



IN THE COURT OF APPEAL

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

CIVIL APPLICATION NO. NAI 90 OF 2013 (UR 60/2013)

BETWEEN

NGURUMAN LIMITED.....APPLICANT

AND

SHOMPOLE GROUP RANCH.....1ST RESPONDENT

OL KIRAMATIAN GROUP RANCH.....2ND RESPONDENT

(Application for Review or alternatively of correction of the orders given by the Court of Appeal (Koome, Gatembu Kairu & Otieno-Odek JJA) Dated 19th April, 2013

in

Nairobi Civil Appl. No. Nai 18 of 2012 (UR 13/2012)

RULING OF NAMBUYE, JA

1. The litigation before us has its roots in two suits. In Kericho HCCC No. 65 of 2009 the applicant herein, **Nguruman Limited**, was named as the plaintiff while the respondents, **Shompole Group Ranch, Moshila Ole Mataiyan, Nkoitiko ole Napiriya and Turanaole Kumari**, were named as the 1st, 2nd, 3rd and 4th defendants, whereas in Kericho HCCC **Ol Kiramatian Group Ranch, Mointi Lemarora Nkoyoko, Albert Ole Lenana and Mugesa Ole Lenana**, were named as the 1st, 2nd, 3rd and 4th defendants respectively. Various reliefs were sought against both sets of (defendants) respondents.

2. The two suits were consolidated and heard together, giving rise to the Judgment of **Ang'awa, J.** dated and delivered at Kericho on the 2nd day of December, 2009, whereby the learned Judge made orders, *inter alia*, that the Judgment was in respect of original file number HCCC 145 of 2001 and HCCC 146 of 2001 then Kericho HCCC 65 of 2009 and 66 of 2009 as consolidated; an order of eviction was to issue directed at both sets of (defendants) respondents and their members, agents and or servants directing them to vacate the suit premises with immediate effect; a permanent injunction to restrain the (defendants) respondents, their servants, agents or otherwise from continuing or repeating their trespass on the applicant's Land; nominal damages of Kshs. 5 million; the preliminary objection was dismissed; costs of the suit to the applicants and interest on the nominal damages.

3. No notice of appeal was filed against that decision. Costs of the suit were taxed at Kshs.8,

066,335.00 and a certificate of taxation dated the 2nd day of June, 2009 issued. There followed the extraction of the decree dated 19th day of April, 2010 and filed in Court on 27th day of April, 2010. There after the Execution process was set in motion.

4. On 11th August, 2010 **M/s Ochieng, Onyango, Kibet and Ohaga** presented an application by way of notice of motion dated the 2nd day of August, 2010 on behalf of the 1st respondent in HCCC No. 65 of 2009, **Shompole Group Ranch**, in which among other orders, they sought stay of execution of the Judgment of **Ang'awa, J.** of

2nd December, 2009, the resulting decree and all other proceedings emanating therefrom; stay of an impending sale, review and setting aside of the orders of **Ang'awa, J.**, the setting aside and nullification of the sale by public auction then impending, other reliefs and costs. The application was opposed, heard on its merits and resulted in a ruling delivered by **G.B.M. Kariuki, J.** (as he then was) of 9th day of January, 2012 in which the learned Judge dismissed the application for review and at the same time had it struck out.

5. The respondents were aggrieved by that dismissal order A notice of appeal dated the 20th day of January, 2012 was filed followed by the presentation of Civil application number Nai 18 of 2012 brought under Rule 1(2) and 5(2) (b) of the Court of Appeal Rules 2010. The substantive prayers sought are reproduced hereunder as:-

“(1). That this Honourable Court be pleased to stay the execution of the Judgment and decree of the Honourable Lady Justice Mary Ang’awa delivered on 2nd December 2009 in Kericho High Court Civil case No. 65 of 2009- Nguruman Limited versus Shompole Group Ranch, Moshila Ole Mataiyan, Nkoitiko Ole Napiriya and Turana Ole Kimari Consolidated with Kericho High Court civil case No. 66 of 2009- Nguruman Limited versus Ol Kiramatian Group Ranch Limited, Mointi Lemarora Nkoyokoy, Albert Kuseyo Kipainoi Muges Lenana, upon the striking out and dismissal of the applicants application for review by Justice GBM Kariuki on 19th January, 2012 pending the filing hearing and determination of the intended appeal from the said orders.

(2) That the applicant be at liberty to apply for such further orders and/or Directions as the Honourable Court may deem Just and expedient to grant”.

6. The application was opposed by a notice of preliminary objection dated the 15th day of March, 2012 and filed on the 20th day of March, 2012. It reads:

“(1) There is no positive and enforceable order, other than an order for costs which is capable of execution by the Respondent arising from the ruling delivered and orders made by the Honourable Mr. Justice G.B.M. Kariuki on 19th January, 2012. Therefore there is noting for this Court to stay, enforce or restrain by an injunction under the notice of motion application dated 27th January, 2012.

(2). The High Court never ordered the parties to do anything or refrain from doing anything or to pay any sum under the Ruling delivered on 19th January, 2012. Therefore the order made by the Honourable Mr. Justice G.B.M. Kariuki on 19th January 2012 striking out an order dismissing the applicants’ notice of motion application dated 2nd August, 2010, is not capable of execution by the respondent against the applicants.

(3). The order sought by the applicants in the notice of motion application dated 27th January, 2012 does not relate to what the Honourable Mr. Justice G.B.M. Kariuki decided on 19th January, 2012. The order sought by the applicants in the said notice of motion application is extraneous to an order for stay of execution. The said order does not relate to what the Honourable Mr. Justice G.B.M. Kariuki either ordered on 19th January 2012 to be done or not to be done.

(4). The orders sought are not obtainable.

(5). The Court lacks Jurisdiction under Rule 5(2) (b) of the Court of Appeal Rules to entertain the notice of motion application dated 27th day of January, 2012.

(6). The application has been brought and maintained contrary to the principle in *John N. Liboyi versus the Board of Governors. St. John College, Nairobi* civil application No. Nai 1138 of 2009 (UR 92/2009) unreported.

(7). The said notice of motion application is misconceived, bad in law, incurably defective.

(8). The notice of motion application has been brought contrary to the principle in *Western College of Arts and Applied Science versus Oranga C [1976] KLR63*. Therefore the said notice of motion application ought to be struck out”

7. The merit disposal of the application resulted in the ruling of **Koome, Gatembu Kairu and Odek, JJA** delivered on the 19th day of April, 2013. The portion of the ruling relevant to the rival arguments herein is that found at paragraphs 30, 31,32,33,34,35,36,37 and 38. For purposes of clarity, these are reproduced herein as here under:-

“30 There is, however, a valid Notice of Appeal in regard to the orders of 19th January, 2012. Is there an arguable appeal from the decision of the High Court given on 19th January, 2012?. We are persuaded the grounds raised in the draft memorandum of Appeal against the orders of 19th January, 2012 cannot be said to be frivolous. There is for instance the question whether the High Court was right in declining to review the order for “nominal damages” of Kshs.5, 000,000.00. We have also considered that the application dated 2nd August, 2010 that culminated in the orders given by the High Court on 19th January, 2012 included the prayer that: ‘The Honourable Court be pleased to review and set aside the order of Lady Justice Mary Ang’awa delivered on 2nd December, 2009.’”

31. If the applicants were successful in that application that sought a review of the Judgment given on 2nd December, 2009, it would have resulted in at least an order being made to set aside the order of eviction or of the payment of nominal damages in the sum of Kshs. 5 million.

32. The application dated 2nd August, 2010 was dismissed on the grounds inter alia that there was no “error, apparent on the face” of the Judgment of Ang’awa J. The application was also struck out for reasons that the firm of Onyago Otieno Kibet and Ohaga were not properly on record.

33. In our view the outcome of the application for review, if it was successful was intended to set aside orders of eviction and the nominal damages. We think that, in the circumstance of this case, the applicants should have an opportunity, bearing in mind the over arching objective in the administration of Justice is to do substantive Justice, to be heard on the substantive appeal from the decision of the High Court given on 19th January, 2012.

34. Considering that it is contended that the applicants (sic) property is under threat of sale in execution of the decree supports over 40,000 people. we think that the second limb for the grant of relief under rule 5(2) (b) of the rules of this Court are satisfied. There is a notification for sale of the applican’s parcel of land in execution of the decree which shows the decretal sum to be recovered is Kshs.18, 731,335.00 together with auctioneers’ charges of Kshs. 10,071,000.00. The sale of the applican’ts property would entail the displacement of over 40,000 people who are said to derive their livelihood from the suit land and they would perhaps be rendered destitute.

35. This Court has power, under rule 5(2) (b) of the rules of this Court, to make three types of orders. The Court can order a stay of execution, an inJunction or a stay of any further

proceedings. We think the particular circumstances of this case warrant the grant of an order for stay of proceedings in the High Court pending the hearing and determination of the appeal from the decision of the High Court given on 19th January, 2012.

36. For the avoidance of doubt, this order shall not in any way affect the order of permanent injunction given on 2nd December, 2009 restraining the applicants from interfering or trespassing on the respondents parcel of land known as Narok/Nguruman/Kamarora/1 until the determination of the appeal.

37. The order for stay of proceedings is subject to the applicants filing and serving (if they have not already done so) within sixty (60) days from the date of delivery of this ruling failing which the order for stay given herein will stand automatically discharged.

38. Costs of this application shall follow the appeal in any event”

8. The current applicants were aggrieved by that ruling. They have moved to this same forum and presented an application by way of Notice of Motion dated the 25th day of April, 2013, brought under Section 3(2) of the Court of Appeal Act No.9 Laws of Kenya and Rule 42 of the Court of Appeal Rules, 2010 and all enabling provisions of law including Article 159 (2) of the Constitution of Kenya. The application invokes this Court’s Jurisdiction to review paragraphs 30, 31,32,33,34 and 35 of the aforesaid ruling; allow the preliminary objection dated 20th March, 2012 and then dismiss the notice of

motion dated 27th January, 2012. Alternatively that this Court do correct the order made on the 19th April, 2013 in Nairobi civil application No. Nai 18 of 2012 (UR 13/2012) by setting aside the order given for the stay of proceedings contained in paragraph 35 of the ruling and other such consequential, further, or other orders as it may deem Just and lastly, that costs be provided for.

9. The application is grounded on the grounds in the body of the application and the contents of a supporting affidavit of **Moses Loonta Sati Ololo Wuaya** of 21st day of April, 2013. The respondents have opposed the application on the basis of the grounds of opposition dated the 19th day of June, 2013 and filed on the 20th day of June, 2013.

10. When the motion came up for hearing on the 15th July, 2013 directions were given that the review application be heard by the same panel which gave the orders sought to be reviewed and set aside. Instead, the President of the Court of Appeal in his wisdom found it fit to constitute a panel of five Judges to hear and determine the application, hence this ruling.

11. In his oral submission to Court, **Mr. Mohamed Nyaoga**, learned counsel for the applicant, outlined the background information culminating in the application under review already set out above. **Mr. Nyaoga** then added that there was no notice of appeal filed against the Judgment of **Ang’awa, J.** of 2nd December, 2009; there was no Jurisdiction in this Court to entertain the application of 27th January, 2012 in the manner framed; the applicant was Justified in raising a preliminary objection to that application on the ground that this Court had no Jurisdiction to entertain that application; the Court of itself acknowledged this fact and instead of downing its tools and dismissing the application, it did an about turn and erroneously granted an order of stay of proceedings in the High Court.

12. It is **Mr. Nyaoga’s** further argument that the issue of stay of proceedings was not one of the issues framed for discussion; the learned Judges therefore issued an order which had not been sought by the respondent; which order should not have been issued in the absence of the Court being properly vested with Jurisdiction; the Court therefore made orders rules of natural Justice; an injustice was therefore meted out against the applicant which should be reversed by this Court.

13. **Mr. Ahmednasir**, Senior Counsel leading **Mr. Mohamed Nyaoga** in addition, reiterated that this Court has residual powers to correct the error committed by itself in the ruling complained of; the learned Judges had no Jurisdiction to grant the orders of stay granted because these had not been prayed for; or argued. The matter had been heard to finality and Judgment given. There were therefore no

further proceedings pending capable of being stayed. **Three**, since the application was for review, all that the learned Judge (**G.B.M. Kariuki, J.**) did was to give a negative order, that is, a dismissal order and or a striking out order incapable of being stayed. **Four**, the Jurisdiction of the Court has been properly and procedurally invoked under **Section 3(2) of the Appellate Jurisdiction Act** as it is a matter incidental to this Court's main mandate donated by Section 3 of the Act.

14. Mr. Masika, learned counsel for the respondents, relying on the grounds of opposition filed herein. Urged the Court to dismiss the applicant's application. It was **Mr. Masika's** argument that the learned Judges committed no error as they simply took cognizance of the fact that the respondents were the party aggrieved by the Judgment of **Ang'awa, J.** dated 2nd December, 2009; such an aggrieved party was entitled to seek the remedy of review; there were execution proceedings pending which would have been forestalled had the review application succeeded; learned Judges could not have ignored the prevailing surrounding circumstances and were entitled to note that the respondents had been aggrieved by the failure to grant the review order; since a notice of appeal had in fact been lodged and served against the order refusing review; the learned Judges were obligated to ensure that the intended appeal was not compromised and lastly that no injustice was suffered by the respondent as a result of the orders sought to be reversed.

15. On Jurisdiction, **Mr. Masika** argued that rule 35 of the Court of Appeal Rules only donates to the Court power to correct purely clerical errors or a simple mistakes. This Court's inherent Jurisdiction cannot also be invoked where it is likely to result in an injustice to one party who has already complied with the orders sought to be reversed.

16. In response to the respondents' submission, **Mr. Ahmednasir**, Senior Counsel, reiterated their earlier stand that the learned Judges recognized the failure to file a notice of appeal against **Ang'awa, J's** Judgment and as such no stay orders could have been issued with regard to that Judgment; although the Court was categorical that this Judgment had not been stayed, a proper construction of the intended purpose of the ultimate result of the impugned ruling was that it in effect stayed the Judgment of **Ang'awa J** of 2nd day of December, 2009; the orders of **G.B.M. Kariuki, J.** were incapable of being stayed and lastly that this Court has power to address an injustice which has been meted out to the applicant.

17. The applicant relied on the decision in the case of **Board of Governors Moi High School Kabarak & another versus Malcolm Bell Supreme Court Petitions Nos. 6 and 7 of 2013 (unreported)** for the proposition that a Court's Jurisdiction flows from either the Constitution or Legislation or both. As such a Court cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by Law. It must operate within the Constitutional limits; and lastly the inherent power of the Court is meant to prevent its process from being misused in such a way as to diminish its capability to arrive at a Just decision of the dispute. The case of **Equity Bank Limited versus West Link MBO Limited [2013] eKLR** was cited for the proposition that once a notice of appeal is filed an appeal is deemed to be in existence as rule 2 defines an appeal as including an intended appeal. The decision in the case of **Macharia M. Sande versus Kenya Co-operative Creameries Limited Mombasa CA No. 154 of 1992 (UR) and Nairobi City Council versus Thabiti Enterprises Limited [1995-1998] 2EA231** was cited for the proposition, *inter alia*, that a Judge has no power to decide an issue not raised before him through the pleadings of which parties are made aware. The case of **National Cereals & Produce Board versus Errad Suppliers & General Contractors Limited, Nairobi civil Application No. Nai 48 of 2012 (UR) 33 of 2012** was cited for the proposition that no stay order is capable of being issued by a Court of law against a negative order (such as a dismissal or a striking out order).

18. The respondents on the other hand relied on the decision of **Rafiki Enterprises Limited versus Kings Way Tyres & Automart Limited, Civil Application No. Nai 375 of 1995 (UR)** for the proposition that once the Court of Appeal has determined an appeal, it has no residual Jurisdiction to reopen the appeal. The decision in **Jasbir Singh Rai and 2 others versus Tarlochan Singh Rai and 4 others Nairobi Civil Appeal No. 307 of 2003 (154/2003 UR)** for the proposition that the Court of Appeal has no Jurisdiction to re-open, re-hear and then recall its earlier decision and substitute it with another. Lastly, the decision in the case of **Patrick Gathenya versus Esther NJoki Rurigi and anothe [2008] eKLR** for the

proposition that the public policy principle that there must be an end to litigation triumphs over the equally weighty principle that Justice must be done and be seen to be done in each case that comes before the courts for determination; (ii) the power of the Court of Appeal to re-open and re-hear an appeal is no where to be found in the Constitution; or the Appellate Jurisdiction Act; (iii) for the Court of Appeal to be properly vested with Jurisdiction, there has to be in place a pending appeal or an intended appeal.

19. Our Jurisdiction to intervene in this matter has been invoked under Sections 3(2), 3A of *the Appellate Jurisdiction Act Cap 9* laws of Kenya, Rule 1 (2), 35 (2) 42 of the *Court of Appeal Rules, 2010* and also *Article 159 (2) (d) of the Constitution of Kenya, 2010*. The power donated to the Court to revisit its own concluded matter since 1920 was limited to correction of mistakes and errors limited to giving effect to the intention of the Judgment.

This position changed with the introduction of Section 3A of the Act enshrining the overriding objective principles of the Court by Act No.6 of 2009 as an additional tool in this Court's dispensation of Justice.

20. It is now trite and as will be demonstrated later on in this ruling that the exercise of this Court's mandate is usually set in motion by either the lodging of a notice of appeal thereby signifying a party's intention to appeal or alternatively by the filing of the appeal itself (See the case of *Safaricom Limited versus Ocean View Beach Hotel Limited and 2 others Civil Application No. 327 of 2009 (UR7)*). In the matter before us neither a notice of appeal nor an application for preservative orders were presented in respect to the Judgment of *Ang'awa, J.* of 2nd December, 2009. Instead, an application for review and setting aside of the said Judgment was presented but declined by *G.B.M. Kariuki, J.*, prompting the lodging of a notice of appeal and an application for preservative orders against the order declining the request for review and setting aside. It is the resulting ruling on the request for preservative orders which has aggrieved the applicants, allegedly for purporting to stay a negative order and secondly, for erroneously and unprocedurally staying the Judgment of *Ang'awa, J.* and thereby causing an injustice on to the applicants, sought to be vindicated by this ruling.

21. The main vehicle for accessing redress for this grievance as cited by the applicant is none other than Rule 35(1) (2) of this Court's rules. It is titled "*correction of errors.*" It provides:-

(1) 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 on the application of an interested person so as to give effect to what the intention of the Court was when the 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 supports or where the Judgment has been corrected under sub rule (1) with the Judgment as so corrected."

22. The mandate thus donated by Rule 35 is for this Court to correct "*any clerical or arithmetical mistake or any error arising therein from an accidental slip or omission*". The target is either a Judgment or an order. What we are dealing with herein is a ruling which gave rise to orders sought to be impugned. I have no doubt that it is covered by this rule as it forms the basis of a pronouncement of the Court on equal footing as a Judgment or an order as the case may be, as defined in Section 2, of the Appellate Jurisdiction Act, (supra) which defines "*a Judgment*" as including decree, order, sentence and decision. It therefore follows that in order for rule 35 to apply, there has to be demonstration of existence of the following: (i) an acknowledgement that there is either a clerical, arithmetical mistake or an error which has arisen in the ruling; (ii) the alleged clerical Arithmetical or error identified arose as a result of an accidental slip or omission; and (iii) its rectification is necessary in order to give effect to the intention of the Court in the said Judgment, order or ruling as the case may be.

23. The alleged offending paragraphs in the learned Judges' ruling are paragraphs 30, 31,32,33,34,35,36,37 and 38. The findings of the learned trial Judges in those paragraphs, in a summary are as follows: **One**, the intended appeal as against the orders of the Superior Court of 19th April, 2012 of *G.B.M. Kariuki, J.* was not frivolous. **Two**, had the application giving rise to the orders of 19th April, 2012 succeeded, it would have reviewed and set aside the orders of eviction and an award of Kshs. five million nominal damages forming the core of the Judgment of *Ang'awa, J.* of 2nd December, 2009.

Three, bearing in mind that the overriding objective, in the administration of Justice is to do substantive Justice, it was prudent on the part of the Court to give the respondents an opportunity to be heard on the appeal from the decision of the High Court given on

19th January, 2012. **Four**, the learned Judges appreciated the respondents' concerns that the property under threat of sale in execution of the decree supports over 40,000 people; and for this reason, the learned Judges opined that the second limb for the grant of the relief under Rule 5(2) (b) of the rules of this Court had been satisfied; the sale of the respondents' property would entail the displacement of over 40,000 people who are said to derive their livelihood from the suit land and they would perhaps be rendered destitute. **Five**, the Court had power under rule 5(2) (b) of the Rules of this Court either to stay execution, grant an injunctive relief or stay any further proceedings. **Six**, the particular circumstances of the case warranted the granting of an order for stay of further proceedings in the High Court pending the hearing and determination of the appeal from the decision of the High Court given on 19th January, 2012. **Seven**, the order for stay of proceedings in the High Court would not affect the order of permanent injunction given on 2nd December, 2009, restraining the applicants from interfering or trespassing on the Respondent's parcel of land known as Narok/Nguruman/Kamarora/1 until the determination of the appeal. **Eight**, the order of stay of proceedings was subject to the respondent (if they had not already done so) filing and serving the record of appeal within sixty (60) days of that ruling.

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 Courts' Rules. There has been no submission by either side as regards existence of any clerical or arithmetical errors. Therefore none of these exist. Next is to determine firstly the intention of the Court in the ruling sought to be impugned followed by a determination as to whether any error or omission was made by the Court to defeat that intention which needs rectification in order to give effect to that intention. A reading of the findings of the Court set out above tend to portray that the learned trial Judges came to the conclusion that the respondent's intended appeal against the orders of *G.B.M. Kariuki, J.* of 19th April, 2012 was not frivolous, considering that though, the application had been dismissed on account of failure to demonstrate existence of any error apparent on the face of the Judgment of *Ang'awa, J.* of 2nd December, 2009, none-the-less the application was struck out on account of it having been presented by counsel who had not properly placed himself on the record. The learned Judges went further to note that, there were peculiar circumstances of the case which they could not lose sight of; these peculiar circumstances were that there were 40,000 people who live and derive a living from the very land which was threatened with not only an auction but also an eviction of the 40,000 or so people, that if the impending eviction was not forestalled, the 40,000 people would have been rendered destitute; there was a need to lean towards the rendering of substantive Justice as opposed to adherence to strict rules of procedure; the substantive Justice demanded that there should be a stay of further proceedings in the High Court; but which stay would not affect the order of permanent injunction contained in the Judgment of *Ang'awa, J.* of 2nd December, 2009.

