IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 290 OF 2005 (UR 180/05)

PATRICK GATHENYA …….. APPLICANT

AND

ESTHER NJOKI RURIGI …….. 1ST RESPONDENT

HON. ATTORNEY GENERAL …….. 2ND RESPONDENT

(*Application to set aside the judgement and order in Civil Appeal No. 128 of 2002 from the judgment of the High Court of Kenya at Nairobi (O'Kubasu, J) dated 25th February, 2000* in H.C.C.C. NO. 504 OF 1989)

RULING OF THE COURT

On 29th April, 2005, this Court determined C.A. NO. 128 of 2002 when it delivered judgment in a long standing land dispute between **ESTHER NJOKI RURIGI (Njoki)** and **PATRICK GATHENYA (Gathenya)**. Sixteen years before our judgment, Njoki, the administratix of the estate of her late husband, had filed suit for recovery of Land Parcel No. Kiambaa/Kanunga/499'A' which she claimed was illegally occupied by Gathenya. She sought a declaration to that effect and an order for Gathenya's eviction. The claim did not succeed in the superior court, but on appeal to this Court, the declaration and eviction order were granted. A consequential order was also made for cancellation of illegal amendments made to the Registry Index Map (RIM) by the Director of Survey. Each party was to bear its own costs of the litigation.

Ordinarily that would have been the end of the dispute between Njoki and Gathenya, since this is the final Court in the land. But Gathenya did not think so as he still felt aggrieved. On the advice of his advocates on record, M/S Kinoti & Kibe Company Advocates, he took out a Notice of motion which he filed on 31st October, 2005, six months after the judgment. The main order sought in the motion was that the judgment and orders made by this Court on 29th April, 2005 be set aside. There were also other orders sought in the alternative or as consequential to the order for setting aside. The fundamental issue which arises for consideration is therefore, whether this Court is at liberty to set aside or review its own judgments and re-open litigation for further agitation. Gathenya, on the advice of counsel strongly felt there was jurisdiction to do so, particularly where the judgment or order was made in violation of the Constitution, rules of natural justice and common law. Persuasive authority to support that contention was offered through:- ***R v Bow Street Metropolitan Stipendiary Magistrate and others****, ex parte* Pinochet Ugarte (No. 2) (1999) 1 ALL ER 577, a decision of the House of Lords in England and ***Musiara Ltd. V. Ntimama*** [2004] 2KLR 172, a decision of this Court, differently constituted, made in November, 2004, which applied the Pinochet case.

The motion came up for hearing on 13th March, 2007 but was, with the concurrence all parties, adjourned to await the decision of a bench of five Judges of this Court on the same issue, in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others****,* Civil Appl. Nai. 307/03 (unreported). That Court was so constituted to resolve an apparent conflict in previous decisions of the full court in ***Rafiki Enterprises Ltd. vs. Kingsway Tyres & Automart Ltd,*** Civil Appl. Nai. 375/95 (UR), on the one hand, and ***Musiara Ltd v Ntimama*** (supra) which was applied in ***Chris Mahinda t/a Nyeri Trade Centre v Kenya Power & Lighting Co. Ltd*** Civil Appl. Nai. 174/05 (UR), on the other hand. The ***Rafiki*** case had held that once the Court of Appeal has determined an appeal, it has no residual jurisdiction to reopen the appeal. Musiara and Mahinda however contained dicta, relied on here by the applicant, that the court had jurisdiction to reopen a decided appeal in certain circumstances. It could, for example, be "bias" on the part of any member of the court as in Musiara or "exceptional circumstances such as "significant injustice" as noted *obiter* in Mahinda. The ***Rai*** case extensively examined these earlier decisions, the relevant statutory provisions and other persuasive authorities from other jurisdictions. In the end the court held that ***"the Court of Appeal had no jurisdiction to re-open, re-hear and then recall its earlier decision and substitute it with another"***. The public policy principle that there must be an end to litigation thus triumphed 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. That decision was rendered on 7th December, 2007 and, once again, one would have thought that it would apply with equal force to the motion now before us. But not so.

Learned counsel for *Gathenya, Mr. Kibe Mungai* sought to distinguish the Rai case from the matter before us and submitted that it was inapplicable. The distinguishing feature, in his view, was that unlike the Rai case, there were parties in this case who were not given an opportunity to be heard, either before the superior court or the Court of Appeal. That was the District Land Registrar and the Director of Survey who were found to have illegally interfered with the disputed land and who must now comply with the consequential orders issued on appeal. Another distinguishing feature was that the issues argued before the Court of Appeal were not pleaded or argued in the superior court, particularly the issue of nullification of entries in the land register. Finally, it was Mr. Kibe's view that the consequential orders given in the final decision by this Court were incapable of enforcement.

With the utmost respect, we think learned counsel was trying to make a distinction without a difference. In the ***Rai*** case, as in this case, the losing appellants invoked Constitutional provisions, particularly ***Sections 64 and 77*** of the Constitution and ***Section 3*** of the Appellate Jurisdiction Act, to found the claim that their constitutional and fundamental rights as litigants had been violated or that rules of natural justice and the Common Law had been breached. In the ***Rai*** case, it was alleged there was bias by one of the Judges presiding over the appeal, and therefore there was no fair hearing. In the case before us it was the fundamental rights as litigants had been violated or that rules of natural justice and the Common Law had been breached. In the **Rai** case, it was alleged there was bias by one of the Judges presiding over the appeal, and therefore there was no fair hearing. In the case before us it was the omission to hear some of the parties affected by the judgment, thus rendering it untenable. In both cases, the authorities relied on and considered were the same, including the ***Rafiki Enterprises case, Musiara*** case and the ***Pinochet*** case.

There may well have been errors or omissions of fact and law in the decision rendered by the court in this case although we do not say there were. On the contrary, the issues raised by Mr. Kibe have no merits. Nevertheless, Judges of this Court have never claimed infallibility. But it is now clear since the Rai case, that the decision will not be reopened. After reviewing the statutory provisions which set up the Court of Appeal and the jurisdiction exercisable by the court in contra-distinction to the High Court and other courts established by law, Omolo, J.A. with whom the other four members of the court agreed, stated as follows:-

"There can be not doubt from the material placed before us that on 13th November, 2003, when the present motion was filed, there was no appeal pending before the Court. The appeal in question had been concluded and decided on 30th September, 2002, more than one year back. We are asked to re-open that appeal and re-hear it. The power to re-open and rehear an appeal is to be found nowhere in the constitution. It is to be found nowhere in the Appellate Jurisdiction Act. Section 77 (9) of the Constitution which is cited as being the basis of the motion does not give the "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 an appeal."

And so it is in this case. By the time the notice of motion before us was brought on 31st October, 2005, there was no appeal pending before the court. It had been concluded on 29th April, 2005, about six months earlier.

Omolo, J.A. concluded:-

"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 that court can, in effect, reverse the decision of this Court made on an appeal from a decision emanating from the very self-same High Court. It is to be remembered that there is an appeal from the decision made by the High Court pursuant to the provisions of the Constitution and in my view it would be an absurd situation to keep moving from the Court of Appeal back to the High Court and then back to the Court of Appeal again. I have always thought the law is no friend of absurdities.

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

We agree.

In the end we find that there is jurisdiction to deal with the application before us in the manner sought. The application is for striking out and we so order. Costs of the struck out motion shall be borne by the applicants.

Dated and delivered at Nairobi this 19th day of December, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR