Steyn v Ruscone (Civil Suit 291 of 2013) [2025] KEHC 6196 (KLR) (Commercial and Tax) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6196 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 291 OF 2013

FG MUGAMBI, J

MAY 16, 2025

BETWEEN

HERMANUS PHILLIPUS STEYN ..... PLAINTIFF

AND

GIOVANNI GNECCHI- RUSCONE ..... DEFENDANT

The doctrine of res judicata does not bar a court from setting aside a judgment of a court of coordinate jurisdiction where it was obtained through fraud

The plaintiff sought to impeach a 2007 High Court judgment in HCCC No. 51 of 2005 on grounds that it was procured through fraud and perjured evidence. He relied on fresh arbitral and Tanzanian court findings confirming no compensation had been paid by the Government of Tanzania, contrary to the defendant's testimony. The court held that fraud constituted an independent cause of action not barred by res judicata and that a judgment so tainted was a nullity. It found the defendant's representations deliberately false, set aside the impugned judgment, restrained execution, and ordered a retrial on the merits.

Reported by Kakai Toili

Civil Practice and Procedure *– doctrine of res judicata – applicability of the doctrine of res judicata – applicability in claims of fraud - whether the doctrine of res judicata barred a court from setting aside a judgment of a court of coordinate jurisdiction where the judgment was obtained through fraud - under what circumstances could a court set aside a judgment issued by a court of coordinate jurisdiction - Civil Procedure Act (cap 21), sections 3A and 7.*

Evidence Law *– standard of proof - standard of proof in claims of fraud - what was the standard of proof in fraud claims - what were the elements required to establish a claim of fraud.*

Brief facts

The plaintiff contended that in the 1970s he held shares in companies operating in Tanzania and that in 1981 those companies were unlawfully expropriated by the Government of Tanzania. Subsequently, in 1983 the Tanzanian Parliament passed the Specified Companies (Acquisition and Transfer of Management) Act

which provided for compensation. However, no compensation was paid to him or to the companies. The plaintiff claimed that the defendant represented that he could facilitate payment of the compensation and executed a commission agreement entitling the defendant to 10% of any compensation received. Subsequently, a settlement agreement was executed between the plaintiff and the Tanzanian Government, providing for the return of certain assets and a compensation sum of USD 12,060,155.23.

Thereafter, the defendant instituted HCCC No. 51 of 2005, seeking USD 1,206,015.52, being 10% commission allegedly due under the commission agreement. The plaintiff denied having received compensation and asserted that the defendant misled the court by presenting false evidence regarding the alleged payment. At the trial, the defendant and Gabinus Edgar Maganga (Mr. Maganga) testified that compensation had been paid and certain assets restored. The plaintiff contended that the representations were knowingly false. Consequently, the court on September 7, 2007 entered judgment in favour of the defendant, finding that the plaintiff had been fully or substantially compensated.

The plaintiff claimed that the judgment was procured by fraud and perjury and thus he filed the instant suit. The plaintiff presented new evidence not previously available, including an arbitral award dated July 9, 2010 (and corrected on September 14, 2010) that found that the Tanzanian Government had breached the settlement agreement and had not paid the compensation. The High Court of Tanzania adopted that award and issued a decree. The plaintiff averred that the new evidence demonstrated that the impugned judgment was procured by fraudulent misrepresentations and that execution proceedings based on that judgment were unjust.

The plaintiff further averred that his appeal was dismissed by the Court of Appeal, and that the Supreme Court declined to grant him leave to appeal. The plaintiff sought several reliefs, including declarations that the defendant committed perjury and fraud in HCCC No. 51 of 2005; that the resulting judgment and decree were null and void *ab initio* and an order setting aside the same. The plaintiff further sought an injunction restraining the defendant from executing or enjoying any benefit from that judgment, or alternatively, an order for a retrial.

Issues

i. Whether the doctrine of *res judicata* barred a court from setting aside a judgment of a court of coordinate jurisdiction where the judgment was obtained through fraud.
ii. Under what circumstances could a court set aside a judgment issued by a court of coordinate jurisdiction?
iii. What were the elements required to establish a claim of fraud?
iv. What was the standard of proof in fraud claims?

Held

1. Jurisdiction was the foundation upon which judicial authority was founded, and without it, a court must down its tools as any decision rendered without jurisdiction was a nullity. Jurisdiction could not be conferred by the parties or assumed by the court; it must be expressly provided by law. Article 165(3)(a) of the Constitution conferred upon the High Court unlimited original jurisdiction in criminal and civil matters. Section 47 of the Evidence Act expressly envisioned challenges to an earlier judgment on grounds of fraud.
2. The statutory framework contemplated that a judgment, however final it appeared, could be challenged in subsequent proceedings where it was tainted by fraud. In the same vein, section 3A of the Civil Procedure Act safeguarded the court's inherent jurisdiction to issue such orders as may be necessary to secure the ends of justice or to prevent an abuse of the court's process. A judgment obtained through fraudulent means constituted a manifest abuse of that process, and in such circumstances, the court was empowered to set aside the judgment *ex debito justitiae*.
3. In exceptional circumstances, a court could set aside a judgment issued by a court of coordinate jurisdiction. That was to the extent that even where a court had heard and determined a matter

to finality and was *functus officio*, limited exceptions existed that may warrant the reopening of proceedings.

4. The court had authority to reopen a case when fraud had been established. The instant matter had already reached the Supreme Court and no further right of appeal was available to the parties. It was for that precise reason that the plaintiff sought to litigate on the basis of new and important evidence that was not before the court during the earlier proceedings, upon which the claim of fraud was made.
5. Section 7 of the Civil Procedure Act did not preclude a challenge based on fraud. The doctrine of *res judicata* intended to bar re-litigation of matters that were directly and substantially in issue in a previous suit between the same parties and determined by a court of competent jurisdiction. However, a judgment obtained through fraud did not constitute a legitimate or final determination on the merits.
6. Fraud undermined the integrity of the judicial process and displaced the presumption of conclusiveness attached to final judgments. Accordingly, where fraud was properly pleaded and demonstrated, particularly where it was concealed and could not have been uncovered with reasonable diligence at the time of the original proceedings, the bar of *res judicata* could not stand in the way of the court's jurisdiction to revisit the impugned decision. The court was properly seized of jurisdiction to entertain the instant suit, notwithstanding that the judgment under challenge was issued by a court of coordinate jurisdiction.
7. To deny the plaintiff an avenue for redress would amount to allowing a party to benefit from fraudulent conduct, thereby undermining the integrity of the judicial process and depriving the aggrieved party of any effective remedy.
8. Fraud, as defined in Black's Law Dictionary, 9th Edition, at page 131, was described as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. That definition highlighted the two essential elements of fraud; a deliberate misrepresentation or concealment, and an intention to deceive, leading to detrimental reliance by the other party. Both elements must be established for a claim of fraud to succeed.
9. The burden of proof in fraud claims was higher than that required in ordinary civil proceedings. Although the standard fell below that of proof beyond reasonable doubt, it was above the ordinary balance of probabilities. Allegations of fraud must be proved with clarity, precision, and cogency.
10. At the time the judgment in HCCC No. 51 of 2005 was delivered, the court was not aware that the plaintiff had, by a request dated December 22, 2007, formally commenced arbitration proceedings against the Government of Tanzania on the very grounds that he had not received the compensation alleged in HCCC No. 51 of 2005. That request-initiated arbitration between the plaintiff and the Government of Tanzania culminated in a final arbitral award issued on July 9, 2010 and subsequently amended on September 14, 2010.
11. The award was later adopted as a judgment of the High Court of Tanzania, and a corresponding decree was issued on May 3, 2011, nearly four years after the judgment of the High Court in HCCC No. 51 of 2005, and approximately seven months after the Court of Appeal rendered its decision. As such, that evidence could not have been available or presented before either the High Court or the Court of Appeal during the earlier proceedings. The arbitrator ultimately awarded the plaintiff general damages for breach of the principal agreement, compound interest, and the costs of the arbitration. Therefore, from a plain reading of the award, the assertions made by the defendant and supported by the testimony of Mr. Maganga in HCCC No. 51 of 2005, were materially false and misleading.
12. The court's conclusion that the plaintiff had likely been paid and that explained his failure to institute suit against the Tanzanian Government was based entirely on the misrepresented facts. That falsehood thus went to the very heart of the dispute and materially influenced the court's determination of the defendant's entitlement to commission.
13. The truth, as revealed through the arbitral award and supporting documents, was that the plaintiff had, at the time of the hearing and judgment, already commenced formal arbitration proceedings

against the Government of Tanzania precisely because the compensation in question had not been paid. The arbitral proceedings were not speculative or inconclusive; they culminated in a final award unequivocally finding that the Government had breached its obligations under the principal agreement and the third addendum by failing to remit the agreed sums. That award was later adopted as a judgment of the High Court of Tanzania, confirming the Government's liability.

14. The Government of Tanzania actively participated in the arbitration, challenging the plaintiff's claim and denying that any payment was due. That active opposition directly contradicted Mr. Maganga's testimony that he knew for a fact the plaintiff had been paid. Mr. Maganga's statements were not only factually incorrect but knowingly false or recklessly made, given that the Government, on whose behalf he purported to speak, was contemporaneously denying the very payment he affirmed had been made. Such conduct amounted to a deliberate attempt to mislead the court.
15. The representations made by the defendant and Mr. Maganga were not only unsubstantiated by any documentary evidence, but were affirmatively contradicted by the Government's contemporaneous position in arbitration. That juxtaposition of false testimony and contradictory public record reflected a clear pattern of fraudulent misrepresentation, calculated to mislead the court and obtain judgment by deception.
16. The judgment delivered on September 7, 2007 in HCCC No. 51 of 2005 was procured through fraud. It was not merely a case of nondisclosure or mistaken belief; it was a deliberate fabrication of material facts designed to induce judicial error. In law and in equity, such a judgment could not be allowed to stand. No judgment of a court could be allowed to stand if it had been obtained by fraud; fraud unraveled everything.
17. It was both necessary and just that the matter be remitted for retrial and that the defendant's claim be reconsidered afresh, with the benefit of the now-available evidence and subject to full adversarial testing. A retrial would ensure that justice was not only done but seen to be done, and no party unjustly benefitted from deceit or falsehoods in judicial proceedings.

Claim allowed.

Orders

i. *A declaration was issued that the defendant committed perjury and gave false and fraudulent evidence in Milimani HCCC No. 51 of 2005.*
ii. *A declaration was issued that the judgment and decree issued on September 7, 2007 in HCCC No. 51 of 2005 were obtained by fraud and were null and void ab initio.*
iii. *A declaration was issued that the judgment and decree were the result of fraud practiced on the High Court by the defendant and Mr. Maganga.*
iv. *An order was issued setting aside the judgment and decree given by the High Court on September 7, 2007 in Nairobi Milimani HCCC No. 51 of 2005.*
v. *A permanent injunction was issued restraining the defendant, whether by himself or through his servants, employees, or agents, from executing or acquiring any benefit under or by virtue of the judgment and decree in any manner whatsoever.*
vi. *An order was issued that the defendant's claim in Nairobi Milimani HCCC No. 51 of 2005 was remitted for retrial, to be heard and determined on the merits.*
vii. *The plaintiff shall have the costs of the suit.*

Citations

Cases

Kenya

1. *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* Civil Application 16 of 2012; [2014] KECA 872 (KLR) - (Explained)

2. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Explained)
3. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR) - (Mentioned)
4. *Republic v Chengo & 2 others* Petition 5 of 2015; [2017] KESC 15 (KLR) - (Explained)
5. *Showcase Properties Limited v Kenya Commercial Bank Ltd & another* Commercial Case 305 of 2013; [2023] KEHC 24601 (KLR) - (Mentioned)
6. *Vijay Morjaria v Nansingh Madhusingh Darbar & another* Civil Appeal 106 of 2000; [2000] KECA 5 (KLR) - (Explained)

United Kingdom

Lazarus Estates Ltd V Beasley (1956) 1 All ER 341 - (Mentioned)

Regional Court

Railal Gordhanbhai Patel V Lalji Makanji [1957] EA 314, - (Mentioned)

Texts

Suggestions Garner, BA., (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 131

Statutes

Kenya

1. Civil Procedure Act (cap 21) sections 3A, 7 - (Interpreted)
2. Constitution of Kenya article 165(3)(a) - (Interpreted)
3. Evidence Act (cap 80) section 47 - (Interpreted)

Tanzania

Specified Companies (Acquisition and Transfer of Management) Act (Act 20 of 1983) - (Cited)

Advocates

None mentioned

JUDGMENT

Introduction and Background

1. The matter before this court represents an extraordinary challenge to judicial finality as it seeks to impeach a judgment delivered by a court of coordinate jurisdiction on the basis of alleged fraud and perjured evidence.

The Plaintiff's Case:

2. By a plaint dated July 9, 2013, the plaintiff seeks several reliefs, including declarations that the defendant committed perjury and fraud in HCCC No 51 of 2005; that the resulting judgment and decree of September 7, 2007 are null and void *ab initio* and an order setting aside the same. The plaintiff further seeks an injunction restraining the defendant from executing or enjoying any benefit from that judgment, or alternatively, an order for a retrial, and costs of the suit.

3. The plaintiff contends that in the 1970s he held shares in companies operating agricultural and livestock businesses in the Makuyuni area, Arusha, Tanzania. He alleges that in 1981, these companies were unlawfully expropriated by the Government of Tanzania (hereinafter 'the Government'). Subsequently, in 1983, in response to such expropriations, the Tanzanian Parliament passed the *Specified Companies (Acquisition and Transfer of Management) Act*, No 20 of 1983, which provided

for compensation. However, no compensation was paid to him or to the companies as stipulated under the Act.

4. The plaintiff claims that the defendant represented that he had influence to facilitate payment of the compensation. The parties executed a Commission Agreement on July 26, 1991, entitling the defendant to 10% of any compensation received from the Government. Subsequently, on November 8, 1993, a Settlement Agreement was executed between the plaintiff and the Government, providing for the return of certain assets and a compensation sum of USD 12,060,155.23.

5. About a month later, the defendant instituted HCCC No 51 of 2005, seeking a sum of USD 1,206,015.52, being 10% commission allegedly due under the Commission Agreement, arising from sums purportedly received pursuant to the Settlement Agreement. The plaintiff, in response, denied having received any compensation whatsoever and asserted that the defendant had misled the court by presenting false evidence regarding the alleged payment. He further contended that the defendant was not entitled to any commission.

6. The trial of HCCC No 51 of 2005 proceeded before Justice H Waweru, during which the defendant and one Gabinus Edgar Maganga (hereinafter Mr Maganga) testified that compensation had been paid and certain assets had been restored. It was asserted that the initial instalments had been processed and disbursed by the relevant departments, though no supporting documentation was produced to substantiate these claims.

7. Mr Maganga in particular, testified that he personally facilitated the processing of the first and second instalments and, despite lacking any documentary proof, maintained that he believed the payments had been effected. The plaintiff contends that the said representations were knowingly false or made with reckless disregard for the truth. Consequently, relying on the impugned testimony, the court on September 7, 2007 entered judgment in favour of the defendant, finding that the plaintiff had been 'fully or substantially' compensated. The plaintiff maintains that the said judgment was procured by fraud and perjury.

8. The plaintiff now presents new evidence not previously available, including an arbitral award dated July 9, 2010 (and corrected on September 14, 2010) that found that the Tanzanian Government had breached the Settlement Agreement and had not paid the compensation. The High Court of Tanzania adopted this award, and a decree issued on May 3, 2011. The plaintiff avers that this new evidence conclusively demonstrates that the judgment in HCCC No 51 of 2005 was procured by fraudulent misrepresentations by the defendant and Mr Maganga, and that execution proceedings based on that judgment are unjust.

9. The plaintiff further avers that his appeal in Nairobi Civil Appeal No 171 of 2009 was dismissed by the Court of Appeal on October 22, 2010, and that the Supreme Court declined to grant him leave to appeal on the ground that the matter did not raise issues of general public importance. In his view, the appellate courts were constrained by the absence of the evidence he now presents.

10. Meanwhile, the plaintiff states that the defendant has initiated execution proceedings in both Kenya and Tanzania, seeking to enforce the allegedly tainted judgment. The plaintiff contends that unless restrained, the defendant will continue to prosecute the said execution to his detriment.

The Defendant's Case:

11. In his defence dated August 15, 2013, the defendant denies all allegations of fraud or perjury. He maintains that the judgment in HCCC No 51 of 2005 was lawfully obtained and that he is entitled to enforce it. He claims that the plaintiff wrongfully terminated the Commission Agreement after he had

secured a compensation settlement from the Government on behalf of the plaintiff to avoid paying his commission. He states that he legitimately pursued his claim for the 10% commission.

12. The defendant invokes the doctrine of *res judicata*, arguing that the issue of compensation was conclusively determined, and that the plaintiff is barred from re-litigating it. Further, the defendant argues that the plaintiff has already been substantially compensated as per the testimony given in the earlier trial and arbitration processes, and thus there is no basis for alleging fraud or setting aside the judgment in HCCC No 51 of 2005. He prays that the suit be dismissed with costs.

The reply to Defense:

13. The plaintiff, in his reply dated September 4, 2013, maintains that the new evidence, including the corrected arbitral award and Tanzanian decree, was not available at the time of the trial, the appeal, or the Supreme Court proceedings. He reiterates that the compensation of USD 12,060,155.23 was never paid.

14. He argues that *res judicata* does not apply to suits grounded on fraud, and that this is a distinct cause of action aimed at setting aside a judgment procured by deceit. He denies anticipatory breach and avers that this suit is necessary to prevent further injustice. The plaintiff prays that the court dismisses the defence, describing it as scandalous, frivolous, and vexatious, and sought the reliefs set out in the plaint.

The Hearing:

15. The hearing of the matter proceeded with learned counsel Mr Ahmed Nassir and Mr Havi making their opening statements on behalf of the plaintiff and the defendant respectively.

The Plaintiff's Case:

16. The plaintiff called two witnesses. The first witness, Martin Richard Steyn (PW1), testified as the *Guardian ad Litem* of the plaintiff. His testimony aligned to his witness statement dated June 6, 2024.

17. In cross-examination, PW1 emphasized that the plaintiff had never received any part of the alleged compensation and that the defendant's claims were baseless and founded on fabricated evidence. He highlighted that the defendant had committed fraud by testifying that the payment was made and by withholding critical documents that could prove otherwise. He further testified that the new evidence obtained from the arbitration proceedings and the Tanzanian courts unequivocally demonstrated that the compensation sum remained unpaid and that the assets in question had not been restored to the plaintiff.

18. He further clarified that the Court of Appeal's dismissal of the appeal in 2010 and the Supreme Court's refusal to grant leave for appeal were based on incorrect findings about the payment.

19. The second witness was Wilbert Kapinga (PW2), a senior advocate from the firm of Bowmans Tanzania. It was his testimony that he was instructed by the plaintiff in 2008 to pursue claims involving assets in Tanzania, specifically focusing on the enforcement of a sale agreement with the Government of Tanzania which stipulated compensation of USD 12,060,155.23, interest, and the return of specified properties. He stated that, despite the passage of 15 years, the government had failed to make the full payment or return the properties as agreed.

20. Mr Kapinga further confirmed that two addendums were executed and payments amounting to USD 5,000,000 were made, yet the USD 12,060,155.23 remained unpaid. He confirmed that the arbitral tribunal had expressly found that the Government of Tanzania was still indebted to the plaintiff. He further testified that the arbitral award, corrected on September 14, 2010, and the subsequent court

decree issued on May 3, 2011, clearly indicated that the alleged payments, as claimed by the defendant and Mr. Maganga, were non-existent.

21. Mr Kapinga conceded that if evidence of fraud were established, the impugned judgment could indeed be set aside. However, he reiterated that the plaintiff's current claim was predicated on new evidence that was not available during the original proceedings. He emphasized that the fresh evidence, specifically the arbitral award and court decree, clearly demonstrated that the compensation sum of USD 12,060,155.23 remained unpaid.

22. In re-examination, Mr Kapinga clarified that the addendums executed by the plaintiff with the Tanzanian Government were distinct from the original purchase agreement, which primarily dealt with shares. He underscored that the plaintiff's claim in the present suit is specifically concerned with the unpaid sum of USD 12,060,155.23 under the Principal Agreement, which, despite the partial payments made under the addendums, remained outstanding.

The Defendant's Case:

23. The defendant, Giovanni Gnecchi-Ruscone (DW1), relied on his witness statements dated December 2, 2015 and May 13, 2016.

24. During cross-examination he explained his association with the plaintiff and gave the details of the agreement that he entered into with the plaintiff. He conceded that he was aware of the eventual payment of USD 12,060,155.23 to the plaintiff but was not involved in the subsequent negotiated addendums to the Principal Agreement. He confirmed that he did not possess any documentary evidence to prove that the USD 12,060,155.23 had been paid at the time. He also admitted that despite making inquiries with various officials in Tanzania, he could not obtain any documentation verifying the alleged payments. He insisted that his assertions were based on communications he had with third parties regarding the payments.

25. In re-examination, DW1 reiterated that his claim for the 10% commission was based on the Commission Agreement and that he genuinely believed that compensation had been disbursed to the plaintiff. He denied that he deliberately misled the court or acted fraudulently in the previous proceedings.

Analysis and Determination

26. At the conclusion of the hearing the parties filed their respective submissions which I have considered alongside the pleadings, the evidence and authorities cites. In my view, the key issues for determination are as follows:

    i. Whether this court has jurisdiction to set aside the judgment of a court of coordinate jurisdiction;

    ii. Whether the plaintiff is precluded from bringing the current suit by the doctrine of res judicata;

    iii. Whether the judgment in HCCC No 51 of 2005 was procured by fraud and perjured evidence;

    iv. Whether the plaintiff is entitled to the reliefs sought.

Jurisdiction:

27. As I earlier stated, this is an extraordinary suit. On the one hand, the finality of litigation is a bedrock principle which demands that litigants must have certainty and repose in court decisions. On the other hand, public policy demands that justice must not be sacrificed to finality when fraud is alleged.

Nevertheless, the overwhelming weight of authority holds that fraud must take precedence since no court can countenance a judgment founded on dishonesty. I now proceed to analyze the issues before me in light of this contextual background.

28. The defendant asserts that the judgment under challenge was rendered by a court of competent and concurrent jurisdiction in HCCC No 51 of 2005, and subsequently affirmed by the Court of Appeal and the Supreme Court. Consequently, the defendant contends that this Court lacks jurisdiction to reconsider or set aside that judgment, as doing so would effectively amount to sitting in appeal over a decision of a court of equal standing.

29. In contrast, the plaintiff argues that the current proceedings are neither an appeal nor a review, but a distinct and independent action premised on allegations that the previous judgment was obtained through fraud. The plaintiff submits that where a judgment is established to have been procured by fraudulent means, it constitutes a nullity and may be set aside by a court of coordinate jurisdiction. Accordingly, the central issue for determination is whether this court has jurisdiction to entertain a fresh suit challenging a prior judgment on the basis of alleged fraud.

30. It is trite law that jurisdiction is the foundation upon which judicial authority is founded, and without it, a court must down its tools as any decision rendered without jurisdiction is a nullity. This principle has been emphasized in various decisions, including the landmark decision of *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others*, [2012] eKLR. In that case the Supreme Court stated that jurisdiction cannot be conferred by the parties or assumed by the court; it must be expressly provided by law.

31. The court further emphasized that a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the *Constitution* or statute. This principle was also reiterated in *Republic v Karisa Chengo & 2 others*, [2017] eKLR, where the Supreme Court held that jurisdiction is conferred by the *Constitution*, statute, or both, and that any orders issued by a court lacking jurisdiction are a nullity. Thus, jurisdiction cannot be abrogated, expanded, or waived by the consent of the parties or the court itself.

32. Article 165(3)(a) of the *Constitution* confers upon the High Court "unlimited original jurisdiction in criminal and civil matters." Section 47 of the *Evidence Act* expressly envisions challenges to an earlier judgment on grounds of fraud. It provides that:

> "Any party to a suit or proceeding may show that any judgment, order or decree which is admissible in evidence was delivered by a court not competent to deliver it, or was obtained by fraud or collusion." (emphasis added).

33. In my considered view, the statutory framework contemplates that a judgment, however final it may appear, may be challenged in subsequent proceedings where it is tainted by fraud. In the same vein, section 3A of the *Civil Procedure Act* safeguards the court's inherent jurisdiction to issue such orders as may be necessary to secure the ends of justice or to prevent an abuse of the court's process. A judgment obtained through fraudulent means constitutes a manifest abuse of that process, and in such circumstances, this court is empowered to set aside the judgment ex debito justitiae.

34. The jurisprudence that emerges from the available case law also confirms that, in exceptional circumstances, a court may set aside a judgment issued by a court of coordinate jurisdiction. Although the Supreme Court of Kenya does not have a counterpart of concurrent jurisdiction, I draw guidance from the decision in *Outa v Okello & 3 others*, KESC 25 (KLR) (24 February 2017).

35. This is to the extent that even where a court has heard and determined a matter to finality and is functus officio, limited exceptions exist that may warrant the reopening of proceedings. In *Outa*, the Supreme Court was confronted with the question of whether it had jurisdiction to review its own decisions. In addressing this issue, the court undertook a comparative analysis of the position in other jurisdictions, including Nigeria and South Africa, and ultimately held as follows:

> "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." (emphasis added).

36. Drawing parallels from comparable jurisdictions, the Court of Appeal, in *Benjoh Amalgamated Ltd & another v Kenya Commercial Bank Ltd,* [2014] eKLR, observed that a fresh suit is the appropriate legal avenue for challenging a judgment tainted by fraud, particularly where such fraud comes to light after the conclusion of the original proceedings or was not previously raised.

37. In reaching this conclusion, the court conducted a review of relevant decisions from across the Commonwealth and stated as follows:

> "Where the court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)". (Emphasis added)

38. In *Showcase Properties Ltd v Kenya Commercial Bank* (2023), HCCC No 577 of 2011 (High Court at Nairobi), the plaintiff contended that a judgment of the High Court had been fraudulently obtained through the concealment of material evidence. The plaintiff argued that such a judgment could only be challenged through a fresh suit, rather than by way of appeal, as a fresh suit allows for the tendering of new evidence. In response, the defendants asserted that the High Court lacked jurisdiction in view of a pending appeal, and further contended that the matter was *res judicata*.

39. The plaintiff, however, invoked section 47 of the *Evidence Act*, maintaining that the Court of Appeal was ill-suited to adjudicate an allegation of fraud where new evidence was required. In its determination, the High Court observed, in part, as follows:

> "... The plaintiff has to first demonstrate and/or prove the allegations of fraud against the judgment delivered on June 29, 2020 at the Court of Appeal for the setting aside of the said judgment, and order for a re-trial before a different Judge other than Lady Justice Grace Nzioka. It is only then that this court or any other Court of concurrent and competent

jurisdiction can re-open the issues litigated on in HCCC No 577 of 2011 and determine them on their merits after the parties have adduced evidence afresh."

40. I cite the above decision as confirmation of this court's authority to reopen a case when fraud has been established. However, I distinguish the present case from the Showcase matter, noting that the present matter has already reached the Supreme Court and that no further right of appeal is available to the parties. It is for this precise reason that the plaintiff seeks to litigate on the basis of new and important evidence that was not before the court during the earlier proceedings, upon which the claim of fraud is made.

41. This fact was confirmed by PW1 who stated in cross examination that:

> " I don't wish for this court to sit on appeal by the Court of Appeal and Supreme Court but to consider the fresh evidence that we have now. The defendant's deceived the court previously. We can show that we had never been paid the money. We haven't presented this evidence in HCCOMM 51/2005 before Justice Waweru. That case was closed by that time."

42. And again that:

> " Our case is based on the finding of the payment of the 12 million which we are now able to prove that is an erroneous finding based on the additional evidence. The evidence would have made a difference in my view. The decision is conclusive proof that we were not paid the 12 million."

Res Judicata

43. On the question whether the doctrine of *res judicata* bars this court from setting aside a judgment of a court of coordinate jurisdiction, it is essential to observe that section 7 of the *Civil Procedure Act* does not preclude a challenge based on fraud. The doctrine is intended to bar re-litigation of matters that were directly and substantially in issue in a previous suit between the same parties and determined by a court of competent jurisdiction. However, a judgment obtained through fraud does not constitute a legitimate or final determination on the merits.

44. Fraud undermines the integrity of the judicial process and displaces the presumption of conclusiveness attached to final judgments. Accordingly, where fraud is properly pleaded and demonstrated, particularly where it was concealed and could not have been uncovered with reasonable diligence at the time of the original proceedings, the bar of *res judicata* in my view, cannot stand in the way of the court's jurisdiction to revisit the impugned decision.

45. This position finds support in the Court of Appeal's decision in Benjoh Amalgamated where the court observed that although a court ordinarily becomes *functus officio* upon rendering judgment, an allegation of fraud constitutes an independent cause of action. In such exceptional circumstances, the court is entitled to intervene to avert a miscarriage of justice, as a judgment procured through deceit cannot be said to result from a fair and impartial adjudication, and thus does not attract the protections of *res judicata*.

46. In conclusion, I am satisfied that this court is properly seized of jurisdiction to entertain the present suit, notwithstanding that the judgment under challenge was issued by a court of coordinate jurisdiction.

47. To deny the plaintiff an avenue for redress would amount to allowing a party to benefit from fraudulent conduct, thereby undermining the integrity of the judicial process and depriving the aggrieved party

of any effective remedy. I shall therefore proceed to consider whether the plaintiff has established the alleged fraud in the impugned judgment.

> Whether the judgment of September 7, 2007 in HCCC No 51 of 2005 , was obtained through fraud and perjured evidence:

48. Fraud, as defined in *Black's Law Dictionary*, 9th Edition, at page 131, is described as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment".

49. This definition highlights the two essential elements of fraud; a deliberate misrepresentation or concealment, and an intention to deceive, leading to detrimental reliance by the other party. Both elements must be established for a claim of fraud to succeed.

50. The burden of proof in fraud claims is notably higher than that required in ordinary civil proceedings. In *Railal Gordhanbhai Patel v Lalji Makanji*, [1957] EA 314, the court held that although the standard falls below that of proof beyond reasonable doubt, it is above the ordinary balance of probabilities. Allegations of fraud must be proved with clarity, precision, and cogency. Further guidance on the pleading and proof of fraud is found in *Vijay Morjaria v Nansingh Madhusingh Darbar & another*, [2000] eKLR, where Tunoi JA stated:

> "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

51. Turning to the suit presently before this court, learned counsel Mr Ahmed Nassir, in his opening address, emphasized the central significance of the alleged payment of USD 12,060,155.23 to the plaintiff in the proceedings in HCCOMM No 51 of 2005. He submitted:

> "If the plaintiff was not paid the amount, the defendant wouldn't be entitled to the commission. Payment was of essence. This was not controverted."

52. This statement clearly frames the alleged payment as the fulcrum upon which the defendant's entitlement to commission rested, thereby rendering any misrepresentation concerning such payment materially relevant to the outcome of the earlier proceedings.

53. Indeed, the defendant's case, as previously presented under oath, was anchored on the assertion that the plaintiff had received full compensation from the Government of Tanzania and that the expropriated assets had been duly restored. This narrative formed the cornerstone of the defence in HCCOMM No 51 of 2005. The same position was reaffirmed by DW1 during cross-examination in the present proceedings, where he unequivocally stated:

> "The defendant was paid and the assets returned to my knowledge. This was my testimony on October 11, 2005. The source of information was Mr Maganga who I worked with...The court agreed with me that the defendant was paid US$ 12 million and that I was entitled to 10%."

54. In its judgment dated September 7, 2007, the court placed considerable reliance on the plaintiff's failure to adduce any correspondence evidencing a demand or follow-up for the alleged compensation from the Government. Equally, the court accepted the oral testimony of Mr. Maganga, who maintained

with marked certainty that the plaintiff had indeed been compensated, despite the absence of any documentary proof. At page 7 of the judgment, the court observed:

> " It is the plaintiff's further case that the defendant has been paid and his other assets restored to him by the Government of Tanzania as provided for in the settlement agreement."

55. At page 20, the learned judge further relied on Mr Maganga's testimony:

> " Mr Maganga testified that his department, which dealt with the negotiations, initiated the payment to Mr Steyn by the department of the Accountant General. He knew for a fact that Mr Steyn was paid the first instalment of USD 1,000,000 because he initiated the process of payment. He also initiated the payment process for the 2nd instalment and knew for a fact that it was paid."

56. Additionally, the court drew an adverse inference from the plaintiff's failure to pursue legal action against the Government of Tanzania. At page 28 of the judgment, the learned judge remarked:

> " Why has the defendant not sued the Government of Tanzania to enforce the settlement agreement? Obviously, it is because the defendant has been paid or substantially paid the USD 12,060,155.23 and accrued interest."

57. Taken cumulatively, the findings of the court in HCCC No 51 of 2005 were significantly influenced by testimony that is now alleged to have been false or materially misleading. Whether that testimony was knowingly false, or given with reckless disregard for the truth, lies at the heart of the issues presently before this Court for determination.

58. It is now apparent that, at the time the judgment in HCCC No 51 of 2005 was delivered, the court was not aware that the plaintiff had, by a request dated 22nd December 2007, formally commenced arbitration proceedings against the Government of Tanzania on the very grounds that he had not received the compensation alleged in HCCC No 51 of 2005 . This request-initiated arbitration between the plaintiff and the Government of Tanzania culminated in a final arbitral award issued on July 9, 2010 and subsequently amended on September 14, 2010.

59. The award was later adopted as a judgment of the High Court of Tanzania, and a corresponding decree was issued on May 3, 2011, nearly four (4) years after the judgment of the High Court in HCCC No 51 of 2005, and approximately seven (7) months after the Court of Appeal rendered its decision. As such, this evidence could not have been available or presented before either the High Court or the Court of Appeal during the earlier proceedings.

60. The arbitral award relied upon by the plaintiff is at pages 338 to 413 of his bundle of documents. The decree is to be found at pages 431 to 433. A central issue in those arbitration proceedings was whether the Government of Tanzania had breached the Principal Agreement and the Third Addendum by failing to make compensation payments due to the plaintiff. At page 66 of the award, the arbitrator made the following finding:

> " In this regard Felix Josia Mlay admits the provisions of article 3 of the Third Addendum but does not go further to say why it was not implemented. By reason of the above observations I hold that the respondents breached article 3 of the Third Addendum to the Principal Agreement."

61. Further, at page 68, the arbitrator concluded:

> "In my judgment the claimant has made his case regarding the two breaches I have considered."

62. And at page 72, the arbitrator observed:

> "...reading the Principal Agreement together with the Third Addenda, there appears to be no justification why the respondent failed to implement the Principal Agreement which was executed on November 8, 1993 and instead embarked on fresh negotiations which led to the Third Addendum which was executed on August 6, 2007. Because the parties had agreed on the sum of USD 12,060,155.23 as being a full and fair compensation, he was entitled to immediate payment, failing which the respondent is bound to pay compound interest on that sum..."

63. The arbitrator ultimately awarded the plaintiff general damages for breach of the Principal Agreement, compound interest, and the costs of the arbitration. It is therefore evident from a plain reading of the award that the assertions made by the defendant, and supported by the testimony of Mr. Maganga in HCCC No 51 of 2005, were materially false and misleading.

64. Interestingly, during cross-examination before this court, DW1 candidly admitted that he had continued to search for evidence of payment even after the judgment had been delivered. He explained that his intention was:

> "to confirm my testimony that payment had been made...I did not receive a written communication from the government of Tanzania giving evidence of payment."

65. This admission starkly contrasts with his testimony previously given under oath, upon which the court in HCCC No 51 of 2005 substantially relied, namely, that the plaintiff had been paid the full amount of USD 12,060,155.23.

66. This inconsistency is not merely incidental or the result of an honest mistake. It constitutes a deliberate and material misrepresentation that had a direct and decisive influence on the outcome of HCCC No 51 of 2005. The defendant, through DW1 and Mr Maganga, presented to the court a narrative that the plaintiff had received full or substantial compensation from the Government of Tanzania in the sum of USD 12,060,155.23. This representation was tendered as fact, under oath, and was not qualified by any caveat as to its uncertainty or the lack of verification. Critically, the defendant failed to disclose that the claim of compensation was based purely on hearsay or inference.

67. The court, relying heavily on this false narrative, was misled into finding that there was no justifiable basis for the plaintiff to pursue enforcement proceedings against the Government of Tanzania. The learned judge's conclusion that the plaintiff had likely been paid and that this explained his failure to institute suit against the Tanzanian Government was based entirely on the misrepresented facts. This falsehood thus went to the very heart of the dispute and materially influenced the court's determination of the defendant's entitlement to commission.

68. The truth, as now revealed through the arbitral award and supporting documents, is that the plaintiff had, at the time of the hearing and judgment, already commenced formal arbitration proceedings against the Government of Tanzania precisely because the compensation in question had not been paid. These arbitral proceedings were not speculative or inconclusive; they culminated in a final award unequivocally finding that the Government had breached its obligations under the Principal

Agreement and the Third Addendum by failing to remit the agreed sums. That award was later adopted as a judgment of the High Court of Tanzania, confirming the Government's liability.

69. It is further significant that the Government of Tanzania actively participated in the arbitration, challenging the plaintiff's claim and denying that any payment was due. This active opposition directly contradicts Mr Maganga's testimony that he "knew for a fact" the plaintiff had been paid. The logical conclusion is that Mr. Maganga's statements were not only factually incorrect but knowingly false or recklessly made, given that the Government, on whose behalf he purported to speak, was contemporaneously denying the very payment he affirmed had been made. Such conduct amounts to a deliberate attempt to mislead the court.

70. As I have stated, DW1 admitted before this court that he continued to search for evidence of payment even after the judgment in HCCC No 51 of 2005 had been delivered. This post-judgment conduct is telling. It betrays the defendant's knowledge, even at the time of trial, that the alleged compensation had not been independently confirmed and that his testimony lacked a reliable evidentiary foundation. The decision to nonetheless present that testimony as conclusive fact without any qualifying disclosure demonstrates an intent to deceive.

71. In sum, it is my finding that the representations made by the defendant and Mr. Maganga were not only unsubstantiated by any documentary evidence, but were affirmatively contradicted by the Government's contemporaneous position in arbitration. This juxtaposition of false testimony and contradictory public record reflects a clear pattern of fraudulent misrepresentation, calculated to mislead the court and obtain judgment by deception.

72. Therefore, the evidence now before this court overwhelmingly supports the conclusion that the judgment delivered on September 7, 2007 in HCCC No 51 of 2005 was procured through fraud. It is not merely a case of nondisclosure or mistaken belief; it is a deliberate fabrication of material facts designed to induce judicial error. In law and in equity, such a judgment cannot be allowed to stand.

73. This conclusion resonates with the pronouncement in *Lazarus Estates Ltd v Beasley*, (1956) 1 All ER 341. Denning LJ declared that: "no judgment of a court... can be allowed to stand if it has been obtained by fraud; fraud unravels everything".

74. Given this finding, it is both necessary and just that the matter be remitted for retrial and that the defendant's claim be reconsidered afresh, with the benefit of the now-available evidence and subject to full adversarial testing. A retrial will ensure that justice is not only done but seen to be done, and that no party unjustly benefits from deceit or falsehoods in judicial proceedings.

Disposition and final orders:

75. Accordingly, and for the reasons stated:

    i. A declaration is hereby issued that the defendant committed perjury and gave false and fraudulent evidence in Milimani HCCC No 51 of 2005;

    ii. A declaration is hereby issued that the judgment and decree issued on September 7, 2007 in the said suit were obtained by fraud and are null and void *ab initio*;

    iii. A declaration is hereby issued that the judgment and decree were the result of fraud practiced on the High Court by the defendant and Mr Maganga;

    iv. An order is hereby issued setting aside the judgment and decree given by the High Court on September 7, 2007 in Nairobi Milimani HCCC No 51 of 2005;

v. A permanent injunction is hereby issued restraining the defendant, whether by himself or through his servants, employees, or agents, from executing or acquiring any benefit under or by virtue of the said judgment and decree in any manner whatsoever;

vi. An order is hereby issued that the defendant's claim in Nairobi Milimani HCCC No 51 of 2005 be and is hereby remitted for retrial, to be heard and determined on the merits; and

vii. The plaintiff shall have the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF MAY 2025.

F. MUGAMBI

JUDGE