25. It is evidently clear from the record that, in making the above findings, the learned trial Judges were not oblivious of the presence of the negative order of dismissal and or striking out in the orders of 19th April, 2012 as well as lack of both a notice of appeal and an intended appeal as against the Judgment of *Ang'awa, J.* of 2nd December, 2009. The learned Judges were alive to the presence of both and that is why they elected to opt for the grant of an order for a stay of proceedings instead of a stay of execution.

26. The question is whether by electing to make the orders made, they committed an error which had

gone to negate their real intention in the said ruling, which error or omission calls for rectification in order to give effect to that intention. The learned Judges appear to have been aware of the implications and or repercussions of their failure to intervene especially on the special circumstances of the case before them highlighted above. They therefore chose to exercise their Judicial discretion in the manner done solely to guarantee substantive Justice to the 40,000 people living on the suit property until the parties' rights or otherwise had been crystallized by the intended appeal arising from the orders of **G.B.M. Kariuki, J.** In refusing to review and set aside the Judgment of **Ang'awa, J.** This may very well be a wrong exercise of Judicial discretion according to the applicants. However, a reversal of this in reliance on Rule 35 of this Courts' rules will defeat the clear intentions of the trial Judges in the said ruling. Such a move would be against the clear directive in rule 35 of this Court's Rules that interference with a decision of this Court by itself is limited to giving effect to the intention of the ruling. Anything beyond that is outside the ambit of that rule.

27. The problem as regards this Court's Jurisdiction to re-open and re-determine a matter previously concluded by it has kept on popping up every now and then notwithstanding efforts made not only by this Court but also its predecessor, the Court of Appeal for Eastern Africa, to find a lasting solution to it. It is on the same footing that we have now been invited to re-address this same issue. In the case of **Valla Bhdas Karsandas Ranica versus Mansukhlal JivraJ and others [1965] EA700**, the central proposition in it was that ***"a slip order will only be made where the Court is fully satisfied that it is giving effect to the intention of the Court at the time when Judgment was given or in the case of a matter which was overlooked where it is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention."*** In **Lakhamshi Brothers Limited versus R. RaJa & Sons [1966] EA313**, at page 314 paragraph E-F, **Sir Charles Newbold, P.** made the following observation:-

"Indeed there has been a multitude of decisions by this Court on what is known generally as the slip rule, in which the inherent Jurisdiction of the Court to recall a Judgment in order to give effect to its manifest intention has been held to exist. The circumstances however, of the exercise of any such Jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to Judgment to give effect to the intention of the Court when it gave its Judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted. I would here refer to the words of this Court given in the Rainga case (2) [1965] E.A. at P. 703) as follows:

"A Court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when Judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention."

These are the circumstances in which this Court will exercise its Jurisdiction and recall its Judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter.

But this application, and the two or three others to which I have referred, go far beyond that. It asks, as I have said, this Court in the same proceedings to sit in Judgment on its own previous Judgment. There is a principle which is of the very greatest importance in the administration of Justice and that principle is this: It is in the interest of all persons that there should be an end of litigation.

In **Somanis versus Shirinkhanu (No 2) [1971] EA79, Spry Ag. P'**. (as he then was) had this to say:-

"It has repeatedly been held by this Court that we have no power to review.

.....

As regards Sections 3(2), I think this can only apply up to the point where an appeal is

decided and determined. I do not consider that it confers on this Court the power to review which the High Court enjoys by statute. On the more general ground, this Court is not a Court of unlimited Jurisdiction. It is a creation of statute and enjoys only such Jurisdiction as is conferred on it by statute. It has no inherent Jurisdiction.

....

That Rule exists to enable the Court to correct a mistake so as to give effect to what was the intention of the Court at the time when the mistake was made.

.....

I wish that we had the power to recall and review our Judgment but I am satisfied that we have no such power”

Law, *Ag. V.P.* (as he then was) on the other hand had this to say:-

“The only circumstances in which this Court will alter the text of a Judgment which it has pronounced is where it is necessary to do so to give effect to the intention of the Court at the time when Judgment was given.....”

28. In *Isaacs versus Robertson [1984] 3ALLER 140*, the Privy Council was categorical that it had Jurisdiction to reverse its decision, if the circumstances warrant e.g where there has been a breach of the rules of natural Justice. In *Taylor and Another versus Lawrence and another [2003] QB 52,8*, the Court of Appeal of England ruled, *inter alia*, that it had an implicit Jurisdiction to correct wrong decisions by re-opening proceedings which it had already heard and determined if it was clearly established that a significant injustice had probably occurred and there was no alternative effective remedy. This was subject to the Court considering the effect of re-opening the appeal on others, the extent to which the complaining party was the author of his own misfortune and lastly that the move would ensure public confidence in the administration of Justice.

29. In the *Tanzanian case of Transport Equipment Limited versus Valambhia [1994] 1LRC 114*, after reviewing a wide range of decisions both within and from other Jurisdictions, Constitutional and statutory provisions of law governing the mandate of the Court for Appeal of Tanzania made observations, *inter alia*, that while there was nothing in the Constitution of the United Republic of Tanzania which expressly empowered the Court of Appeal for Tanzania to review or alter its own decisions, nonetheless drawing inspiration from both the provisions on the inherent Jurisdiction of the Court and the decision of the Court of Appeal for Eastern Africa in *Somani versus Shirinkhanu (No.2) [1971] EA 79*, the learned Chief Justice *Nyalali CJ* (as he then was) went on to hold *inter alia* that:

“The Court of Appeal for Eastern Africa had recognized that, it had limited inherent Jurisdiction to review its own decision 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 have been on a manifest error on the face of the record resulting in miscarriage of Justice.

30. Turning to this Court’s own recent pronouncement on the issue, in *Rafiki Enterprises Limited versus Kings Way Tyres & Automart Limited (Supra)*, after scrutinizing the Jurisdictional provisions of this Court, both under the retired Constitution and the Appellate Jurisdiction Act (Supra), the Court observed, *inter alia*, thus:-

“Sections 3 gives power to the Court of Appeal only in its Appellate capacity. Similarly the inherent power conferred by Rule 1(3) can only be exercised within and in the course of hearing of an appeal and of course it is now trite law that a right of appeal must be

expressly be given by law and such a right cannot even be implied or inferred... in Musiara Limited versus Ntimama [2005] IEA 317, at page 323 paragraph C-F there is observation that:-

“Though we agree with Mr. Gautama that it is the duty of the Court to see that no injustice is occasioned to a litigant, at the same time we reiterate that, it is to be remembered that a Court has no inherent power to do that which is prohibited by law.

.....

At the moment, this Court is the final Court on the land. Where an issue had

been determined by a decision of the Court, that decision should indefinitely determine the issue as between those who were party to the litigation. The reason for this general approach is that, public policy demands that the outcome of litigation should be final and that litigation should not unnecessarily be prolonged. This is the reason why limits have been placed on the rights of citizens to open or re-open disputes. The law also recognizes that any determination of disputable fact may be imperfect well knowing that human beings err.” On the basis of the above reasoning and after reviewing both English and East African decisions on the subject, this Court set out the position in law then as follows:-

“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. To depart from this rule would be a most dangerous course in that, it would be open to all and sundry to challenge the correctness of the decision of this Court on the basis of fresh arguments brought up long after the Judgment or decision was delivered or made.

31. In the case of Jasbir Singh Rai & 3 others versus Tatlorchan Singh Rai & 4 others (supra), a bench of five (5) eminent Judges of this Court was constituted to address the issue. Three of these namely **Omolo, Bosire and Githinji, JJA** wrote opinions, while **Waki and Devrell JJA** concurred. In summary, the observations of **Omolo JA** were as follows.

On matters of general public policy, the learned Judge opined that the cardinal principles that underpin the Jurisdiction of this Court as the then final Court in this land were two namely; **one**, that there ought to and must be an end to litigation; **two**, that Justice must be done and be seen to have been done in each case that comes before courts for determination. On the role of the Judge as a human being, that it should be recognized that Judges are human beings who are by nature fallible. As such, a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered facts which had it been available at the time the decision was made, might well have made the decision to go the other way. On the general Jurisdictional mandate of the court of Appeal in Kenya, the learned Judge observed that this Court as was then mandated only had Jurisdiction to hear and determine appeals from the High Court. It did not enjoy a mandate similar to that donated to the High Court vide Section 80 of the Civil Procedure Act, that permits the High Court to revisit its own previously concluded decision, re-open and re-determine. The Judge appreciated that the Court has Jurisdiction to deal with other matters incidental to the determination of appeals but to the learned Judge, by “**incidental**” was meant matters that were incidental to its appellate mandate, which is the hearing and determination of a pending appeal. The learned Judge after revisiting Sections 77(9) and 64 of the retired Constitution, Section 3 of the Appellate Jurisdiction Act (supra), and rule 1(3) of the Court of Appeal Rules which enshrined the inherent Jurisdiction of the Court came to the conclusion that all these did not donate a power to this Court to re-open and re-hear a finally determined matter.

32. On the local Jurisdictional case law sampled by the learned Judge, observations made were as follows. On the **Lakhamshi Brothers case (Supra)** that the issue of re-opening and re-hearing an appeal did not arise; in the **Somani’s case (Supra)** that this Court accepted the proposition that the Court of Appeal is a creature of statute and only enjoys that Jurisdiction which had been granted by statute, in the **Rafiki Enterprises case (Supra)** the decision was wrong as concerned application of the inherent

Jurisdiction of the Court, which had to be exercised bearing in mind the general mandate of the Court (namely in the course of hearing and determination of an appeal); the ***Musiara case (Supra)***, was based on rule 56(2) (which is the equivalent of Rule 57(1) (2) of this Court's rules. To the Judge this rule merely dealt with rescission of orders made by a single Judge or by the whole Court with regard to the extension of time for doing any act otherwise than to a specific date of time or if the order was one permitting the doing of some act without specifying the date by which the act was to be done. To the learned Judge, no one could contend that rule 56(2) could ever Justify the re-opening and re-hearing of a concluded appeal, nor can rule 1(3) (enshrining the inherent Jurisdiction of the Court) Justify such a conclusion.

33. Turning to the English case law, on the ***Exparte Pinochet Ugarte case (Supra)***, the learned Judge observed that in this case the House of Lords was categorical that it (the House of Lords) as the final Court in that Jurisdiction (in England) had vested itself with the power to correct any inJustice, whereas in the case of ***Taylor versus Lawrence (Supra)*** the Court of Appeal for England which was not a final Court in its Jurisdiction had ruled that it had residual power to re-open and re-hear its own concluded matter also had back up Jurisdictional provisions permitting it to re-open and re-hear a concluded appeal which was not the case with this Court. These foreign decisions were dismissed as being merely persuasive.

33. On the basis of the above observations, the learned Judge concluded thus:-

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

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

34. ***Bosire, JA***, in the same ***Rai case*** stated that Section 64 established the Court of appeal with Jurisdiction and power in relation to appeals from the High Court. By the words “As ***may be conferred by law***”; the learned Judge understood these to mean that the law which conferred Jurisdiction on this Court is the Appellate Jurisdiction Act (Supra). As for the Rules made thereunder, that these do not provide for review of decisions of the Court relating to appeals except pursuant to the provisals to Rules 99(1) and 55(3) of this Court's Rules dealing with dismissal of appeals and applications respectfully for want of prosecution. On the basis of the above observations, the learned Judge delivered himself thus:

“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 the doctrine which enables the Court 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 Court must balance one aspect against another and decide which one supercedes 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 regards that litigation should come to an end. On the basis of the existing rules of practice the applicants were heard by this Court and a Judgment pronounced”

35. **Githinji, JA.** in the same **Rai case** kicked off his observations by setting out the Constitutional and statutory Jurisdictional provisions of this Court namely Section 64(1) and 77(9) of the retired Constitution, Section 3(1) of the Appellate Jurisdiction Act (supra), Section 3(1) of the Judicature Act Cap 8 of the laws of Kenya, and Rule 1(3) of this Courts Rules; drew inspiration from the decision of this Court in **Anarita Karimi NJeru versus the Republic (No.2) [1979] KLR 162** for the proposition that the establishment and Jurisdiction of this Court and its predecessor had remained the same since 1902; this Court is a creature of statute and can only exercise such Jurisdiction as conferred on it by statute; and it cannot assume Jurisdiction which has not been conferred on it by statute. **Githinji, JA,** like **Omolo and Bosire, JJA,** revisited and reviewed decisions of this Court in **the Rafiki Enterprises Limited (supra), Musiara Limited (supra) and Chris Mahinda t/a Nyeri Trade Centre versus Kenya Power & Lighting Co. Limited Civil Application No. Nai 174 of 2005 (UR).** On the **Rafiki Enterprises case** the following observation was made:-

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

.....

To the learned Judge, it was clear then that **Rafiki Enterprises Limited** case was not only consistent with the Appellate Jurisdiction Act and previous similar statutes as conferring Jurisdiction on the predecessor of this Court but also consistent with previous decisions of the predecessor of this Court such as **Lakhamshi Brothers Limited versus RaJ & Sons (Supra)** and **Somanis versus Shirinkhanu (No.2) (supra)** ” Turning to the **Musiara case (supra)** the learned Judge made observation that; the statement of law in the **Musiara case** that this Court had Jurisdiction to re-open a concluded appeal was indeed obiter. As for the holding in the **Chris Mahinda case (supra),** that the application was dismissed on the ground that, there were no exceptional circumstances such as bias to warrant rescission of the order. On the basis of the above comparison, the learned Judge concluded that it was beyond contention that there is no statute or rules of this Court conferring Jurisdiction on the Court of Appeal to re-open a finalized appeal. As for the decisions of the English Courts namely **Republic and Taylor versus Lawrence (supra)** among others followed in the **Musiara case (supra)** these were dismissed as merely persuasive; were Judge made laws; and lastly this Court did not in the **Musiara case** subject them to appropriate tests before adoption as law in this country. On the basis of the above observations, the learned Judge concluded thus:-

“In my humble view, it is for the parliament to decide as a matter of policy whether residual Jurisdiction in addition to the statutory Jurisdiction should be conferred on the Court of Appeal. It would be wrong to clothe the Court of Appeal with Jurisdiction imported from another Jurisdiction without the approval of the legislature”

36. In the case of **Patrick Gathenya versus Esther NJoki Rurigi and another (supra)** there is observation that the disposal of the matter therein was put on hold to await the decision of a five Judge bench of this Court in **Jasbir Sing Rai & 3 others versus Taylor Chan Singh Rai & 4 others (supra),**

which was constituted to resolve an apparent conflict between the decision in the **Rafiki Enterprises** case on the one hand and the **Musiara** and **Mahida** cases on the other hand as regard this Court's Jurisdiction to re-open, re-hear and re-determine a matter previously concluded by it. The learned Judges noted that in the **Rafiki** case the Court had been categorical that the Court had no Jurisdiction, but in the **Musiara** and **Mahida** cases dicta Matter had tended to suggest that the Court had Jurisdiction in certain circumstances; that the **Rai** case was to define the extend of these circumstances but then had ended up dismissing the Dicta matter in the **Musiara** and **Mahida** cases and upheld the reasoning and holding in the **Rafiki** case. On the basis of the above observations and the reasoning that followed that, were largely on all fours with the reasoning of the learned Judges in the **Rai case**, Jurisdiction was declined and the motion dismissed.

37. I may be tempted to ask as to what was this court saying in the above lengthy survey of the previous pronouncements on the issue at hand. To me, it has tended to show that the issue at hand is now an age old problem. It keeps on recurring every now and then. Despite handing out the well considered opinions by the five (5) learned Judges, the issue still refuses to go away. I am also part of a five (5) Judge bench which has once more been invited to also have a bite at it. The lessons learned from the above survey when considered in the light of the current provisions of both the Constitutional and statutory provision donating Jurisdiction to this Court will go along way to enable me determine whether time has now come to turn on a new leaf for this Court; "**that Parliament has spoken**" as regards the statutory Jurisdictional base as donated by the Appellate Jurisdiction Act (supra) and "**that the consumers of Justice**" (the people of Kenya) have spoken to me that I should go the way the applicant has asked us to go.

38. A summary of these will do no harm. In the decision in the **Somani's (supra) and the Lakhamshis cases (supra)** the reason the Court declined Jurisdiction was because there were no statutory provisions providing an avenue for accessing such a relief. By "**statutory**", it would also mean and include an appropriate rule providing that avenue. Also notable is that, the Court was categorical that it did not even have "**inherent power**" as a possible enabling avenue but acknowledged possession of the slip rule powers which to the Court were limited to interference with its finally concluded decisions for purposes of giving effect to the intention of the Court in handing down the particular Judgment or decision only. This is the power which is traceable to the current rule 35(1) (2) of this Court's Rules. It is also noted that issue of Constitutional empowerment were not interrogated in the said two earlier decisions.

39. With regard to the Tanzanian decision of **Transport Equipment Limited, (supra)** the Tanzanian Court of Appeal acknowledged that it prima facie possessed power through the slip rule provisions and procedures limited to the correction of errors and omissions in the decision for purposes of giving effect to that decision for purposes of making such a decision effective in its intend and purport. It went further to state that, right from the era of its predecessor the Court of Appeal for Eastern Africa, the inherent power of the Court had been recognized beyond the slip rule, though under limited circumstances. Drawing inspiration from the decision in the **Somani versus Shirinkhanu (No.2) [1971] EA79**, it stated that it enjoyed inherent Jurisdiction to review its decisions where such decisions display an apparent manifest error on the face of the record resulting in miscarriage of Justice.

40. Turning to this Court's own recent pronouncements on the issue in the **Rafiki Enterprises Limited (supra)** this Court declined invitation to revisit its concluded decision because the statutory provisions relied upon as the enabling provisions did not support that view. In the **Musiara Limited case**, Jurisdiction was also declined for the reasons that, the Court of Appeal as was then the final Court on the land, where an issue had been determined by a decision of the Court that decision should definitely determine the issue as between those who were party to the litigation. Public policy also demanded that the outcome of litigation should be final, which is the reason why limits have been placed on the right of citizens to open or re-open disputes; that the law recognizes that any determination of disputable facts may be imperfect well knowing that to err is human; the Court only recognizes invitation to review, vary or rescind its own decisions where it is necessary to give effect to its intention at the time the decision was made; to depart from adherence to the slip rule provisions as the only

instances in which this Court can revisit its past decisions would be a most dangerous course in that, it would be open to all and sundry to challenge the correctness of the decision of this Court on the basis of fresh argument brought up long after the Judgment or decision was delivered or made.

41. In the *Chris Mahinda t/a Nyeri Trade Centre case (supra)*, Jurisdiction was declined because there were no exceptional circumstances necessitating intervention such as failure to hear a party resulting in that party suffering an injustice. whereas in the *Jasbir Singh Rai & others case (supra)* Jurisdiction was declined for the reason that such a move would be contrary to the two cardinal guiding principles which require that litigation of whatever nature undertaken in a court of law must come to an end, and secondly that Justice should not only be done but should be seen to be done; this Court as the then final Court of any form of litigation in this land was obligated to protect the rule against absurdities likely to be transgressed if it were to allow re-opening, and reviewing of its finally determined issues; the Constitutional provisions namely Sections 77(9) and 64 of the retired Constitution had not been interrogated in the *Rafiki, Musiara and Chris Mahinda cases (supra)*; the decision in *Musiara case* purporting to suggest existence of a power in this Court to re-open and re-hear a matter previously finally determined by it was of no consequence as it had been based on obiter matter; the English authorities on the basis of which the *Musiara case* had been decided were merely persuasive and could not be used to overrule local decisions which had crystallized the position in law on the issue. Lastly that this Court like its predecessor wished it had the power to revisit, re-open and re-hear its previously finally determined decisions but until parliament says so, there was no way the Court could vest itself with that Jurisdiction.

42. In the *Patrick Gathenya case (supra)* Jurisdiction was declined because, the motion in it had been premised on the basis of the Dicta in the *Mahinda case* on the one hand, and on the other hand, the position in law as regards issues raised therein had been crystallized by the five (5) Judge bench in the *Rai case*.

43. It is against the above background that the applicant has invited us to grant him the relief sought, while the respondent on the other hand has invited us to decline granting the relief sought. In deciding one way or the other, I need to retrace my footsteps back in relation to the avenues used by litigants in the above previous decisions, determine the status of these as at the time they were used as avenues for the relief sought but declined, then determine their current position and then state why these are feasible avenues or not and give reasons either way.

44. On dismissals for want of prosecution, it was correctly stated by *Bosire, JA* in the *Rai case* that these were accessible vide rules 55 and 99 of this Court's Rules, currently Rules 56 and 102. To earn a relief under these rules a litigant is required to show sufficient reason or cause for non attendance. An order for dismissal for want of prosecution cannot fall into the category of orders granted in finality in any matter as the merit aspect of the particular matter affected is never interrogated before the Court makes such an order. Such orders are therefore usually made purely on technicalities.

45. As for orders under the slip rule, it is evident that, all the decisions assessed herein acknowledged not only the existence of this power but its availability at the disposal of this Court and then went further to stress that this power is a must possession for this Court save that it is limited in its scope, in that it exists only for purposes of this Court to invoke it with the aim of giving effect to its decision. This was cited by the applicant as a possible avenue vide Rule 35 of this Courts Rules. Its application parameters have already been assessed above and a conclusion reached that it cannot be invoked as an avenue for re-opening, re-hearing and –re-determining a concluded matter.

46. Turning to the power to rescind its own orders, I note from the heading of the application that the relevant rule was not one of those cited. It was formerly rule 56 but currently rule 57 of this Court's Rules. Though not cited by the applicant, I find it prudent to interrogate it as the Court is exploring all possible avenues through which the relief sought can possibly be granted. I can access this provision through the general phrase "**and all other enabling provisions of the law**". It provides:

"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”

48. This provision in its former state as Rule 56 was cited as an enabling provision in the *Musiara case* (supra) but rejected. In giving reasons for its rejection as a possible avenue, both *Omolo and Githinji, JJA* were categorical that it only related to rescission of orders made by a single Judge by the full bench; the said orders were limited to orders for extension of time for doing something under the rules and no more. Rule 57 (1) clearly donates power to this Court to revisit the orders made by a single Judge pursuant to that rule. It is evidently clear that these are reversible either by the same single Judge, any other Judge or by the full Court, the only caveat being that these orders must be those relating to an extension of time on the one hand, and those relating to a general mandate to a litigant to perform a certain task without specifying the date by which the task should be accomplished. None of these two situations apply to the scenario herein. Subrule (2) of this rule is framed in a generalized manner. It reads:-

(2) An order made in an application to the Court may similarly be

varied or rescinded by the court”

49. The apparent general application of subrule (2) of rule 56 (now 57) to any other orders made by the Court in applications other than those presented under the said rule

56 was rejected by this Court in the *Musiara, Mahinda* and *Rai* cases. The Court simply stated that **“there was nothing in sub rule 2 to suggest that it donated such a power”**. The Court however did not go further to explain as to why the power donated under sub rule (2) of the same rule to revisit such orders by the same single Judge, any other Judge or the full Court, could be given additional powers in sub rule (2). To me had the Rules Committee intended to confine the operation of sub rule 2 to applications presented under subrule (1) only, it would have gone further to indicate that the operation of subrule (2) was also limited to any other application presented with regard to matters mentioned in sub rule 1. For example, the framing could have read like this:-

“The order made on any other application made to the Court under subrule (1) the order may similarly be reviewed or rescinded by the court”

In the absence of such a restriction being placed on the operation of sub rule (2), I opine that the court could have explored this avenue as a possible avenue to revisit, re-open, re-hear and re-determine its previous decisions.

50. Rule 57(1) clearly donates power to this Court to revisit the orders made by a single Judge pursuant to that rule. These are reversible either by the same Judge, any other Judge or by the full Court, the only caveat as stated above being that, these orders must be those relating to an extension of time on the one hand and those relating to a general mandate to a litigant to perform a certain task without specifying the

date by which the task should be accomplished. The learned Judges when rejecting the applicability of this rule as an avenue did not say that such orders made by a single Judge are routine orders. They arise from reasoned rulings by the particular Judge as to why the relief of extension of time or otherwise has either been granted or declined. They are in effect merit decisions. It therefore follows that, if a merit decision on extension of time or otherwise to perform a task under this Courts Rules can be revisited, re-opened, re-determined either by the same or other Judges or the full Court, then why not any other merit decision of the Court.

51. Turning to the inherent power of the Court, Rule 1(2) of this Courts Rules which enshrines this power was cited as one of the enabling provisions to access the relief sought. It provides:-

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

It is now trite that the inherent power of the Court exists in the Court’s Jurisdiction as a safety valve to enable the Court to make such orders as may be necessary for the ends of Justice or to prevent the abuse of the power of the Court. It cannot be cited where there is an appropriate Section, order or rule to cover the relief sought. (*WanJau versus Muraya [1983] KLR276.*) See also the case of *Total Kenya Limited versus Kenya Revenue Authority [2013] eKLR* for the proposition that existence of a specific relief under the rules does not preclude the Court in specific circumstances from making any other orders under its inherent Jurisdiction for ends of Justice to be met to both parties. The case of *Dickson Muricho Muriuki versus Timothy Kagendo Muriuki and 6 others [2013] eKLR* for the proposition that the inherent power of the Court is the authority possessed by a Court, implicitly without it, being derived from the Constitution or statute; it is the unwritten power of the Court without which the Court is unable to function with Justice and good faith. The exercise of the Courts’ inherent Jurisdiction is closely linked to the court’s exercise of its Judicial discretion, generally which is to the effect that it is unfettered but has to be exercised Judicially, that is to say, on sound reason, rather than whim, caprice or sympathy. (*Githiaka versus Nduriri [2004] 2KLR67.*)

52. From the local decisions assessed above, this Court was aware of the possible invocation of its inherent power enshrined in rule 1(2) above formerly 1(3) as a possible access avenue. But this Court, like in the case of rule 56(57) flatly rejected this avenue by simply stating that there is nothing in it to suggest the existence of such a power. When confronted with the invocation of this same inherent power in the *Transport Equipment Limited case (supra)* the Court of Appeal for Tanzania and the House of Lords in the *Pinochet case*, these two Courts (the House of Lords and the Court of Appeal for Tanzania) acknowledged that this was a possible avenue. Whereas this Court dismissed these as being merely persuasive and as such could not be used to oust local decisions on the subject. From the content of the cases assessed above on the applicability of this power, it is clear that the power is available to a Court of law of Superior Jurisdiction to operate as a safety valve to avail Justice to litigants where no known provisions of law or rule can be invoked to avail such a relief, to ensure ends of Justice is met to parties who come seeking it from a court of law, and to prevent abuse of the Court process. In the absence of any convincing reasons as to why the inherent power was not available to this Court as an access avenue, find it prudent to state that this has always been a possible access avenue, to this Court with latitude for the Court to define the confines within which it should be applied to grant the relief under review.

53. Section 3(2) of the Act provides:-

“3(2) for all purposes of and incidental to the hearing and determination of any appeal in the exercise of 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.

In *Patrick Gathenya versus Esther NJoki Rurigi & Another (supra)* , this Court stated clearly that this Court’s Jurisdiction under Section 3(2) is accessed vide existence of either an already filed appeal or an

intended appeal. In **Safaricom Limited versus Ocean View Beach Hotel Limited and 2 others civil application No. 327 of 2009 (UR) Omolo JA** had this to say:-

“At the state of determining an application under Rule 5(2) (b) there may be no actual appeal. Where there is no actual appeal already lodged, there must be an intention to appeal which is manifested by lodging of a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5(2) (b) because as a I have already pointed out the Jurisdiction of the Court of Appeal is limited to hearing of appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to mediate in the decision of the High Court.”

As mentioned earlier on, herein, no notice of appeal or stay order was sought against the Judgment of **Ang’awa, J.** However there was a notice of appeal and an application for stay against the orders of **G.B.M. Kariuki, J.** On an application under Rule

5(2) (b) of this Court’s Rules. A three Judge Bench of this Court found the appeal arising from the orders of **G.B.M. Kariuki, J.** not frivolous, found existence of special circumstances therein as concerned the 40,000 or so persons who were affected by that litigation and issued the orders complained of, alleged by the applicant to have been issued without Jurisdiction.

54. In the year 2009 Act No.6 of 2009 introduced an additional aid tool to this Court in the discharge of its mandate; the **“overriding obJective principle.”** This is enshrined in Section 3A of the Act. It provides:-

“3A (1) the overriding obJective of this Act and the rules made thereunder is to facilitate the Just, expedition, proportionate and affordable resolution of the appeals governed by this Act”

Case law on the applicability of this principle now a bound, to offer guidance. ***See the case of City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima wa Mukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR199/2008)*** for the proposition that the principle confers on the Court considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder; the case of ***Kariuki Network Limited & another versus Dally & Figgis Advocates Civil Application No. Nai 293*** for the proposition that the overriding obJective principle is to enable the Court achieve fair, Just, speedy, proportionate, time and cost saving disposal of cases before it; but does not operate to uproot established principles and procedures, but to embolden the Court to be guided by a broad sense of Justice and fairness; and lastly the case of ***Hunter Trading Company Limited versus ECF/011 Kenya Limited Civil Application No. Nai 6 of 2010 (UR3/2010)*** for the proposition that, the overriding obJective principle is intended to not only energize the process of the Court but also ensure that interpretation of any of the provisions of the Act and the Rules made thereunder are “02” compliant.

55. From the above set of case law principles, it is clear that this Court has now been given a wide latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder; intended to enable the Court achieve a fair and Just disposal of cases. It is meant to reenergize the process of the Court ensuring that the Court’s interpretation of the law and the Rules made thereunder are “02” compliant. The tool introduced under Section 3A of the Act was not available as at the time the decisions in which this Court’s Jurisdiction was declined were made. It therefore follows that; in the exercise of its mandate in the determination of the issue at hand it cannot ignore the application of the

overriding objective principles to that determination. In doing so, the case law on the application of this principle enjoins the Court not to lose sight of the established principles and procedures i.e those dealing with the principle of finality among others but to embolden the court to be guided by a broad sense of Justice and fairness.

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:-

***“The Court of Appeal has Jurisdiction to hear appeals from : (a) The High Court and
(b) Any other court or tribunal by an Act of Parliament.*”**

In interpreting the extend of this mandate, I cannot lose sight of the prescription in Article 259(1) and (3) thereof. This provide 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 away 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***”.

In view of the above, there is no way this Court can hide under the umbrella of its previous decisions handed out under the mandate donated by the Act as supported by the provisions of the retired Constitution which did not outlaw technicality as a tool in

the dispensation of Justice on the one hand and which did not have the benefit of an additional tool in the form of the “***overriding objective principles***” now enshrined in Section 3A of the Act. When the totality of the above Appellate Court Act and Constitutional provisions of law mentioned above are taken into consideration, I find that there is Jurisdiction donated to this Court to revisit its past decisions. The maJor hand cap fronted by this Court in its past decisions has been that though it wished that it had such a power and since Parliament had not spoken there was nothing it could do. Now that Parliament has spoken through the “***overriding objective principle***” in Section 3A of the Act as an additional tool of aid on the one hand and the consumers of Justice (the people) through the Constitution on the other hand, it is time for this Court to take a bold stand in the same vein as its Tanzanian counter part and state that on the basis of the provisions of law assessed above Jurisdiction exists in this Court to re-open, re-hear and re-determine decisions previously determined by it.

58. The next question for me to determine, is whether the enabling provisions set out above provide adequate safeguards against fears of opening up the door to all and sundry to Jump onto the band wagon and flood this Court with past litigation and this in the process transgress on the rule of finality in litigation; and fail to provide sufficient safe guards against absurdities. My response to this is in the affirmative. My reasons for saying so are as follows:-

1. The Court has all along acknowledged the necessity of possessing such a power. Once donated, it will be Jealously guarded and protected by this same Court to ensure that it is not abused but used only in deserving cases for review.
2. The court acknowledged that the High Court possessed such statutory power and has been

exercising it since its creation. This Court did not point out any particular incident where the exercise of such a power by the High Court has led to any absurdities. The Court also acknowledged that in addition to the statutory provisions in Section 80 of the Civil Procedure Act, there were attendant supportive alternative rules. Likewise once accepted that the power exists, this Courts' Rules which are not cast in stone can be amended to accommodate the new development as the Court is not devoid of power to make attendant rules defining its operation in any given situation.

3. There is now the Supreme Court established as the final Court of this Land with an apparent restricted mandate limited in scope. There is however an opening under Article 163(4) whereby matters finally determined by this Court can find their way to the Supreme Court through certification by this Court. It is now a matter of public notoriety that since the coming into effect of Article 163(4), this Court has competently and effectively sifted matters fit for reference to the Supreme Court and those that are not. See the case of **Telkom Kenya Limited versus John O. Ochanda [2004] eKLR and Charles Nderitu Gitoi (suing on his behalf and as legal representative of Charity Nyaguthi Gitoi (deceased) versus Christopher Muchemba Wawi & 2 others [2004] eKLR.** Likewise this Court can competently and effectively sift through any matters presented to it and determine which of these are proper candidates for revisiting reopening and rehearing and which ones are not.

4. There is an inhouse practice that can be borrowed from though this is backed up by a specific rule, rule 29(2) of this Court's Rules vide which the Court has donated Jurisdiction to introduce additional evidence on appeal. I note this is a mere skeleton provision. But this Court of its own, in the exercise of that Jurisdiction has refined parameters within which such a relief can be accessed. See **African Line Transporters Co. Limited versus Hon. Attorney General Mombasa Civil Application No. 159 of 2007, John Wagure Ikuku & 3 others versus Lee Gachuga Muthoga Nyeri Civil Application No. 196 of 2009.** This Court can on the same vein define parameters through which a party can approach its seat of Justice to re-open, re-hear and re-determine a matter finally determined by it.

5. It can follow the foot steps of the Supreme Court in the case of **Hermanus Phillipus Steyn versus Glovanni Gneechi- Ruscone [2013]** and lay down in clear terms the Rules of engagement in such a litigation through its own decisions.

6. Fear of transgression on the principle of infallibility of this Courts Judges no longer holds. Neither can it be excused in the wake of the requirement under the current Constitution that Judges of this Court as public servants be held accountable in the discharge of their functions in line with the prescriptions in Article 10 of the Constitution, 2010 dealing with National values.

7. The Calibre, competence and capability of Judges of this Court is not in doubt. As put by this Court in **Butt versus Rent Restriction Tribunal[1982]KLR417 (Orbiter)** a Judge is a Judge. This Court is possessed of 24 carat gold Judges who can effectively handle any perceived influx of litigation in this area if the door is opened and put an end to this.

59. Having come to the conclusion that there is Jurisdiction in this Court to revisit the question is whether the applicant has met the threshold for such a re-opening of the decision of this Court (**M.K. Koome, S. Gatembu Kairu and J Otieno –Odek (Prof) JJA**) dated and delivered at Nairobi on the 19th day of April, 2013 and interfere with it partially by reversing the order for stay of proceedings in the High Court pending the hearing and determination of the appeal from the decision of the High Court given on 19th January, 2012. It is common ground as mentioned earlier on herein that no notice of appeal was filed against the decision of **Ang'awa, J** but against the decision of **G.B.M. Kariuki, J.** (as he then was) refusing to review the Judgment of **Ang'awa, J** aforesaid. It is also undisputed that when the respondents moved to this Court seeking orders of stay, what they had in mind was to stay proceedings in relation to the order of **G.B.M. Kariuki, J.** refusing to grant an order for the review of the Judgment of

Ang'awa, J. The correct position in law in so far as the invocation of this Court's Jurisdiction under rule 5(2) (b) of this Court's Rules is concerned has now been crystallized by case law. See the case of **Equity Bank Limited versus West Link MBO Limited (Supra)** for the proposition that, once a notice of appeal is filed, an appeal is deemed to be in existence as rule 2 defines an appeal as including an intended appeal; the decision in the case of **Macharia M. Sande versus Kenya Cooperative Creameries Limited (Supra) and Nairobi City Council versus Thabiti Enterprises Limited (Supra)** for the proposition, *inter alia*, that a Judge has no power to decide an issue not raised before him through the pleadings of which parties are made aware. Lastly, see the case of **National Cereals and Produce Board versus Errad Supplies & General Contractors Limited, Nairobi Civil Application No. Nai 48 of 2012 (supra)** for the proposition that no stay order is capable of being issued by a Court of law against a negative order (such as a dismissal or a striking out order)

60. As already mentioned above, it is not that the learned trial Judges who made the decision sought to be impugned were not aware of this position in law as the correct position to have guided their ultimate result of that determination. Of course they were. This is borne out clearly by the learned Judges' observations set out in paragraphs, 26-27 of that ruling. I find it prudent to reproduce them here under:-

“26 There is no notice of appeal in relation to the Judgment delivered on 2nd December, 2009. In the case of Nairobi City Council Versus Resley (2002) EA 494. This Court at page 494 stated.

“There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision.

And later in the same decision:

“It is trite law that without a notice of appeal against particular orders we would have no Jurisdiction to grant a stay of those orders and we cannot, therefore, accept Mr. Oduol's argument to the effect that the notice of appeal against the ruling of 11th April, 2002, entitles him to apply for a stay of execution of orders made on 11th March, 2002.

27. In this matter, the notice of appeal relates to the decision of the High Court given on 2nd December, 2010 dismissing the application for review. The order for stay that is sought is in relation to the Judgment delivered on 2nd December, 2009. No appeal has been preferred against that Judgment. In the case of John N. Liboyi versus the Board of Governors of St. John College Civil Application No. Nai 13 of 2009 (UR 92/2009) to which we were referred, this court held: “The Court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the Court the Jurisdiction to grant an order of stay, an injunction or a stay of further proceedings that is clear enough from the wording of the Rule”

61. The question I have to ask myself is whether the learned Judges having correctly appraised themselves of the parameters for the exercise of their Jurisdiction under rule 5(2) (b), then what compelling reason did they have for detouring from that stand in the manner done? The answer to this can be found in paragraphs 28, 29, 30 and 31 of the said ruling.

In summary, the learned Judges properly posed a pertinent question to themselves as to whether in the circumstances displayed in paragraphs 26 and 27 (supra) there was Jurisdiction to grant the orders that had been sought from them. They then refreshed their minds again with the orders sought before them and came to the conclusion that the orders had been framed in a confusing manner; they had addressed their minds to the confusing prayers with a lot of anxiety while acknowledging that there was no notice of appeal regarding the Judgment of **Ang'awa, J** of 2nd December, 2009.

62. Their foregoing observations notwithstanding, the learned Judges went a head to note that there was a

valid notice of Appeal against the decision of the High Court given on 19th January, 2012; the grounds raised in the memorandum of appeal against the orders of 19th January, 2012 could not be said to be frivolous; the application dated 2nd August, 2010 that culminated in the orders given by the High Court on 19th January, 2012 included a prayer for review and the setting aside of the order of **Lady Justice Mary Ang'awa** delivered on 2nd December, 2009. The learned Judges went on further to state, that had the application for review aforesaid been successful, the orders of eviction and an award of nominal damages would have been set aside. On that account, the learned Judges held that the respondents deserved an opportunity to be heard on the then intended appeal, bearing in mind the over arching objective in the administration of Justice namely, to do substantive Justice to the parties therein, considering that it had been contended before the learned Judges that the respondents' property under threat of sale in execution of the decree supported over 40,000 people. On that account, the learned Judges were satisfied that the 2nd limb for the grant of the relief under Rule 5(2) (b) of the Rules of this Court had been satisfied.

63. The learned Judges did not stop there. They went on to observe that the sale of the respondents' land to recover the decretal sum of Kshs. 18,731,335/= together with the Auctioneers' charges of Kshs. 10,071,000/= would definitely have entailed the displacement of the over 40,000 people who were said to derive their livelihood from the suit land and who would perhaps be rendered destitute. On the basis of the foregoing reasoning, the learned Judges opined that the particular circumstances of the case as had been displayed before them warranted the grant of an order of stay of the proceedings in the High Court pending the hearing and determination of the appeal from the decision of the High Court given on 19th January, 2012.

64. It is this adherence to the overarching principle of substantive Justice to the

respondents than adherence to the clear crystallized principles governing the exercise of this Court's discretionary powers under rule 5(2) (b) of this Court's Rules that the applicant has asked us to interfere with. The applicant alleges lack of Jurisdiction to grant a relief based on the principle of overarching principle of

Justice. Drawing inspiration from the principles in the case of **Board of Governors Moi High School Kabarak & another versus Malcolmbell (supra)**, I find that the learned Judges having found that the orders sought by the respondent in their bid to forestall the execution of the negative orders of **G.B.M. Kariuki, J** of 19th January, 2012 were confusing in that they had intertwined the issues of stay of the orders of **G.B.M. Kariuki J.** with the stay of the orders of **Ang'awa J;** and considering that they were alive to the fact that there was no possibility of them granting a stay order to stay the negative order of **G.B.M. Kariuki J;** and the possibility of their attempt to stay the negative order of **G.B.M. Kariuki, J** in whatever language used would in effect result in them staying the orders of **Ang'awa, J** of 2nd December, 2009 without Jurisdiction, they should have downed their tools there and then.

65. Indeed I appreciate the overarching principle of substantive Justice now enshrined in Article 159 of the Constitution of Kenya 2010 is a fundamental principle which this Court cannot lose sight of. Nonetheless, I find nothing in the said principle that authorizes a court of law to ignore clear rules of procedure fortified by principles of case law enunciated by this Court . Such a departure from a well beaten path of procedure would be an affront to the well established principle which is now trite that rules of procedure are not made for cosmetic value. They are meant to provide order, clarity and predictability in the Court process. Holding otherwise would be a clear recipe for chaos in Court processes.

67. The upshot of the above assessment is that, the applicant has a genuine grievance. There is merit in the application before us. I am accordingly inclined to partially review paragraphs 30, 31,32,33,34 and 35 of the ruling delivered by this Court on the 19th day of April, 2013 in Nairobi civil Application No. Nai 18 of 2012 (UR.13/2012) and consequently do set aside the order of stay of proceedings contained and reflected in paragraph 35 of the aforesaid ruling. The applicant will have costs of the application. In view of the representation to Court that appeal No. 115 of 2013 is already filed and in view of the Orders made herein above, I direct that appeal No. 115 of 2013 be expedited.

Dated and delivered at Nairobi this 3rd day of October, 2014.

R.N. NAMBUYE

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

DEPUTY REGISTRAR.

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 90 OF 2013

BETWEEN

NGURUMAN LIMITED APPLICANT

VERSUS

SHOMPOLE GROUP RANCH 1ST RESPONDENT

OL KIRAMATIAN GROUP RANCH 2ND RESPONDENT

(Being an application for review or alternatively of correction of the

orders given by the Court of Appeal (Koome, Gatembu Kairu & Otieno- Odek, JJ.A) on 19th April 2013

in

Civil Application No. NAI. 18 of 2012

RULING OF MUSINGA, J.A.

It is important to understand the background to the applicant's application dated 25th April, 2013, the subject matter of this ruling. On 2nd December, 2009 the High Court of Kenya at Kericho, (Ang'awa, J.) entered Judgment for the plaintiff (the applicant herein) in **HCCC No. 65 of 2009 consolidated with H.C.C.C. No. 66 of 2009, Nguruman Ltd v Shompole Group Ranch & Others.** The Court granted the applicant's prayer for eviction of the defendants (respondents) from a parcel of land known as Title No. **Narok/Nguruman/Kamorora/1** and nominal damages for trespass amounting to Kshs.5 million. The respondents did not file any notice of appeal against the decision and indeed no appeal has been preferred. Thereafter a decree was issued and execution proceedings commenced.

On 2nd August, 2010 the respondents filed an application seeking, inter alia, review and stay of execution of the aforesaid Judgment and decree. The application was heard by G.B.M. Kariuki, J.

(as he then was). Vide a ruling delivered on 19 th January, 2012, the application was dismissed. Being dissatisfied with that ruling, the respondents filed a notice of appeal against the Judge's decision to refuse a review of the Judgment.

By an application dated 27th January, 2012 filed under **rules 1 (2) and 5 (2) (b) of the Court of Appeal Rules**, the respondents prayed:

“(i) That this Honourable Court be pleased to stay execution of the Judgment and decree of the Honourable Lady Justice Mary Ang’awa delivered on 2nd December, 2009 in Kericho High Court Civil Case No. 65 of 2009 – Nguruman Limited v. Shampole Group Ranch, Moshila Ole Mataiyan, Nkoitiko Ole Napiriya &

Turuna Ole Kumari (consolidated with Kericho High Court Civil Case No. 66 of 2009 – Nguruman Limited v Ol Kiramatian Group Ranch Limited, Mointi Lemarora Nkoyokoy, Albert Kuseyo Kipainoi & Mugesa Ole Lenana) upon the striking out and dismissal of the applicants’ application for review by Justice G.B.M. Kariuki on 19th January, 2012 pending the filing, hearing and determination of the intended appeal from the said orders.

(ii) That the applicants be at liberty to apply for such further orders and/or directions as the Honourable Court may deem Just and expedient to grant.

(iii) That the costs of this application be provided for.”

This Court, differently constituted, considered the said application and in its ruling held, inter alia:

“26. There is no notice of appeal in relation to the Judgment delivered on 2nd December, 2009. In the case of Nairobi City Council v Resley [2002] E.A. 494 this Court at page 494 stated:

“There is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of execution of an earlier decision.”

And later in the same decision:

“It is trite law that without a notice of appeal against particular orders, we would have no Jurisdiction to grant a stay of those orders and we cannot, therefore accept Mr. Oduol’s argument to the effect that the notice of appeal against the ruling of 11th April, 2002 entitles him to apply for a stay of execution of orders made on 11th March, 2002.”

27. In this matter, the notice of appeal relates to the decision of the High Court given on 2nd December, 2010 dismissing the application for review. The order for stay that is sought is in relation to the Judgment delivered on 2nd December, 2009. No appeal has been preferred against that Judgment. In the case of John N. Liboyi v The Board of Governors St. John College to which we were referred, this Court held:

“The Court has held on occasions too numerous to recite in this

ruling that it is the filing of the notice of appeal which confers on the court the Jurisdiction to grant an order of stay, an injunction or a stay of further proceedings. That is clear enough from the wording of the rule."

Notwithstanding that firm re-statement of the law regarding this Court's Jurisdiction in dealing with **rule 5 (2) (b)** applications, the Court granted **"an order for stay of proceedings in the High Court pending the hearing and determination of the appeal from the decision of the High Court given on 19th January, 2012."**

Dissatisfied with that ruling, the applicant filed an application dated 25th April, 2013 under **Sections 3 (2) and 3A** of the **Appellate Jurisdiction Act, Rules 1 (2), 35 (2) and 42** of this **Court's Rules** and **Article 159 (2) (d)** of the **Constitution of Kenya**. The application seeks the following orders:

"1.

2. THAT this Honourable Court be pleased to review paragraphs 30, 31, 32, 33, 34 and 35 of its ruling delivered by the Court of Appeal on the 19th of April, 2013 in Nairobi Civil Appeal No. NAI 18 of 2012 (UR 13/2012).

3. THAT consequent upon the said review, this Honourable Court do set aside the order given for the stay of proceedings contained and reflected in paragraph 35 of the ruling delivered by the Court of Appeal on the 19th April, 2013 in Nairobi Civil Application No. NAI 18 of 2012 (UR 13/2012).

4. THAT further consequent upon the said review, this Honourable Court do allow the Preliminary Objection of the Applicant herein dated 20th March, 2012 and do dismiss the Notice of Motion dated 27th January, 2012.

5. THAT alternatively, this Honourable Court do correct the order made on the 19th April, 2013 in Nairobi Civil Application No. NAI 18 of 2012 (UR 13/2012) by setting aside the order given for the stay of proceedings contained and reflected in paragraph 35 of the ruling.

6. THAT this Honourable Court does give such consequential, further or other order(s) as it may deem Just.

7. THAT the costs of this application be provided for."

In view of the fact that the applicant has sought review of specific paragraphs of the ruling dated 19th April, 2013, it is only proper that I reproduce the contents of those paragraphs. They are as hereunder:

"30. There is however, a valid Notice of Appeal in regard to the orders of 19th January 2012. Is there an arguable appeal from the decision of the High Court given on 19th January 2012? We are persuaded the grounds raised in the draft memorandum of Appeal against the orders of

19th January 2012, cannot be said to be frivolous. There is for instance the question whether the High Court was right in declining to review the order for "nominal damages" of Kshs.5,000,000.00. We have

also considered that the application dated 2nd August, 2010 that culminated in the orders given by the High Court on 19th January 2012 included the prayer that:

“The honourable court be pleased to review and set aside the order of Lady Justice Mary Ang’awa delivered on 2nd December, 2009.”

31. If the applicants were successful in that application that sought a review of the Judgment given on 2nd December 2009, it would have resulted in at least an order being made to set aside the order of eviction or the payment of the nominal damages in the sum of Kshs.5 million.

32. The application dated 2nd August 2010 was dismissed on the grounds inter alia that there was no ‘error apparent on the face’ of the Judgment of Ang’awa, J. The application was also struck out for reasons that the firm of Onyango Otieno, Kibet and Ohaga were not properly on record.

33. In our view the outcome of the application for review, if it was successful was intended to set aside orders of eviction and the nominal damages. We think that, in the circumstances of this case, the applicants should have an opportunity, bearing in mind the overarching objective in the administration of Justice is to do substantive Justice, to be heard on the substantive appeal from the decision of the High Court given on 19th January 2012.

34. Considering that it is contended that the applicants property under threat of sale in execution of the decree supports over 40,000 people we think that the second limb for the grant of relief under rule 5(2)(b) of the rules of this Court are satisfied. There is a notification of sale of the applicant’s parcel of land in execution of the decree which shows the decretal sum to be recovered is Kshs.18,731,335/- together with auctioneers charges of Kshs.10,071,000/-. The sale of the applicant’s property would entail the displacement of over 40,000 people who are said to derive their livelihood from the suit land and they would perhaps be rendered destitute.

35. This Court has power, under rule 5(2)(b) of the rules of this Court, to make three types of orders. The Court can order a stay of execution, an injunction or a stay of any further proceedings. We think the particular circumstances of this case warrant the grant of an order for stay of proceedings in the High Court pending the hearing and determination of the appeal from the decision of the High Court given on 19th January 2012.”

The main thrust of the application is that the Court had no Jurisdiction to hear the application dated 27th January, 2012 because there was no notice of appeal against the order sought to be stayed. The applicant further contended that the order of stay of proceedings was made without any party having sought for it and without having heard parties on the same. A Judge has no power or Jurisdiction to decide an issue which had not been pleaded, the applicant contended, citing **SANDE v KENYA CO-OPERATIVE LTD** [1992] LLR 314. In any event, the applicant added, there were no further proceedings in the High Court capable of being stayed. The High Court matter had been finalized, Judgment delivered, a decree issued and its execution was underway.

One of the grounds cited by the applicant in support of this application is that:

“Article 159 of the Constitution of Kenya, Section 3A of the Appellate Jurisdiction Act Cap. 9 Laws of Kenya and Rule 1 (2) of the Court of appeal Rules,

2010 each empower the Court to make the orders prayed for which are necessary for the ends of Justice and to give effect to the overriding objectives of a Just resolution and to prevent an abuse of the process of the Court by lack of Jurisdiction and illegality arising out of the acknowledged absence of Jurisdiction.”

The respondents opposed the application and filed grounds of opposition raising the following grounds:

“1. The Court lacks Jurisdiction to entertain the application for the review of its orders and to the extent that the application manifests a collateral challenge on the correctness of the decision of this Court issued on 19th April,

2013, the same lies only to the Supreme Court.

2. The application violates the doctrine of finality of this Court’s orders and is therefore contrary to public interest.

3. The application seeks to re-argue matters which are otherwise res Judicata.

4. The application has been filed mala fides as the respondents have, keeping with the conditions imposed by the Court in the ruling of 19th April, 2013, already filed the substantive appeal herein vide Civil Appeal No.

115 of 2013. The present application merely delays the expeditious hearing and determination of the said appeal.”

Mr. Ahmednasir, S.C. and Mr. Nyaoga, who appeared for the applicant, submitted that this Court is empowered by **Section 3A** of the **Appellate Jurisdiction Act** to review the ruling in question as it is not a final Judgment. They submitted that unless the Court does so, the ruling would set a bad precedent where the Court can deliberately choose to exceed its Jurisdiction and grant orders of stay of execution or proceedings in the absence of a notice of appeal. That would also be against express provisions of the Court’s Rules and contrary to a long line of its decisions which have been in existence for decades. Counsel cited a recent 5 Judge decision of this Court, **EQUITY BANK LIMITED v WEST LINK MBO LTD, Civil Application No. 78 of 2011** where the Court re-stated that its Jurisdiction to grant any order under **rule 5 (2)(b)** flows from an appeal or notice of appeal in respect of which the specific relief is sought.

Mr. Masika, learned counsel for the respondents, submitted that this Court in granting the order for stay of proceedings was making the decision conscious of the fact that the respondents’ property that was under threat of sale in execution of the decree supports over 40,000 people. It was therefore necessary to preserve it until the appeal that challenges the High Court’s refusal to review its Judgment is heard and determined. Counsel pointed out that the appeal had already been filed. He added that this Court lacks Jurisdiction to review its own decisions. He cited several decisions of this Court, among them, **JASBIR SINGH RAI & 3 OTHERS v TARLOCHAN SINGH RAI & 4 OTHERS** , **Civil Application No. NAI 307 of 2003.**

The fundamental issue for determination in this application relates to the Jurisdiction of this Court. What is the source of the Court’s Jurisdiction? What is it empowered to do?

Article 164 (1) of the **Constitution of Kenya, 2010 (“the Constitution”)** establishes the Court of Appeal and **Article 164 (3)** stipulates that:

“(3) The Court of Appeal has Jurisdiction to hear appeals from-

- (a) the High Court; and**
- (b) any other Court or tribunal as prescribed by an Act of Parliament.”**

The preamble to the Appellate Jurisdiction Act reads as follows:

“An Act of Parliament to confer on the Court of Appeal Jurisdiction to hear appeals from the High Court and for purposes incidental thereto.”

Section 3 (1) of the Act stipulates.

“The Court of Appeal shall have Jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.”

The Court’s Jurisdiction is therefore properly circumscribed and cannot be enlarged. The Supreme Court of Kenya in **SAMUEL KAMAU MACHARIA & ANOTHER v KCB LTD & 2 OTHERS, Application No. 2 of 2011** delivered itself thus:

“A court’s Jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise Jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has Jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter; for without Jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of Jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the Jurisdiction of a Court of law, the court must operate within the constitutional limits. It cannot expand its Jurisdiction through Judicial craft or innovation. Nor can Parliament confer Jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the Jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the Jurisdiction of such a court or tribunal by statute law.”

Under **rule 2** of the **Court of Appeal Rules**, an appeal includes an intended appeal, which, by virtue of **rule 75 (1)** is manifested by filing of a notice of appeal. **Rule 75** states as follows:

“Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.”

It is therefore crystal clear that before an appeal is filed a notice of appeal must first be lodged. Without an appeal or a notice of appeal, the Court lacks Jurisdiction to grant any orders.

The power of this Court under **rule 5 (2) (b)** to order a stay of execution, an injunction or a stay of further proceedings is only exercisable where a notice of appeal has been lodged in accordance with **rule 75** of this Court’s Rules. In **RUBEN & 9 OTHERS v NDERITU & ANOTHER [1989] KLR 459**, this Court held that:

“At the stage of determining an application under Rule 5 (2) (b) there may or there may be no actual appeal. Where there is no actual appeal lodged there nevertheless must be an intention of appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under rule 5 (2) (b) becausethe Jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the business of the High Court.”

I may add that, for myself, no matter the nature of injustice that an applicant believes will be occasioned if the Court of Appeal declines to grant a relief under **rule 5 (2)(b)**, as long as there is no appeal on record (which includes a notice of appeal) the Court’s hands are tied and it cannot, in the guise of administering substantive Justice, purport to grant any order under the aforesaid rule. If it were to do so, that would amount to violation of both **Article 164 (3)** of the **Constitution** as well as **Section 3 (1)** of the **Appellate Jurisdiction Act**.

Once the Court realizes that there is no notice of appeal it must simply strike out the **rule 5 (2)(b)** application, unless it is withdrawn. That is because the Court lacks Jurisdiction to hear the application. The timeless dicta of Nyarangi, J.A. in **THE OWNERS OF MOTOR VESSEL LILIAN “S” vs CALTEX OIL (KENYA) LTD [1989] KLR 1** at page 14 comes to mind:

“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.”

Turning to the application that came up before our sister and brother Judges, it was not in dispute that there was no notice of appeal against the Judgment of Ang’awa, J, delivered on 22nd December, 2009, yet the notice of motion dated 27th January, 2012 brought under **rules 1 (2) and 5 (2) (b)** of the Court of Appeal Rules sought stay of execution of that Judgment.

Could the Court invoke **rule 1(2)** to grant some relief to the applicants? I think not. That sub rule states:

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

The inherent power referred to in the aforesaid rule must be in relation to the power granted to the Court under **Article 164 (3)** of the **Constitution** and **Section 3 (1)** of the **Appellate Jurisdiction Act** which is to hear and determine appeals from the High Court and such tribunals as may be prescribed by an Act of Parliament. The inherent power of the Court cannot be brought to bear unless the Court is properly seized of a matter and that presupposes existence of an appeal or notice of appeal.

In the ruling sought to be reviewed, before issuing orders for stay of execution of the High Court orders, our sister and brothers reminded themselves of the Court’s earlier holding in **NAIROBI CITY COUNCIL v RESLEY** (supra) that:

“It is trite law that without a notice of appeal against particular orders, we would have no Jurisdiction to grant a stay of these orders....”

They appreciated that **“there is no provision for allowing a notice of appeal lodged in a later decision to be used in an application for stay of an earlier decision”**. See **NAIROBI CITY COUNCIL v RESLEY** (supra). That notwithstanding, the learned Judges observed:

“29. There is, however, a valid Notice of Appeal in regard to the orders of

19th January, 2012. Is there an arguable appeal from the decision of the High Court given on 19th January, 2012? We are persuaded the grounds raised in the draft Memorandum of Appeal against the orders of 19th January, 2012, cannot be said to be frivolous....”

I think what the Court was saying in not so many words is that it was not bound by this Court’s earlier decisions to the effect that it is the filing of the notice of appeal in respect of the impugned decision which confers upon the Court Jurisdiction to grant an order of stay, injunction or stay of further proceedings. As long as there was a notice of appeal that relates to the decision in question the court can grant some relief under **rule 5 (2)(b)**, the learned Judges so implied.

With great respect, I do not subscribe to that school of thought. I am alive to the fact that this Court is free to depart from its previous decisions but I do not think it can exercise such latitude if by so doing it will be acting contrary to the Constitution and statute. When the Court of Appeal was the highest court in the land, Sir William Duffus, V.P. in **DODHIA v NATIONAL & GRINDLAYS BANK LTD [1970] E.A. 195** observed as follows:

“I entirely agree with my Lord President that this Court must, as the ultimate Court of Appeal, have a similar power to that formerly exercised by the Privy Council when it was the final Court of Appeal for Kenya. The duty of this Court in Kenya is to decide any case coming before it according to the laws of Kenya and this Court may be unable to do so if it is bound to follow a previous decision, which is clearly contrary to law and which this Court feels that it would be wrong to follow, and the Court must, therefore, as the ultimate Court of Appeal, be able to depart from a previous decision when it appears right to do so.”

The Court’s position as stated above was that it would normally regard its previous decisions as binding, while remaining free in appropriate circumstances to depart therefrom. The Court can depart from its earlier decisions if it was made in error, or where the decision conflicts with a later decision of the Supreme Court. Where there are two conflicting decisions of this Court, it can choose one and override the other. The principle of **stare decisis** is important in the administration of Justice. It ensures predictability, certainty, uniformity and stability in the application of law. This Court cannot deliberately and without a Justifiable cause depart from its decisions which have Constitutional and statutory foundations. The earlier bench did not proffer any reason for its departure from the well laid down principles.

Recently, the Supreme Court of Kenya in **JASBIR SINGH RAI & 3 OTHERS vs TARLOCHAN SINGH RAI & 4 OTHERS, Petition No. 4 of 2012**, laid down broad principles and directions regarding its own precedents, which I think are applicable in this Court. They are as follows:

- 1. where there are conflicting past decisions of the Court, it may opt to sustain and to apply one of them;**
- 2. the Court may disregard a previous decision if it is shown that such decision was given per incuriam;**
- 3. a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion;**
- 4. the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness.”**

The ruling which this Court has been asked to review by the applicant was not decided per incuriam. I agree with Mr. Masika that the Court was making a conscious decision to grant the order of stay in the absence of a notice of appeal. However, no statutory provision or case law was cited as authority for so doing. I think the Court had no Jurisdiction to grant the orders it did and to that extent such orders were void. In the words of Denning, L.J. in **MACFOY v UNITED AFRICA CO. LTD.**

“If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.”

The question that I now have to determine is whether this Court has power to review the ruling of 19th April, 2013 and set aside the order of stay of proceedings. The respondent’s learned counsel submitted that once the Court has determined an appeal it has no residual Jurisdiction to re-open it. He cited **JASBIR SINGH RAI & 3 OTHERS v TARLOCHAN SINGH RAI & 4 OTHERS**, Civil Application No. NAI 307 of 2003, where a 5 Judge bench Court held that it had no such power. I must however point out that the application in the **RAI** case was seeking re-opening of a final Judgment of the Court. See also **RAFIKI ENTERPRISES LTD v KINGSWAY & AUTOMART LTD** Civil Application No. 375 of 1996.

The applicant’s application was premised on **rules 1(2), 35(2) and 42** of this **Court’s Rules and Article 159(2)(d)** of the **Constitution**. I have already considered the scope of the power conferred upon the Court by **rule 1(2)**.

Rule 35(2) states as follows:

“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 supports to embody or, where the Judgment has been corrected under sub-rule (1), with the Judgment as so corrected.”

I think that rule cannot be applied unless it is acknowledged that the Court made an order that does not correspond with its Judgment. That is not the case here. Firstly, there is no Judgment delivered by the Court. Secondly, the impugned orders were not made by error. As regards **Article 159(2) (d)** of the **Constitution** which states that **“Justice shall be administered without undue regard to procedural technicalities”**, while I think it is of some relevance, I am not persuaded that it is the most efficacious ‘tool’ for the orders sought. If there is an applicable rule it ought to be cited rather than that general constitutional principle relating to the administration of Justice.

In my view, **rule 57 (2)** of the **Court of Appeal Rules** is the most appropriate one. The marginal note in respect of both **rules 57 (1) and (2)** reads: **“Rescinding of orders”**. I will reproduce the entire rule for clarity:

“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.”

The orders sought to be reviewed and/or set aside were made on an application to the Court, not in a

Judgment flowing from an appeal. The “order” referred to in **rule 35(2)** flows from a Judgment but **rule 57(2)** is specific to an “order made on an application”. It is not lost to my mind that **Section 2** of the **Appellate Jurisdiction Act** defines “Judgment” to include decree, order, sentence and decision but in the context of **rules 35 and 57** there is a difference between an order issued pursuant to a Judgment and an order made on an application.

Neither the **Appellate Jurisdiction Act** nor the **Court of Appeal Rules** contain any provision for review of this Court’s final Judgments, though it has been held in several decisions that the court has residual Jurisdiction to reopen appeals, albeit in very limited circumstances. In **MUSIARA LTD v WILLIAM OLE NTIMAMA** the Court stated:

“The residual Jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the Jurisdiction to be exercised. There was a tension between a court having such 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. The need to maintain confidence in the administration of Justice made it imperative that there should be a remedy in a case where bias had 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 a significant injustice had probably occurred and that there was no alternative effective remedy.”

In **CHRIS MAHINDA v KENYA POWER & LIGHTING CO. LTD (Civil Application No. NAI 174 of 2005)** the Court reiterated that it had residual Jurisdiction to review, vary or rescind its decisions in exceptional circumstances. However, in the **Rai case**, the five Judge bench (Omolo, Bosire, Githinji, Waki and Deverell, J.J.A.) the Court pointed out that in **MUSIARA LTD v WILLIAM OLE NTIMAMA** (Supra) and **CHRIS MAHINDA v KENYA POWER & LIGHTING CO. LTD** (Supra) the issue of the Court’s Jurisdiction was not raised. The Court reiterated its earlier position in **RAFIKI ENTERPRISES LTD v KINGSWAY AUTOMATIC LTD** (Supra).

Returning to the Court’s Jurisdiction to review certain aspects of the ruling delivered on 19th April, 2013 in **Nairobi Civil Appeal No. NAI 18 of 2012**, I hold the view that **rule 57(2)** grants this Court Jurisdiction to vary or rescind an order made in an application. I believe there are sufficient grounds for holding that the orders for stay of further proceedings were not merited. I summarize those grounds as follows:

- (a) **there was no notice of appeal against the Judgment delivered on 22nd December, 2009 and consequently the court lacked Jurisdiction to grant any relief under rule 5(2)**
- (b).
- (b) **there were no High Court proceedings capable of being stayed.**
- (c) **the orders granted were not sought by the respondents.**
- (d) **none of the parties were given any opportunity to address the Court on the issue of stay of further High Court proceedings.**

For these reasons, I would grant prayers 2, 3, 4 and 5 of the application dated 25th April, 2013. The respondents shall bear the costs of the application. In view of the orders granted herein, I direct that hearing of Civil Appeal No. 115 of 2013 be expedited.

Dated and Delivered at Nairobi this 3rd day of October 2014.

D.K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR