IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWILU, MUSINGA, KIAGE & J. MOHAMMED- JJ.A)

CIVIL APPLICATION NO. NAI 224 OF 2006

BETWEEN

STANDARD CHARTERED FINANCIAL SERVICES …..…1ST APPLICANT

A.D. GREGORY……………………………....……..……2ND APPLICANT

VERSUS

MANCHESTER OUTFITTERS (Suiting Division) LTD

(Now known as King Woollen Mills Ltd)……………1ST RESPONDENT

GALOT INDUSTRIES LTD………………………………2ND RESPONDENT

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

(Application for the setting aside in toto the Judgment and Order Dated 4th October 2002

in

H.C.A. No. 88 of 2000)

****

RULING OF NAMBUYE, JA

1. ***Standard Chartered Financial Services Limited and A.D. Gregory*** in their capacity as the 1st and 2nd applicants, moved to this Court and presented Civil application No. Nai 224 of 2006 on 18th June, 2006 against ***Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited,) Galot Industries Limited and C.D. Cahil*** in their capacity as the 1st, 2nd and 3rd Respondents respectively. In it, the applicants seek two substantive reliefs namely; that the Court be pleased to re-open and re-examine its judgment and order made on 4th October, 2002 in ***Civil Appeal No.88 of 2000 Manchester Outfitters (Suiting Division) Limited and Another versus Standard Chattered Financial Services Limited and 2 others;*** and that the said Judgment and order be declared a nullity and set aside and the appeal be heard afresh. The application is predicated on Sections (sic) 64 and 77 (a) of the Constitution, Section 3 of the Appellate Jurisdiction Act (Cap 9) and Section 3 of the Judicature Act (Cap 8) and/or Rule 1 (2) of the Court

of Appeal Rules. The application is opposed by a replying affidavit of ***Meshack Odero*** filed on 18th April, 2007.

2. During the pendence of the merit disposal of the said application, the 1st and 2nd respondents lodged a notice of preliminary objection on 21st May, 2007 raising ten (10) grounds of objection namely:-

1. ***This Court has no jurisdiction to entertain, hear and determine this application.***

2. ***It seeks to have this Court sit in judgment on its own previous decision.***

3. ***The applicants intend to change the intent of the judgment of this Court by side wind.***

4. ***The application is an abuse of the process of the Court.***

5. ***By a long line of decisions of this Court has stated categorically that it will not entertain this type of application except in exceptional circumstances.***

6. ***No basis has been established.***
7. ***No explanation circumstances have been demonstrated to justify the application.***

8. ***No significant injustice has been shown to have been occasioned.***

9. ***This very Court in the very matter has already stated that its judgment was final and the end of the litigation. It resolved the final position of the parties.***

10. ***The application should be struck out with costs certified for two counsel."***

3. In his oral submission to Court, **A.B. Shah (JA Rtd)** leading ***Mr. Havi*** for the 1st and 2nd respondents, urged us to allow the preliminary objection on the grounds that, **one,** the judgment sought to be reviewed is sound, unanimous and unassailable. **Two**, the jurisdiction of the Court of Appeal as was then prescribed by the retired constitution and the Appellate Jurisdiction Act makes no provision for the Court of Appeal to review its own judgment, save for issues governed by the slip rule provisions. **Three,** that in all the decisions of the Court of Appeal where such an attempt has ever been made, the Court of Appeal has consistently stated that there is no jurisdiction vested in the Court of Appeal as currently constituted to review its own decisions.
4. It was ***Mr. A.B. Shah's*** further argument that if this Court were to be allowed to vest jurisdiction in itself to review its own decisions outside the mandate provided by law, it would open a pandoras box by opening up a flood gate of similar litigation. On this account, we were urged to maintain the trend the Court of Appeal has itself previously taken in reiterating its earlier decisions, that it has no jurisdiction to review its own decisions. The application is therefore an abuse of the Court process and we should hold so, argued ***Mr. A.B. Shah.***
5. ***Mr. Gikera*** for the 3rd respondent supports the preliminary objection fully.

6. In opposition, ***Mr. Oraro,*** Senior Counsel for the applicant leading ***Mr. Paul Chege,*** urged us to dismiss the preliminary objection for the reason that the mandate of the Court of Appeal is pre-determined by both the Constitution and the Appellate Jurisdiction Act Cap9 Laws of Kenya; namely; to deal with matters arising from either a decree or order arising from a decision of the High Court as it was the case under the old Constitution and any other appeals permitted by law as is the position under the current Constitution. In the circumstances sought to be vindicated by the application for review sought to be forestalled by the preliminary objection, argued ***Mr. Oraro***, the applicants were genuinely aggrieved as the Court of Appeal went over board of its mandate when it admitted documents *de bene esse* from the bar, documents which the High Court had no opportunity to interrogate and rule upon, received arguments on these which arguments formed the core of the decision sought to be reviewed.

If given a chance, ***Mr. Oraro*** added, the applicant intends to demonstrate that the Court of Appeal has jurisdiction to recall its decision demonstrated to be a nullity. It is their stand that, by reason of this Court calling for evidence *de bene esse* which the High Court had no opportunity to interrogate, the Court acted outside its mandate rendering its resulting decision thereby annulity. Being a nullity, argued ***Mr. Oraro,*** it is not shielded by the provisions of law as well as the case law relied upon by the preliminary objectors. Being outside that ring of protection of the sanctity of a Court of Appeal decision, it falls within the exceptional circumstances case envisaged by the decision in the ***Torloch Singh Rai Case (Supra).*** That time has now come for this Court to rise up to the occasion and put the record in this long standing matter straight. On that account Mr***. Oraro*** urged us to dismiss the preliminary objection with costs to applicants.

7. In his reply to the applicant's response to the preliminary objection, ***Mr. A.B. Shah*** reiterated the objections and added that rule 29 of the Court of Appeal Rules donated power to the Court to assess damages where no damages had been given by the High Court; that no objection was raised by the applicant to that arrangement; that they concede that Section 3 of the Appellate Jurisdiction Act (Supra) donates power to the Court of Appeal to hear appeals from the High Court; that there was no justification for ***Lakha, JA.*** (as he then was) to recuse himself as he had not taken a brief from any of the litigants. On that account, ***Mr. A.B. Shah*** urged us not to lose sight of the stand taken by the Supreme Court in the case law assessed herein that the Court of Appeal has no jurisdiction to review its own decisions; that jurisdiction is everything and it is only given by statute and this Court has no jurisdiction to enlarge its own jurisdiction where none has been donated by statute; that the Tanzanian decision relied upon by the applicants is distinguishable.
8. The preliminary objectors relied on several authorities, among them, ***Lakhamshi Brothers Limited versus R. Raja & 5 others [1966] EA 313, Vallabhalai Karsandas Ranica versus Mansukhlal Jiuras) and others [1965] EA 700, Man Singh Madhu Singh Darbar versus Vijay Morjaria Civil Application No. Nai 366 of 2000 (UR), Musiara Limited versus William ole Ntimama, Nairobi CA No. 271 of 2003 (UR), Chris Mahinda T/A Nyeri Trade Centre versus Kenya Power & Lighting Co. Limited Civil Application No. Nai 174 of [2005] (106/2005 UR,*** all for the propositions that (i) the Court of Appeal has always refused invitation to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made, for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of this Court on the basis of arguments thought of long after the judgment or decision was delivered or made; (ii) that where an issue has been determined by a decision of the Court of Appeal, that decision should definately determine the issues between those who were party to the litigation; (iii) that, public policy demands that the outcome of litigation should be final and that litigation should not unnecessarily be prolonged which is the reason why limits have been placed on the rights of citizens to open or to reopen disputes (iv) while drawing inspiration from ***Taylor & Another versus Lawrence & Another [2002] 2ALL ER 353*** for the proposition, (v) that the Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. (vi) that the Court had implicit powers to do that which was necessary to achieve the real objectives of an Appellate Court, namely; to correct a wrong decision so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. Such power is necessary to enable the Court to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its process. (vi) …..the residual jurisdiction to reopen appeals was linked to a discretion whose use is confined for use in cases in which it was appropriate to use it…. (vii) that there was a tension between a Court having such a residual jurisdiction and the need to have finality in litigation, such that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen; (viii) that the need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias has been established and that might justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. It should however be clearly established that significant injustice had probably occurred and that there was no alternative effective remedy. (ix) That the effect of reopening the appeal on the one hand and the extent to which the complaining party was the author of his own misfortune would also be a relevant

consideration.

9. In opposition, the applicant relied on the case of ***Anarita Karimi Njeru versus the Republic [No.2] [1971] EA 79*** for the proposition that the Court of Appeal enjoys no general supervisory role over the judicial process and only has such jurisdiction as is expressly conferred on it by statute; the case of ***Somanis versus Shirinkhanu (No.2) [1971] EA 79*** for the proposition that the Court is a creature of statute and had only such jurisdiction as was conferred on it by the statute. It had no inherent jurisdiction.; the decision in the case of ***Owners of the Motor Vessel "Lilian S" versus Caltex Oil (Kenya) Limited [1989] KLR 1,*** for the proposition that jurisdiction is everything; (ii) that a question of jurisdiction may be raised by a party or by a Court on its own motion and it must be decided forthwith on the evidence before the Court; the Tanzanian decision in the case of ***Transport Equipment Limited versus Valambhia [1994] 1LRC*** for the proposition that in the absence of an express provision in the Constitution empowering the Court to review or alter its own decision after delivery, the Court (full bench) has to consider whether such jurisdiction existed under any other law; (ii) that the Court of Appeal for Eastern Africa had recognized that it had limited inherent jurisdiction to review its own decisions in circumstances where a party was wrongly deprived of the opportunity to be heard or where for reasons of fraud or otherwise the decision of that Court was a nullity.
10. Both sides relied on the case of ***Jasbir Singh Rai and 3 others versus Tarlochan Singh Rai and 4 others Nairobi Civil Application No. Nai 307 of 2003 (154/2003 UR) and Peter Ng'ang'a Muiruri versus Credit Bank Limited & 2 others [2008] eKLR*** for the propositions that (i) the Court of Appeal can revisit its earlier decision in exceptional circumstances in exercise of its residual inherent jurisdiction; (ii) that public policy demanded that there be an end to litigation; (iii) the Court of Appeal just like the High Court and other Subordinate Courts' are all creations of various written laws; (iv) when one considers our statutory position and the authority based on the statute, the Court of Appeal has no jurisdiction to re-open, rehear and then recall its earlier decision and substitute it with another; (v) the doctrine of finality is a doctrine which enables the Court to say litigation must end at a certain point regardless of what the party thinks of the decision which has been handed down. It is a doctrine or principle based on public interest.
11. My simple task now is to determine whether the preliminary objection advanced by the respondents is to stand or not. The parameters to be applied by me in so determining is none other than that which was provided by the predecessor of this Court, the Court of Appeal for Eastern Africa in the celebrated case of ***Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Limited [1969] EA 696***. At page 700 Paragraphs D-E ***Law, JA,*** *(*as he then was) had this to say:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission, that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles New bold P. on the other hand had this to say at page 701 pr. A-B:-

" A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

12. From the above, it is my considered view that the prerequistes that the respondents need to establish in order to convince me to uphold their preliminary objection are as follows:-

i. That their preliminary objection as laid is purely on a point of law.
ii. That the facts of the proceedings sought to be faulted are not contested.
iii. That they are not seeking the exercise of this Court's judicial discretion.

13. With regard to the first prerequisite, I entertain no doubt that this has been met because the issue of lack of jurisdiction to re-open and review its own decision advanced by the respondent

preliminary objector is one of the examples of pure points of law given by ***Law, JA*** in his opinion in the ***Mukisa case (Supra)*** set out above.

14. As for the second prerequisite, I am of the opinion that there is tension between the rival arguments. The respondent preliminary objectors have argued that the decision sought to be revisited through the application sought to be forestalled was reached within the confines of Section 64 of the retired Constitution, the substantive jurisdictional Section 3 of the Appellate jurisdiction Act Cap 9 Laws of Kenya and the Rules made thereunder and is therefore unassailable. On the other hand, the stand of the applicant is that the decision sought to be revisited was reached in circumstances other than those cushioned by the jurisdictional protection in provisions of law mentioned above and it is therefore assailable. That Section 64(1) of the retired Constitution and Section 3(1) of the Appellate Jurisdiction Act No. 9 Laws of Kenya conferred on the Court of Appeal jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law. Rule 31 of the Court of Appeal Rules donates general powers of the Court. It provides:-

"On any appeal the Court shall have power so far as its jurisdiction permits to confirm, reverse or vary the decision of the Superior Court or to remit the proceedings to the Superior Court with such decree as may be appropriate or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs"

Rule 35 (1) (2) on the other hand donates power to correct errors. It provides:-

"A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what was the intention of the Court when judgment was given.

(2) An order of the Court may at any time be corrected by the Court either of its own motion or on the application of any interested person if it does not correspond with the judgment it purports to embody or where the judgment has been corrected under sub rule (1) with the judgment as so corrected"

15. ***"Judgment"*** is defined by the substantive provisions of the Act. Section 2 says that ***"judgment"*** includes decree, order, sentence and decision." To ***Mr. Oraro,*** this definition is confined to what was before and handled by the High Court up to the point of transmission of the said judgment, decree or order, from the High Court to the Court of Appeal for appellate process. ***Mr. Oraro*** also appears not to have any serious contention over the existence of the powers donated to this Court by the slip rule provisions as contained in Rule 35 of this Court's Rules. His bone of contention is that as at the time the final decision sought to be revisited was given, additional facts or matters beyond what the High Court transmitted to this Court were thus placed before this Court, considered and then these played a major role in the outcome of the decision sought to be revisited. It is this action that the applicants intend to fault. It is their action and the documents so omitted on appeal that the applicants contend that were not cushioned by the jurisdictional safe guards set out above.

16. The respondents' preliminary objectors do not dispute the introduction of these new matters. I have been made to understand that these were documents admitted *de bene esse*, parties allowed to submit on them and then a judgment delivered to that effect. The respondents also do not seem to be seriously contesting the introduction of the additional material. To them, the Court of Appeal acted within its mandate when it admitted these materials. Reliance was placed on the decision in the case of **Wanje versus Saikwa [1984] KLR 275** for the proposition that the Court of Appeal, under rule 29(1) of the Court of Appeal Rules has the power to take additional evidence in an appeal from the decision of the High Court acting in the exercise of its original jurisdiction or to direct that additional evidence be taken by the trial Court; the decision in a persuasive authority of **Murphy versus Stone Wall Work (Chariton) Limited [1969] 2ALL. E.R 949** for the proposition that the Court of Appeal of England had jurisdiction to exercise its discretion in favour of admitting fresh evidence and re-open a case. See also the decision in the case of **Tanganyika Farmers Association Ltd versus Unyamwezi Development Corperation Limited [1960] EA**

620 for the proposition that an appellate court has discretion to allow an appellant to take a new point on appeal if full justice can be done to the parties…."

From the above assessment and keeping in line with my clear mandate of being limited to the determination as to whether the preliminary objection fronted by the respondent's is to stand or not, my hands are tied. I am not in a position to rule as to whether the matters admittedly admitted by this Court subsequent to the transmission of the High Court decision to this Court for Appeal purposes fully fall within or without the jurisdictional base provisions set out above; that these could safely be admitted under rule 29 (1) of this Courts Rules without formal invitation as I have not been told by either side that such a move was made before the mentioned documents were admitted as evidence *de bene esse* and acted upon.

The nearest I can go is to rule that there is serious contest as regards the factual base as to whether in the circumstances displayed here in upholding of the preliminary objection in the manner sought can comfortably fully determine the issues in controversy as between the parties and put the matter to rest. This being the position, I find that the second prerequisite for upholding a preliminary objection has not been met. There is need for the interrogation by the Court of the factual base relied upon by either side before arriving at the conclusion as to whether there is jurisdiction to reopen or not to reopen its decision.

As for the last prerequisite dealing with invitation of the exercise of the Court's judicial discretion, I find that this is evidently borne out from the arguments on both sides. The applicant has invoked my discretion to rule that the decision sought to be reopened falls within the ambit of protection envisaged by the jurisdictional provisions of law set out above. The respondents on the other hand have invited me to rule that it falls outside the ambit of that jurisdictional protection into the special category envisaged by the decision in the ***Rai case (Supra)*** and it should be allowed to go for interrogation on its merits by way of disposal of the application objected to.

Before I put the matter to rest, it is prudent for me to determine but without going into the merits of that application, whether on the face of the facts before me, it is proper to say that the application sought to be faulted by the preliminary objection is frivolous and an abuse of the due process of the Court. I think not. My constrained reason is that it goes beyond the Rule 35 (1) (2) procedures though it appears to be floating in think it raises serious issues unchartered waters. I have read the ruling of ***Kiage, JA*** and I fully concur.

Dated and delivered at Nairobi this 27th day of June, 2014.

R.N. NAMBUYE

……………….……..…

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWILU, MUSINGA, KIAGE & J. MOHAMMED, JJA)

CIVIL APPLICATION NO. NAI 224 OF 2006

BETWEEN

STANDARD CHARTERED FINANCIAL SERVICES LTD.....1ST APPLICANT

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 the setting aside in toto the Judgment and Order made

on the 4th day of October

in

Civil Appeal Number 88 of 2000)

****

RULING OF P. M. MWILU JA.

I have had the advantage of reading in draft the Ruling of Kiage JA.

I am in full agreement with his reasoning and conclusions and therefore have nothing useful to add.

Dated and delivered this 27th day of June 2014.

P. M. MWILU

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWILU, MUSINGA, KIAGE & J. MOHAMMED, JJA)

CIVIL APPLICATION NO. NAI 224 OF 2006

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in

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****

RULING OF MUSINGA JA.

I have read the ruling of my brother Kiage, J.A with which I am in full agreement. I have nothing useful to add.

DATED and delivered this 27th day of June 2014

D. K. MUSINGA

………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MWILU, MUSINGA, KIAGE & J. MOHAMMED, JJA)

CIVIL APPLICATION NO. NAI 224 OF 2006

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

(An application for the setting aside in toto the Judgment and Order made on the 4th day of October

in

Civil Appeal Number 88 of 2000)

****

RULING OF KIAGE JA.

On 18th April 2006, the applicants herein, **STANDARD CHARTERED FINANCIAL SERVICES LTD** and **A. D. GREGORY,** lodged a Notice of Motion in this Court. It was not your every day application for it sought the setting aside ***in toto*** the judgment and order made on the 4th day of October 2002 in **Civil Appeal No. 88** of **2000**. That appeal was between **MANCHESTER OUTFITTERS (SUITING DIVISION) LTD** now known as **KING WOOLLEN MILLS LTD** and **GALOT INDUSTRIES LTD** the current respondents to the Motion in question as the appellants and the applicants and another party, **C. D. CAHILL,** as the respondents. The application is expressed as brought under **Section 64** and **77(9)** of the retired **Constitution, Section 3** of the **Appellate Jurisdiction Act (Cap 9)** and **Section 3** of the **Judicature Act (Cap. 8)** and/or **Rule 1 (2)** of The **Court of Appeal Rules**. The specific prayers it seeks are in the main that this Court be pleased to re-open and reexamine the aforesaid judgment and that the same be declared a nullity with the effect that it be set aside and that appeal be heard afresh. The grounds upon which it is predicated appear on its face as:-

"*(a)* ***The Court acted outside its jurisdiction;***

17. ***The majority decision was in connection with a cause of action which arose after the decision in the superior court and after the appeal had been lodged;***

18. ***The Applicants were not given a fair hearing;***
19. ***Rules of natural justice were not observed;***
20. ***The judgment is a nullity;***
21. ***Mr. Justice Lakha J.A. who presided on (sic) the hearing was biased in favour of the appellants (in the said Appeal).***

In support of the application the applicants presented two affidavits both expressed as sworn on the said 18th August 2006. The first was by **ANDREW DOUGLAS GREGORY** the second Applicant while the other was by **PETER LE PELLY** advocate and senior counsel who had represented the applicants in the said appeal. Those affidavits provided the evidentiary back-up for the grounds on the face of the application.

The application is opposed by way of a lengthy affidavit sworn by **MESHACK ODERO** Advocate on behalf of all the Respondents and all to the effect that the application should be dismissed.

The application is yet to be heard and determined but on the day it was listed before us, a preliminary objection to the application was argued. That objection was by the 1st and 2nd Respondents and notice of it had been lodged on 21st May 2007 and duly served on the applicants.

The preliminary objection is premised on some ten grounds as follows;

"1. This Court has no jurisdiction to entertain hear and determine this application.

It seeks to have this Court sit in judgment on its own previous decision.

The applicants intend to change the intent of the judgment of this Court by sidewind.

The application is an abuse of the process of the Court.

By a long line of decisions this Court has stated categorically that it will not entertain this type of application except in exceptional circumstances.

No basis has been established.

No exceptional circumstances have been demonstrated to justify the application.

No significant injustice has been shown to have been occasioned.

This very Court in the very matter has already stated that its judgment was final and the end of the litigation. It resolved the final position of the parties.

The application should be struck out with costs certified for two counsel."

Urging the preliminary objection before us, Mr. A. B. Shah, learned counsel appearing with Mr. Havi for the 1st and 2nd Respondents submitted that this Court cannot reopen its own decisions which have the seal of finality. He cited a number of decisions of this Court for that proposition including the well known **JASBIR SINGH RAI & 3 OTHERS –VS- TARLOCHAN SINGH RAI & 4 OTHERS Civil Application No. Nai 307 of 2003 (154/2003 UR)** contending that there is a public policy need for litigation to come to an end so that a judgment of this Court cannot be set aside by this Court itself no matter how wrong it may be. That decision was by a five–judge bench of this Court and it has been followed in many others including **PATRICK GATHENYA –VS- ESTHER NJOKI RURIGI & ANOTHER CIVIL APPLICATION NO. NAI 290 OF 2005 (UR. 180/05).**

Borrowing the language of the Supreme Court in **SAMUEL KAMAU MACHARIA & ANOTHER –VS- KENYA COMMERCIAL BANK LTD & 2 OTHERS [2012] e KLR**, learned counsel submitted that to re-open the appeal as sought by the applicants would trigger a turbulence of pernicious proportions in the private legal relations of citizens in this case, paying due regard to the fact that proprietary rights have already passed and vested following this Court's final judgment. The theme of the finality of this Court's judgments not amenable to review or re-opening by itself was the recurring strain, in counsel's submission, in various other cases including **LAKHAMISHI BROTHERS LTD –VS- R. RAJA & SONS [1966] EA.313; RANIGA –VS- JIVRAJ & OTHERS [1965]EA 700; NYAMODI OCHIENG RAMOGO & ANOR –VS- KENYA POSTS & TELECOMMUNICATIONS CORPORATION CIVIL APP. NO. NAI 9 OF 1994 and MUSIARA LTD –VS- NTIMAMA [2005] 1 EA 317.** It was counsel's view then that this Court being devoid of jurisdiction to re-open its judgment, the application before Court is incompetent and ought to be struck out.

Mr. Oraro, learned counsel for the applicant, naturally took the opposite view. He contended that the Supreme Court decisions in **S. K. MACHARIA and JASBIR SINGH RAI & 3 OTHERS –VS- TARLACHAN SINGH RAI & 4 OTHERS [2013] e KLR** were both distinguishable and in-applicable to the matter before us as they related to the entirely different issue of the constitutionality of **Section 14** of the **Supreme Court Act** in so far as it donated appellate jurisdiction to that Court quite beyond the parameters set by the Constitution. Mr. Oraro was categorical that we are now under a new constitutional dispensation where violation of fundamental rights cannot be glossed over or ignored in the name of finality as the decisions of this Court cited by the respondents seemed to suggest. He was quick to add that even though the application objected to was filed in August 2006, it was nevertheless saved alongside

all other extant litigation by the new Constitution.

Mr. Oraro further posited that the peculiarities of the present case are such as would entitle us to depart from the general position that appeals once decided cannot be re-opened. He contended that the decision sought to be re-opened, reviewed and set aside was made absent jurisdiction in that the Court exercised an original as opposed to an appellate jurisdiction. Appeals can only be from orders or decrees as clearly discernible from **section 66** of the **Civil Procedure Act, Cap 21** yet the Court dealt with and decided matters that transpired or arose post the judgment of the High Court, which renders the Court's decision a manifest nullity inviting re-consideration. He pointed out that Bosire JA had in the **RAI –VS- RAI** re-consideration application quite categorically stated the Court's lack of original jurisdiction so that any calling of evidence after judgment, when the Court is *functus officio,* is an illegality; yet that is the very thing that transpired in the impugned judgment herein. To Mr. Oraro, the absence of jurisdiction rendering a judgment a nullity is a valid exception to the rule of finality and would justify a re-opening of an appeal.

A second exception in counsel's submission is where a party was denied a hearing. Mr. Oraro pointed to the judgment of Omolo JA in **RAI –VS- RAI** where the learned Judge made reference to the case of **SOMANI's –vs- SHIRINKHANU (NO. 2) [1971] EA. 79** where Law, JA. had stated thus;

"...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 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 null and void, a consideration which is absent in the case."

It was Omolo JA's view that where a party has not been heard through no fault of his own there cannot be any finality in the judgment. He did not see any other situation which would prevent a party from being heard **"unless it is a situation where the Court itself goes berserk and simply prevents a party from addressing it."** The question that would arise and require interrogation is what the effect of such aberrant or like conduct on the part of the Court would be on the applicability of the doctrine of finality. At any rate, Mr. Oraro says, if I understood him a-right, that the applicant intends to demonstrate at the hearing of its application that it was denied a hearing in a manner that is contrary to natural justice and the right to a fair trial as now captured in Article 25 (c) of the Constitution as an irreducible minimum.

Mr. Oraro next specifically raised the miscarriage of justice or nullity exception and cited the Tanzanian case of **TRANSPORT EQUIPMENT –VS- VALAMBHIA [1994] 1LRC** 114 where a five–judge bench of the Court of Appeal was called upon to decide the exact point with which we are grappling herein; viz whether the Court of Appeal had jurisdiction to review its own decisions. The issue, as here, was raised by way of a preliminary objection. Overruling the objection; that full bench held as follows;

''(2) There was nothing under S117 or any other provision of the Constitution which expressly empowered the Court of Appeal to review or alter its own decisions after delivery. Therefore the full bench had to consider whether such jurisdiction existed under 'any other law' as envisaged by S117(1) of the Constitution. The Court of Appeal for East Africa had recognized that it had limited inherent jurisdiction to review its own decisions in circumstances where a party was wrongly deprived of the opportunity to be heard or where, for reasons of fraud or otherwise, the decision of that court was a nullity. In addition the Court of Appeal of Tanzania also enjoyed inherent jurisdiction to review its decisions where such decisions were based on a manifest error on the face of the record resulting in miscarriage of justice…"

Counsel submitted that there was miscarriage of justice in the judgment sought to be reviewed on at least three bases namely:-

iv. The learned Judges dealt with matters not before them on that appeal.
v. The applicant was denied an opportunity to be heard in that documents were produced before the

court apparently *de bene esse*.

vi. One of the Judges on the bench, Lakha JA, had already been objected to on ground of bias and ought not to have sat.

Mr. Oraro completed his submissions by stating that even though a re-opening and rehearing of an appeal may turn out to be an unusual and unprecedented occurrence in own jurisdiction, it is neither unheard of nor necessarily improper, having been exercised within the East Africa region and in England as well in the precedent-setting former House of Lords decision of **R –VS- BOW STREET METROPOLITAN STIPENDIARY MAGISTRATES & OTHERS EX PARTE PINOCHET UGARTE (NO.2) [1999] 1 ALL ER 577**. Counsel submitted that the matter before us presented a unique and peculiar situation where there is a combination of all known exceptions to the rule against finality. He therefore urged us to dismiss the preliminary objection and pave way for the hearing of the review/recall or setting aside application.

In his reply to those submissions, Mr. Shah sought to show that given **Rule 29** of this Court's Rules, there was nothing objectionable about the Court having admitted the evidence complained of *de bene esse*. He also countered the issue of Lakha JA's alleged bias by stating that no objection had been raised to his sitting and that even though there was a note from the Chief Justice on the issue of alleged bias, he had not quite barred Lakha JA from sitting, stating only that the learned Judge **"may have to disqualify himself"** as the basis for an empanelling of a bench that was to exclude Lakha JA. At any rate, concluded counsel, the alleged bias of one or more of the Judges who heard the appeal cannot be productive of a jurisdiction to re-open concluded appeals which the Court does not have, as jurisdiction cannot be conferred by contrivance.

I have in this ruling very deliberately avoided going into any detailed analysis of the rival arguments made and the authorities cited in support. This is for the reason that the same arguments and the same authorities relate to the question whether or not a final judgment of this Court is amenable to review, rehearing or recall. As I am not at this point called upon to make any firm determination on whether or not the said judgment merits review and re-opening, I am of the circumspect view that it would be improper and potentially embarrassing to us when we embark on the task of determining the application proper were we, at this stage, to be conclusive or express final views on the matters raised.

All we need decide is whether we should simply strike out this application for being incompetent for the reasons that appear in the notice of preliminary objection. I think not.

In the old and oft-cited case of **MUKISA BISCUIT MANUFACTURING CO. LTD –VS- WEST END DISTRIBUTORS [1969] EA 696**, Law JA gave expression to his understanding of what a preliminary objection is, which has since gained acceptance and authority and has been followed and applied in numerous decisions ever since. Said the Judge (at p700):

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

There is no doubt that in so far as the preliminary objection raised touches on the question of whether we have the jurisdiction to entertain the application for review and setting aside a judgment of this Court, it is properly taken. It is a valid preliminary objection. What I am not prepared to find, however, is that this is a proper case in which the said objection should be upheld. My own way of looking at the matter is that a preliminary objection is essentially a pre-emptive strike against the pleading or proceeding objected to. In raising it, the objector essentially invokes the Court's summary jurisdiction to deal with the issue raised liminally and reject the challenged pleading, application, suit or proceeding without having to hear it on its merits. That being the true nature and effect of a preliminary objection properly-understood, I apprehend that it is to be upheld only in the clearest of cases where there really can be no

valid argument or dispute both as to the correctness of what is asserted and as to the consequence of it, which is that what is sought to be struck out is entirely unsustainable. Then only can the drastic move be justified. It would follow that if the issue being raised is one that calls for serious disputation, then a court would be remiss to dispose of it at the threshold without the advantage of full merit–based argument by both sides. This implicates the natural justice requirement of *audi alteram partem* and is in consonance with the Court's bounden constitutional duty to do substantial justice untrammeled by technicalities of procedure.

Having considered the submissions made before us and the authorities cited, what emerges is that the question of whether or not the judgment of the Court ought to be reviewed in the unique and probably irreplicable circumstances of this case, where it is alleged that there is a rare confluence of three exceptional bases for review, is not a plain and obvious one. Indeed, the very issue of whether or not a jurisdiction exists to rehear or review this Court's judgments is itself contentious as there definitely are authorities pre-**RAI –VS- RAI** which suggest that such jurisdiction does exist although the vast majority of decisions say otherwise. **RAI –VS- RAI** itself held that those decisions supposedly recognitive of such jurisdiction did not actually do so save ***obiter***, but this too, is by no means a settled issue in view of persuasive decisions from our counterpart courts in Uganda and Tanzania. All these issues, in my estimation, call for full and proper consideration at the hearing of the application. I would therefore not be quick to shut out such interrogation and engagement with the issue of plain importance by upholding the preliminary objection.

I consider it unfortunate that we had to engage so much time and effort in dealing with the preliminary objection when, on a proper consideration, the issues being raised therein could well have been raised and fully ventilated in the normal manner as a response to the application before us. I am cognizant of the fact that there are many instances reported in the cases where the same issue was raised by the same way of preliminary objection and will therefore not place blame on the objectors. Still, the words of President **Sir Charles Newbold in MUKISA BISCUIT CO. –VS- WEST END DISTRIBUTORS** are germane and indicative of sagacious restraint even when what is being raised does qualify as a preliminary objection in the technical sense;

"The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

The upshot of my consideration of this matter is that the preliminary objection must fail and I would dismiss it. Costs would abide the outcome of the applicants' motion dated 18th August 2006.

As Nambuye, Mwilu, Musinga and J. Mohammed JJA, agree, it is so ordered.

DATED and delivered this 27th day of June 2014.

P. O. KIAGE

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(**CORAM: NAMBUYE, MWILU, MUSINGA, KIAGE & J. MOHAMMED, JJA**)

CIVIL APPLICATION NO. NAI 224 OF 2006

BETWEEN

STANDARD CHARTERED FINANCIAL SERVICES LTD.......1ST APPLICANT

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 the setting aside in toto the Judgment and Order made

on the 4th day of October

in

Civil Appeal Number 88 of 2000)

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RULING OF J. MOHAMMED, JA.

I have had occasion to read the Ruling of Kiage JA. I agree with it.

DATED and delivered this 27th day of June 2014

J. MOHAMMED

………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR