Ethics and Anti Corruption Commission v Kenya Broadcasting Corporation & 3 others (Civil Application E060 of 2023) [2025] KECA 873 (KLR) (23 May 2025) (Ruling)

Neutral citation: [2025] KECA 873 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E060 OF 2023

F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

ETHICS AND ANTI CORRUPTION COMMISSION ..... APPLICANT

AND

KENYA BROADCASTING CORPORATION ..... 1ST RESPONDENT

HOUSING FINANCE COMPANY OF KENYA LTD ..... 2ND RESPONDENT

KENSKO AGRO PRODUCTS LTD ..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an application for orders that Mombasa Civil Appeal No. 82 of 2018 be re-opened, the judgement be set aside, Ethics and Anti-Corruption Commission be made a party and additional evidence be taken)

RULING

1. The 2nd respondent, Housing Finance Company of Kenya Limited (HFCK), filed a suit against the 1st respondent, Kenya Broadcasting Corporation (KBC) and the 3rd respondent, The Hon. Attorney General, who were the 1st and 2nd defendants respectively in Mombasa Environment and Land Court Case No. 282 of 2013. The 4th respondent, Kensko Agro Products, was named therein as a Third Party. The 2nd respondent was challenging the 1st respondent's alleged trespass on its parcels of land, being title numbers Mombasa/Block XXI/580, 581 and 582 (the suit parcels). The suit parcels resulted from the subdivision of Mombasa Municipality Block XXI/577 (the suit property).

2. The 1st respondent's defence was that it had always been in possession of the suit parcels for over 12 years; that the suit parcels are government properties vested upon it; and that the 2nd respondent's suit was time barred.

3. Upon conclusion of the trial, the learned Judge (Omollo, J.) was satisfied that the 2nd respondent had proved its ownership of the suit parcels, and that it had a good title thereto.

4. Aggrieved by the decision, the 1st respondent filed an appeal to this Court, being Mombasa Civil Appeal No. 82 of 2018, and, by a judgement delivered on 7th March 2019 (Visram, Karanja & Kiage, JJ.A.), the Court found no merit in the appeal and, in dismissing it, upheld the trial court's decision.

5. The Ethics and Anti-Corruption Commission (EACC), the applicant herein, is now seeking this Court's intervention through an application dated 11th July 2023 for orders that:

   i. Spent.

   ii. The appeal in Mombasa Civil Appeal No. 82 of 2018 - Kenya Broadcasting Corporation vs. Housing Finance Company Kenya; Attorney General and Kensko Agro Products Limited be re- opened and Judgement entered by this Court on 7th March 2019 be set aside;

   iii. The Ethics and Anti-Corruption Commission be joined to the proceedings as an Interested Party or in any other capacity that the Court may deem fit;

   iv. The Court be pleased to take additional evidence orally and cross-examination of the witnesses be allowed; and

   v. In the alternative to prayer (iv) above, the Court be pleased to direct that the additional evidence in the applicant's possession be taken by the trial court.

6. The application is supported by the affidavit of Stephen Ivuvu, an investigating officer with the applicant. He deposed that, on 3rd June 2022, EACC received a report that there was an unlawful allocation of public land which was planned and alienated for extension of KBC within Mombasa Island; that the allocation was for the benefit of the 4th respondent; and that a portion thereof was subsequently transferred to HFCK to the detriment of public interest.

7. It was deposed that, pursuant to investigations carried out by EACC, it was discovered that the suit property was alienated public land but that, through a letter of allotment Ref. TP/3/2/XV/148 dated 9th May 1994, it was illegally acquired by Silver Clouds Investments Limited, a private entity; that, subsequently, the 4th respondent divided the suit property into five portions, being the suit parcels which were transferred to HFCK by the 4th respondent for a consideration of Kshs.30,000,000 and two other portions, namely Nos. 583 and 584 which were retained by Silver Clouds Investments.

8. Mr. Ivuvu faulted the allocation of the suit property by the Commissioner of Lands as ultra vires his powers and functions. It was also deposed that the document annexed in support of the letter of allotment is not a Part Development Plan, but an unreferenced and unapproved sketch; that, it was also established that the cited Plan No. TP/3/2/XX/138A is a misrepresentation since it does not conform to the reference numbering system applied by the Department of Physical Planning; and that, consequently, the sketch could not be a basis for allocation, thereby rendering the letter of allotment null and void.

9. It was deposed that the investigations established that there was no transfer of any interest held by Silver Clouds Investments Limited to the 4th respondent; that the 4th respondent only surfaced upon execution of the lease between itself and the Commissioner of Lands; that the transfer dated 12th March 2023 between the 2nd and 4th respondents indicated that the consideration was Kshs.44,000,000, but that the 4th respondent only received Kshs.30,000,000; that this was a material fact that the 4th respondent failed to disclose by not calling witnesses or filing a witness statement before the trial

court; that the difference of Kshs.14,000,000 that was not received by the 4th respondent, coupled with the material non-disclosure by the 4th respondent, is an indication that the 2nd and 4th respondents had knowledge that the suit property was public land, and that the sum not disclosed represented a fraudulent benefit for the officers employed by the 2nd respondent.

10. It was further contended that, once a land is alienated through an approved Part Development Plan and set aside for public use, it renders that parcel unavailable for allocation for private use; that this Court arrived at its decision without the benefit of evidentiary material which was unavailable at the time of the hearing, but is currently in the applicant's possession; and that the evidence collected in the investigations, being the certified documents and maps, statements recorded from technical officers from the departments at the Ministry of Lands, Housing and Urban Development could not be secured and availed by the 2nd respondent, but could only be available to the applicant after conducting investigations.

11. Learned counsel Ms. Kibogi highlighted the applicant's submissions dated 1st August 2023. We were referred to the Supreme Court decision in Manchester Outfitters (Suiting Division) Ltd (now known as King Woolen Mills Ltd) & Another vs. Standard Chartered Financial Services Limited & 2 Others Petition No. 6 of (2016) 2017 eKLR and this Court's case of Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (2014) KECA 872 (KLR) for the proposition that this Court is clothed with residual jurisdiction to re-open and re-hear a concluded matter where the need to obviate injustice outweighs the principle of finality as is in the present case.

12. She conceded that, indeed, the question of allocation of public land was heard and determined, but that it was without the benefit of the evidence obtained through subsequent investigations by the applicant; that the new evidence seeks to impugn the process of alienation of Title No. 577 which was reserved for the 1st respondent for future expansion through an approved Part Development Plan Number 198; that this Court did not also have the benefit of seeing how the 4th respondent acquired Parcel Number 577 yet, at the time of acquisition of the property, it did not have a title thereto; that the 4th respondent was not the original allotee, but obtained the parcel from brokers; that more interesting is the fact that it only came into the picture at the point when the Lease in its favour was being signed by the Commissioner of Lands; and that, thereafter, a title was processed in its name.

13. Counsel submitted that the 1st respondent does not have powers to investigate, summon witnesses, record evidence and call for records held by State departments; that the public will suffer great prejudice in the event that the land reserved for expansion of a national broadcaster is left in the hands of a private entity without the evidence impugning the allocation being presented before the court for adjudication.

14. It was further submitted that none of the respondents stands to suffer prejudice since the parcels of land have not been alienated or transferred to other parties; that all the respondents are currently litigating before the ELC is in relation to parcels Nos. 583 and 584; that the best way to resolve the dispute is to re-open the concluded matter and send the parties back to the ELC where all the parties are, allow the applicant to present the evidence and let the court adjudicate over the matter; and that any aggrieved party can still appeal to this Court.

15. It is the applicant's view that no prejudice will be occasioned to the respondents if the case is re-opened or additional evidence taken as they will be accorded an opportunity to rebut the additional evidence and test its veracity through cross- examination of witnesses.

16. On behalf of the 1st respondent, learned counsel Ms. Mathenge submitted that the 1st respondent was supporting the application through written submissions dated 13th October 2023; that the instant

application could not be filed earlier because parties were busy with the trial at the ELC and appeal in the Court of Appeal; that, it was only after KCB called in EACC to investigate the matter that more information emerged necessitating the instant application; that, since her client did not possess investigative powers, it could not dig deeper than in what was contained in the then available documents on how the suit property was allocated for private use; and that, even the 1st respondent also wrote to EACC asking it to investigate the substratum of alienation of the suit property to private entities.

17. This Court's case of Benjoh Amalgamated Limited & another vs. Kenya Commercial Bank Limited (2014) KECA 872 (KLR) was cited for the proposition that the Court has residual jurisdiction to re-open an appeal which it already determined in order to avoid real injustice in exceptional circumstances.

18. On the prayer for joinder of the applicant as an interested party in the suit, counsel submitted that the applicant is a public body charged with the duty of conducting investigations especially on matters of public interest; that the new evidence that the applicant has come up with is is vital to ensuring that public land is not misappropriated by private individuals, which is a matter of public interest; that the applicant's interest is basically to discharge its mandate in line with Article 79 of *the Constitution*; that the non- joinder of the applicant will lead to the prejudice of the interest of the public who are represented by it in this case; that this is demonstrated by the fact that the suit property is being claimed by a public entity (the1st Respondent) which serves the people of the entire Republic of Kenya; that, once this Court's judgment is set aside, the applicant's newly discovered evidence will be beneficial to all parties in resolving this long outstanding dispute; and that, furthermore, it will serve the wider interest of doing justice. Reliance was placed on the case of Attorney General vs. David Ndii & 73 others (Petition 12 (E016) of 2020) (2021) KESE 17 (KLR) where the Supreme Court laid down the factors to be considered before a party is joined in proceedings.

19. The 2nd respondent opposed the application vide a replying affidavit sworn on 9th August 2023 by Ms. Belinda Nganga, its Head of Legal and Deputy Company Secretary. She deposed that the investigation report being alluded to by the applicant had not been adduced and that, therefore, there was nothing to support the prayer for re-opening the trial. She denied that the suit parcels were acquired by the 2nd respondent illegally and fraudulently to the detriment of the intended public interest. It was stated that, prior to purchasing the suit parcels, the 2nd respondent conducted due diligence, and a valuation report dated 21st February 1995 was prepared; that the 2nd respondent took possession of the suit parcels, and has been enjoying quiet possession from the year 1995 until 2005; that the 2nd respondent leased the suit parcels to Auckland Agencies Limited and it commenced development; that, however, in October 2005, the District Commissioner stopped the developments and the 1st respondent illegally constructed a perimeter wall, which prompted the 2nd respondent to file suit in the trial court; and that both the trial and appellate courts declared that: the suit parcels belonged to the 2nd respondent; the 1st respondent was liable to pay mesne profits at Kshs.25,000 per month from October 2005; and that the 1st respondent demolishes the wall and give up vacant possession.

20. Ms. Nganga further deposed that the 2nd respondent instructed Amazon Valuers Limited to inspect, conduct and prepare a valuation report of the suit parcels; that the report dated 7th June 2019 established that the 2nd respondent is the registered proprietor of the suit parcels; and that the said report further established that the green cards in respect of the suit parcels were unavailable at the Mombasa Land Registry.

21. Further, that the 2nd respondent discovered that the suit parcels were amalgamated with Title No. Mombasa/Block/XXI 579 on 6th October 1995 to form Title No. Mombasa/Block/XXI/590, which was registered in the name of Suleiman Hamisi Kadingo as the new owner, and that a title was issued

on 11th February 2019; that it placed restrictions over the suit parcels, but that they were later lifted pursuant to this Court's decision of 8th June 2023; and that the registration in favour of its subsidiaries was completed and titles issued on 10th July 2023.

22. It was further deposed that the documents being presented now, that is the letter of allotment dated 9th May 1994 to Silver Clouds Investment Limited for Title No. Mombasa/Block XXI/577, Survey Plan No. 258/88 and other attendant documents do not defeat the 2nd respondent's indefeasible right to title of the suit parcels which were legally acquired; and that Silver Clouds Investments Limited was a stranger to the previous proceedings, and the applicant has not sought to join them because the investigations concerning Silver Clouds Investments Limited portray similar interests to those of the 1st respondent and the applicant.

23. It is the 2nd respondent's case that the Part Development Plan No. 198, Ref. CT/12/11/88/1, dated 16th February 1998 is not new evidence; that the High Court and the Court of Appeal determined the issue regarding the alleged alienation of public land to the 1st respondent by finding that the 1st respondent lacked sufficient evidence to claim ownership of the suit property; and that the 1st respondent had only requested for land extension to the unsurveyed Plot B from the Commissioner of Lands who had not yet given a response.

24. It was further deposed that, after rendering its decision, this Court became functus officio in the matter; that re-opening of the case will occasion an injustice and prejudice to the 2nd respondent; that the application has been brought with undue delay; and that, as such, it should be dismissed with costs.

25. On behalf of the 2nd respondent, learned counsel Mr. Musyoka, while highlighting written submissions dated 15th August 2023, contended that the applicant has not demonstrated how the impugned decision of this Court has occasioned an injustice or miscarriage of justice to any party, or that it was vitiated with fraud or deceit, or is a nullity due to the Court's incompetence, misrepresentation, mistake or illegality by operation of law; that the applicant's intention is merely to bolster the 1st respondent's case; that, in any case, the applicant is presently before the ELC where the subject matter in dispute is Plot Nos. 583 and 584 which emanated from the subdivision of Plot No. 577; that the applicant has not demonstrated whether it has any direct or substantial interest in the matter and in the suit parcels; and that any challenge arising from the appeal filed in this Court, should have been made by the 1st respondent but not the applicant.

26. It was submitted that the application does not indicate whether public confidence was eroded in the administration of justice by the decision of this Court; that there is evidence that: the 2nd respondent conducted due diligence before purchasing the suit parcels; how it made the payment; how the suit parcels were transferred to it; and how it finally occupied them. Whilst acknowledging that this Court has residual jurisdiction to re-open the trial as was held by the case of Benjoh Amalgamated Limited & another vs. Kenya Commercial Bank Limited (supra), it was submitted that the applicant had not satisfied the principles laid down in the case of Kamau James Gitutho & 3 Others vs Multiple ICD (K) Limited & Another (2019) KECA 379 (KLR) to warrant our exercise of judicial and residual jurisdiction in this regard.

27. On the prayer for allowing additional evidence, it was submitted that it has not been shown that the evidence could not have been obtained with reasonable due diligence; that the trial court and this Court found that the 2nd respondent had adduced sufficient evidence to prove ownership of the three parcels of land; that the 2nd respondent had produced letters marked as Exhibits Nos. BN - 11 to BN - 13 indicating that the applicant conducted investigations in 2022. Reliance was placed on, inter alia, the case of John Wagura Ikiki & 3 others vs. Lee Gachuaga Muthoga (2011) eKLR to buttress the

submission that the applicant had not demonstrated sufficient reason as to why the Court should allow admission of additional evidence.

28. As to whether the applicant should be joined as an interested party, it was submitted that it had not demonstrated any direct or substantial interest in the matter; that its mandate to recover any illegally alienated property does not ultimately vest it with an interest in the property; and that the issues it intends to bring on board through additional evidence have already been effectually and conclusively heard and determined by both the ELC and this Court. Reference was made to the cases of Francis Karioko Muruatetu & Another v Republic & 5 others, Sup Ct Petition No 15 as consolidated with Petition No 16 of 2015, [2016] eKLR; Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others SC Petition (Application) No. 12 of 2013; EG v Attorney General; David Kuria Mbote & 10 Others (Interested Parties) (2021) eKLR; Hamisi Yawa & 36,000 Others v Tsangwa Ngala Chome &19 Others (2018) eKLR; and Kensalt Limited v Water Resources Management Authority (2018) eKLR, submitting that the applicant had not demonstrated what personal interest or stake it had in the matter to warrant its joinder as a party; and that, instead, its interest in merely peripheral.

29. Learned counsel Ms. Waswa appearing for the 3rd respondent supports the application and fully relies on the 1st respondent's submissions. She did not file any submissions on behalf of the 3rd respondent.

30. The 4th respondent opposed the application by way of a replying affidavit sworn by one Francis Waiganjo Kimanga, its Director/Shareholder on 21st July 2023. He deposed that the applicant had failed to demonstrate that the investigation report will enable the court to make an informed decision on whether the evidence in its possession is new and was not the subject of new issues raised by the 1st respondent in their defence and counterclaim in the trial court; that this Court has no jurisdiction to entertain this application since it is functus officio having rendered a judgment on appeal; and that, as such, if the suit is re-opened, it will ultimately be res judicata; that the applicant has not approached this Court with clean hands since it has filed ELC No. E051 of 2023 and the 1st respondent has filed ELC No. E196 of 2021; and that, in both suits, parties are seeking similar prayers as were sought in the concluded suit.

31. The 4th respondent further stated that this Court is not a trial court; that it cannot hear oral evidence or entertain new material evidence which was not raised in the trial court, save in exceptional cases which the applicant has failed to demonstrate; that the application has been brought with inordinate delay coming 5 years and 4 years after delivery of the judgements in the trial Court and this Court respectively; that, no reason for the delay has been advanced; that the application has no merit; and that it is in public interest that there be an end to litigation.

32. In highlighting the 4th respondent's submissions dated 7th August 2023, learned counsel Ms. Ukubane took the same position as the 2nd respondent. Counsel relied on the decisions of Kamau James Gitutho & 3 Others (supra); and Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (supra) to emphasise the principles which a court should take into consideration when considering an application for re-opening of a case, in that, the finality to litigation principle and the justice principle are of paramount importance, as well as the case of Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 others (2017) eKLR for the proposition that a court will be reluctant to invoke its residual jurisdiction to re-open a case where there is laches.

33. We have considered and appreciated the application, the affidavits in support of, and in opposition to, the application, the detailed oral and written submissions made by the respective counsel, the authorities relied upon and the law. The issues that fall for our determination are: whether the applicant has met the threshold to warrant the re-hearing of the appeal, and whether new evidence should be adduced; if the answer to the foregoing is in the affirmative, whether the applicant should be joined

as an interested party; and, consequently, whether we should set aside this Court's judgment delivered on 7th March 2019.

34. We start by making the observation that, at both trial in the ELC and on appeal to this Court, the 2nd respondent was adjudged to be legally entitled as the owner of the suit parcels. The trial and the appeal having been concluded would lead us to conclude that the two courts at their respective levels became functus officio to the matter at hand. In keeping with the principle of finality of litigation, the doctrine of functus officio envisages that matters adjudicated before a competent court of law should not be re-opened. The only exception to revisiting a judgement is under the slip rule as envisaged under section 99 of the *Civil Procedure Act* for purposes of correcting clerical or arithmetic mistakes. There is no room for a court to correct its substantive decision. The doctrine bars merit-based decisional re-engagement with the case once a final judgment has been entered and a decree therefrom issued.

35. The limitation of application of the slip rule was enunciated in the case of Valla Bhdas Karsandas Ranica vs. Mansukhlala Jivraj & others (1965) EA, 700 thus:

> "... a slip order will only be made where the Court is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given or in the case of a matter which was overlooked where it is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention."

36. The Supreme Court in Odinga 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 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."

37. 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. The instant matter before us, where we are being asked to re-hear the appeal, is unique in that, this Court exercised its appellate jurisdiction and that, by a judgement delivered on 7th May 2019, it upheld the decision of the trial court. 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. It is also unique in the sense that the applicant was neither a party before the ELC nor in the appeal in this Court.

38. Returning to the substratum of the application, it is noteworthy that the applicant raises issues of concern on how the 2nd respondent acquired the suit parcels. The applicant argued that this is a matter of public importance as the suit parcels in question are public properties. Section 13(2) (b) and (c) of the Ethics and Anti-Corruption Act, Cap 7H gives the applicant powers to "undertake preventive measures against unethical and corrupt practices and conduct investigations on its own initiative or on a complaint made by any person." Clothed with this power, the applicant embarked on its independent investigations after receiving a complaint from the 1st respondent.

39. This Court (Madan, Wambuzi & Miller Ag, JJ.A.) (per Madan, JA.) in Belinda Murai & 9 others vs. Amos Wainaina (1981) KECA 34 (KLR) stated that, what constitutes a question of general public importance is one which takes into account the well-being of the society in just proportions.

40. After considering a long list of previous decisions arising from this Court in Standard Chartered Financial Services Limited & 2 others vs. Manchester Otfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited) & 2 others (2016) KECA 671 (KLR), this Court held as follows on re-opening and re-hearing of matters:

> "We have deliberately quoted extensively from the Rai case, the Nguruman case, and the Benjoh case in order to bring out the position that this Court has taken in the past and the reason for any deviations. From the aqua it is evident that although the facts in the Rai case were similar to the Benjoh case, to the extent that in both instances there was a motion seeking to reopen a concluded judgment of the Court, the new constitutional dispensation justified a departure from the Rai case as it called for an interpretation of the Court's jurisdiction in a manner that brings it into conformity with the principles of the 2010 Constitution, and gives allowance for the development of the law. The exercise of the Court's residual jurisdiction under section 3A of the *Judicature Act* was therefore justified. This is to say that this Court has already pronounced itself in the Benjoh case in a way that evinces a clear intention of departing from the precedent set out in the Rai case. We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation. Indeed, the Benjoh case addressed this point thus:
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> > '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.'"

41. This Court in the case of Niels Bruel vs. Moses Wachira & 2 others [2018] eKLR while addressing the question of the residual jurisdiction of the Court to order a re-hearing of an appeal said:

> " 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. In Benjoh Amalgamated Ltd & Another v. Kenya Commercial Bank Ltd (2015) e KLR, this Court expressed itself as follows regarding that jurisdiction:
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> > '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).'"

42. Further, it is our considered view that the applicant, being an entity entrusted in protecting public property, has made out a case for re-opening of the appeal before this Court for the very good reason that the matter is one of public interest as it touches on preservation of public land. In Dina Management Limited vs. County Government of Mombasa & 5 Others (2023) KESC 30 (KLR), the Supreme Court pronounced itself that, where public land is involved, there has to be a proper procedure before allocation of unalienated Government Land. The Court frowned upon sanctioning irregularities and illegalities in the allocation of public land.

43. The issue we have determined above is intertwined with the prayer for taking additional evidence, which is well settled is a matter of discretion of the Court, and should ordinarily be considered separately from the prayer for a retrial or re- hearing of an appeal. In Joginder Auto Service Ltd vs. Mohammed Shaffique & Another (2001) eKLR, this Court held that:

> " But this Court and other courts in different common law jurisdictions have, over the years, enunciated principles to guide the courts in applications for leave to adduce additional evidence. There is for instance the case of Mzee Wanjie & 93 Others v. Saikwa & Others (1982- 88) 1 KAR.462, which was applied in Edgar Ogechi & 12 Others v. University of Eastern Africa, Baraton, (Civil Appeal (Application) 130 of 1997) (unreported). There is also the old case of Karmali Mohamed & Another v. Z. H. Lakhani & Company [1958] EA.567. In summary, these and several other cases decide that the power of the court and more particularly this Court, to receive further evidence is discretionary..."

44. Further, the Supreme Court in Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR laid down the governing principles on allowing additional evidence in appellate courts as follows:

> " (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
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> b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
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> c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
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> d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
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> e. the evidence must be credible in the sense that it is capable of belief;
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> f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond respectively;

g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. where the additional evidence discloses a strong prima facie case of wilful deception of the Court;

i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

45. What is paramount when a court is considering whether to allow a party to adduce additional evidence is that it should be considered in exceptional circumstances and on a case by case basis.

46. The issues that the applicant intends to raise are by no means frivolous, vexatious, an abuse of the court process or likely to cause prejudice to any party. If indeed the 2nd respondent contends that it acquired the suit parcels legally, it should have no problem in defending its position once more. In addition, unlike other circumstances, the issues being raised by the applicant were not heard and determined on merit and, in particular, the fact that the suit parcels were first reserved to be public land, and that it is therefore questionable how they metamorphosed to be private land to be allocated to private entities. Those are weighty issues deserving of close judicial scrutiny.

47. We also bear in mind the fact that the evidence intended to be adduced was not available to the parties at the initial trial. It was also evidence which the parties could not have obtained unless by way of investigation. On this score, it is trite that the 1st respondent had no capacity to conduct investigations so as to establish the root cause of alienation to the 2nd respondent and of the suit property Silver Clouds Investments, as a result of which help was sought from the applicant. As soon as the investigations were complete, the instant application was filed. Therefore, we do not think that the applicant intends to fill up gaps in the 1st respondent's case, or that the application is actuated by the 1st respondent's loss in the trial and appeal.

48. We are fully conscious that rule 31(1)(b) of the Court of Appeal Rules, 2022 confers on this Court the discretion to take additional evidence, or direct that additional evidence be taken by the trial court, and for good reason. The applicant has a report which is the outcome of its investigations to back up its claims. This being an appellate court, we think that the oral evidence is best taken by the trial court where witnesses may be cross-examined and re-examined to test its veracity.

49. So then, is the applicant entitled to the prayer for joinder as an interested party in the suit? We do not wish to belabour much on this point as it is intertwined with the other two issues discussed above. Both the 1st and the 3rd respondents have set the tone on this issue with which we fully concur. The applicant is an independent Commission established pursuant to Article 253 of *the Constitution*. Under section

11(1) d) of the *Ethics and Anti-Corruption Commission Act*, 2011, among other functions of the applicant, is:

> 11(1) (d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*;

50. As noted above, the matter at hand is one of public interest. The investigations that required to be done to establish the root cause of the alienation of the suit property to private ownership could not be carried out by a body without investigative powers. Thus, the applicant, upon being requested by the 1st respondent to carry out the investigations, cannot be termed as a busy body, or a body with peripheral interest as the 2nd and 4th respondents would want us to believe.

51. This Court in the case of Pravin Bowry vs. John Ward & another [2015] eKLR, although dealing with the question of joinder of a co-defendant noted that, a court may itself add such a party to a suit so that such addition will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

52. In the case of Muungano Wa Wanavijiji Akiba Mashinani Trust vs. Kihiu & 3 others; Waweru & 5 others (Interested Parties) (Civil Application E279 of 2022) [2023] KECA 946 (KLR) (28 July 2023) (Ruling), this Court noted that the Court's Rules do not provide for joinder of an interested, but of an effected party. It also noted that, an affected party is not defined by the Rules. In an attempt to explain whether an interested party could fall under the definition of an affected party had the following to say:

> " 14. We agree that Rule 79(1) does not define the word "affected." However, this Court defined the word in the case of Centre for Rights Education and Awareness & Another v John Harun Mwau & 5 Others, *CA No 74 of 2014* (CA). Referring to the cases of Kamlesh Pattni v StarwoodHotels and Resorts World Wide Inc & 7 Others Civil Application No Nai 330 of 2001 (UR 176/2001) and Commercial Bank of Africa Limited v Isaac Kamau Ndirangu, Civil Appeal No 157 of 1991, (CA); [1992] eKLR, the Court held that:
>
> > 'The person referred to in the Rule is, at least, one whose property rights are affected by the judgment appealed against and that he need not have been party to the superior court case to be served and allowed to participate in the appeal.'
>
> 15. The Supreme Court in Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR at paragraphs 18 of the ruling did define an interested party as follows: -
>
> > 'Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or

she herself appears in the proceedings, and champions his or her cause.'

16. Of note is that the Court of Appeal Rules provides for joinder of persons affected by the appeal and does not have any provision for joinder of interested party, but given the Supreme Court definition in the afore cited case, such a person would be covered by Rule 79 as an affected person. Joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned "

53. The Court then stated that, a court in exercise of its discretion to join an interested party must be satisfied that:

"a. The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.

b. The intended party's presence would enable court to resolve all the matters in the dispute.

c. The intended party would suffer prejudice in case of non-joinder.

d. The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings."

54. We conclude that, based on the above criteria and the entire background to this matter, the applicant has made out a case that warrants its joinder as an interested party in the suit.

55. Should we then set aside the Judgment of this Court delivered on 7th March 2019? Section 3A of the *Civil Procedure Act* whose preamble is "Saving of inherent powers of court", provides that nothing shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of court.

56. Section 80 (a) and (b) of the *Civil Procedure Act* gives power to a party who wishes to apply for review as follows:

Any person who considers himself aggrieved-

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

57. A court's power to review a judgement as set out in Order 45 of the Civil Procedure Rules arises from the following grounds:

a. there must be discovery of new and important evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

b. there was a mistake or error apparent on the face of the record; or

c. there were other sufficient reasons; and

d. This Court in the case of the application must have been made without undue delay. Lighting Co. Ltd (2005) 2 Mahinda vs. Kenya Power & KLR 418 lays down the general principle which a court should consider when reviewing its decision as follows:

> " The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

59. We take the liberty to cite in extenso the Court of Appeal sitting in Nairobi (K. M'inoti, F. Sichale & J. Mohammed, JJ.A.) in Cape Holdings Limited (Under Administration) v Synergy Industrial Credit Limited (Civil Appeal (Application) 81 of 2016) [2023] KECA 1497 (KLR) (8 December 2023) (Ruling which also set the tone for circumstances under which the Court can set aside its own decision thus:

> "29 This brings us to the general jurisdiction of this Court to review its own judgments, which is the direct jurisdiction invoked in this application. There is no doubt that the Court has the jurisdiction to review its judgments, but only in exceptional cases. In Benjoh Amalgamated & another v. Kenya Commercial Bank Ltd. [2014] eKLR, the Court was invited to review and set aside its judgment on the grounds that a consent order, the subject of the appeal, was entered into by an advocate who did not have instructions. The Court considered the circumstances under which a court of appeal, though not the apex court, may review its decisions. The Court concluded that it had residual jurisdiction to review its decisions but in exceptional circumstances. The Court held 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).' (Emphasis added).
> >
> > However, the Court dismissed the application after finding that the applicant had not put forth any grounds to justify invoking the residual jurisdiction of the Court.

32. On the other hand, in Mukuru Munge v. Florence Shingi Mwawana & 2 others (2016) eKLR the applicant invited the Court to review and set aside its judgment on the ground that it had misapprehended the law on limitation of actions. The Court reiterated as follows:

> 'The residue power of the Court to reopen its decisions is ... a circumscribed power to be exercised in exceptional cases. That power is not intended to circumvent the principle that, save in those cases where *the Constitution* allows an appeal to the Supreme Court, decisions of this Court are otherwise final.' (Emphasis added).
>
> In dismissing the application for review, the Court held:
>
> > 'The central question in this application is whether it falls within the restricted categories under which the Court can re-open its judgment. The primary ground upon which the Court is being asked to exercise its residual jurisdiction is that its application of the law of limitation is erroneous. That, with respect, cannot constitute a ground for re-opening the judgment for two reasons. Firstly, to proceed as the applicant invites us to do amounts to this Court sitting in appeal from its own decision, which clearly is not the purpose of the Court's special and residual jurisdiction.'"
> >
> > (Emphasis added).

60. Still emphasising the unique circumstances of this case, it is trite that neither the applicant nor the 1st respondent had the advantage of being possessed with the new evidence which the applicant intends to adduce. Failure to allow the presentation of the new evidence will no doubt fetter the 1st respondent's right to a fair trial, and a trial that is anchored on objective and independent evidence as envisaged in Article 50 of *the Constitution*. In this case, the discovery of new and important evidence which, after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order made, constitutes good reason why this prayer, too, should succeed. In other words, the grounds advanced by the applicant for the review of the Judgment in the impugned Notice of Motion are merited.

61. In view of the foregoing, we have no doubt that the application herein is not made in vain. We hereby allow the applicant's Notice of Motion dated 11th July 2023 in the following terms:

    a. that the Judgment of this Court delivered on 7th March 2019 be and is hereby set aside;

b. that the matter be remitted to the trial court (the ELC) at Mombasa for the purpose of taking new evidence;

c. that, in exercise of our powers as provided for under rule 31 (1) (b) of this Court's Rules, 2022, we hereby order and direct that the applicant be joined as an interested party in the trial court, and be at liberty to adduce additional evidence;

d. that the new evidence shall be limited to the investigation report relating to the suit property;

e. that, this being an application made in public interest, we hereby order that each party shall bear its own costs of the application.

62. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

F. TUIYOTT

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR