

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT THIKA**  
**CIVIL SUIT NO. E016 OF 2024**

**WESTBUILD GENERAL CONTRACTORS  
LIMITED..... 1<sup>ST</sup>**

**PLAINTIFF/APPLICANT**

**NJOWAMBU (K) LIMITED .....2<sup>ND</sup>**

**PLAINTIFF/APPLICANT**

**VERSUS**

**NCBA BANK KENYA PLC.....**

**DEENDANT/RESPONDENT**

**PHILLIPS INTERNATIONAL AUCTIONEERS.....  
INTERESTED PARTY**

**RULING**

1. This is a Ruling in respect of an application under a Certificate of Urgency by way of a Notice of Motion dated 9.9.2025. it is filed by the Defendant/Applicant.
2. It seeks the following orders:
  - 1) *Spent.*
  - 2) *Spent.*
  - 3) *THAT pending the hearing and determination of the intended appeal, there be a stay of execution of the judgment delivered on 14<sup>th</sup> August 2025 and all consequential orders.*

- 4) *THAT in the alternative and in the interest of fairness and justice the Court to invoke the inherent jurisdiction under Section 3A of the Civil Procedure Rules and Article 159 (2) of the Constitution and take such corrective action as justice demand by recalling and setting aside the erroneous judgment in its entirety and submit the Plaintiff's Notice of Motion application for hearing and determination afresh before any other Judge.*
- 5) *THAT the cost of the application be provided for.*
3. The application is supported by the affidavit of **KENNETH MAWIRA MURIITHI** sworn on 9.9.20205.
4. The Application is opposed by the Plaintiff who have filed ground of opposition dated 13.10.2025 as well as a Replying Affidavit sworn by one **WANGU MBURU** sworn on 13.10.2025.

### **Background facts**

5. This matter was selected for hearing during the **Rapid Result Initiative (RRI)**. This was in respect of an application by the Plaintiff's dated 2.7.2024. it is not in doubt that the application was interlocutory in nature and sought among others an order of injunction.
6. The Court retired to consider the matter and deliver a Ruling.

7. In its judgment dated 14.8.2025, the Court determined the suit and closed this file.
8. Aggrieved, the Defendant/Applicant has appealed the decision and applied to this Court for a stay of execution. It has alternatively sought that this Court recalls the decision and sets it aside, to pave way for a hearing on merits as to the pending application.
9. The Application is opposed by the Plaintiffs who state that the Court lacks the jurisdiction to interfere with the decision rendered on 14.8.2025. It submits that the decision was rendered correctly and fairly. That this Court is *functus officio*. That a proper challenge can only be by way of an Appeal. That an Appeal has already been preferred.
10. The Court directed that parties file submissions which were orally highlighted by the Counsel for the parties on 14.10.2025. The matter was thereafter reserved for this Ruling.

### **Issues for Determination**

11. Having considered the application, the response, the rival submissions and the authorities cited, the Court frames three (3) issues for determination as follows:
  - a) *Whether the Court has the powers to recall and set aside its decisions.*

- b) *Whether a Court can be said to be functus officio from an erroneous decision.*
- c) *Which reliefs can the Court grant in the circumstances?*

### **Analysis**

12. At the heart of the application before the Court are two fair questions.
- a) What should the Court do when confronted with its error that causes injustice?
  - b) *Whether a Court can be said to be functus officio from an erroneous decision.*
13. A glimpse at the decision rendered by the Court dated 14.8.2025 shows that it is a judgment. It deals conclusively with the claims sought by the Plaintiff. At the CTS the entry made is that *“judgment delivered and case closed.”*
14. Yet clearly this is an error by this Court as the parties were expecting a Ruling on an interlocutory application. The matter has not progressed to the point at which parties and their witnesses had presented their evidence.
15. **Mr. Kabaiku** Counsel for the Defendant submits rather persuasively that this Court overstepped its mandate. That it acted without jurisdiction in delivering a judgment when all that was required was a Ruling.

16. **Mr. Mugambi** Counsel for the Plaintiffs/Respondents disagrees. To him the Court has delivered its decision. It has penned off the case and should not be seen to interfere. He also argues that this Court has no jurisdiction to unpen its decision of 14.8.2025. That any errors which made reference to a Judgement instead of a Ruling, can be cleaned up through the “Slip Rule” in **Section 99** of the **Civil Procedure Act**.

17. **Section 99** of the **Civil Procedure Act** states as follows:

**99. Amendment of judgments, decrees or orders**

*Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.*

18. To this Court the Slip Rule under Section 99 contemplates simple clerical and inadvertent mistakes. The Slip Rule cannot convert a mistake of the Court from a judgment back to a Ruling.

19. It is not lost to this Court that a grave error has occurred on the record of the Court. There now exists a decision referred to as judgment, whereas the parties were expecting a Ruling.

20. The Court's duty at all times is to do justice. This is amplified in **Section 1 A** and **1B** of the **Civil Procedure Act** which states as follows:

**1A. Objective of Act**

*(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes 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) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

**1B. Duty of Court**

*(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—*

*(a) the just determination of the proceedings;*

*(b) the efficient disposal of the business of the Court;*

*(c) the efficient use of the available judicial and administrative*

*resources;*

*(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*

*(e) the use of suitable technology.*

21. In doing justice, the Court must take care that it does not cause any injustice or any harm. Indeed, **Section 3 A** of the **Civil Procedure Act** expresses the inherent powers of the Court to ensure that justice is done. **Section 3 A** of the **Civil Procedure Act** states as follows:

***3A. Saving of inherent powers of court.***

*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

22. The inherent powers for the ends of justice to prevent abuse of the process of the Court, are not donated by **Section 3 A** of the **Civil Procedure Act**. The language of the Act is that these powers are not limited by anything within the Civil

Procedure Act. That the powers are inherent. This Court understands the law to state with clarity and conviction that it is innate, inborn, intrinsic, congenital, natural, essential, deep rooted, built-in fundamental and within the instinctive and primordial nature of the Court to do justice, to do good, to cause no harm. That is the true DNA of the Courts.

23. This dove-tails perfectly with the provisions of **Article 159 2 (a) (d)** of the Constitution of Kenya which states as follows:

***159. Judicial authority***

***(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(a) justice shall be done to all, irrespective of status;***

***(b) justice shall not be delayed;***

***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***

***(d) justice shall be administered without undue regard to procedural technicalities; and***

***(e) the purpose and principles of this Constitution shall be protected and promoted.***

***(3) Traditional dispute resolution mechanisms shall not be used in a way that—***

***(a) contravenes the Bill of Rights;***

***(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or***

***(c) is inconsistent with this Constitution or any written law.***

24. The Court of Appeal in **Benjoh Amalgamated Limited & another v Kenya**

**Commercial Bank Limited [2014] KECA 872 (KLR) citing Equity Bank v**

**West Link MBO Limited (Civil application No.78 of 2011) stated as**

follows as regards the inherent powers of the Court;

***“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but***

*within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute.”*

**a) Whether the Court has the powers to recall and set aside its decisions.**

25. The Defendant herein has been condemned unheard. It will not have an opportunity to call any witnesses or present its case, if the impugned judgment is allowed to stand. The Defendant has been locked away from the seat of justice without a hearing.
26. Once such an error is brought to the attention of the Court, the Court itself acting in good conscience cannot be said to be helpless. The obvious recourse is for the Court to recall and set aside its decision which was issued in error. This will be in exercise of the discretion for this Court. This Court borrows from the words of **Daffus P in Patel vs East Africa Cargo Handling Services Limited [1974] EA 75.**

***“The main concern of the Court is to do justice to the parties. The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error,***

***but not to assist a person who has deliberately sought to obstruct or delay the course of justice.”***

27. This power to recall decisions which cause injustice has found favour in the Court of Appeal decision in **Benjoh Amalgamated Limited & Ano. vs Kenya Commercial Bank Limited [2014] KECA 872 (KLR)**. The Court of Appeal stated that it had a residual jurisdiction to review its own decisions, to avoid injustice.

*“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 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.*

*This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing*

*further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being.”*

28. This Court is persuaded by the **Mr. Kabaiku’s** submissions that it can intervene and set aside by recalling its earlier judgement. This is more so when its conscience is pricked that due to infallibility, an error has occurred that is causing an injustice. It is also demonstrated that this is an error that the Court still has powers to correct as no rights of third parties have been affected.

**b) Whether a Court can be said to be *functus officio* from an erroneous decision.**

28. **Mr. Mugambi** submits that the Court has already rendered a decision in this matter. That there is an Appeal pending at the Court of Appeal. That his Court is hence *functus officio*. It has already put down its pen and should not allow further litigation on the issue. That this Court cannot sit on an Appeal of its own decision.

29. **Mr. Kabaiku** on the other hand disagrees. He submits that there can be no final decision in this matter as his clients have never been heard. That the Court jumped the procedure of hearing the parties. That in doing so, the Court acted without jurisdiction. He refers to such a decision rendered as nullity. It is therefore fit for a recall and this does not amount to an Appeal. He also wondered whether

the Court should tell parties to wait for an appeal on what is patently an error on the face of the record, crying out to be corrected.

30. The Court's attention is drawn to the case of **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR)**. The Court of Appeal citing a decision of the Supreme Court defined *functus officio* as follows;

***“The Supreme Court in RAILA ODINGA v IEBC cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated;***

***...“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once***

***such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”***

31. On the effects of the *functus officio* doctrine, the Court of Appeal stated as follows:

***“The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in JERSEY EVENING POST LTD VS AI THANI [2002] JLR 542 at 550, also cited and applied by the Supreme Court;***

***“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties.***

***Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”.***

32. The Court of Appeal’s decision is clear that the *functus officio* doctrine kicks in when the Court has performed all its duties in a particular case and given a final decision.
33. Looking at the case before the Court, it was called upon to determine an interlocutory application. It was not called upon to render a final judgment. No final decision has been rendered on the interlocutory application. As matters stand, there is no Ruling on record as to the application dated 2.7.2024. Once again, the Court is persuaded by the **Mr. Kabaiuku’s** submissions that the Court exceeded its jurisdiction and arrived at a decision that was a nullity. Nothing flows from a nullity. The injustices claimed by the Defendant/Applicant ought not to be allowed to flow from a nullity that in turn arose from an error. The facts of this case are a clear exception to the *functus officio* doctrine.

**c) Which reliefs can the Court grant in the circumstances?**

34. It should therefore be clear that the Court is persuaded to recall the judgment and set it aside so as to correct the error. This is by invoking the inherent powers of the Court to advance the course of justice and not to do an injustice. This should not be seen as a license by the Court to do and undo its decisions willy nilly. There has to be certainty in the decisions of the Courts. This therefore is a unique case arising out of unique circumstances.
35. In the circumstanced the Court needs not consider whether to grant a stay, though if the judgment had not been set aside, the Court would have granted such a stay pending Appeal.
36. As to costs, the parties are not to blame for the error. So there will be no orders at to costs.

**Determination**

37. The Defendant/Applicant's application by way of a Notice of Motion dated 9.9.2025 is allowed in the following terms;
- a) *THAT in the interest of fairness and justice the Court does invoke its inherent jurisdiction under section 3A of the Civil Procedure Act and Section 159 (2) of the Constitution and recalls and sets aside the judgment*

*delivered in this matter dated 14.08.2025 in its entirety.*

- b) To avoid influencing the mind of the Court that will subsequently be handling this matter, the judgment delivered on 14.8.2025 that has now been recalled and set aside be and is HEREBY expunged from the records of the Court.*
- c) THAT the Plaintiff's application dated 2.7.2024 in respect of which no decision has been rendered is to be relisted for hearing and determination before the Judge sitting at the Thika High Court.*
- d) THAT the status quo prevailing as at 14.8.2025 before the delivery of the judgement now set aside, do continue pending the hearing and determination of the Notice of Motion dated 2.7.2025 and/or further orders of the Court.*
- e) THAT there be no orders as to costs.*
- f) The file is to be released and transmitted back to Thika Law Courts to be placed before the Honourable Deputy Registrar of the Court for further action.*

38. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS  
23<sup>RD</sup> DAY OF OCTOBER, 2025.**

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of:

Miss Nekoye holding brief for Mr. Mugambi for the  
Plaintiffs/Respondents.

Mr. Kabaiku for the Defendant/Applicant.

N/A for Interested Party.

Mr. Peter Wabwire - Court Assistant.

