Benjoh Amalgamated Limited v Kenya Commercial Bank Limited & another (Civil Appeal (Application) 40 of 2018) [2024] KECA 593 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KECA 593 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 40 OF 2018

MSA MAKHANDIA, K M'INOTI, S OLE KANTAI, F TUIYOTT & JM MATIVO, JJA

MAY 24, 2024

BETWEEN

BENJOH AMALGAMATED LIMITED ..... APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED ..... 1ST RESPONDENT

BIDII KENYA LIMITED ..... 2ND RESPONDENT

(An application to review the judgement of the Court of Appeal, Nairobi (Nambuye, Asike-Makhandia & M'Inoti, JJ.A.) made on 15th day of December, 2017 in Civil Appeal Nos. 107, 137 and 174 of 2010)

RULING

1. A brief history of this protracted litigation culminating in the applicant's application dated 16th February 2018. The subject of this ruling is necessary so as to put into proper context the diametrically opposed arguments pressed by the parties in support of their respective positions. Fortunately, the factual background is substantially common ground or uncontroverted. This Court (Nambuye, Makhandia & M'inoti, JJ.A.) aptly captured the chequered history of this prolonged litigation in their judgment dated 15th December 2017 as follows:

> " The dispute between the parties has had a long history in the court corridors spanning a period in excess of 25 years, from 1992 when the first suit was filed in the High Court. Since then, there has been at least fourteen (14) suits with all manner of applications being made in the said suits. The dispute between the parties has been canvassed in all the courts of record in this land, all the way to the

2. Briefly, sometimes in 1988, the United States of America International Development "USAID" offered funds by way of loans to Kenyans under the Rural Projects Enterprise Programme to be administered

by the Kenya Commercial Bank (the 1st Respondent) hereinafter referred to as "KCB"), amongst other banks. The applicant (Benjoh), desiring to start a flower export business applied for a loan of Kshs.18,675,000 through KCB. Following a feasibility study, KCB recommended the project and in 1989, it granted Benjoh the loan facility secured by legal charges over two properties known as L.R. Nos. 12411/1 and LR No. 12411/2 (the suit properties). Upon request by KCB for further security, as a guarantee for the loan facility, a charge was created over L.R. No. 10075 owned by Muiri Coffee Estate Ltd. ("Muiri").

3. Benjoh defaulted in the repayment of the loan. Following the default, KCB instructed its advocates to realize the charged securities. The advocates instructed auctioneers to advertise and sell by public auction the charged properties. A day before the scheduled auction, Benjoh and Muiri filed HCCC No. 1219 of 1992 against KCB seeking to stop the auction and claiming Kshs. 13,125,000 which they claimed they had lost in the process. The suit was however compromised by the parties through a consent order recorded before Githinji, J. (as he then was) on 4th May, 1992 in which Benjoh admitted its indebtedness to KCB and undertook to repay the loan by 31st July 1992. In default, the consent order allowed KCB to proceed with the realization of the securities. Benjoh and Muiri failed to liquidate the loan as per the consent order and KCB again sought to realize the security through a public auction scheduled for 23rd January 1993.

4. A day before the auction, Benjoh filed HCCC No. 285 of 1993 at Nairobi seeking to stop the looming auction. It obtained an injunction which was later dismissed after inter-partes hearing. Undeterred in the realization of its security, KCB scheduled another auction for 26th June 1996. Two days prior to the scheduled public auction, the guarantor, Muiri filed HCCC No. 1520 of 1996 against KCB and Benjoh seeking inter alia general damages. Contemporaneous with the plaint, it filed an application seeking to stop the auction. The suit was however dismissed. Almost a year later, Muiri filed HCCC No. 1611 of 1996 against KCB and Benjoh but the suit was struck out because it was based on a mistaken belief that the LR No. 10075 had been sold. Another auction was slated for 7th February 1997 but HCCC No. 24 of 1997 was filed in the High Court at Nyeri by Benjoh against KCB a day prior to the scheduled auction. In the suit, Benjoh prayed for a proper and detailed statement of accounts and general damages. It successfully obtained an injunction stopping the said auction but the suit was ultimately struck out on 9th May 1997 for being res judicata.

5. Undeterred, Benjoh went back to the original suit HCCC No. 1219 of 1992, and filed an application seeking to set aside the consent order. The application was allowed by the High Court but the same was overturned on appeal in Civil Appeal No. 276 of 1997. The Court of Appeal upheld and reinstated the consent order. Benjoh then sought consolidation of HCCC No. 1219 of 1992 with HCCC No. 285 of 1993 but the application was dismissed since the former suit had been finalized. A subsequent application by Benjoh to review the consent order in HCCC No. 1219 of 1992 was also rejected by the court.

6. Still undeterred, Benjoh and Muiri instituted HCCC No. 1576 of 1999 seeking statement of account from KCB but the suit was dismissed by Lenaola J. (as he then was) on 23rd July, 2004 with costs for among other reasons being res judicata. Aggrieved, Benjoh and Muiri filed Civil Appeal No. 239 of 2005 which appeal was also dismissed on 31st March, 2006 for also being res judicata. Four days later, Benjoh and Muiri instituted HCCC No. 337 of 2006 against KCB which later became HCCC No. 243 of 2006 upon transfer to the Commercial Division of the High Court. In the suit, Benjoh and Muiri sought for release of title deeds to the suit properties and declarations that records from KCB had failed to establish their indebtedness to it. The court however struck out the suit following an application by KCB for being an abuse of court process. Applying the doctrine of res judicata, the

Judge held that the court was not entitled to try issues which had already been determined previously by other courts.

7. Subsequently, constitutional petition numbers 122 and 352 of 2007 were instituted by Benjoh and Muiri against KCB but both were dismissed for being, inter alia, res judicata on KCB's application. The first petition sought declaration that Benjoh's loan account had been fraudulently operated and also sought to compel the director of Criminal Investigations to institute investigations into the said account. The second petition sought declarations that KCB's attempt to sell the charged properties in Nyandarua and Kiambu was in contravention of the petitioner's right to property under section 75 of the former Constitution. The petitioners also prayed that KCB's attempt to sell the charged properties be declared illegal and unconstitutional and the said properties be discharged and released to them.

8. Eventually, on 19th September 2007, L.R. No. 10075 was sold through a public auction to the highest bidder, Bidii Kenya Limited, the 2nd respondent (Bidii), and it was registered as the proprietor. The sale and transfer notwithstanding, Benjoh and Muiri filed HCCC 494 of 2008 against KCB and Bidii seeking to nullify the sale. In a ruling dated 3rd November 2008, Lady Justice J. Khaminwa found that issues raised in the suit had been previously canvassed before other courts and hence res judicata. However, since the property had now been disposed off, the Judge ordered KCB to render the final statement of accounts to Benjoh so as to bring the litigation between the parties to an end. That was not to be. Benjoh yet again instituted HCCC No. 205 of 2009 against KCB, amongst others, still questioning the advanced loan and statement of account which had been raised in the previous suits.

9. Three applications filed in the High Court were the sources of three appeals, namely Civil Appeal Nos. 107, 137 and 174 of 2010 which culminated in the judgment of this Court which triggered the application the subject of this ruling. The first appeal was in respect of an application dated 2nd April 2009. The application was filed by KCB against Benjoh. It was based on a suit instituted by Benjoh and Muiri against KCB being HCCC No. 90 of 2009. In the suit, Benjoh and Muiri, as already indicated, sought a declaration that the final statement of account rendered by the appellant pursuant to the order of Khaminwa J. was fraudulent and a sham. They also sought a declaration that KCB breached the contract between it and Benjoh and further prayed for special damages in the sum of Kshs.2,243,067,494 and general damages. Upon learning about the existence of the said suit, KCB filed a defence and an application to strike out the suit.

10. The application was premised on the grounds that Benjoh had filed previous suits against it and the issues in those suits were directly or substantially in issue in the instant suit; that the suit was time barred by the Limitations of Actions Act and that the suit had been filed without the authority of Muiri who had previously withdrawn a suit against it. In response to KCB's application, Benjoh raised a preliminary objection on the ground that KCB filed its defence outside the prescribed period and therefore sought to have it struck out. The Judge however refused to strike out the defence on the basis that Benjoh had failed to demonstrate that summons to enter appearance had been served upon KCB. Likewise, the Judge declined the application by KCB holding that since HCCC 90 of 2009 was pending and raised similar issues as the instant suit, the instant suit would be stayed pending the finalization of that previous suit.

11. Aggrieved by the said ruling, KCB filed the appeal (Civil Appeal No. 137 of 2010) which is the subject of the instant application, and Benjoh filed a cross-appeal. In the appeal, KCB contended that the Judge misdirected herself by failing to appreciate the effect of the consent entered into by the parties which had finally resolved the dispute between them. Further, that the Judge erred by failing to appreciate that the suit was res judicata and it was barred by the *Limitation of Actions Act*.

12. In its cross-appeal, Benjoh faulted the Judge for failing to strike out KCB's defence which was filed out of time and for failing to enter judgment against KCB for failing to file appearance and defence within the prescribed period.

13. On its part, Bidii instituted Civil Appeal No. 174 of 2010 against the same ruling. It complained that the Judge in her determination failed to appreciate that Muiri, as the original owner of LR No. 10075, having discontinued its suit against KCB on 29th September 2008, Benjoh lacked locus standi to institute the suit. It further faulted the Judge for failing to appreciate that the issues raised in the suit had previously been canvassed even before her and she had found the same to be res judicata. There is also the ground of appeal that the Judge had failed to appreciate the consent previously recorded and upheld by the various courts.

14. The appeals, with the consent of the parties, were canvassed by way of written submissions which the parties highlighted orally in Court. This Court, (Nambuye, Asike-Makhandia & M'inoti, JJ.A.) after considering the appeals and the cross-appeal, identified and determined the following issues in the judgment dated 15th December 2017: whether the dispute between the parties was re-judicata; what was the effect of the consent order recorded before Githinji, J. on 4th May, 1992; and finally, whether KCB's exercise of its statutory power of sale over LR No. 10075 was justified.

15. In determining the question whether the dispute was res-judicata, the Court stated:

> " The history of this matter shows a vexatious litigant who in spite of having lost all the fourteen cases and despite the costs involved is still willing to further subject KCB and Bidii to ceaseless litigation. Justice demands that a successful party in litigation be allowed to enjoy the fruits of its litigation. It is time the respondent accepted the inevitable despite the consequences such a possibility portends to it and stops further litigation on this long running dispute which has all been about KCB's exercise of its statutory power of sale and accounts. To open up any further litigation would complicate matters as they stand and goes against the pursuit of finality in this dispute."

16. Concerning the consent order, the Court's findings were:

> " The consent has been affirmed by all the courts of record. In HCCC 1576 of 1999, the High Court in its judgment held that, "For the avoidance of doubt, the consent order of 4.5.1992 in HCCC 1219/92 remains the decision of the court in the dispute between parties and I so affirm."
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> This Court of Appeal in Civil Appeal No. 239 of 2004; Benjoh Amalgamated & Another v KCB dealt with the issue of consent order as follows,
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> > " "All those suits ended or were terminated in favour of the Respondent but on 4th April, 1997, some five years after the original suit was filed and the consent judgment entered the two Appellants went back to Civil Case No. 1219 of 1992 and under Order 44 Rule 1 asked Githinji, J (as he then was) who had recorded the consent judgment to review or set aside the consent judgment. The reasons for that application are not really relevant. What is relevant is that Githinji, J. heard the application, and by his order dated 31st October, 1997 allowed the same and set aside the consent judgment. The present Respondent was aggrieved by the order of Githinji, J. and appealed to this Court vide Civil Appeal No. 276 of 1997. By its judgment dated and delivered Supreme Court. In its ruling rescinding the

leave, the apex court pronounced itself in Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another [2016] eKLR as follows, "

A Court's Judgment and/or Ruling, in the perception of *the Constitution* and the law, is an edict that resolves a live issue of controversy, and is by no means an abstract pronouncement. In asking this Court to pronounce itself on the propriety of a missing record of the High Court, the Court is being called upon, in the very first place, to determine the question of the legality of the consent made by the parties herein in that missing record. That question was settled as far back in time as 1998. It is not conceivable that this Court should reopen that consent. Since that 10th March, 1998, rights, obligations and interests have crystallized, and they carry all validity, and embody proper and legitimate expectations. The system of justice that is upheld by the Court of law, will not tamper with such rights and obligations, even where some parties may feel aggrieved."

This Court is bound by those findings. This Court too cannot depart from the findings of fact previously reached by the trial courts as they were based on evidence. We think we have said enough to demonstrate that the question or the fate of the consent order has been settled by the highest court in the land and is therefore not amenable to challenge by Benjoh."

17. Concerning KCB's exercise of its statutory power of sale, this Court stated:

"It should also be remembered that the charge over the sold property was created after KCB requested or demanded further security for the loan facility. L.R. No. 10075 was thereafter charged upon that demand and therefore was given as a security for the loan. Benjoh cannot therefore argue that KCB exercised its right of sale over the wrong property. The said property had been charged to secure the loan and was sold upon default. In our view it was within KCB's right to choose upon which property to exercise its rights over."

18. Aggrieved by the above judgment, Benjoh moved this Court by an application dated 16th February 2018, the subject of this ruling in which it seeks a raft of prayers all targeted at re-opening, reviewing and setting-aside the judgment of this Court delivered on 15th December, 2017 and praying that its appeal which was dismissed be allowed. The application is founded on Articles 25, 159, 163(4) (b), 164, and 259 of *the Constitution*, Rule 24 (1) of the Supreme Court Rules, 2012, Sections 3, 3A & 3B of the *Appellate Jurisdiction Act*, Rules 1 (2) and 31 of the Court of Appeal Rules.

19. The grounds in support of the application for review are as follows:

a. To date the loan account has never been closed and continues to attract interest at undisclosed interest rates; (b) it has been impossible to trace and/or establish the whereabouts of Mr. Gideon Kaumbuthi Meenye; (c) Benjoh came into possession of material evidence only in December 2017 being the evidence of Mr. Meenye who allegedly entered into the impugned consent on its behalf; (d) Mr. Meenye has disavowed his participation in the alleged consent; (e) following a request by Mr. Meenye, the Inspector General of police is investigating the circumstances under which the impugned consent was entered into; (f) Benjoh did not have in its possession the new evidence at the time and would not have obtained it even with due diligence; (g) the consent is a nullity having been entered into without the knowledge or participation of the applicant; (h) the continued validation of the impugned consent is obviously an egregious mistake that has visited grave injustice upon Benjoh and driven it away from the seat of justice for the last 25 years; and, (i) there has been no unreasonable delay in bringing the instant application;.

20. During the hearing of the application on 18th March 2018 Mr. Kyalo, learned counsel for the applicant, abandoned prayer two for certification to the Supreme Court in accordance with Article 163 (4) of *the Constitution* and leave to appeal to the Supreme Court.

Instead, learned counsel stated that the applicant was only pursuing the prayer for review.

21. The parties filed written submissions in support of their respective positions which they highlighted during the virtual hearing on 18th March 2018.

22. We have considered the grounds in support of the application, the supporting affidavit sworn by the applicant's director Capt. Kungu Muigai on 16th February 2018 and his supplementary affidavit sworn on 14th March 2024 and the annexures thereto. We have also considered KCB's replying affidavit sworn on 8th June 2018 by Bonnie Okumu, KCB's Head, Legal Service and the annexures thereto, and Bidii's replying affidavit sworn on 22nd June 2018 by one Rahul Dilesh Bid, its director, and the annexures thereto.

1. The applicant's prayer for review is premised on the following grounds:

(a) in overturning the decision of Lady Justice Khaminwa of 6th July,2009 and 17th November 2009 this Court curtailed a bank customer's undoubted right to have full and proper accounts rendered by a banker;

(b) this Court bestowed upon the Bank the liberty to exercise a statutory power of sale without being held accountable;

(c) the applicant has obtained new and important evidence which vindicates its long-standing assertion that the proceedings of 4th May 1992 before the High Court in HCCC 1219 Benjoh Amalgated Limited vs Muiri Coffee Estate Limited & Kenya Commercial Bank were a nullity;

(d) the physical copy of the consent is not available in the court record as confirmed by the Deputy Registrar in a letter dated 17th June 2019;

(e) Mr. Gideon Kaumbuthu Meenye, the advocate who purportedly entered into the consent on behalf of the applicant has sworn on oath that he never entered into the said consent and has disavowed the same in its entirety;

(f) over the years it has not been possible for Benjoh to establish the whereabouts of Gideon Kaumbuthu Meenye and only managed to trace him and obtained his affidavit in December 2017;

(g) Mr. Gideon Kaumbuthu Meenye was never engaged by Benjoh as its advocate in any proceedings before the court;

(h) Mr. Gideon Kaumbuthu Meenye did not hold a practicing certificate as at 4th March 1992 according to an advisory letter from LSK;

(i) investigations by the National Police Service concluded that KCB and Bidii were culpable because they conspired to defraud the applicant by deceiving it about the market price of the property contrary to section 317 of the Penal Code;

(j) Benjoh did not have in its possession the new and material evidence at the time and would not have obtained it despite due diligence;

(k) the continued validation of the consent is obviously an egregious mistake that has visited grave injustice upon Benjoh and driven it from the seat of justice repeatedly for the last 25 years;

(l) the applicant is entitled to substantive justice which must not only be done but seen to be done; and

(m) this Court has residual jurisdiction to re-open, review and set aside the orders on account of new and material evidence in possession of the applicant.

23. The gravamen of Mr. Kyalo's argument was that the applicant has obtained new and important evidence which was previously unavailable, which qualifies to be exceptional circumstances justifying the review and setting aside this Court's decision of 15th December 2017. Counsel relied on this Court's decision in Musiara Limited vs William ole Ntimama [2004] eKLR in support of the proposition that this Court can reopen/review its final decisions where a party has been deprived of the opportunity of presenting his case, and such proceedings can be declared null and void. He submitted that since it has been established that the advocate who purported to enter into the impugned consent of behalf of Benjoh did not have a practicing certificate, the consent order and the proceedings before the High Court were invalid, and therefore, they ought to be set aside.

24. Mr. Kyalo further argued that this Court's inherent jurisdiction under section 1A, and 1D of the *Appellate Jurisdiction Act* is meant to cure any injustices occasioned by defective proceedings. He relied on Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & Others [2013] eKLR in support of the holding that technicalities should not hinder this Court's overriding objective under the above provisions.

25. Mr. Nyachoti, the 1st respondent's learned counsel, relied on his client's replying affidavit. He described the applicant's application as grossly misconceived, misplaced, frivolous, mischievous, vexatious and an abuse of the court process. He urged this Court to be slow in exercising its residual jurisdiction to review its decision where there are laches or where legal rights have accrued in favour of innocent third parties which cannot be interfered with without causing injustice.

26. Counsel maintained that Mr. Meenye has always been available since 1992, that the issue of execution of the consent was dealt with by this Court in Civil Appeal No. 276 of 1997 in its judgment of 10th March 1998. He contended that it took Mr. Meenye over 20 years to swear the affidavit and added that Benjoh has not demonstrated how the said affidavit is new evidence to merit this Court's discretion. He submitted that Mr. Meenye's affidavit was not part of the evidence before the trial Court, therefore it cannot be introduced at the appellate stage. Mr. Nyachoti further argued that this Court, vide a ruling delivered on 20th June, 2014 dismissed Benjoh's invitation to review its judgment delivered on 10th March 1998 which Benjoh now seeks to be reviewed again just because it was delivered before the promulgation of 2010 Constitution.

27. Mr. Nyachoti submitted that post the 2010 court decisions have held that this Court's jurisdiction to review its decisions strictly is solely restricted to the decisions in which there exists no appeal and even then, to only correct errors of law that have occasioned real injustice or miscarriage of justice eroding public confidence in the administration of justice. In support of the foregoing, Mr. Nyachoti cited this Court's decision in Nguruman Ltd vs Shompole Group Ranch & Another (2014) eKLR in support of the proposition that this Court's jurisdiction to review its judgments is exercised in limited circumstances to avert opening a flood gate for applications challenging the correctness of decisions.

28. Mr. Issa, the 2nd respondent's learned counsel in opposition to the application relied on his client's replying affidavit and submitted that no explanation has been provided why it took over 20 years to procure Mr. Meenye's affidavit that purports to discredit the consent orders recorded on 4th May 1992. Furthermore, the firm of Meenye and Kirima Company Advocates is registered in Kenya and in the Law Society of Kenya's database, therefore, Benjoh would not have had any challenge in locating Mr. Meenye to testify before the High Court in HCCC 1576 of 1999, Benjoh Amalgamated & Anor vs. Kenya Commercial Bank Limited, however, no attempts were made to get in touch with Mr. Meenye until the delivery of this Court's judgment.

29. Mr. Issa, learned counsel, submitted that the issue of the consent order is not new and has been the subject of adjudication in the following cases: Supreme Court Motion Nos. 42 and 43; Kenya Commercial Bank Limited vs Muiri Coffee Estate and Another; Civil Application No. Sup. 16 of 2012 (UR 9/2012 Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited; Civil Appeals Nos. 107, 137 and 174 OF 2010; Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited and Another; Civil Appeal No. 100 & 106 of 2010: Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited; Civil Appeal 56 of 2012; The Commissioner of Police & Others vs Kenya Commercial Bank Limited & 4 Others; and Civil Appeal No. 276 of 1997; Kenya Commercial Bank vs Benjoh Amalgamated Limited and Another.

30. Mr. Issa further submitted that this Court will only exercise its jurisdiction to review its decisions in exceptional circumstances where the need to obviate injustice outweighs the principle of finality in litigation and relied on Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited & 2 Others [2016] eKLR in support of the said proposition.

31. Mr. Issa contended that the Supreme Court in rescinding the leave granted by this Court to the applicant to appeal to the Apex Court held that it was bound by the findings of fact previously reached by the trial court because they were based on evidence. Therefore, the question or the fate of the consent has been settled by the highest Court in the land, hence it cannot be challenged.

32. He also submitted that the instant application is prejudicial to the 2nd respondent and cited this Court's decision in Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR that allowing a party to introduce new evidence aT the appellate stage is prejudicial to the opposing party and offends public policy and the law.

33. Counsel concluded by arguing that it has taken over 20 years for Mr. Meenye to swear the affidavit disowning the consent, and maintained that review orders cannot be granted where there are laches or where rights have accrued in favour of innocent third parties. Counsel underscored that the 2nd respondent was not a party to the consent and it is an innocent purchaser for value and the proprietary rights over the suit property have been vested in it for over 20 years. He relied on this Court's decision in Benjoh Amalgamated limited & Another vs Kenya Commercial Bank Limited [2014] eKLR in support of his aforesaid argument.

34. We have evaluated the grounds and authorities cited in support of and against the application. This application will stand or fall on two issues. The first issue is a pertinent jurisdictional precept which is whether it is open for this Court to entertain and determine the instant application which seeks to review, vary or set aside the consent recorded on 4th May 1992 in light of the Supreme Court determination in Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR. This is the first hurdle which this application must surmount. The second issue is whether the application satisfies the tests laid down by decided cases to merit the review sought.

35. The Apex Court in the above case after considering the chequered history of the litigation between the parties held as follows regarding the same consent this Court is being invited to review, vary or set aside:

> "(89) As the issue of the consent in this matter was determined by the final Court of the time, namely the Court of Appeal, and before the establishment of this Court, we have no jurisdiction to reopen it by granting certification in this matter." (Emphasis added). "[104] A Court's Judgment and/or Ruling, in the perception of *the Constitution* and the law, is an edict that resolves a live issue of controversy, and is by no means an abstract pronouncement. In asking this Court to pronounce itself on the propriety of a missing record of the High Court, the Court is being called upon, in the very first place, to determine the question of the legality of the consent made by the parties herein in that missing record. That question was settled as far back in time as 1998. It is not conceivable that this Court should reopen that consent. Since that question was first determined with finality on 10th March, 1998, rights, obligations and interests have crystallized, and they carry all validity, and embody proper and legitimate expectations. The system of justice that is upheld by the Court of law, will not tamper with such rights and obligations, even where some parties may feel aggrieved."
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> 1. As the Apex Court was categorical that the question of validity of the consent was determined with finality way back in 10th March, 1998, pursuant to Article 163 (7) of *the Constitution*, this Court is bound by the decisions of the Supreme Court. It is mind-boggling that the applicant is inviting this Court to re- open the same consent that the Apex Court declined to re- open. The applicant is naively or mischievously asking this Court to circumvent the Supreme Court's decision. We decline the invitation to do so. On this ground alone, the application collapses.

36. The next issue is whether the applicant has satisfied the threshold to merit the review orders sought. Undeniably, errors can creep into judgments necessitating correction by the Court, albeit, in rare and extremely exceptional cases. Perhaps, that's why Lord Wilberforce proclaimed the general approach which upholds the finality of Court decisions in Ampthill Peerage Case (1976) 2 All ER 411, (1977) AC 547, but emphasized that judgments may be attacked in rare and limited cases where the facts justifying the re-opening are strictly proved. He stated:

> "... For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals; so the law, exceptionally, allows appeals out of time; so the law still more exceptionally allows judgments to be attacked on the ground of fraud; so limitation periods may, exceptionally be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

37. The Court of Appeal (England and Wales) in Taylor and Another vs Lawrence and Another (2002) EWCA Civ 90 held that it had a residual jurisdiction to re-open an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. It stressed that a court has implicit power to do that which is necessary to achieve the dual objectives of an appellate court, which

are- (a) to correct wrong decisions so as to ensure justice between the litigants involved; and (b) to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. PARAGRAPH 38.

In Australia, the case of Autodesk Inc vs Dyason (No. 2) (1993) HCA 6; (1993) 176 CLR 300 set forth the following principles to be preferred in applications for review:

i. the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law;

ii. as this Court is a final Court of Appeal, there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment; and

iii. it must be emphasized, however, that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a back-door method by which unsuccessful litigants can seek to re- argue their cases. (Emphasis added).

39. The Supreme Court of India in Rupa Ashok Hurra vs Ashok Hurra; Writ Petition (Civil) 509 of 1997 underscored the need for justice to transcend all barriers. It stated:

> "...Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. The rule of stare decisis is adhered to for consistency, but it is not inflexible in Administrative Law as in Public Law. Even the law bends before justice...Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order, the courts culled out such power to avoid abuse of process or miscarriage of justice."

40. This Court in Kamau James Gitutho & 3 Others vs Multiple Icd (K) Limited & Another (2019) eKLR acknowledged its residual jurisdiction to re-open its own decisions. In Chris Mahinda vs Kenya Power & Lighting Co. Ltd, Civil Application No. NAI 174 of 2005 (unreported) this Court stressed that such jurisdiction is to be exercised with caution and only in exceptional cases.

41. In Nguruman Ltd vs Shompole Group Ranch & Another (Supra), this Court placed fair hearing as the anchor of its discharge of judicial function and, therefore, ruled that it had the right to revisit its past decisions. In Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited & 2 Others (Supra), this Court underscored the need for fairness and justice to take priority over the principle of finality.

42. However, as was observed by this Court in Cecilia Situmai Ndeti and Michael Kyende Ndeti vs Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti (Deceased) & 4 Others, Civil Application No. E064 of 2019, this Court's residual power is tied to a discretion, which enables the Court to confine its use to the cases in which it is appropriate for the jurisdiction to be exercised. This Court also observed that the residual powers of this Court are not an open license for the court to exercise unlimited discretion. It stated that residual powers are invoked to effect fairness between the parties where a statute falls short of doing so, or where there is a gap in the law. The Court also held that the "residual jurisdiction" of this Court is available at a stage in which

the court is normally deemed to have lost jurisdiction over the case or the subject matter involved in the appeal.

43. This Court's residual jurisdiction, as was recently held in *AVH Legal LLP vs Raballa & 8 Others Civil Appeal (Application) 117 of 2018* (un reported) delivered on 3rd March, 2023 is to re- open a decided case in appropriate and exceptional cases, such as when judgment- (a) was obtained by fraud or deceit; (b) was a nullity; (c) was given under a mistaken belief that the parties consented to it; (d) was given in the absence of jurisdiction; (e) the proceedings adopted were such as to deprive the decision or judgment of the character of a legitimate adjudication; or (f) that it was rendered with fundamental irregularity.

44. It is clear from decided cases that a party is not entitled to seek a review of a judgment delivered by a Court of Appeal merely for the purpose of a rehearing and obtaining a fresh decision in the case. Departure from the general principle of finality of court decisions is justified only when circumstances of a substantial and compelling character make it necessary to do so. The germane issue urged by the applicant is that it discovered new evidence. The alleged new evidence is an affidavit sworn by one G. K. Meenye on 21st December 2017 in which he disowns the consent recorded on 4th May, 1992 in HCC No. 1219 of 192; Benjoh Amalgamated Limited and Another vs Kenya Commercial Bank Limited. In the said affidavit, Mr. Meenye denies that he recorded the said consent. He also denies that he was the counsel on record in the said matter or ever having been instructed by Benjoh and/or Muiri Coffee Estate Limited to represent them in the said case. Benjoh avers that the said information was not within its knowledge at the time this Court delivered its judgment on 15th December, 2017. The applicant also argues that Mr. Meenye did not have a practicing certificate as at the time of recording the consent, therefore, the consent order was invalid, including the proceedings in HCC No. 1219 of 192; Benjoh Amalgamated Limited and Another vs Kenya Commercial Bank Limited.

    2. To qualify as new evidence, an applicant must demonstrate that the evidence was not adduced in the proceedings in question; and it could not have been procured despite exercise of reasonable diligence. Evidence is "compelling" if the Court considers it to be reliable and substantial and, when considered in the context of the outstanding issues, the evidence appears to be of high probative value.

    3. It is common ground that the consent in question was recorded in Court on 4th May 1992. As at the time the instant application was filed on 16th February 2018 the consent had been in existence for 26 years. As at today, the consent has been in existence for the last 32 years. Relevant to this determination is the fact that this consent has been the subject of numerous court decisions as highlighted earlier. For example, in Civil Application No. SUP. 16 of 2012 in which the applicant sought certification and leave to appeal to the Supreme Court, this Court at paragraph 12 of its ruling was of the view that the applicant's remedy regarding the said consent lies elsewhere in law.

    4. One wonders why during the numerous cases the applicant filed in the High Court and in this Court including the above application and also the application we alluded to earlier in which the applicant sought to set aside the consent, the applicant never, even in the slightest manner alluded to the issues now being canvassed before us. The applicant now wants this Court to believe that it took all those years to discover that it never instructed Mr. Meenye to represent it. The applicant now wants us to believe all this time it never knew its lawyer on record. The applicant is suggesting that Mr. Meenye emerged from nowhere and actively represented it in Court without its instructions. Such assertions are in our view the hallmark of dishonesty which should not find its way into the corridors of justice. Further, the applicant appears to be approbating and reprobating. On one hand it suggests that there was no consent recorded, yet on the other it seems to suggest there was consent but it was entered in to by counsel whom

they had not instructed and without its blessing. We, in the premises, find absolutely no merit in all the grounds cited in support of the review sought. Consequently, the prayer for review is dismissed.

5. In summation, the application dated 16th February, 2018, lacks merit and it is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K.M'INOTI

.....

JUDGE OF APPEAL

S.ole KANTAI

.....

JUDGE OF APPEAL

F.TUIYOTT

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR