Manchester Outfitters (Suiting Division) Ltd (Now known as King Wollen Mills Ltd) & another v Standard Chartered Financial Services Ltd & 2 others (Petition 6 of 2016) [2019] KESC 7 (KLR) (20 December 2019) (Judgment)

Manchester Outfitters (Suiting Division) Ltd (now known as King Wollen Mills Ltd) & another v Standard Chartered Financial Services Ltd & 2 others [2019] eKLR

Neutral citation: [2019] KESC 7 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 6 OF 2016

DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

DECEMBER 20, 2019

BETWEEN

MANCHESTER OUTFITTERS (SUITING DIVISION) LTD (NOW KNOWN AS KING WOLLEN MILLS LTD) ..... 1ST PETITIONER

GALOT INDUSTRIES LTD ..... 2ND PETITIONER

AND

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

A.D GREGORY ..... 2ND RESPONDENT

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

(Being an appeal from a ruling of the Court of Appeal (Karanja, Okwengu, Mwera, GBM Kariuki & Mwilu JJA) at Nairobi in Civil Appeal No. Nai 224 of 2006 dated 8th April 2016)

The Court of Appeal has jurisdiction to review its own decisions

Reported by Beryl Ikamari

Jurisdiction *- jurisdiction of the Supreme Court - appellate jurisdiction - jurisdiction on matters of constitutional interpretation and application - whether the Supreme Court had jurisdiction to hear and determine an appeal lodged against a review decision of the Court of Appeal to question whether the Court of Appeal had jurisdiction to review its decisions - whether the Supreme Court had jurisdiction to hear and determine an appeal lodged against a ruling of the Court of Appeal which entailed a review decision made after the delivery of the Court of Appeal's judgment.*

Jurisdiction *- jurisdiction of the Court of Appeal - jurisdiction to review its decisions - overriding objective principles - whether the Court of Appeal had jurisdiction to review its decisions.*

Brief facts

The petitioners filed a suit, HCCC No 5002 of 1990, to challenge the appointment of the 1st and 2nd respondents as receiver managers under a debenture. They also challenged the validity of the debenture and securities that formed the basis of the appointment. The petitioners stated that the appointments were done in bad faith and for improper motives and they also constituted a breach of an agreement. The 1st respondent filed a defence and counterclaim in which it stated that the 2nd respondent was lawfully appointed as receiver manager pursuant to a debenture dated April 5, 1982. Under that debenture, the 2nd and 3rd respondents claimed Kshs 2,337,161.75 and interest thereon at 10% per annum being their expenses for services rendered. The High Court dismissed the suit and allowed the counterclaim as filed by the 1st and 2nd respondents.

The 1st and 2nd petitioners moved to the Court of Appeal and sought the setting aside of the High Court judgment or alternatively, orders for re-hearing of the suit before a different High Court judge. While the appeal was pending, the respondents sold off the 1st and 2nd petitioners' assets in order to recover the 1st respondent's funds. Via a majority decision, the Court of Appeal allowed the appeal and awarded the 1st petitioner Kshs 251,000,000 plus interest at 14% per annum from August 1, 2002, which was to be paid within 30 days of the judgment. The award of damages was based on a valuation report admitted to the court *de bene esse* by the 1st petitioner's counsel.

The respondents sought redress before the COMESA Court of Justice. They argued that the Court of Appeal acted in excess of its jurisdiction and violated the respondents' right to be heard but they withdrew the matter from that court on July 20, 2006. On August 18, 2006, the respondents filed an application which sought the setting aside of the Court of Appeal's orders of October 4, 2002. The basis of the application was alleged bias in the case of one judge. The said judge, while serving as an advocate, had received instructions from the petitioners but he declined them. The Chief Justice removed him from a bench involving the same parties and subject matter. The Court of Appeal, in a ruling delivered on April 8, 2016 gave orders for it to hear the appeal (Civil Appeal No 88 of 2000) afresh.

The 1st and 2nd petitioner lodged the instant appeal in which they questioned whether the Court of Appeal had residual jurisdiction to re-open and re-examine a concluded appeal. They sought orders for the 2002 judgment in Civil Appeal No 88 of 2002 to be restored.

Issues

i. Whether the Supreme Court had jurisdiction to hear and determine an issue, about whether the Court of Appeal could review its decisions, as a matter of constitutional interpretation and application.
ii. Whether the Supreme Court had jurisdiction to hear and determine an appeal lodged against a ruling of the Court of Appeal which entailed a review decision made after the delivery of the Court of Appeal's judgment.
iii. Whether the Court of Appeal had jurisdiction to review its decisions.

Held

1. The issues raised by the petitioners had to fall within the ambit of constitutional application or interpretation. For the Supreme Court to exercise jurisdiction, the petitioners had to show that the gist of the cause at the Court of Appeal and that court's reasoning and conclusions that lead to the determination of the cause, put in context, could properly be said to have taken a trajectory of constitutional interpretation or application. The petitioners would have to be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter.
2. The subject of appeal was not a Court of Appeal judgment but a Court of Appeal ruling in which the court accepted an invitation to review its own judgment. The issue to be determined at the Supreme Court was whether the Court of Appeal properly invoked jurisdiction to review its judgments. It was an issue addressed by the Court of Appeal but it had not been settled by the Supreme Court. The

Supreme Court had jurisdiction to interrogate the issue raised and to give directions to the Court of Appeal on the exercise of its review jurisdiction.

3. Each case had to be evaluated on its own facts. Where a moment to settle novel jurisdictional issues arose, as a constitutional court, the Supreme Court had to rise to the occasion and invoke its constitutional mandate and give direction.
4. Despite the fact that the appeal related to a post-judgment ruling of the Court of Appeal, the unique circumstances of the case were such that it was appropriate for the Supreme Court to assume jurisdiction and determine the issue.
5. There were two divergent views as to whether the Court of Appeal could review its decisions. There was one on the principle of finality of litigation which was based on public interest and the need for stability and consistency in law. The preposition on the principle of finality did not support reviews of decisions by the Court of Appeal. The second position was on the justice principle which favoured limited review predicated on the basis that the object of litigation was to do justice.
6. Before the promulgation of the Constitution of Kenya 2010, the Court of Appeal was the final court in the hierarchy of courts. It did not have residual jurisdiction to review or sit on appeal on its own matters. Since 2010, the Court of Appeal expressed the wherewithal to exercise inherent jurisdiction to review its decisions.
7. The Supreme Court had jurisdiction to review its decisions under certain conditions and it would be absurd that the Court of Appeal, should not, in appropriate circumstances exercise the same review power. Overriding objective principles were an additional tool to further the cause of justice. The Court of Appeal had jurisdiction to re-open, re-hear and re-determine decisions previously determined by it.
8. There was no justifiable fault in the decision of the Court of Appeal to re-open and hear afresh the matter before it, on the basis of their consideration of facts and circumstances of the case.

Petition dismissed.

Orders

Each party to bear its costs.

Citations

Cases

Kenya

1. *Asanyo & 3 others v Attorney General* Petition 21 of 2015; [2018] KESC 15 (KLR) - (Explained)
2. *Asanyo & 3 others v Attorney General* Petition 21 of 2015; [2018] KESC 15 (KLR) - (Mentioned)
3. *Basil Criticos v Independent Electoral and Boundaries Commission, Isaiah Saha Madungu & Naomi Namsi Shaban* Petition 22 of 2014; [2015] KESC 25 (KLR) - (Followed)
4. *Benjoh Amalgamated Limited & Muiri Coffee Ltd v Kenya Commercial Bank Ltd* Civil Application Sup 16 of 2012; [2014] eKLR - (Followed)
5. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
6. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Explained)
7. *Joho, Hassan Ali & Another v Suleiman Said Shahbal & 2 others* Civil Appeal 12 of 2013; [2013] KECA 435 (KLR) - (Explained)
8. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
9. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Explained)
10. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Explained)

11. *Nguruman Limited v Shompole Group Ranch & another* Civil Application 90 of 2013; [2014] KECA 358 (KLR) - (Applied)
12. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR) - (Explained)
13. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Followed)
14. *Rai & 3 others v Rai & 4 others* Civil Application Nai 307 of 2003; [2007] eKLR - (Followed)
15. *RMM v BAM* Civil Appeal 267 of 2011; [2015] KECA 1013 (KLR) - (Mentioned)
16. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Supreme Court Application No 16 of 2015; [2015] eKLR - (Followed)

Regional Court

Somani v Shirinkhanu Civil Appeal No 10 of 1970; 1971 EA 79 - (Explained)

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) section 3- (Interpreted)
2. Civil Procedure Act (cap 21) section 80- (Interpreted)
3. Civil Procedure Rules (cap 21 Sub Leg) order 45- (Interpreted)
4. Constitution of Kenya articles 164(1)(3)(4)(a); 262, 263, 264; Schedule sixth sections 7, 22- (Interpreted)
5. Constitution of Kenya (Repealed) sections 64(1); 77(9); 79(9) - (Interpreted)
6. Court of Appeal Rules, 1987 (Repealed) (cap 9 Sub Leg) rule 1(2) - (Interpreted)
7. Judicature Act (cap 8) section 3 - (Interpreted)

JUDGMENT

A. Background

1. The origin of this appeal can be traced to HCCC No 5002 of 1990, where the 1st and 2nd petitioners (as the 1st and 2nd plaintiffs) had filed a suit challenging the appointment of the 1st and 2nd respondents (as 1st and 2nd defendants) as receiver managers under a debenture. In the suit dated September 5, 1990, the 1st and 2nd petitioners further sought to impugn the debenture and the securities thereunder which had formed the basis of the appointment of the 1st and 2nd respondents. In the re-re-amended plaint dated November 18, 1992, the 1st and 2nd petitioners sought;

    (i) A declaration that the 1st defendant (1st respondent) is not entitled to enforce the provisions of the debenture and an injunction to restrain the 1st defendant from seeking to enforce the debenture and a mandatory injunction that the 1st defendant do restore the premises to the 1st plaintiff;

    (ii) Further, in the alternative, a declaration that the calling of the 1st plaintiff's indebtedness and the appointment of the receivers and managers constituted a breach of agreement;

    (iii) Further or in further alternative, the appointment of the receivers and managers under the purported debenture be set aside as the appointment was made maliciously, in bad faith and for improper motives; and

    (iv) The appointment of receivers and managers was wrongful and constituted a trespass and the 1st plaintiff suffered loss and damage and is entitled to an order as to inquiry of damages.

2. In response to the 1st and 2nd petitioners' claim, the 1st respondent filed a defence to the re-re-amended plaint and amended counterclaim dated November 25, 1992. Further to contesting that the

appointment of the 2nd respondent as receiver manager was lawful pursuant to the debenture dated April 5, 1982, the 2nd and 3rd respondents claimed Kshs 2,337,161.75 and interest thereon at 10% per annum being their expenses for services rendered under the debenture. The 1st respondent on its part sought a declaration that the debenture dated April 5, 1982 was a valid and subsisting security for the indebtedness of the 1st petitioner to the 1st respondent, and furthermore, made a claim for Kshs 24,908,418 with interest thereon at 10% per annum being the outstanding balance on the loan facilities to the 1st and 2nd petitioners .

3. The court (Githinji, J as he then was) heard the matter and rendered his Judgment on July 30, 1999. He dismissed the suit by the 1st and 2nd Petitioners in its entirety and allowed the Counterclaim as filed by the 1st and 2nd respondents.

4. Aggrieved by the Judgment of the High Court, the 1st and 2nd petitioners moved to the Court of Appeal and filed Civil Appeal No 88 of 2000. In the appeal, they sought the setting aside of the Judgment by the High Court, or in the alternative, an order remitting the matter to the High Court for re-hearing before a different judge. It was noted that during the pendency of the appeal and following the dismissal of several interlocutory pleadings, the respondents had sold off the properties and assets of the 1st and 2nd petitioners in recovery of the 1st respondent's funds.

5. The Court of Appeal (Tunoi, Lakha & Owuor JJA) delivered its judgment on October 4, 2002. By a majority decision (with Tunoi JA dissenting), the court allowed the appeal and consequently awarded the 1st petitioner, inter alia, a sum of Kshs 251,000,000 plus interest at 14% per annum from 1st August 2002, which payment was to be made within 30 days. The damages awarded to the 1st petitioner were largely based on a valuation report that had been admitted to the court *de bene esse* from the bar by counsel for the 1st petitioner.

6. Being aggrieved by that decision, the respondents attempted to seek recourse before the COMESA Court of Justice. Their contention before that court was that the appellate court had acted in excess of its jurisdiction and violated the rules of natural justice, in particular the respondents' right to fair hearing. They however, withdrew the matter from the COMESA Court on July 20, 2006.

7. On August 18, 2006, the respondents then filed an application in the Court of Appeal being Civil Application No Nai 224 of 2006 in which they sought a declaration of nullity and setting aside of the Judgment of the Court dated October 4, 2002. The application was premised on the provisions of sections 64 and 77(9) of the repealed Constitution, section 3 of the *Judicature Act* and rule 1(2) of the *Court of Appeal Rules, 1987* (repealed). Essentially, the application sought to re-open and re-examine the previous Judgment by the appellate court.

8. The central ground upon which the application was premised was that there was bias in the judgmentissued by the court, which bias arose from the fact that Lakha JA (as he then was) while an advocate and before joining the Bench, had been instructed by the petitioners to represent them when the matter was before the High Court. It was also noted that the said Lakha JA had however declined the instructions and had been subsequently removed by the Chief Justice from an earlier constituted bench involving the same parties for this same reason.

9. On April 18, 2007, the petitioners filed their replying affidavitin opposition to the application. On May 21, 2007, they further filed a notice of preliminary objectioncontending that the appellate court lacked the requisite jurisdiction to review its judgments. The preliminary objectionwas dismissed.

10. On April 8, 2016, the appellate Court (Karanja, Okwengu, Mwera, GBM Kariuki & Mwilu JJA) delivered its Ruling on the application for review of the Judgment. They set aside the said judgment of

the appellate court dated October 4, 2002, and ordered that Civil Appeal No 88 of 2000 be heard fresh, notwithstanding that the same had been determined finally and upon all the issues that had arisen for determination.

B. Case Before the Supreme Court

(i) The petitioners' petition and submissions

11. Aggrieved by the decision of the Court of Appeal to re-open the appeal, the 1st and 2nd petitioners moved to this court to challenge that decision. In the Petition dated May 17, 2018 and filed on May 18, 2018, they rely on the following grounds;

    (i) The Court of Appeal erred in applying the *Constitution of Kenya, 2010* in arriving at its decision when what was invoked were provisions of the *repealed Constitution*, the *Appellate Jurisdiction Act*, the *Judicature Act* and the *Court of Appeal Rules, 1987*;

    (ii) The Court of Appeal disregarded its own decisions in the cases of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Civil Application No NAI 307 of 2003 (154/2003 UR) and *RMM v BAM* 2015 eKLR;

    (iii) The Court of Appeal disregarded the decisions of this court in the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* 2012 eKLR and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others* 2013 eKLR;

    (iv) No law or procedure entitles the Court of Appeal to invoke any original inherent jurisdiction;

    (v) The Court of Appeal had no jurisdiction to re-open an appeal concluded and ruled upon in 2002;

    (vi) The Court of Appeal invoked provisions of the law not relied upon by the 1st and 2nd respondents in their application;

    (vii) The Court of Appeal departed from the doctrine of stare decisis where it is bound by the decisions of this court; and

    (viii) The Court of Appeal arrogated itself jurisdiction to re-open an appeal concluded in 2002 when it has no such jurisdiction.

12. The question that the 1st and 2nd petitioners raised, and which they seek determination of, is whether the appellate court had residual jurisdiction to re-open and re-examine a concluded appeal. They further seek the restoration of the Court of Appeal judgment in Civil Appeal No 88 of 2002 and the costs of this petition and application in the Court of Appeal.

13. In their extensive submissions, the 1st and 2nd petitioners contend that the appellate court did not have residual jurisdiction to review or make orders to re-open and hear fresh a matter that had been concluded and judgment duly entered. They rely on the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* 2012 eKLR (*Macharia*) and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* 2007 eKLR on the issue of jurisdiction. The 1st and 2nd petitioners in that regard submit that this court, as does the Court of Appeal, derives jurisdiction from a legal source, bereft of which none of the two courts can proceed to determine matters not within their purview.

14. They further submit that courts cannot arrogate upon themselves jurisdiction that is not expressly conferred upon them either through the Constitution or statutory provisions, and that to do so, they

would be acting *ultra vires*. In that context, they rely on the case of *In the Matter of the Interim Independent Electoral Commission* 2011 eKLR where this court held, *inter alia*;

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd* 1989 KLR 1, which bears the following passage (Nyarangi, JA at p.14)
>
> > 'I think that it reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the courtseized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step'."

15. They thus argue that the Court of Appeal made its determination, not on the law applied in the application for review, but on provisions that had not been enacted as at the time the application was made. They further argue that the application was instead premised on the provisions of sections 64 and 79(9) of the repealed *Constitution*, section 3 of the *Appellate Jurisdiction Act* and rule 1(2) of the Court of Appeal Rules, 1987 and while the Court of Appeal appreciated that these provisions of the law did not give it any powers to review its previous decision, it nonetheless relied upon provisions of the law that had been enacted after the application had been filed to make its decision.

16. They furthermore argue that the appellate courtrelied upon the provisions of section 3A of the *Appellate Jurisdiction Act* to exercise 'residual jurisdiction' and further contend that the court applied this provision retrospectively and erroneously so. They relied on the *SK Macharia* case for the contention that neither the Court of Appeal nor this court can entertain matters that had been finalized by the Court of Appeal before the commencement of the *Constitution 2010*.

17. With regard to the issue of bias, the 1st and 2nd petitioners contend that the 1st and 2nd respondents did not deem it necessary to raise the question of Lakha, JA's involvement in the matter prior to his appointment to the Bench at the hearing of the appeal. They thus argue that since the question was never brought up in Civil Appeal No 88 of 2000, there was no basis for it to be brought up during the hearing of the application for review of the Judgment.

18. The 1st and 2nd petitioners also contend that the decision by the Court of Appeal to re-open and re-hear the appeal goes against public policy since the dispute between the parties has taken twenty-nine (29) years to be heard and remains unconcluded. They thus submit that the matter first came for determination at the High Court in HCCC No 5002 of 1990 which court delivered its Judgment on July 31, 1999 after a period of nine (9) years. Civil Appeal No 80 of 2002 was determined October 4, 2002 after a period of two (2) years. Subsequently Civil Application No Nai 224 of 2006 was filed after four (4) years and determined on April 8, 2016 after a period of ten (10) years.

19. They thus argue that by allowing an application for review after fourteen (14) years, the appellate court went against the principle of finality of litigation and demonstrates outrights bias and injustice to the 1st and 2nd petitioners.

ii) The 1st, 2nd and 3rd respondents' replying affidavit and submissions

20. In the replying affidavitsworn by Ms Nancy Oginde on behalf of the 1st, 2nd and 3rd respondents, it was contended that this court does not have the jurisdiction to entertain the instant petition as the issues raised and determined by the Court of Appeal in the review application were neither centrally in issue between the parties nor determined by the superior court. They thus contend that the issues raised in

the application fell within the ambit of the principle of finality as envisaged in the decision of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Civil Application No Nai 307 of 2003; 2004 eKLR.

21. They further contend that by dint of articles 262 and 264 of the *Constitution*, as read with section 7 of the Sixth Schedule requiring that all laws ought to be applied in a manner that brings conformity with the Constitution, the proceedings, which were brought under the former Constitution, were still viable for determination under the new constitutional dispensation as the Court of Appeal had done.

22. In their submissions, they note that this court in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* 2017 eKLR set out the principles which a court would need to evaluate before proceeding to review its previous decisions and whether it had the power to do the same. They submit that the Court of Appeal in that context has inherent jurisdiction for the purposes of upholding justice in exceptional and limited circumstances. They contend, as was stated in *Nguruman Ltd v Shompole Group Ranch & another* 2014 eKLR that the court was vested with jurisdiction to re-open, hear afresh and determine issues previously determined by it and that the appeal ought therefore to be dismissed.

C. Analysis and Determination

23. Upon considering the arguments by the respective parties and their submissions, we deem that the following issues fall for determination;

    (i) Whether this court has jurisdiction to hear and determine the instant petition; and

    (ii) Whether the Court of Appeal has the jurisdiction to review its decisions.

    (iii) What reliefs are to issue including on costs?

(i) Jurisdiction of this court

24. *In the Matter of the Interim Independent Electoral Commission* (*supra*) the issue of the jurisdiction of this court was settled. Further, in the *SK Macharia* case, we rendered ourselves as follows;

> "A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law 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."

25. Further, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* SC Application No 5 of 2014; 2014 eKLR on the issue of jurisdiction, this court held:

> " The import of the court's statement in the *Ngoge* case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

26. Have the 1st and 2nd petitioners demonstrated that the issues they raise before this court fall within the ambit of constitutional application or interpretation? The main issue in contention in the appeal is whether the Court of Appeal had the residual jurisdiction to review its previous decisions and/or judgments? In that regard, the 1st and 2nd petitioners submitted that sections 64(1) and 79(9) of the *repealed Constitution*, section 3 of the *Appellate Jurisdiction Act*, section 3 of the *Judicature Act* and rule 1(2) of the Court of Appeal Rules, 1987 had been relied upon in making the application for review in Civil Application No Nai 224 of 2006. These provisions, they argued, had either been repealed or amended after the enactment of the *Constitution, 2010*, and that the court therefore, could not make a determination based on non-existent law.

27. On their part, the 1st and 2nd respondents contend that the promulgation of the *Constitution, 2010*, did not leave a vacuum, but that by dint of sections 7 and 22 of the Sixth Schedule, as well as articles 262 and 263, a transitional mechanism which regulated how the then existing laws would be applied was provided. They relied on the decision in the case of *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* Petition No 14 of 2014 where it was held:

> " The inevitable inference resolves into the principle that the new *Constitution* did not envisage or create a legal vacuum and all processes regulated by law were to continue in progress, as signaled by the Constitution."

28. On our part, and on the question whether the present appeal is properly before us, in *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another* (Tunoi and Wanjala SCJJ) SC Petition No 3 of 2012; (2012) eKLR, this court was categorical that;

> " Article 163(4)(a) must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.....Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application."

29. The court expounded upon this principle at paragraph 28 where it pronounced itself thus:

> " The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)."

30. What the 1st and 2nd petitioners challenge in that context is whether the Court of Appeal was justified in allowing an application for review based on the provisions of section 3A of the *Appellate Jurisdiction Act*, as read with sections 64 and 77 of the former *Constitution*. In our view, the contestation that the appellate court applied provisions of the law that were not in force when the application for review was made go to the exercise of the powers donated to the court under article 164(1) & (3) of the *Constitution*, which establishes the Court of Appeal and confers upon it, powers to exercise its jurisdiction.

31. The *Munya* and the *Nduttu* cases, in our view also, adequately clarify the frontiers of the appellate regime of this court embodied in article 163(4)(a) of the *Constitution*. They thus provide a basis upon which the jurisdictional question before us may be decided.

32. In stating so, we must remind ourselves that what is before us is an appeal, not from a judgmentof the Court of Appeal but a rulingin which the Court of Appeal accepted the invitation to review its own judgmentfor reasons we have already restated. Do we have the jurisdiction to determine such an appeal as of right under article 163(4)(a) of the *Constitution*? Can a ruling of the Court of Appeal after judgment be said to have conclusively been the basis for interpretation and application of the Constitution?

33. In that regard, we partly answered the above questions in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* 2013 eKLR where we stated thus:

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

Furthermore, in *Geoffrey Asanyo & 3 others v Attorney General, Sup Ct Petition No 21 of 2015 2018* eKLR, we stated:

> "It thus emerges that a concise reading of the judicial principles in article 159(2) of the constitutionwould show that they are non-derogable, and have to be adhered to by all courts and Tribunals exercising judicial power/authority. Where there is, therefore, a prima facie case of derogation, it behoves this court to intervene, so as to safeguard the Constitution, within its jurisdiction under article 163(4)(a). This was well stated in the Joho case paragraphs 51 & 52 where the court expressed itself thus:
>
> > 'In defending the *Constitution* and the aspirations of the Kenyan people, this court must always be forward-looking, bearing in mind the consequences of legal uncertainty upon the enforcement of any provision of the *Constitution*. This aspect of defending the *Constitution* is replicated under article 163(4)(a), which allows appeals from the Court of Appeal to the supreme Court as of right, in any case involving the interpretation or application of the Constitution. Such is the approach that this court in hearing this appeal must seek to apply.

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

34. In the same case, we addressed the need to evaluate each case on its own facts and where a moment has arisen to settle jurisdictional issues not previously raised, a constitutional question itself, this court must rise to the occasion and invoke its constitutional mandate as the apex court and give direction to all superior courtsand tribunalson the exercise of their constitutional and statutory mandate. This case has in that context raised the question whether the Court of Appeal properly invoked its jurisdiction to review its own judgments. To our minds that question, already addressed by the Court of Appeal, would clothe this court with the requisite jurisdiction to interrogate the issues raised and give directions to the Court of Appeal on the exercise of its review jurisdiction, a matter never before settled by this court.

35. In the circumstances and noting the unique circumstances of this case and although what has triggered the present appeal is a post-judgment rulingon the review powers of the Court of Appeal, we deem it fit to assume jurisdiction and address the issue placed before us as we shall do here below. In stating so, we are aware that in previous decisions such as of *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Supreme Court Application No. 16 of 2015 and *Basil Criticos v IEBC & others* 2015 eKLR, we stated that we would not assume jurisdiction where the Court of Appeal has not rendered itself with finality on any matter.

36. The present appeal is distinguishable as indeed the Court of Appeal has rendered itself on the main issues in contention and it is its Post-Judgement powers of review that is now in contest, a novel jurisdictional issue that requires settlement by this court.

(ii) Jurisdiction of the Court of Appeal on review

37. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Civil Application No NAI 307 of 2003 (154/2003 UR) (Rai) and with regards to the issue of jurisdiction of the Court of Appeal to review its own Judgments, Omolo JA (as he then was) stated that;

> " The power to re-open and re-hear an appeal is to be found nowhere in the Constitution. It is to be found nowhere in the *Appellate Jurisdiction Act.* Section 77(9) of the Constitution, which is cited as being the basis of the motion, does not give the court the power to re-open and re-hear an appeal. Nor does section 64 of the *Constitution*. Section 3 of the *Appellate Jurisdiction Act* says that when 'hearing and determining an appeal in the exercise of jurisdiction conferred on it by the Act, the Court has power, authority and jurisdiction vested in the High Court' But that power, authority and jurisdiction is to be exercised:
>
> > 'For all purposes of and incidental to the hearing and determination of any appeal-------'
>
> Clearly that section cannot be the basis for concluding that the Court has the power to re-open and re-hear an appeal'."

38. While emphasizing on the principle of finality of matters before the court, the learned judgefurther held that;

> " It is clear that even a final court of appeal can and does make a wrong decision on law and the issue is how such decisions are to be handled. The issue of how to handle an impugned decision is the subject of the dispute before us and I believe I have sufficiently shown that the first principle in contention, namely that there ought to and must be an end to litigation, is an ancient principle and derives its authenticity from a public policy basis. Yes, a party may be able to show that a decision is wrong either in law or upon some other reason. But for the interest of peace, in the interest of certainty and security, such a party might and is often told:
>
> > 'Even if all that you say is correct, yet the decision has been made and you must learn to live with it'."

39. Bosire JA also sitting on the bench in the *Rai* case, reiterated on the principle of finality of a matter in the court, and stated that in as much as a party may be aggrieved, the hands of the appellate court were tied by the law, and that it did not have the power to review its own judgments. In part, the learned judge stated *inter alia*:

> " I wish however, to state that the Court of Appeal is the final court in Kenya. The appellate process ends there. Whatever decisions which emanate from the court, except those I have stated above, are final and binding on the parties concerned. This application appears to challenge the doctrine of finality. This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down. It is a doctrine or principle based on public interest. As I stated earlier, there are instances where the public interest principles are in conflict and the courts must balance one aspect against another and decide which one supersedes the other, of course, depending on the facts and circumstances of each case. The conflict here is that the applicants feel they were not given a fair hearing by an impartial court. The principle of finality requires that litigation should come to an end. On the basis of the existing rules of practice, the applicants were heard by this courtand judgmentwas pronounced."

40. In *Somani v Shirinkhanu* (No 2) Civil Appeal No 10 of 1970; 1971 EA 79 the Court of Appeal (Spry Ag P, Law Ag VP, & Lutta JA) had earlier held that the Court of Appeal did not have unlimited jurisdiction; that it was a creation of statute and enjoys only such jurisdiction as is conferred on it by statute. In emphasizing that point, Law Ag VP (as he then was) stated that;

> " The only circumstances in which this courtwill 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. We are now asked to review our judgment and to alter it in such a way as to give effect to what was not the intention of the court at the time the judgment was given. Sir Charles Newbold has laid down the clearest of terms in *Lakhashmi Bros Ltd v R Raja & Sons (2)* that this court has no such jurisdiction, which would in effect involve this Court sitting in appeal on its own decision. To allow this application would be to open the doors to all and sundry to challenge the correctness of the decisions of this Court on the basis of arguments thought of long after the judgment was delivered. There would be no finality to litigation." Emphasis added

41. It must however be understood that the above decisions were made prior to 2010, when the Court of Appeal was the apex courtin Kenya and therefore its decisions were final.

42. This court as the court of finality after 2010, has generally taken a similar approach because in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others* SC Petition No 4 of 2012; 2013 eKLR (*Rai 2*) at paras. 49-50, it held that;

> " It is right, therefore, that in the submissions before this court, none of the counsel urged that it was not possible to depart from our previous decision. Counsel, as we understood it, no more than underlined the need for fidelity to the principle of stare decisis, while urging that only in the most exceptional circumstances, should there be a departure from this principle.
>
> For the special role of precedent in the certainty and predictability of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision was an obiter dictum (side-remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement obiter dictum is one made on an issue that did not strictly and ordinarily, call for a decision: and so, it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the valid and governing pillars of law." Emphasis added

43. The approach taken by the appellate court in this instance, in allowing the application for review and re-opening the matter for fresh hearing, was that there were developments to the Constitution and statute law that allowed and indeed donated power to that court to review its previous decisions. The first of these laws was section 3A of the *Appellate Jurisdiction Act* which was amended vide Act No 6 of 2009. The said section reads;

> (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.
>
> (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
>
> (3) An advocate in an appeal presented to the court is under a duty to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court."

44. Further, there was the proposition that the *Constitution of Kenya, 2010* allowed for an extensive and purposive interpretation of the Constitution and statutory law, and the appellate court stated that, "therefore the focus in the 2010 Constitution is on justice, and in order to give effect to the objective and purpose of the Constitution, this court must, in interpreting its jurisdiction, go beyond the letter in the Constitution and legislative provisions and apply the spirit of the Constitution. While the decision in the *Rai* case laid stress on the letter of the law as it was then, and the need for finality in litigation, the position has now changed as this Court is obligated not just to follow the letter but also the spirit of the Constitution which stresses on justice being done. Thus, where appropriate as in this case, the principle of fairness and justice must take priority over the principle of finality." But in seeking this extensive and purposive interpretation of the Constitution and statutory law and in emphasizing on the spirit of the law, did the appellate court ensure that the ends of justice and fairness were met, or did it act beyond the scope of its province as provided in law?

45. The appellate court in its Ruling reiterated that it had justifiably exercised its residual jurisdiction donated under section 3A of the *Appellate Jurisdiction Act* for the purpose and intent that the new

constitutional dispensation justified a departure from the *Rai* case as it called for an interpretation of the court's jurisdiction in a manner that brings it into conformity with the principles of the 2010 Constitution, and give allowance for the development of the law. In essence, what the court was saying was that the law in the Rai case was bad law; that it was not bound by the decision of a concurrent court, and that in the circumstances of the prevailing law, it was justified in deviating from such a decision and seeking to develop the law. Was this a matter in which it would be said that the appellate court appropriately achieved that mandate of developing the law?

46. The appellate court's finding was that it exercised its residual jurisdiction under section 3A of the *Appellate Jurisdiction Act* in order to arrive at the conclusion that it did, aided by reliance on *Benjoh Amalgamated Limited & Muiri Coffee Ltd v Kenya Commercial Bank Ltd* 2014 eKLR (the *Benjoh* case) and *Nguruman Ltd v Shompole Group Ranch & another* 2014 eKLR (the *Nguruman* case).

47. However, in the *Benjoh* case, the appellate court had held that even though it had residual powers to review its own decisions following the promulgation of the *Constitution 2010*, the court could not entertain review of decisions made before that Constitution came into being. In dismissing the application for review, primarily on the grounds that the applicant in that matter was guilty of laches, the court nonetheless held *inter alia*:

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

48. On whether the court had the requisite jurisdiction to allow a review of its previous decision post 2010 of appeal on the present matter held that:

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

49. It would then emerge from the above pronouncements that the appellate court, as the then final court, had held the view that it did not have and was not vested with inherent jurisdiction, which it could exercise to review its own decision. This was emphatically reiterated by both Bosire and Omolo JJA in the Rai case. In the *Nguruman* case, however, the court had the occasion to deal with the issue of review of its previous Judgments, decisions and orders. In the matter, the court held *inter alia*;

> 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 and 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 the additional tool in the form of the 'overriding objective principles' now enshrined in section 3A of the Act....Now that Parliament has spoken through the 'overriding objective principles' in section 3A 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 counterpart 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."

50. The above decisions would show that there is an impasse as to which case law by the appellate court is applicable in the circumstances as there are two divergent positions and prepositions from the court of Appeal. There is the "principle on finality" of litigation on the one hand which does not support review and there is "the justice principle" on the other hand which favours limited review predicated on the basis that the object of litigation is to do justice. The finality principle is urged on the basis of public interest as a public policy issue and is premised on the need for stability and consistency in law while the justice principle is urged on the basis of justice to the parties.

51. This court has on occasion had the opportunity to deliberate on the issue of review of its decisions extensively in the Rai 2 case and *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* 2017 eKLR (Outa). In the latter case, this court held, at paras 90 and 91, *inter alia*:

> "Flowing from the above analysis, and taking into account the elaborate submissions by counsel, and the practice in the Commonwealth and beyond, the inescapable conclusion to which we must arrive, is that this Court, being the final courtin the land, has no jurisdiction to sit on appeal over, or to review its own judgments, rulings, or orders, save in the manner contemplated by section 21(4) of the *Supreme Court Act*. The court becomes functus officio once it has delivered Judgment or made a final decision. The stamp of finality with which this Court is clothed should not be degraded except in exceptional circumstances as determined by the Court itself. Were we to hold otherwise, there would be no end to litigation, thus, severely compromising the integrity of the judicial process, and the integrity of this court.
>
> Having reached this conclusion, based largely on the fact that, neither the Constitution, nor the law, explicitly confers upon the court, powers to review its decisions, does this render this court entirely helpless? Aren't there situations, so grave, and exceptional, that may arise, that without this court's intervention, could seriously distort its ability to do justice? Of course, litigation must come to an end. But should litigation come to an end, even in the face of an absurdity? The Supreme Court is the final Court in the land. But most importantly, it is a final court of justice. This being the case, the court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this court, and indeed all courts in the land, derive their legitimacy decrees that we must do justice to all."

52. In the *Rai 2* case, this court set out the conditions that a party needed to satisfy before the court could consider reviewing its previous decisions. The broad principles set out included;

    a. where there are conflicting past decisions of the court, it may opt to sustain and to apply one of them;

    b. the court may disregard a previous decision if it is shown that such decision was given per incuriam;

    c. 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; and

    d. the court will not depart from its earlier decision on grounds of mere doubts as to its correctness.

53. These broad principles were further refined in the *Outa* case at para 92 to read:

> " Taking into account the edicts and values embodied in Chapter 10 of our Constitution, we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:
>
> i. the judgment, ruling, or order,is obtained, by fraud or deceit;
>
> ii. the judgment, ruling, or order, is a nullity, such as, when the Court itself was not competent;
>
> iii. the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto;
>
> iv. the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of a deliberately concealed statutory provision."

54. What emerges from this disposition is that the Court of Appeal, being the final court of the land before the enactment of the *2010 Constitution*, did not have the residual jurisdiction to review or sit on appeal on its own matters. However, as it has emerged, the court has since 2010, in some cases, expressed the wherewithal to exercise its inherent jurisdiction in circumstances that it deemed warranted the exercise of that jurisdiction. The latter is our position although we are cognizant of the fact that there are no constitutional or statutory provisions that allow this court to sit on appeal or review of its own decisions as the final arbiter. We may however, as in the circumstances highlighted in both *Rai 2* and *Outa* cases, review previous decisions and/or depart from previous judgments if the principles as set out in the two cases are satisfied. Judicial precedent necessitates that we sustain that position.

55. In applying the same principles to this case, therefore, we note for example that the High Court, not being a Court of final determination of disputes, as was the Court of Appeal prior to 2010, has the jurisdiction to review its Judgments by dint of powers conferred by section 80 of the *Civil Procedure Act* as read with order 45 of the *Civil Procedure Rules*. It would be absurd that the Supreme Court, following the *Rai* and *Outa* decisions can review its decisions as the apex court while the Court of Appeal should not, in appropriate cases, exercise the same power.

56. In the circumstances, the *Nguruman* decision by the Court of Appeal is not only a sound exposition of the law post 2010 but is also reasonable, pragmatic and we can but only agree with the Court of Appeal in that regard.

57. In the end, we find no justifiable fault in the decision of the appellate court to re-open and hear fresh the matter before it, as the previous Judgment, based on their consideration of the facts and circumstances, would be deemed as one in which the issues in context must be relooked at afresh.

(iii) Reliefs including on costs?

58. We have said enough to show that the appeal before us is misconceived and is one for dismissal.

59. On costs, the principle that costs follow the event is the general rule in this court. However, noting the nature of the Appeal before us and the fact that a novel issue has been settled by this Judgment

while the parties are still to be reheard by the Court of Appeal, we deem it fit that each party should bear its costs hereof.

D. Orders

60. On the basis of our findings and conclusions regarding the main issue for determination, we make the following orders:

    (a) The petition dated May 17, 2019 is hereby dismissed;

    (b) Each party shall bear its costs of the appeal.

61. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019

.....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT JUSTICE OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA