



**Mbarak v Freedom Limited & 4 others (Civil Appeal (Application) E028 of 2022)
[2024] KECA 1919 (KLR) (11 October 2024) (Ruling) (with dissent - KI Laibuta, JA)**

Neutral citation: [2024] KECA 1919 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E028 OF 2022
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
OCTOBER 11, 2024**

BETWEEN

OMAR AWADH MBARAK APPELLANT

AND

FREEDOM LIMITED 1ST RESPONDENT

BOARD OF MANAGEMENT BUNI PRIMARY SCHOOL 2ND RESPONDENT

DIRECTOR OF SURVEY 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

MINISTRY OF EDUCATION 5TH RESPONDENT

(Being an application for joinder, stay of execution and review of the Judgment and Orders of the Court of Appeal of Kenya at Mombasa (Murgor, Laibuta & Odunga, JJ.A.) delivered on 23rd February 2024 in Civil Appeal No. E028 of 2022)

RULING

Ruling of Dr. K. I. Laibuta

1. Before us is a Notice of Motion dated 26th March 2024 filed by the Board of Management of Buni Primary School, the applicant (which is described in the Motion as “2nd respondent/applicant”), pursuant to rule 55 of the Court of Appeal Rules, which makes provision for hearing of applications before this Court, but which, evidently, has no significant bearing on the orders thereby sought.



2. The applicant's Motion is supported by the annexed affidavit of Robert Vura Matsungu (the Chairman of the applicant's Board of Management) sworn on 25th March 2024 essentially deposing to the 12 grounds on which it is anchored. The applicant seeks a raft of 13 orders, namely:

- “1. Spent
2. That pending the hearing and determination of this application inter-parties the Applicant herein be granted leave to join these proceedings as an interested party.
3. That pending the hearing and determination of this application inter-parties an order do issue staying the judgment delivered on 23rd February 2024 and any further dealings in regards to the suit property comprised in plot MN/V/2028 (Original Number MN/V/1948 – Mazeras).
4. That pending the hearing and determination of this application inter-parties the Director of Survey be granted leave to join these proceedings as the 2nd Interested party.
5. That pending the hearing and determination of this application inter-parties the Chief Land Registrar be granted leave to join these proceedings as the 3rd interested party.
6. That pending the hearing and determination of this application inter-parties the Ministry of Education be granted leave to join these proceedings as the 4th interested party.
7. That this honourable court be pleased to summon the Director of Survey to issue a report confirming on which plot parcel the school lies.
8. That this honourable court be pleased to order that the Director of Survey draw out a deed plan and survey as per the attached plan DRG No 2 of October 2018.
9. That upon granting prayer number 5 this honourable court be pleased to direct that the Chief Land Registrar do issue title in line with the said plans to Applicant.
10. That in the alternative this honourable court direct that the matter be heard do novo at the High Court for purposes of summoning the Director of Survey to confirm the plot location of the school and to issue a respective deed plan to allow for the registration and issuance of Title to the school by the Land Registrar.
11. That the Applicant be at liberty to join the fresh proceedings at the High Court as an interested party.
12. That this honourable court be pleased to review its judgment dated 23rd February 2024 and the resultant decree issued on 5th March 2024 and have the same set-aside and in its place do issue a judgment awarding the Applicant 3 acres on where the school is located.
13. That the costs of this application be provided for.”



3. In summary, the grounds on which the applicant's Motion is made are: that there is eminent risk of Buni School being relocated/evicted or dealt in a manner that threatens the rights of the citizens, more so the children; that the proceedings of the High Court and the Court of Appeal leading up to the judgment delivered on 23rd February 2024 did not consider the interests of the school; that the applicant and "citizens of Buni School" face the risk of substantial loss of its assets and property and infringement of their rights; that the matter proceeded without the participation of the applicant, who ought to have been a party as they were never served with pleadings; that the judgment and decree issued is not only grossly unfair, but irregular and unconstitutional as it adversely affects the applicant; and that it is only fair and just that the said judgment and decree be set aside and the application allowed as prayed.
4. Supporting the applicant's Motion, the 3rd, 4th and 5th respondents relied on the replying affidavit of G. O. Nyangweso (the Land Registrar in charge of Mombasa Registry) sworn on 11th April 2024 stating, inter alia, that the 4th respondent (the Chief Land Registrar) is not opposed to being joined as a party to "the suit" save that he/she ought to be joined as a "respondent" and not as an "interested party" in order to shed more light on the disputed property; that the 4th respondent, as the custodian of all land documents, should have been a party to the suit in the superior court so as to present records of the suit property before delivery of the judgment; and that it is in the interest of justice that the applicant's Motion be allowed.
5. It is noteworthy that the accompanying grounds in support of the application dated 26th March 2024 merely replicate the contents of G. O. Nyangweso's affidavit aforesaid, and nothing more needs to be said of it.
6. The 1st respondent (Freedom Limited) did not file any affidavit in response to the applicant's Motion.
7. Opposing the Motion, Omar Awadh Mbarak (the appellant) filed a replying affidavit sworn on 5th April 2024 contending that the joinder of parties sought by the applicant is a ploy by the 1st respondent (Freedom Limited) to relitigate by proxy using the applicant; that the applicant's claim is inextricably intertwined with the 1st respondent's claim; that, by the principle of res judicata, this Court lacks jurisdiction to hear and determine the application; that this Court became functus officio upon delivery of its judgment on 23rd February 2024; that the applicant is slyly seeking to re-open the case; that the application is without merit, misconceived, bad in law and amounts to gross abuse of the Court process; and that it ought to be dismissed with costs.
8. In addition to the foregoing, the appellant avers that he is nonetheless ready and willing to donate to the applicant a 4- Acre portion of the suit property in place of the 3 Acres prayed for, and on which the school is currently situate; that he will personally undertake the subdivision exercise at his own cost and ensure that a title deed is issued to the school in respect of the 4 Acres; and that he undertakes to spare the school from eviction in execution of the judgment, a figurative olive branch extended in a sworn statement, and in which one would reasonably take comfort.
9. Along with his replying affidavit, the appellant filed a notice of preliminary objection and grounds of opposition dated 5th April 2024, whose contents essentially replicate the facts deponed to in his replying affidavit.
10. In a further affidavit sworn on 8th April 2024 and filed in reply to the appellant's replying affidavit, preliminary objection and grounds of objection aforesaid, Robert Vura Matsungu contended that the issues raised in the applicant's Motion are not res judicata; that this Court has jurisdiction to entertain the application; that the appellant's offer of 4 Acres is suspect and appears to be an attempt to silence the applicant from presenting the truth about the suit property to this Court; and that its claim and



interest is on its own behalf as a public school, and in the best interest of school-going children of the Buni school community.

11. Learned counsel for the applicant, M/s. JMK Advocates LLP, filed written submissions and case digest dated 9th April 2024 in support of the applicant’s Motion. Counsel cited the cases of Benjoh Amalgamated Limited & Another vs. KCB Limited [2014] eKLR, highlighting the inherent power of this Court to review its own decisions; LSK vs. CAK & 10 Others [2023] KESC 27 (KLR) where the Supreme Court held that “there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the superior court;” and Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others [2015] eKLR in which the Supreme Court defined an

“interested party” as “one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she will be affected by the decision of the court when it is made, such a person feels that his or her interest will not be articulated unless he himself or herself appears in the proceedings and champions his or her course.”

12. None of the other respondents filed written submissions, although learned counsel for the 1st respondent, Mr. Borona, made oral submissions in support of the applicant written submissions as highlighted orally by its learned counsel, Mr. Githinji Mwangi, who appeared with Ms. Arika for the applicant when the Motion came up for hearing on the Court’s go to Meeting virtual platform.
13. Likewise, Mr. Mwandeje, learned counsel for the 3rd, 4th, and 5th respondents, made oral submissions in support of the applicant’s Motion and of the submissions made by its counsel orally and in writing.
14. On their part, M/s. Muturi Gakuo & Kibara, learned counsel for the appellant, filed two sets of written submissions dated 12th April 2024 in support of their preliminary objection and in opposition to the applicant’s Motion. Counsel cited 3 judicial decisions in support of their preliminary objection, namely:

IEBC vs. Maina Kiai & 5 Others [2017] eKLR in which this Court pronounced itself on the doctrine of res judicata; Telkom Limited vs. John Ochanda [2014] eKLR; and Raila Odinga vs. IEBC & 3 Others [2013] eKLR, highlighting the principle of functus officio, namely that functus officio is an enduring principle that prevents the re-opening of a matter before a court that rendered the final decision.

15. With regard to the Motion, counsel cited the cases of Communications Commission of Kenya & 3 Others vs. Royal Media Services Limited & 7 Others [2014] eKLR in which the Court defined an interested party; and Five Star Agencies Limited & Another vs. NLC & 2 Others [2024] KECA 439 (KLR) where this Court defined “necessary parties” as ‘parties who are necessary to the constitution of the suit without whom no decree at all can be passed;” and “a proper party” as “... one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the court of law as being an interest which the court will enforce. A person who is only indirectly or commercially interested in the proceedings is not entitled to be added as a party.”
16. Having carefully considered the applicant’s Motion, the grounds on which it is anchored, the affidavits in support and in reply, the appellant’s preliminary objection, the rival submissions made orally and in writing, the cited authorities and the law, I am of the view that the Motion stands or falls on our determination of three main issues, namely: whether the applicant is competent to make the application for joinder and review of the impugned judgment; whether the applicant is entitled to orders staying the judgment; and whether the applicant has established a basis for review of this Court’s decision.



17. The 1st issue as to whether the applicant is competent to make the application before us raises two more questions as to whether an order for joinder of the applicant and the respondent's avails in the circumstances of this case; and whether the Court has power to re-open the appeal for retrial of the claims raised by the applicant this late in the day.
18. I hasten to observe that neither the applicant nor the 3rd, 4th or 5th respondents were party to the suit in the Environment and Land Court at Mombasa ELC Case No. 358 of 2016 – Freedom Limited vs. Omar Awadh Mbarak – whose judgment was the subject of appeal before this Court in Civil Appeal No. E028 of 2022 – Omar Awadh Mbarak vs. Freedom Limited – in which judgment was delivered on 23rd February 2024. Neither did they seek to be joined in the proceedings on appeal before hearing and determination thereof.
19. This Court rendered its judgment on 23rd February 2024, and it is this judgment and decree that the applicant seeks to be stayed and reviewed and, thereafter, that the orders sought in its Motion be granted.
20. To facilitate the desired review, the applicant prays that it be first joined as party to the already-determined appeal together with the 3rd, 4th and 5th respondents named in its Motion. The pertinent question is whether, in the circumstances of this case, there exists proceedings before this Court in which the applicant and the 3rd, 4th and 5th respondents are capable of being joined to facilitate re-litigation of their respective claims with the effect of introducing new parties as well as new evidence in the already-determined appeal so late in the day. I think not.
21. The propriety of an application for joinder after final judgment on appeal has been the subject of pronouncement by the Supreme Court to the effect that the door to further litigation (except, perhaps, on appeal to the Supreme Court or review by this Court on application by a party to the appeal) is firmly shut on final judgment as was the case here. The Supreme Court of Kenya in *JMK vs. MWM & Another* [2015] eKLR emphasized in no uncertain terms that:

“...an application for joinder of parties can be filed only in pending proceedings; that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings, either before, or during the trial; and that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable.” [Emphasis added]
22. The proceedings on appeal in which the applicant and the 3rd, 4th and 5th respondents seek to be joined came to an end on 23rd February 2024. With all due respect to counsel for the applicant and for the 3rd, 4th and 5th respondents, there are no pending proceedings in which the applicant, the 3rd, 4th and 5th respondents can be joined. Neither does the Court have power to re-open the appeal for retrial on evidence at the behest of strangers to the concluded appeal as though this were a court of first instance. Put differently, any stranger to the proceedings in the ELC and on appeal to this Court in the suit and appeal aforesaid is barred from seeking joinder as party to the appeal this late in the day.
23. As strangers to the appeal already determined by this Court, the applicant, the 3rd, 4th and 5th respondents have no locus standi to seek review of this Court's judgment and decree. In *Law Society*



of Kenya vs. Communications Authority of Kenya [2023] eKLR, the Supreme Court of Kenya held as follows on the significance of a party having locus standi in a matter:

“... Furthermore, there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the superior courts. A person in this context should therefore be a party with locus standi in the matter.”

24. I need not overemphasize the guiding principle that only a party to the appeal can move the Court for review of its decision albeit in exceptional circumstances as was observed in *The Supreme Court’s decision in Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR where the Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled “The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 which reads:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

25. As to whether this Court has jurisdiction to issue orders of stay following the determination of an appeal in the first instance is a matter upon which this Court has time and again pronounced itself. In the case of *in Mukesh Kumar Kantilal Patel vs Charles Langat* [2021] eKLR, this Court held that:

“It is trite that an application for stay by dint of Rule 5(2)(b) of the Court of Appeal Rules gives this Court discretionary powers to order stay of execution in order to preserve the subject matter of an appeal in order to ensure its just and effective determination. This relief was strictly to apply to matters that are yet to be heard and determined with finality by this Court. It was not envisioned to apply once this Court has issued its final orders. Hence this Court has no jurisdiction to issue orders staying its final decision delivered on 3rd October 2019.”

26. In the same vein, this position was well articulated by the Court in *Jennifer Koinante Kitarpei vs Alice Wahito Ndegwa & Another* [2014] eKLR thus:

“An application under Rule 5(2)(b) presupposes that such stays of execution of judgments or proceedings are only applicable when an appeal has been filed, under Rule 75 and is pending in this Court. The application under Rule 5(2)(b) contemplates a stay of the judgment of the High Court or any tribunal authorized by law while an appeal is pending in this court and NOT a stay of a final judgment of this court. Therefore, once a final judgment has been delivered in respect of any substantive appeal, this court becomes functus officio.”

27. Likewise, this Court in *Everton Coal Enterprises Limited v Kirundi & 5 others; Limited (Interested Party) (Civil Appeal (Application) 172 of 2010)* [2023] KECA 838 (KLR) (7 July 2023) (Ruling) reiterated this position and observed that:

“it is apparent that the application falls under Rule 5(2)(b) of the Court of Appeal Rules. Consequently, we have no jurisdiction to stay execution of the judgment of the Court. The applicant has not demonstrated to our satisfaction, any extraordinary circumstances



that would warrant this Court departing from the clear trodden path and clothe itself with jurisdiction, to stay its own final decision.”

28. To my mind, the foregoing judicial authorities to which I humbly subscribe are clear that, once a final judgment of this Court has been rendered, this Court has no jurisdiction to stay the judgment of the Court pursuant to rule 5(2) (b) of the Court’s rules, or at all, for the reason that, on conclusion of the appeal, the Court is functus officio. Neither does the Court have the jurisdiction to re-open and remit the issues already determined with finality to the court below for retrial in the circumstances of this case as sought in the Motion. That is not to say, though, that the applicant is not entirely without recourse elsewhere.
29. Turning to the 3rd and final issue, this Court having delivered its judgment on 23rd February 2024, its work was done and it became functus officio. Consequently, it was not open to a stranger to the appeal to seek review of its judgment. The Supreme Court of Kenya in *Kaluma vs. NGO Co-ordination Board & 5 others* [2023] KESC 72 (KLR) had this to say on the matter of review of its judgment on application by a person who was not party to the proceedings:
- “ 30. The court cannot entertain an application for review of its judgment filed by an applicant who was not a party to the proceedings as this goes to the root of the matter and sanctity of the already determined suit which was contested by the parties. Consequently, we find that the applicant is not competent to seek a review of the judgment under reference.”
30. In my considered view, the applicant has failed to establish any basis for stay, joinder and review of this Court’s decision. With regard to the reliefs sought, I consider the applicant’s Motion as a ploy to re-litigate the now-rested claims between the appellant and the 1st respondent. As the Supreme Court of Kenya in *Kaluma vs. NGO Co-ordination Board & 5 others* [2023] KESC 72 (KLR) held on an application similar to the one before us:
- “32. In our view, the application is a disguised appeal from this court’s judgment and does not fall within the confines of the parameters prescribed for review by statute and applicable case law.”
31. Having carefully considered the applicant’s Motion, the affidavits in support and in reply, the rival submissions, the cited authorities and the law, I reach the inescapable conclusion that the applicant’s Motion fails and is hereby dismissed with costs to the appellant. Orders accordingly.

Concurring Ruling of Murgor, JA

32. I have had the advantage of reading in the ruling of LAIBUTA, JA. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

Dissenting Ruling of Odunga, JA

33. The material facts and submissions in the application the subject of this ruling have been fully stated in the majority judgement which I have had the advantage of reading in draft and I consider it unnecessary to restate them here.
34. The instant application raises a very pertinent question of: what is the remedy available to a party who, due to reasons not of its own making, was unable to participate in the proceedings in the High Court and in this Court, upon discovery that a judgement was made by this Court on appeal to its detriment, supposed to do?



35. The applicant herein filed an application for review of this Court’s judgement in which this Court set aside the judgement of the High Court and declared, inter alia, that:

1. The estate of the late MBARAK AWADH SALIM is the beneficial owner of ALL that piece or parcel of land containing by measurement Nine Hundred and Seventy Three (973) Acres or thereabouts and known as Plot No. 287/3 Section V situate in the province of Seyidie at S.E of Mazeras Station and more particularly described and delineated on Deed Plan No. 21108.
2. A mandatory injunction be and is hereby issued to compel the respondent, its servants or agents or anyone claiming under it, to relinquish to the estate of the late Mbarak Awadh Salim (under which the appellant claims) vacant possession of the suit property, to wit, Plot No. 287/3 Section V situate in the province of Seyidie at S.E of Mazeras Station and more particularly described and delineated on Deed Plan No. 21108 and, further, to demolish or remove all or any buildings and structures previously erected by the respondent within 45 days from the date hereof, failing which the appellant shall be at liberty to undertake the demolition or removal thereof at the respondent’s cost.

36. The applicant in this application is the Board of Management of Buni Primary School. Buni Primary School, according to the applicant, occupies some 3 acres of the disputed property. It was neither a party before the Environment and Land Court nor before this Court on appeal. It contends that it was not aware of the proceedings that gave rise to this appeal as well as the proceedings in this appeal. It further contends that the said proceedings were not only grossly unfair, but irregular and unconstitutional as they adversely affect it. It is seeking, inter alia:

That this honourable court be pleased to review its judgment dated 23rd February 2024 and the resultant decree issued on 5th March 2024 and have the same set-aside and in its place do issue a judgment awarding the Applicant 3 acres on where the school is located.

37. There is no doubt that this Court has the jurisdiction to review its decision and the principles upon which this Court reviews its decisions are now well settled. In the case of Ndeti & another v Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti - Deceased) & 4 others Civil Application E064 of 2019) [2023] KECA 60 (KLR), this Court clarified that:

“The law as we understand it is that the general rule is that a Court of Appeal will not ordinarily re-open its decisions. But there are exceptions to the general rule, which as authorities suggest are reserved for rare and limited cases, where the facts justifying them can be strictly proved. 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. Ordinarily, the norm is that a judgment pronounced by the Court of Appeal is final and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. The Court may also re-open its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice...Whenever the residual jurisdiction is sought to be invoked, the court must be satisfied that the case falls within the exceptional categories before it can accede to the application and reopen the case. One may without levity ask the question, how exceptional is exceptional? The language used in decided cases is necessarily general: apart from the descriptive phrase “exceptional circumstances”, the requirements are that the probability of a significant (“real”) injustice must be clearly established, and that there be no effective alternative remedy”.



38. However, as was held in *Benjoh Amalgamated Ltd v Kenya Commercial Bank Limited* [2014] eKLR, the residual jurisdiction of the Court to review its own decisions “should be invoked with circumspection”. In that case, the Court, after reviewing decisions from different jurisdictions, expressed itself 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)...It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice... This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice”.

39. In *Ndubi v Standard Limited (Civil Application No. 74 of 2019)* [2021] KECA 364 (KLR) Kiage, JA expressed himself as hereunder:

“I reiterate the constant refrain of this court that reviews are not provided for in our rules. They must never be thought of as common place exercises to be sought as knee-jerk response to decisions of the court that do not flatter a party’s fancy. We entertain applications for review only in exceptional circumstances where it is apparent that the usual principle of finality might work injustice...See also *Benjoh Amalgamated Ltd & another vs Kenya Commercial Bank Ltd* [2014] eKLR. I think that the court ought to be even less inclined to revisit and review rulings made at interlocutory stages such as the one sought to be reviewed herein. The court exists to determine appeals and does not have the luxury of engaging in such applications, and twice over at that. On point of principle therefore, I stand disinclined to the grant of this kind of application.”

40. In reaching its decision, the Court relied on *Mohammed Jawayd Iqbal (personal Representative of The Estate of The Late Ghulam Rasool Jammohamed) v George Boniface Mbogua* [2020] eKLR in which this Court held that:

“...the power to review, re-open and/or set aside judgments in concluded appeals is one that is exercisable only in exceptional circumstances. The court embarks on it cautiously, with circumspection and, we dare add, in the most compelling cases where the justice of the case patently demands that the court turn back and re-examine what is declared with finality. The burden to convince the court to do must lie with the applicant....”



41. In the case of *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, this Court stated that:

“In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in *Inco Europe Ltd & others* (supra) hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances. Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law.”

42. In the case of *Patrick Kitamonge Leparleen v Maralal Town Council* [2020] eKLR, this Court observed that:

“The above makes it clear that this Court does have a limited residual jurisdiction to review its decisions. The residual jurisdiction is to be exercised in very exceptional circumstances where the application has been brought without undue delay and only for the purpose of correcting errors of law that have occasioned substantial injustice or miscarriage of justice, and in regard to which errors there is no other alternative remedy. In addition, the Court will not invoke the residual jurisdiction to review its decision where to do so would interfere with rights of innocent third parties.”

43. Chief Justice, Lord Wolf, in his lead judgement in the case of *Taylor & another v Lawrence & Another* [2002] 2 All ER 353, dealt with both the justice principle and finality principle and held that the Court of Appeal:

“...had implicit powers to do that which was necessary to achieve the due objectives of an appellate Court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and 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. A Court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was tension between a court having such residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established and that might justify the Court of Appeal in taking the exceptional cause of reopening proceedings which it had already heard and determined. It should however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy.”

44. It is argued that the only person who can invoke the Court’s residual power is a party to the case. This argument is hinged on the decision of the Supreme Court in *Law Society of Kenya v Communications Authority of Kenya* [2023] eKLR, where it was held that:

“....there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the superior courts. A person in this context should therefore be a party with locus standi in the matter.”



45. In my understanding, the Supreme Court did not categorically state that a relief can never be granted at an appellate stage to a party who did not litigate before the superior courts. The Supreme Court only appreciated the difficulty in doing so. Secondly, in that case, the Supreme Court was dealing with the issue of the locus standi of a person who was not a party in the court below, to appeal the decision and found that the definition of a person seeking to file an appeal only extended to a party who was aggrieved by a decision issued against him by the Court of Appeal and wished to prefer an appeal to the Supreme Court. The Court was not dealing with an application for review like in the present case where the applicant, not being a party to the proceedings in the court below and in this Court, cannot, based on *Law Society of Kenya v Communications Authority of Kenya* (supra), cannot appeal to the Supreme Court. On the other hand, this Court having made its decision, the Environment and Land Court, which tried the case in the first instance, cannot, under the guise of entertaining the applicant's application, set aside this Court's judgement. In other words, the applicant has no effective alternative remedy backwards or forwards and that gives it the locus to bring this application.

46. The second decision is that of Supreme Court of Kenya in *Kaluma v NGO Co-ordination Board & 5 others* [2023] KESC 72 (KLR) in which it was held that:

“The court cannot entertain an application for review of its judgment filed by an applicant who was not a party to the proceedings as this goes to the root of the matter and sanctity of the already determined suit which was contested by the parties. Consequently, we find that the applicant is not competent to seek a review of the judgment under reference.”

47. In that case the Supreme Court's jurisdiction was invoked pursuant to section 21A of the [Supreme Court Act](#) which provides that:

The Supreme Court may review its own decision, either on its own motion, or upon application by a party in any of the following circumstances—

- a. where the judgement, ruling or order was obtained through fraud, deceit or misrepresentation of facts;
- b. where the judgement, ruling or order is a nullity by virtue of being made by a court which was not competent;
- c. where the court was misled into giving a judgement, ruling or order under the belief that the parties have consented; or
- d. where the judgement, ruling or order was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision. [Underlining mine].

48. It is clear that the Supreme Court exercises its powers of review pursuant to the strictures of section 21A aforesaid which expressly provides that such an application may only be made by a party. As already stated above, this Court's power of review is not expressly donated by any statutory provision or rule. In the absence of an express rule this Court in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known as King Woollen Mills Limited & 2 others* [2016] eKLR, in arriving at its decision, resorted to the provisions of Articles 10, 20, 25, 159 and 259 of [the Constitution](#) as well as section 3A of the [Appellate Jurisdiction Act](#) and held that:

“(52) 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 analysis 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.”

49. It is clear that this Court, in exercising its residual power of review, draws from the new constitutional dispensation as opposed to any particular statutory legal regime. This, in my view, is an inherent and intrinsic power which the court may draw upon to do justice between the parties and to secure a fair trial between them. As was held by Hancox, JA (as he then was) in Meshallum Wanguhu v Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986- 1989] EA 593:

“it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.”

50. It may well be that the applicant could commence fresh proceedings against the appellant with a view to carving out the parcel of land it occupies. However, why should the applicant be subjected to such a process when this Court has what it takes to do justice to it in this application and particularly when the party he is likely to sue is before this Court and is not objecting to that portion being carved out in favour of the applicant? To my mind confidence of the public in our system of justice would be boosted if we adopted a course that brings justice to all parties to the litigation with minimum costs pursuant to section 3A of the Appellate Jurisdiction Act which provides that:

The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

51. Waki, JA expounded on the overriding objective in the case of John Gakure & 148 Others v Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007 (UR) where he expressed himself as follows:

“The court is, however, aware of the emerging philosophy recently introduced by Parliament through enactment of sections 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Laws of Kenya. The construction of those provisions has since been made in several decisions of the Court. The overriding objective confers on the court considerable latitude in the interpretation of the law and rules made thereunder. And in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. The jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court’s view, dealing with a case justly includes inter alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in the court’s view, calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases.” [Underlining mine].

52. This Court, similarly held in the case of Mohamed Koriow Nur v The Attorney General & 2 Others Civil Application No. Nai. 347 of 2009 (UR) that:

“Prayer 4 of the application which sought an order or further orders as the Court may deem just to grant must have been predicated on sections 3A and 3B of the Appellate Jurisdiction Act which sections introduced the overriding objective of civil litigation...The said sections



which have their parentage in England since 1999 were tailored to enabling the court to deal with cases justly which includes

- (a) ensuring that the parties are on an equal footing;
- (b) saving expenses;
- (c) dealing with the case in ways which are proportionate
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting it appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

53. The Court emphatically held in *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] 1 KLR 226 that:

Litigants and their advocates should note that in the "O2" principle, they have a powerful ally where they are advancing its aims and a powerful adversary where they are bent on subverting its aims. The "O2 principle" is the hub upon which the objectives of the two Acts, their provisions and the rules made thereunder turn. It is a requirement of "O2 principle" "that the exercise of any power under the Act or the rules must be exercised in line with its principal aims. Similarly, the interpretation of any provision in the Acts and the rules has to be "O2" compliant.

One of the principal purposes of the double "OO principle" is to enable the Court to take case management principles to the centre of the Court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap." [Emphasis added].

54. It follows that one of the overriding objectives of the *Appellate Jurisdiction Act* and the Rules made under it is to save the parties of the unnecessary expenses thereby resolving disputes at a cost affordable to the parties hence promoting the right of access to justice under Article 48 of *the Constitution* which provides that:

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

55. Access to justice in my view not only mean physical access but also affordable access and the courts ought, where possible, ensure that its actions do not subject parties to incur unnecessary expenses or expenses that may be avoided by reducing a multiplicity of litigation while at the same time ensuring that the rules of natural justice are adhered to.

56. It was submitted that since the proceedings have come to an end, the applicant has no locus standi to make the instant application. However, as held in *Ndeti & another v Matei Julius Mulili Ndeti &*



Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti - Deceased) & 4 others (supra):

“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.”

57. From the above decisions I gather that:

1. The power of review exercisable by this Court is not provided for in our Rules or hence this Court has not been expressly statutorily conferred with the jurisdiction to reopen a decided matter.
2. That notwithstanding, this Court has residual constitutional jurisdiction to reopen a decided matter.
3. The jurisdiction to do so is only available in exceptional and limited circumstances where it is apparent that the usual principle of finality might work injustice and when circumstances of a substantial and compelling character make it necessary to do so.
4. That the jurisdiction is exercisable in cases of fraud, bias, or other injustice in cases where a manifest wrong has been done and it is necessary to pass an order to do full and effective justice with a view to correct the same and to boost the confidence of the public in the system of justice.
5. That the jurisdiction 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.
6. That to justify reopening of the matter, there must be a probability of a significant, real or substantial injustice or miscarriage of justice without an effective alternative remedy.

58. To my mind a person who stands the risk of suffering a significant, real or substantial injustice or miscarriage of justice and has no effective alternative remedy, may properly move this Court notwithstanding that he was not a party to the previous proceedings. This Court is, conversely, obliged to entertain such a person if to do so would boost the confidence of the public in the system of justice.

59. In this case we are dealing not with an individual but a primary school. The school was, admittedly not a party and was not afforded an opportunity of being heard both in the proceedings before the trial court and in this appeal. Based on the judgement of this Court, it risks eviction from the suit property. If that were to happen, the future of the students would be in jeopardy. In my view, a decision that preserves the school in the circumstances of this case would boost the confidence of the public in the system of justice. The converse is likely to lead the public to frown upon the justice system and lose confidence in the administration of justice. To my mind, there is no greater injustice than to subject a person to a prejudicial decision when he had no opportunity of being heard and when all avenues of going forward or backward have been foreclosed. As was held by this Court in the case of *Onyango Oloo v Attorney General* [1986-1989] EA 456:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”



60. The right of a hearing is one of the “ring-fenced” rights under our Constitution. Pursuant to Article 25 of thereof, the right to a fair trial is one of the rights that are non-derogable. It cannot be limited. Therefore, any procedural provision or pronouncement that purports to curtail that right would clearly fall foul of the constitutional edict. In my respectful view, if the avenue of review is interpreted in a manner that locks out a person whose right (in his case the right to protection of the property under Article 40) has been violated or threatened with violation, that interpretation would clearly have no basis under our current constitutional terrain. Article 22(3) of *the Constitution* which empowers the Chief Justice to make rules providing for court proceedings for the enforcement of the Bill of Rights expressly states that such rules must satisfy the criteria, inter alia, that the court, while the rules shall minimise on procedural technicalities, the rules of natural justice must be observed. By parity of reasoning any rules prescribing a procedure for review, must ensure that the rules of natural justice are observed.
61. That said, are there exceptional circumstances in this case?
- In my respectful view, there are. The appellant, against whom the orders are directly sought, has agreed to cede to the applicant not only the area that the applicant seeks but more than that by an acre. In his replying affidavit sworn on 5th April 2024, the appellant deposed at paragraph 7 as follows:
- That as part of supporting the local community, the estate of my late grandfather and I are willing to donate to the 1st Intended Party the 4-acre portion of the suit property instead of the 3 acres prayed for on which the school is currently situated, wherein I will personally undertake the subdivision exercise at my own costs and ensure that a title deed to that effect is issued to the school of 4 acres.
62. In other words, to grant the applicant the substantive order it seeks in the application will not be prejudicial to the appellant, who would ordinarily have opposed the application. With that concession, I do not see the basis for not granting the order, at least to that limited extent. That concession, in my view, places this matter in an exceptional category in the circumstances of this case since, as held in *Ndeti & another v Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti - Deceased) & 4 others*, (supra):
- “the language used in decided cases is necessarily general: apart from the descriptive phrase ‘exceptional circumstances’.”
63. At the hearing of the appeal oral submissions were made on behalf of the applicant which tended to deviate from the prayers sought in the application. With due respect, we can only deal with the application as presented before us. Parties cannot, without amendment, mutate their application and urge reliefs other than those sought.
64. Having considered the application, I would allow the same but limited to review of the judgment dated 23rd February 2024 and the resultant decree issued on 5th March 2024 and direct that the applicant be awarded 3 acres of the suit property where the school is located. If the appellant keeps its word as deposed to in the replying affidavit, nothing bars it from ceding one extra acre. Appropriate steps be taken, through the 3rd respondent in conjunction with the 4th respondent to carve out that portion from the suit property and that portion be registered in the name of Buni Primary School. In light of the findings I have arrived at, it is no longer necessary to consider the other prayers sought in the application.
67. I would make no order as to the costs of this application.



68. As such, and for the reasons advanced, I am unable to agree with the outcome of the Majority.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF OCTOBER, 2024

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

