and does such breach if any invalidate the Debenture?***

5. ***Was the Debenture, legal charge, and guarantee discharged by the localization of the Eurocurrency loan?***

6. ***Was there any breach of any existing agreements undertaken or existence of malice in the appointment of the Receivers and Managers?***

7. ***Is the other security (legal charge) given by 1st plaintiff to the 1st defendant enforceable?***

8. ***Did the receiver and the managers breach the duty of care owed to plaintiffs in the discharge of their duties?***

9. ***Are the plaintiffs entitled to reliefs sought in the plaint?***

10. Are the defendant's entitled to the reliefs sought in the counterclaim?

11. What is the appropriate order for costs?

[55] In order to understand this summary of the issues in relation to the application at hand we refer to the relief sought by the respondents in regard to damages. This was pleaded at paragraph 38A of the Re-amended amended plaint. It is to be noted that the particulars as pleaded in regard to special damages included structural damage and corrosion to the 1st respondent's machinery:

> ***"…committed either by breakage or removal of parts of the machines, or by neglect to protect vital parts of the machinery or their controls, from the ravages of dust and damp actuated by the removal of protective casing…"***

[56] The respondents also made it clear in the plaint that the damage to the machinery could only be properly assessed if the machines were dismantled and an inquiry undertaken by experts as to the extent of the damage. In his judgment the learned Judge of the High Court having considered the evidence of witnesses including experts, rejected the respondents claim for damages to its machinery concluding that the applicants were not responsible for the damage as the deterioration in the state of the machines was due to rust and lack of preventative maintenance that occurred after the receivers left the factory on 19th December 1990, and that most of the machines could be rehabilitated.

[57] It is apparent from the judgment of Lakha, J.A. that as at the time of hearing Civil Appeal No.88 of 2000, the judgment of the High Court had been executed and the 1st respondent's assets including its plant and machinery disposed of. Lakha, J.A. having found that the appointment of the receivers was bad in law and therefore void, noted that no person could take advantage of his own wrong doing, and that the disposal of the 1st respondent's assets during the pendency of the appeal had to be remedied through an award of damages. Taking into account the length of the litigation, the fact that part of the record in the superior court had gone missing, and that the parties did not wish to have the matter remitted back to the superior court for re-assessment, the Court using two valuation reports submitted by the respondents' advocate under **Rule 29** of the **Court Rules**, proceeded to assess damages for the value of the disposed goods. This resulted in the final judgment by the Court whereby the applicants were ordered to pay the respondents **Kshs. 251,000,000/=.** The question is whether the Court had jurisdiction to consider the claim for damages arising from the disposal of the respondents assets when, as conceded by the appellate judges, there were no pleadings or claim for such damages, nor did the learned judge of the High Court consider or assess the quantum of such damages.

[58] There is no doubt that the damages prayed for by the respondents in their plaint were damages to the 1St respondent's machinery which machinery had by then neither been dismantled nor sold. As the damages arising from the sale of the 1st respondent's machinery were not pleaded, the respondent's pleadings could not form the basis for award of such damages. The disposal of the 1st respondent's goods resulted in a new cause of action that could not be dealt with by the Court of Appeal in Civil Appeal No 88 of 2000 as the jurisdiction of the Court at that stage was limited to consideration of the proceedings and judgment of the High Court. In considering Appeal No. 88 of 2000, the Court was exercising its original jurisdiction that in terms of **Rule 29(1)** of the Court Rules called for the Court to re-appraise the evidence adduced in the superior court and draw inferences of fact. The Court could not deal with new issues that had neither been raised nor considered at the trial. Neither the delay in the delivery of the High Court judgment nor the length of the litigation could justify the Court assuming jurisdiction where there was none.

[59] Further, by allowing a claim that had not been pleaded and entertaining new matters at the appeal stage, the Court which was for all intents the Court of last resort, denied the applicants an opportunity to appeal against its decision. Although the Court had limited powers to take additional evidence where there was sufficient reason to do so, under **Rule 29(2)** of the Court Rules such additional evidence could only be taken orally or by affidavit. Moreover, such additional evidence could only relate to the claim that was before the trial court and not evidence relating to an entirely new claim. The admission of the

valuation reports from the Bar at the appeal stage was highly irregular and further compounded the breach of fair process. It matters not that the parties' advocates were party to this unfair process as the bottom line is that the applicants suffered injustice by effectively being denied an opportunity of testing and reacting to evidence regarding the new claim for damages for disposal of the machinery.

Bias

[60] *What then amounts to bias*?

The Oxford English Dictionary defines bias *"**as an inclination or prejudice for or against one thing or person**"* while Black's Law Dictionary defines the word bias as follows:

> ***"Inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject matter involved."***

[61] From the above definition, it is clear that the issue of bias negates the twin virtues of impartiality and independence of the Court of the Judge hearing and determining a matter. These two principles are the hallmark of a fair trial as espoused in **section 77** of the retired Constitution of Kenya and **Article 50** of the current

Constitution.

[62] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal declaration of Human rights (UDHR), and Article 6 of the International Convention on Civil and Political Rights (ICCPR) among other International conventions, which this country has ratified. **Article 25(c)** of the **Constitution 2010** elevates it to an inderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one's case heard by an independent, impartial and unbiased arbiter or judge. The facet of fair trial we are dealing with here is that of bias or perceived bias on the part of the judge or the court.

[63] Bias, whether it is perceived or actual, undermines the public confidence in a judicial officer's ability to dispense justice. In the words of ***Lord Goff*** in the case of ***R vs Gough*, *[1993] 2 All CR 724***:

> ***"Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking 'the judge was biased'.*** (Emphasis ours)

[64] In ***Metropolitan Properties Co., Ltd v Lannon* *(1969) 1 QB 577, [1968] 3 All ER 304, [1968] 3 WLR 694*** it was observed that:-

> ***"Also in a case where the bias is being alleged against a court or judge it is not the likelihood that the court or judge could or did favour one side at the expense of the other that is important, it is that any person looking at what the court or judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias''.*** (Emphasis ours)

[65] In the Australian case of **Webb v The Queen (1994) 181 C L R 41** Mason CJ and McHigh J held:

> **"In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has**

been seen to be done

..."

[66] The rule against bias is an important element of the right to a fair trial. This rule is to be very strictly applied, so that even the appearance of bias is done away with. This is because it aids in public confidence in the fairness and impartiality of the judicial system. In view of the jurisprudential importance and uniqueness of this application we find it necessary to say slightly more on perception or appearance of bias. As the court stated in the English case of ***R v Sussex Justices ExP. Mc Carthy [1924] 1 KB 256:***

"Justice should not only be done but should manifestly and undoubtedly be seen to be done."

[67] The import of the rule against bias, as well as its strict application, is that there need not be actual bias on the part of the judge for apprehended bias to be found. It is enough that the adjudicator might not appear to be impartial. In determining whether or not there has been bias, the test to be applied is whether a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias.

[68] In ***Kimani v Kimani (1995-1998) 1 EA 134*** Lakha JA, who coincidentally, was part of the bench that rendered the impugned decision herein, in the majority judgment stated as follows on the test of likelihood of bias:

"the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias."

[69] In his dissent, Gicheru JA (as he was then) stated in the same case that:

"…..the court hearing the matter is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the court can do is carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair minded person would , that the judge is biased or is likely to be biased"

[70] This test was endorsed by the East African Court of Justice in ***Attorney General of the Republic of Kenya v Prof Anyang' Nyong'o and Others (5/2007) [2007] EACJ 1 (6 February 2007)*** where the Court stated that:

"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially. Needless to say, litigant who seeks disqualification of a judge comes to court because of his own perception that there is appearance of bias on the part of the judge. The court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances of the case."

[71] We also cite with approval the proposition of the English Court in ***FLS Aerospace Ltd [1999] EWHC B3 (Comm) (20 April 1999)*** Ltd wherein it is stated that:

"First, actual bias will of course always disqualify a person from sitting in judgment. Even in the absence of actual bias, however, the importance of public confidence in the administration of justice is such that even the appearance of bias will disqualify." (Emphasis supplied).

[72] This is the standard we must apply in this case in determining whether the Court, as constituted was biased, or could have been perceived to have been biased when handling the impugned proceedings, which are the subject of this application.

[73] Before we discuss the issue of fair trial in the context of the current Constitution, it is important to look at the relevant provision of the retired Constitution, which was in operation when the impugned proceedings were conducted. **Section 77 (9)** of the retired constitution provided as follows:

> ***"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".***

[74] The same provision was imported into the current Constitution 2010 vide Article **50(1)** of the **Constitution** which provides that:

> ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.***

[75] As observed earlier, unlike in the old constitutional dispensation, the right to fair trial is now among four other rights that enjoy an eminent special place in the current Constitution as an inderogable right. This is the more reason why the Court must ensure that the said right is jealously guarded.

[76] **Article 50 (1)** of the **Constitution** imposes a twofold obligation in the dispute resolution process. These are independence and impartiality on the part of the adjudicator, and fairness in the resolution procedures. Thus allegations of bias on the part of a judge presiding over a matter is a serious allegation which if proved amounts to breach of a constitutional right that vitiates the dispute resolution process.

The Pinochet case

[77] It would be remiss of us not to mention the case of ***R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte [2000] 1 AC 119 (In Re Pinochet)***. The brief circumstances of the case were as follows. An extradition warrant had been issued in respect of Augusto Pinochet Ugarte the Chilean head of state by a Spanish court. Subsequently, the Metropolitan Stipendiary Magistrates issued two provisional warrants for his arrest. He applied to the High Court to quash those warrants. He succeeded, but the High Court stayed the quashing order so that an appeal could be taken to the House of Lords on the question of the proper interpretation and scope of immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was a Head of State. This appeal was heard by five lords of the House, among them Lord Hoffmann.

[78] Before the hearing of the main appeal, Amnesty International, along with other human rights bodies, petitioned for leave to participate in the appeal, which was granted. By a majority judgment of three to two, with Lord Hoffmann in the majority, it was held that Pinochet did not have immunity. It transpired later that Lord Hoffman's wife, Lady Hoffmann, was employed by Amnesty International in an administrative position. In addition, Lord Hoffmann was a director and the Chairperson of the Amnesty International Charity Limited, a charitable institution that funds a portion of Amnesty International's activities.

[79] Pinochet moved the court for orders that the entire opinion either be set aside, or the opinion of Lord Hoffmann be set aside and declared to be of no effect.

This prayer was grounded on the fact that Lord Hoffmann's links to Amnesty International were such that they gave the appearance of bias. The House of Lords, while allowing the motion discussed at length this vexing issue of actual or perceived bias at length.

[80] **Lord Browne-Wilkinson** in his speech observed that:

> ***"The contention is that there was a real danger or reasonable apprehension or suspicion that***

Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias. The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."

[81] On his part, **Lord Hope of Craighead** stated that:

"One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: *nemo debet esse judex in propria causa****. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small……***

the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable."

[82] **Lord Hope** concluded that:

"Indeed it may be said of all the various tests which I have mentioned, including the maxim that no-one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial."

[83] In the end, the Lords found that the appearance of bias, and not actual bias, on the part of Lord Hoffmann was so strong, that the public confidence in the administration of justice could be shaken, so that the decision made against Pinochet could not be allowed to stand. The findings of the House of Lords in the Pinochet case (supra) have been echoed closer home in ***Kaplan & Stratton V L.Z. Engineering Construction Limited & 2 Others [2000] eKLR (Civil Application 115 of 2000),*** where this Court pronounced itself on the issue of apparent bias in the following terms:

"***Apart from that, if an allegation of apparent bias is made, it is for the court to determine whether there is a real danger of bias in the sense that the judge might have unfairly regarded with favour or disfavour the case of a party under consideration by him or, in other words, might be predisposed … prejudiced against one party's case for reasons unconnected with the merits of the issue."***

[84] Although the allegations of bias made against Lakha, J.A. were denied, the letter dated 30th Sept 1994 was telling. The letter was written and signed by Lakha Company Advocate. The letterhead shows that A. A. Lakha was the sole advocate in the firm. The letter was addressed to Mohan Galot, and the undisputed evidence before the trial Judge was that Mohan Galot was the Chairman of the Board of

Directors of the 1st respondent company.

[85] The letter states as follows:

> **30th September, 1994**
>
> **Mohan Galot P.O. Box 57387, Nairobi.**
>
> **Dear Sir,**
>
> **RE: HCCC 5002 of 1994**
>
> **M.O.S.D. VS STANDARD CHARTERED FINANCIAL SERVICES LTD Further to our letter of 7th September and to our subsequent meeting of 19 th, we have given anxious consideration to your request to act for you in the above case. In view of our heavy commitments, we regret we will be unable to act for you in the above case. Your papers are returned herewith**
>
> **Yours faithfully Signed**
>
> **LAKHA & COMPANY**

[86] The letter confirms that the advocate had prior correspondence and a meeting with Mohan Galot in regard to a brief concerning representation of the 1st respondent in the High Court suit between the 1st respondent and the 1st applicant. It is common knowledge that before Lakha, J.A. was appointed as a judge, he was practising as an advocate under the firm name of Lakha and Company Advocates. The affidavit sworn by the respondents' advocate, Meshack Odero, does not deny the contact between Lakha, J.A. and the 1st respondent in regard to the brief, but maintains that the judge rejected the brief. That may well be so. However, the very fact that there was contact confirmed a relationship between the judge and 1st respondent that ought to have been disclosed but was not.

[87] It is our view that the learned judge should have disclosed to the parties his earlier relationship with one of the parties in the suit. Dealing with the issue of disclosure in **Kipkoech Kangogo, and others versus The Board of Governors Sacho High and others (Civil appeal No.75 of 2011),** this Court cited with approval the following finding In ***Taylor & Another v Lawrence & Anor [2002] EWCA Civ 90***:

> ***"On the other hand, if the situation is one where a fair minded and informed person might regard the judge as biased, it is important that disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw. In other situations disclosure can unnecessarily undermine the litigant's confidence in the judge."*** (*Emphasis added*)

[88] Secondly, the fact that the judge had occasion to meet and discuss the brief with Mohan Galot, the 1st respondent's Chairman of the Board; and had also the opportunity to discuss the claim and even peruse documents pertaining to the suit, put the judge in a situation where apparent bias could be inferred from the circumstances. We reiterate what the predecessor of this Court stated in ***Tumaini v Republic 1972 [EA] 441*** that:

> ***"…in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable persons."***

[89] In this case there was a good basis upon which a reasonable person could form an impression that Lakha, J.A. did not approach the case with an open mind, as there was a possibility of his mind having been clouded by the information that had come to his knowledge through his prior contact with Mohan Galot. We are alive to the fact that the decision of Lakha, J.A. received support from Owuor, J.A. who

concurred fully with that decision. Nonetheless, in considering the issue of bias as was stated by Lakha, J.A. in **Kimani v Kimani** (supra)

> ***"…the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias."***

[90] The mere probability or appearance of bias was enough to breach the cardinal rule of fair trial in the administration of justice. Having raised the issue of bias arising from the same circumstances, in the hearing of an interlocutory application by the same judge in a matter involving the same parties, we do not understand why the applicants' counsel failed to raise the issue during the hearing of Civil Appeal No. 88 of 2000. That omission notwithstanding, the seriousness of the issue of bias cannot be underrated. As observed in the **Benjoh case**, bias is one of the grounds that would justify review of a previous decision of this Court**.**

Delay

[91] The delay on the part of the applicants in bringing the application for review was a pertinent issue that was raised by the respondents. The impugned judgment was delivered on 4th October 2002 but the application seeking to review that judgment was made almost four years later, on 18th August 2006. The applicants have explained this delay as having been caused by their unsuccessful attempts to seek relief through the COMESA court. That attempt to seek relief from the COMESA court underscores a clear indication of the applicants' dissatisfaction with the ruling and attempts to seek redress.

[92] In **Benjoh case *(supra*)** this Court declined to exercise its residual power to review its previous decision because the application for review was made 14 years after the decision was made. The Court expressed itself thus:

> ***"This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice****."*

[93] In the present case, the application for review was made 4 years after the

Court's judgment. Unlike the **Benjoh case,** the applicants herein have explained the reason for the delay, and there have been no allegations of any rights of innocent third parties being affected by the delay. Moreover, the want of jurisdiction in the assessment of the damages for sale of the machinery, coupled with the appearance of bias vitiates the Court's decision in a manner that far outweighs the issue of delay.

Conclusion and Final Orders

[94] For the above stated reasons we come to the conclusion that this is an appropriate case in which this Court should exercise its residual powers in the applicants' favour.

[95] Accordingly we allow this application, declare that there was failure of justice in the judgment dated 4th October 2002 and we accordingly invoke the court's residual jurisdiction to correct the injustice by reviewing the judgment and setting it aside with all consequent orders; and direct that Civil Appeal No 88 of 2000 be heard afresh. On the issue of costs, given the nature of this application we find that there is an element of public interest in resolving the issue of this Court's residual jurisdiction in reviewing its decisions. We are indeed grateful to the parties' advocates for their submissions and the industry that they have put in this matter. In the premises the order that commends itself to us on costs is that each party should bear their own costs. We so order.

Dated and delivered at Nairobi this 8th day of April, 2016

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J.W. MWERA

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

P. MWILU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR