

**IN THE COURT OF
APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) NO. 305 OF 2018
(CORAM: W. KORIR, H. ONG'UDI & S. OKONG'O, JJ.A.)**

**BETWEEN
BULENT GULBAHAR.....APPLICANT
AND
PAUL MUIYORO T/A SPOTTED ZEBRA.....1ST
RESPONDENT REMAX
REALTORS.....2ND RESPONDENT**

*(Being an application for review of the Judgment of the Court of Appeal
(Nambuye, Azangalala & J. Mohammed, JJ.A.) delivered on 25th
November 2016*

*in
Civil Appeal No. 20 of 2014)*

RULING OF THE COURT

1. The applicant herein has moved this Court through an application dated 24th October 2018 which seeks an order that the judgment delivered by the Court (Nambuye, Azangalala & J. Mohammed, JJ.A) on 25th November, 2016 in Civil Appeal No. 20 of 2014(the appeal) be reviewed, set aside and/or corrected. In addition, he prays for costs of the application.
2. The application is premised on the grounds on its face as well as the affidavit of the applicant sworn on the same date. He stated that in the appeal, this Court erroneously proceeded

on the assumption that the 1st respondent had suffered special damages in the sum of Kshs 3,800,000 and had proved it. He stated, that the Court failed to note that the 1st respondent had in his own testimony conceded that he had pulled down and removed his structures, valued at Kshs. 2,800,000 for which he was claiming compensation. Thus, according to the applicant, the learned Judges of Appeal's conclusion that the 1st respondent suffered special damages was erroneous.

3. He further stated that upon perusing the record filed at the Court of Appeal, he noted that there was no evidence of transfer of funds or any other form of payment to the proprietor of Club D'Mills from whom the 1st respondent was said to have purchased the business of a pub/restaurant together with furniture, fittings, fixtures and equipment at a price of Kshs. 3,800,000. Thus, the Court erred in concluding that the 1st respondent had strictly proven the allegation that he had made payment for the business. He added that the Court should also have noted that the 1st respondent acted fraudulently when he made a request for interlocutory judgment for the entire sum of Kshs. 3,800,000. That the said

money was in fact not owing as the 1st respondent had already moved the structure constituting a value of Kshs. 2,800,000.

4. Mr. Gulbahar stated that the appeal was incurably defective for want of mandatory requirements for instituting an appeal and had the Court noted and addressed the alleged flaws in the appeal, the appeal would have been struck out. He stated that he was non-suited in the High Court and before this Court, and that both Courts erroneously proceeded on the mistaken belief that he was a correct party to the proceedings. He concluded that it is evident that the judgment of the Court of Appeal ought to be reviewed in order to correct the injustice therein and prevent unjust enrichment of the 1st respondent.
5. The 1st respondent did not file any response to the application.
6. At the hearing of the application, the applicant informed the Court that he was acting in person and on behalf of the 2nd respondent. He highlighted his submissions dated 18th February 2026 asserting that the impugned judgment contained errors apparent on the face of the record

which

were patent, self-evident, and incontrovertible, requiring no elaborate argument to identify. He submitted that the legal basis for his application included; **Rule 42 of the Court of Appeal Rules, Sections 3(2) and 3A of the Appellate Jurisdiction Act, and Articles 40 and 159(2) of the Constitution.**

7. The applicant further argued that while this Court found that the investment had been destroyed by their acts, the record of appeal contains an admission from the 1st respondent that he personally dismantled the structures, retained fixtures and mitigated his loss. He cited the decision in **National Bank of Kenya Ltd v Njau [1997] KECA 71 (KLR)**, and submitted that review is the appropriate remedy when a court makes findings diametrically opposite to undisputed admissions on the record.
8. The applicant asserted that the appeal was incompetent because no valid, signed or served Notice of Appeal was filed and the appeal itself was filed out of time without leave. He relied on the decision in **Kenjap Company Limited v Mulatya [2023] KECA 931 (KLR)** to argue that a proper notice is the foundation of jurisdiction. He

also cited **Mae**

Properties Ltd v Joseph Kibe [2017] eKLR and argued that an appeal filed out of time is a nullity.

9. Finally, the applicant argued that failing to correct these errors would result in unjust enrichment of the 1st respondent and a violation of Article 40 of the Constitution, which protects against the arbitrary deprivation of property. He cited the decision in **Kenya Hotels Ltd v Oriental Commercial Bank Ltd. [2019] eKLR** in support of the principle that the law and equity abhor recovery for property that was admittedly retained and never lost. In conclusion, he urged the Court to set aside the award of special damages or remit the matter for a fresh determination on quantum
10. We have read and considered the impugned judgment, the oral highlights made before us by the applicant and his written submissions as well as case law. The issue for determination is whether the applicant has made out a case for review, setting aside and/or correction of the Court's Judgment delivered on 25th November, 2016.
11. The applicant has faulted the Court for erroneously proceeding on the assumption that the 1st respondent had suffered special damages in the sum of Kshs 3,800,000. In

his submissions, he argued that the judgment contained errors apparent on the face of the record that are patent, self-evident, and incontrovertible, requiring no elaborate argument to identify. He further argued that the appeal was incompetent because no valid, signed or served Notice of Appeal was filed, and the appeal itself was filed out of time without leave.

12. In **Benjoh Amalgamated Limited v Kenya Commercial Bank Limited [2014] eKLR**, the consideration by the Court was whether it had the power to review its own decision. The Court stated as follows:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that 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).”

13. Further, in **Niels Bruel v Moses Wachira & 2 others [2018] eKLR**, the applicant sought to review the judgment of the Court on the basis that the Court had failed to evaluate the evidence in the first appeal. The applicant argued that because of that failure, his constitutional right to a fair hearing had been infringed. The Court rejected the argument and stated as follows:

“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 disaffected parties who merely seek a second bite of the cherry or who invite the Court to sit on appeal from its own judgment.”

14. Additionally, in **Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited [Civil Appeal (Application) No. 81 of 2016 [2023] KECA1497 (KLR) (8 December, 2023) (Ruling)**, the Court while considering the jurisdiction to review its own decisions, stated as follows:

“Further, as this Court explained in the decisions we have cited above, 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. From those decisions, 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. There is a good reason why the makers of the Constitution of Kenya did not confer on the Supreme Court, the apex Court in the land, ordinary appellate jurisdiction from decisions of the Court of Appeal, to correct perceived errors of the law made by the Court. If the Supreme Court has no jurisdiction to entertain appeals from this Court on the grounds that it misapplied the law, how can the Court of Appeal itself be asked to routinely review its decisions on the same grounds? It is also not lost to us that this application for review of the judgment of the Court was made only after the Court found that the applicant’s intended appeal to the Supreme Court did not raise any matters of general public importance to justify a certificate to the apex Court. The Supreme Court was similarly not convinced it had any basis for entertaining the applicant’s intended appeal to that Court.” (Emphasis added)

15. In light of the decisions cited above, it is evident that our jurisdiction in an application for review is limited and is to be exercised only in exceptional circumstances. In the case of **Fredrick Otieno Outa v Jared Odoyo Okello &**

3 others [2017] eKLR, the Supreme Court identified the exceptional

circumstances under which a court may review its own decisions to be follows:

- (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.***

16. In further consideration of the decision above, it is our view that the judgment of this Court was not obtained by fraud, nor was it a nullity. It was also not rendered on the basis of repealed law or on account of any deceit. It is our considered position, and as stated in **Benjoh Amalgamated Limited v Kenya Commercial Bank Limited (supra)**, that the power to review should be invoked with circumspection. It is also clear that the applicant's dissatisfaction with the impugned judgment is on the basis of the Court's analysis of the evidence. We opine that the applicant's invitation for us to reconsider the evidence in light of his explanations, is an appeal against the decision of the Court disguised as an application for review.

17. For the reasons stated above, we are not persuaded that there are any exceptional circumstances to warrant a review of the Court's judgment dated 25th November, 2016.
18. Consequently, the notice of motion dated 24th October, 2018 is hereby dismissed. As the application was undefended, we make no orders as to costs.
19. It is so ordered.

Dated and delivered at Nairobi this 25th day of March, 2026.

W. KORIR

.....
JUDGE OF APPEAL

H. ONG'UDI

.....
JUDGE OF APPEAL

S. OKONG'O

.....
JUDGE OF APPEAL

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

Signed _

DEPUTY

REGISTRAR.