

**IN THE COURT OF APPEAL  
AT MOMBASA**

**CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)**

**CIVIL APPEAL (APPLICATION) NO. E013 OF**

**2021 BETWEEN**

**DIM PROPERTIES LIMITED.....APPELLANT**

**AND**

**LAMU BREEZE INVESTMENTS LIMITED ..... 1<sup>ST</sup>**

**RESPONDENT EQUITORIAL COMMERCIAL BANK LTD**

**2<sup>ND</sup> RESPONDENT**

**CHARLES MALAKWEN ..... 3<sup>RD</sup>**

**RESPONDENT LUCAS CHIMERA KENGA .....**

**4<sup>TH</sup> RESPONDENT THE SENIOR REGISTRAR OF TITLES**

**..... 5<sup>TH</sup> RESPONDENT COUNTY GOVERNMENT OF KILIFI**

**..... 6<sup>TH</sup> RESPONDENT THE ATTORNEY GENERAL**

**..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgement and Decree of the  
Environment and Land Court of Kenya at Malindi (Olola,  
J.) delivered on 22<sup>nd</sup> November 2019*

*in*

***ELC No. 224 of 2014)***

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**RULING OF THE COURT**

1. By a Notice of Motion dated 4<sup>th</sup> November 2024 brought under **Rule 59(2)** of the **Court of Appeal Rules, 2022** **the applicant**, Dim Properties Limited, seeks: *that this Court be pleased to review the decision made in its judgement dated 11<sup>th</sup> October 2024 by varying and/or rescinding this (sic) and*

*instead substituting the same allowing the appeal; and that costs of the application be in the cause.*

2. The genesis of the dispute before us surrounded the question of the lawful ownership of L.R. No. 28462 (**the suit property**) held in the applicant's name after consolidation of Plot Nos. 10159 and 10160. From the evidence tendered before Malindi Environment and Land Court (**the ELC**) Case No. 224 of 2014, it was established that Charles Malakwen (**the 3<sup>rd</sup> respondent**) and Lucas Chimera Kenga (**the 4<sup>th</sup> respondent**) had illegally and fraudulently obtained and registered themselves as the owners of **Plot No. 10159 North of Kilifi Township** vide **Title CR No. 44095** before consolidating it with **Plot No. 10160** and transferring the consolidated property to the applicant on 19<sup>th</sup> August 2008. The learned Judge (**Olola, J.**) held that there was nothing capable of being transferred to the applicant due to the fraudulent nature of the transaction.
3. On appeal to this Court (**Murgor, Laibuta & Odunga, JJ.A.**), the decision of the ELC was upheld *vide* a Judgement dated and delivered on 11<sup>th</sup> October 2024. The Court agreed with the findings of the ELC that the 3<sup>rd</sup> and 4<sup>th</sup> respondents' acquisition of the suit property was fraught with illegalities, thus bringing into question the root of their title; that, therefore, any subsequent transfer could not be termed as legal on account of the fraud; and that, on that basis, the applicant's claim that he was the *bona fide* purchaser of the

suit property without notice was unfounded. The appeal was accordingly dismissed.

4. The present Motion seeking to review this Court's judgement is founded on the grounds on its face and the supporting affidavit of **Ashok Doshi**, one of the applicant's Directors sworn on 4<sup>th</sup> November 2024. He deposed that he now had in his possession evidence that shows that the applicant paid the 3<sup>rd</sup> and 4<sup>th</sup> respondents a purchase price of Kshs.13,500,000 and, hence, it (the applicant) was a *bona fide* purchaser for value, by which fact this Court was not persuaded.
5. Mr. Ashok stated that the evidence he now has, could not be discovered or adduced earlier with any due diligence on account of his absence during the trial due to ill health; that the additional evidence was proof that the applicant was the legitimate owner of the suit property, and that, therefore, there is an error or mistake apparent on the face of the record to warrant review of the judgment; and that no prejudice will be suffered by the respondents as they will be given an opportunity to controvert the additional evidence to be adduced.
6. Opposing the application, **Bhupinder Singh Dogra**, the 1<sup>st</sup> respondent's Director, filed a replying affidavit dated 15<sup>th</sup> November 2024. He deposed that the applicant already demonstrated its intention to proceed to the Supreme Court by filing a Notice of Appeal dated 25<sup>th</sup> October 2024 and,

hence, the applicant has to decide whether it wishes to appeal or pursue review of this Court's decision; that the applicant had earlier on filed an application in this Court dated 22<sup>nd</sup> July 2022 seeking to adduce additional evidence, but that the said application was dismissed vide a ruling dated 28<sup>th</sup> April 2023 (**Gatembu, JA.**), and that the issue that he now raises is *res judicata*; and that to allow a review at this stage without the evidential material being presented before the trial court would be a miscarriage of justice, thereby circumventing the doctrine of fair trial as enshrined under **Article 50** of the **Constitution** as the applicant had the opportunity to adduce all the necessary evidence to prove its case, which it did.

7. The 1<sup>st</sup> respondent contended that it would suffer prejudice as it has been in the corridors of justice for more than 11 years; that, during that period, it has not had access to or use of the suit property, the same having been in the applicant's hands.
8. According to the 1<sup>st</sup> respondent, the application as framed divests this Court of the jurisdiction to grant the prayers sought and, as such, the application ought to be dismissed with costs to the respondents.
9. In its supplementary affidavit dated 14<sup>th</sup> May 2025, also deposed by **Bhupinder Singh Dogra**, it was stated that the 1<sup>st</sup> respondent has already taken possession of the suit property; that the 5<sup>th</sup> respondent, the Senior Registrar of Titles, had already complied with the judgement of this

Court

by cancelling the title to the suit property and, consequently, has restored the original Plot No. 10159 to its (1<sup>st</sup> respondent) name, and that a Charge is already registered to Bullion Bank Limited (the predecessor of the 2<sup>nd</sup> respondent).

10. When the application came up for hearing on 7<sup>th</sup> May 2025, learned counsel **Mr. Barasa** holding brief for Mr. Khargram appeared for the applicant while learned counsel **Mr. Munyithya** appeared for the 1<sup>st</sup> respondent. There was no appearance for learned counsel Mr. Gikandi, whom we were informed represented the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, despite service with a hearing notice. Mr. Munyithya informed the Court that he had instructions that the 6<sup>th</sup> respondent had no interest in the application. Mr Barasa wholly relied on the applicant's written submissions dated 10<sup>th</sup> January 2025. On his part, Munyithya submitted that he would solely rely on the 1<sup>st</sup> respondent's replying and supplementary affidavits.
- 11.** The applicant submitted that, under the current constitutional dispensation, this Court has the jurisdiction to review its judgement. In this regard, it relied on this Court's decisions in **Peter Kimani Kairu T/A Kimani Kairu & Co. Advocates vs. Ann Marie Cassiede & Another (2017) KECA 374 (KLR)**; and **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (2014) KECA 872 (KLR)**.
12. It was submitted that the merit of the application is hinged on the fact that the applicant now has evidence to show

that

the purchase price of Kshs.13,500,000 was paid to the 3<sup>rd</sup> and 4<sup>th</sup> respondents; that this was a testament that the applicant was a *bona fide* purchaser for value; that the evidence it seeks to adduce could not, with any due diligence, have been discovered earlier as it was not in its possession due to unavailability of its Director; that the reason for failure to adduce the evidence is an error or mistake apparent on the face of the record which constitutes a ground for review of a judgment; and that the new evidence will settle the issues as to whether the purchase price was settled by the applicant, and whether due diligence was done on the 3<sup>rd</sup> and 4<sup>th</sup> respondent's legitimate ownership of the title to the suit property.

13. We have considered the application, the grounds and affidavit in support thereof, the applicant's submissions and the 1<sup>st</sup> respondent's affidavits in opposition to the application. In our view, the only issue that falls for determination is whether the applicant has met the threshold to warrant our review of this Court's Judgment dated and delivered on 11<sup>th</sup> October 2024.

14. **Article 164(1)** of the **Constitution** establishes the Court of Appeal whose jurisdiction is delineated under **Article 164 (3)** of the Constitution as follows:

**(3) The Court of Appeal has jurisdiction to hear appeals from-**

**(a) the High Court; and**

**(b) any other court or tribunal as prescribed by an Act of Parliament.**

**15. Section 3(1) of the Appellate Jurisdiction Act, Cap 9** provides that:

***The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under any law.***

16. This Court's jurisdiction is properly circumscribed in both the Constitution and Statute and cannot be enlarged to exceed what it is conferred with under the law.

17. It is not disputed that the appeal from Malindi ELC Case No. 224 of 2014 dated and delivered on 22<sup>nd</sup> November 2019 (***Olola, J.***) was heard and determined with finality by this Court on 11th October 2024. The doctrine of *functus officio* envisages that, once a Court pronounces itself on a matter, there is no room for it to wiggle into re-opening it. The Supreme Court of Kenya in ***Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* (2013) KESC 8 (KLR)** 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, which reads:

***"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.”***

18. However, an exception to revisiting a judgement arises where there are minor clerical or arithmetic mistake as envisaged under **Section 99** of the **Civil Procedure Act**. The Court is barred from correcting substantive decisions. Under **Article 163(4)** of the Constitution, a party aggrieved by this Court’s decision has the leeway to appeal to the Supreme Court. In **Ethics and Anti-Corruption Commission vs. Kenya Broadcasting Corporation & 3 others (2025) KECA 873 (KLR)**, this Court rendered itself as follows:

***“In the event that a party is dissatisfied with the decision of a trial court, its remedy on the grievances of any issue can only be dealt with by escalation to the next appellate court, unless otherwise the party chooses a review of the decision as opposed to an appeal. By dint of the provisions of Article 163(3) (b) (i) of the Constitution, a party aggrieved by the decision of this Court has a right of appeal to the Supreme Court.”***

19. In an instant as the one before us where we are being asked to review our decision, the parameters to do so

have been a subject of discussion in many decisions. In  
***Benjoh***

***Amalgamated Limited (supra)***, this Court rendered itself thus:

***“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). 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.”***

20. In ***Niels Bruel vs. Moses Wachira & 2 others (2018) KECA 116 (KLR)***, the applicant sought to review the judgment of this Court on the basis that the Court had failed to evaluate the evidence before the first appellate Court. The applicant argued that because of that failure, his constitutional rights to a fair hearing had been infringed. The Court rejected the argument and stated:

***“Starting with the first prayer to re-open the appeal and review the judgment of this Court, it is axiomatic that this Court has jurisdiction to do so. But that jurisdiction is exceptional and has to be exercised sparingly and with circumspection to thwart dissatisfied parties who merely seek a second bite of the cherry or who invite the Court to sit on appeal from its own judgment.”***

21. In **Cape Holdings Limited (Under Administration) vs. Synergy Industrial Credit Limited (2023) KECA 1497 (KLR)**, this Court stated:

**“...allegations that the Court has misapprehended the law constitutes grounds for appeal, not grounds, for invocation of the exceptional residual review jurisdiction of the Court...the exceptional residual jurisdiction of the Court will be triggered in the rare instances where the Court is satisfied that the judgment in question was made without jurisdiction, or is tainted by fraud, corruption, violation of the rules of natural justice or other grounds of similar genus that result in a glaring miscarriage of justice, such as what the Supreme Court described in the Nyutu case as “process failures as opposed to the merits of the arbitral award itself.” Such review must be on a case-by-case basis. Entertaining applications for review of judgments of this Court on the allegation that the Court has misinterpreted or misapplied the law would be the shortest and surest way to create an illegitimate tier of appeals against the decisions of the Court.”**

22. Furthermore, in the decision of **Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 Others (2017) KESC 25 (KLR)**, the Supreme Court identified the exceptional circumstances where the Court, in exercise of its inherent powers, may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders so as to meet the ends of justice, and which 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.”***

23. On the issue of review, in ***Nguruman Limited vs. Shompole Group Ranch & Another (2014) KECA 358 (KLR) Musinga, JA.*** stated that:

***“Neither the Appellate Jurisdiction Act nor the Court of Appeal Rules contain any provision for review of this Court’s final judgments, though it has been held in several decisions that the court has residual jurisdiction to reopen appeals, albeit in very limited circumstances.”***

24. Against the backdrop of the case law cited herein above, it is clear that this Court’s residual jurisdiction to review its decisions has to be exercised cautiously, with circumspection, on the rarest of the cases and on a case-by-case basis.

25. In the instant case, the applicant’s complaint is that the finding that it was not a *bona fide* purchaser of the suit property was pegged on the fact that there was no evidence of the money paid towards purchase of the suit

property. This

being one of the issues that fell for determination in the impugned Judgment, it follows that it is a matter subject to appeal in the Supreme Court. We make this finding, just as we have observed elsewhere in this Ruling, fully aware that we cannot purport to sit on appeal on our own decision.

26. The upshot is that the applicant's Motion dated 4<sup>th</sup> November 2024 is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**Dated and delivered at Mombasa this 19<sup>th</sup> day of December, 2025.**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**  
**DR. K. I. LAIBUTA CARB, FCI Arb.**

.....  
**JUDGE OF APPEAL**  
**G. W. NGENYE-MACHARIA**

.....  
**JUDGE OF APPEAL**

*I certify that this is the true copy of the original*

***Signed***

**DEPUTY**

**REGISTRAR**