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) (3 February 2023) (Ruling)

Neutral citation: [2023] KECA 60 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E064 OF 2019

HM OKWENGU, LA ACHODE & JM MATIVO, JJA

FEBRUARY 3, 2023

BETWEEN

CECILIA SITUMAI NDETI ..... 1ST APPLICANT

MICHAEL KYENDE NDETI ..... 2ND APPLICANT

AND

MATEI JULIUS MULILI NDETI & NZIOKI MULILI NDETI (ADMINISTRATORS OF THE ESTATE OF HARRISON MULILI NDETI - DECEASED) & 4 OTHERS ..... RESPONDENT

(An application for review and setting aside this Court's Judgment and all consequential orders delivered on 18th February, 2022) (M'inoti, Sichale & J. Mohammed JJ. A.)inCIVIL APPEAL NO. 64 OF 2019)

RULING

1. A synopsis of the germane facts which triggered the dispute between the parties herein is necessary in order to fully appreciate the application dated 12th May, 2022 the subject of this ruling. Fortunate for us, the factual matrix and history of this litigation was aptly captured in this Court's Judgment dated 18th February, 2022, (M'inoti, Sichale and Mohamed JJ.A.) which the applicants seek to review and or set aside. In the said Judgment, the learned Justices of this Court pithily observed that this appeal has had a long and chequered history pitting family members against each other over a period spanning above 40 years. The learned Justices quipped that this litigation has traversed between the High Court, the Environment and Land Court (ELC) and this Court.

2. This 4 decades plus litigation was ignited by an application dated 11th July, 2016 filed at the High Court by Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti), Syokwia Kiilu Ndeti & Vincent Somba Ndeti (Administrators of the Estate of the Late Julius

Kiilu Ndeti (Deceased), Gregory Mutheke Ndeti (Administrator of the Estate of the Late Mutheke Mutua Ndeti (Deceased), Urbanus Kioko Ndeti & Boniface Nthiwa Ndeti (Administrators of the Estate of the Late Alphonse Nthiwa Ndeti (Deceased), Alex Kiilu Ndeti & Esther Ngondu Ndeti Waqo (Administrators of the Estate of the Late Patrick Mutheki Ndeti (Deceased), the respondents in this application who applied for the revocation of the grant issued on 24th of January, 2013 and confirmed on 30th October, 2013.

3. In support of the nullification of the said grant, the respondents in this application stated:

   (a) some of the properties listed as forming the deceased's estate did not belong to the deceased but they belonged to the Ndeti family which comprised of the deceased and all his brothers (the respondents herein). The listed properties were: LR. Numbers 209/7311, 7741/82, 37/175, 7149/9, 337/991, 13323/1, 337/847, 337/923, Plot Numbers 1685, 3001, 3800, Mavoko Town Block 3/107, 3/2401, 3/1063, 3/2446, 3/2397 and 3/1387.

   (b) that the deceased held the said assets in trust for members of the Ndeti family;

   (c) that the Ndeti family operated a business partnership known as P. N. Ndeti & Bros through which the properties were acquired;

   (d) that suits arose between the deceased and some of his brothers over some of the properties;

   (e) a suit was filed by third parties, i.e. ELC No 1116 of 2015, seeking that the suit properties belonging to the partnership be shared out amongst the partners;

   (f) that the administrators sought to distribute the properties as part of the estate of the deceased yet the properties were acquired through the partnership;

   (g) by listing the properties as the free property of the deceased, the administrators disregarded court decisions holding that the said properties belonged to the Ndeti family.

4. The applicants in this application opposed the application for revocation stating:

   (a) none of the properties belonged to the Ndeti family since the brothers, including the deceased carried out business in their individual capacities, and accumulated properties in their individual capacities;

   (b) they denied that any of the suit properties had been subject of any litigation;

   (c) they denied knowledge of any court decision finding that the suit properties listed in the confirmed grant belonged to the Ndeti family;

   (d) they argued that the partnership had been de-registered by the Registrar of Companies and its assets distributed by its shareholders; and

   (e) that all properties listed in the grant belonged wholly to the deceased.

5. The High Court (Musyoka J.) in a ruling dated 14th July, 2018 delivered by Muigai J. on 21st June, 2018 in High Court Succession No 1578 of 2012 held:

   > " As it is there is no proper case before me for revocation of the grant herein for the reasons advanced by the applicants. It is not alleged, nor demonstrated, that the process of obtaining the grant was attended by the problems envisaged under section 76(a) (b) and (c), or the administrators failed to do the things expected of them as set out in Section 76(d), or that the grant had become useless and inoperative as contemplated by 76(e).

> The proper remedy for a person who is unhappy with the confirmation process or with the orders granted is to challenge the same on appeal or on review. Indeed, such a person ought to take advantage of the provisions of rule 40 of the Probate and Administration Rules, and raise protests to the proposed confirmation, which
>
> would then allow them to be heard as per the provisions of rule 41 of the said rules. There was occasion for applicants to follow that process, it has not been demonstrated that they were unaware of the same. The material that they have placed before me ideally ought to have been placed before the court at confirmation of the grant.
>
> For the reasons given above, I do not find basis upon which I should revoke the grant made herein. I shall accordingly dismiss the application dated 11th July, 2016 with costs to the administrators."

6. Aggrieved by the above decision, the respondents in this application filed this appeal citing seven grounds namely:

   (i) the trial judge erred in the manner in which he analyzed the evidence;

   (ii) the ruling of the trial court had the effect of setting aside a judgment of this Court in Civil Appeal No 56 of 2013 holding that LR 7149/9 registered as LR 1872/2 did not belong to the deceased though registered in his name but belongs to the Ndeti family;

   (iii) the trial court failed to consider that the interested parties (the appellants herein) were unaware of the existence of ELC Cause No 1116 of 2015 which sought for an order that the partnership properties be shared out among the partners.

7. This Court (M'inoti, Sichale and J. Mohamed JJA) in a judgment dated 18th February, 2022 in CA 64/2019 allowed the appeal, set aside the ruling by Musyoka J dated 14thJune, 2018 and delivered by Muigai, J. on 21st June, 2018, revoked the confirmed grant issued on 30th October, 2013, prohibited the distribution of the contested properties pending determination of ELC Cause No 1116 of 2015, and ordered each party to bear their own costs in this Court and in the High Court since the dispute involves family members.

8. It is the Judgment of this Court in CA 64/2019 which the applicants now seek to disturb. Vide their application dated 12th May, 2022, the subject of this ruling, they pray that the said judgment be reviewed and or set aside and this Court re- opens the appeal and remit it for fresh hearing. Lastly, they pray for any other orders or directions this court may deem fit to issue. They invoked sections 3 and 3A of the *Appellate Jurisdiction Act*, Rules 1 (2), 5(2), 29, 35, 42 of the *Court of Appeal Rules, 2010*, Articles 10, 20(3) (a) & (b), 48, 50, 159 (1) & (2), 164 (1) & (3) and 259 (1) & (3) of *the Constitution* and all enabling provisions of the law.

9. They have cited the following grounds:

   (a) the judgment was issued per in curium;

   (b) the judges lacked jurisdiction which rendered the judgment a nullity ab initio;

   (c) the court divested itself of the jurisdiction after it relied on a defective record of appeal filed in court on 2nd February, 2019 and inadvertently over looked the supplementary record of appeal filed in court on 24th January, 2020;

(d) the learned judges did not evaluate, consider or refer to the supplementary record of appeal which contained all the evidence and arguments made by the applicants against the application for revocation of the grant;

(e) that the learned judges lacked jurisdiction because the record of appeal was defective for failure to comply with Rule 89(1) (c), (f) and (k) of the Court of Appeal Rules, 2022 which rendered the appeal incompetent;

(f) the judges determined an issue that was within the jurisdiction of the Environment and Land Court.

10. Other grounds mounted by the applicants are:

i. the court failed to consider that they had transferred most of the properties to third parties on the strength of the confirmed grant and that the Estate properties had already been distributed and transferred before the application for revocation of the Grant was filed in court;

ii. this Court failed to review the evidence contained in the supplementary record of appeal which demonstrated that the appellants/respondents were undeserving of the orders for revocation of the confirmed Grant because their application had been caught up by laches;

iii. the respondents did not approach the court with clean hands;

iv. the judges framed an issue for determination that was not before them which is a gross miscarriage of justice because they have nowhere to appeal;

v. the judges misinterpreted and misapplied Section 76 of the Law of Succession. As a consequence of the foregoing, the applicants contend that they are exposed to injustice including suits by third parties/transferees and or bona fide purchasers.

11. The application is opposed vide the replying affidavit of a one Nzioki Mulili Ndeti dated 24th May, 2022, one of the administrators of the estate of Harrison Mulili Ndeti sworn on his own behalf and on behalf of the other respondents. Its salient points are:

a. the application is a veiled appeal against this Court's judgment;

b. this court lacks jurisdiction to sit on an appeal against its decision or to review its judgment;

c. the only option for the applicants is to appeal to the Supreme Court;

d. there is no appeal pending before the Supreme Court against the court's judgement, so the prayer for stay of execution is spurious;

e. the application is not premised on any provision of the *Appellate Jurisdiction Act*;

f. the supporting affidavit is argumentative contrary to the provisions of the *Oaths and Statutory Declarations Act*;

g. the applicants have not specified which part of the supplementary record the court failed to consider nor did they raise the issue of the defective record during the hearing

h. the application was filed after the expiry of 14 days;

i. the applicants are re-litigating the same issues they argued in the appeal;

j. the court with jurisdiction to determine claims for ownership of land is the Environment and Land Court;

k. this Court considered the entire record;

l. the issue of jurisdiction was not raised during the hearing nor can the court be divested of jurisdiction just because a document is missing from the record;

m. there is no basis to merit the review sought.

12. Both parties filed written submissions which they highlighted in Court. Mr. Chigiti SC, representing the applicants submitted that the respondents filed a defective record of appeal which omitted the application dated 11th July, 2016 and all affidavits in support and in opposition to the said application in contravention of Rule 89(1) of the *Court of Appeal Rules, 2022*. He argued that the omission rendered the appeal incompetent thereby di-vesting the court the requisite jurisdiction to adjudicate the dispute.

13. Mr. Chigiti SC argued that at paragraph 18 of this Court's Judgment, the Judges stated "we have considered the record of appeal, the submissions by the learned counsel, the authorities cited and the law." His understanding of the said statement is that the judges failed to consider the supplementary record of appeal. He argued that a reading of paragraphs 18 to 28 of the proceedings and the Judgment shows that the Judges did not re-evaluate, re-assess or re-analyze evidence in the supplementary record of appeal. He relied on *Abok James Odera T/A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013} eKLR, *United India Insurance Co. Ltd v E.A. Underwriters (K) Ltd* [1985} KLR 898 and *Mbogo v Shah & another* [1968} EA 93.

14. Mr. Chigiti argued that there is nothing to show how the learned judges arrived at their conclusions or how as a first appellate Court they undertook a re-hearing, so as to make their own conclusions in line with *Selle v Associated Motor Boat Co*. [1968 EA 424. He relied on *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 to underscore that the legal burden of proof lies upon the party who invokes the aid of the law. He faulted the Court for failing to consider that the applicants had already transferred or charged most of the properties using the confirmed grant. To him, had the court considered Cecilia Situmai Ndeti's replying affidavit, the supplementary record of appeal and reply to the applicant's submissions, its finding would have been different.

15. Mr. Chigiti SC argued that the court disregarded the evidence showing that the respondents were aware of the succession proceedings, so, their application for revocation of the grant was an afterthought aimed at circumventing the legislative and statutory strictures under section 68 of the *Law of Succession Act* and Rules 15, 16, 17, 40 and 41 of the Probate and Administration Rules. He relied on this Court's decision in Joyce Ngima Njeru & Another v Anne Wamheti Njue CA 201 of 2007 which established that Section 76 (a), (b), (c) of the *Law of Succession Act* is meant to attack or fault the process of obtaining the Grant, and, a court must first establish that the evidence tendered by an applicant relying on the above section is aimed at faulting the proceedings leading to the issuance of the Grant. He submitted that the respondents' evidence did not fault, attack or object to the manner in which the applicants obtained the grant. He cited *Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited* [2014] eKLR, where this Court stated it would be reluctant to invoke its residual jurisdiction of review where 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. Further, Mr. Chigiti SC cited *Matheka & another v Matheka* [2005] 2KLR 455 in which this Court held that even where the court revokes a grant by its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance.

16. Mr. Chigiti SC argued that the applicants' claim that the suit properties were held in trust for them by the deceased and they were therefore joint owners of the properties and not beneficiaries of the deceased are a preserve of the Environment and Land Court and that the respondent did not approach

the court with clean hands. He urged this Court to invoke its residual jurisdiction and go beyond the letter in *the Constitution* and legislative provisions and be guided by the fairness and justice principles as opposed to the principle of finality so as to correct the above errors of law which have occasioned miscarriage of justice thus eroding public confidence in the administration of justice.

17. Mr. Chigiti SC submitted that the decision was rendered per incuriam and referred this Court to the Supreme Court decision in *Manchester Outfitters (Suiting Division) Ltd (now known as King Wollen Mills Ltd) & Another v Standard Chartered Financial Services Ltd & 2 Others* [2019] eKLR in support of the holding that the Court may disregard a previous decision if it is shown that such decision was given *per incurium*. He also cited the Supreme Court in *Fredrick Otieno Outa v Jared Odoyo Okello & 2 Others*, [2017] eKLR which he argued held that the court could review its judgments, rulings or orders in exceptional circumstances, so as to meet the ends of justice, but limited to where the judgment, ruling, or order, is a nullity, such as, when the Court itself was not competent. Further, he relied on *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* Sup petition No 15 of 2014, Civil Appeal No 244 of 2010 *Phoenix of E.A. Assurance Company Limited v S. M. Thiga tla Newspaper Service* and *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*.

18. Mr. Chigiti also cited *Manchester Outfitters (Suiting Division) Ltd (now known as King Wollen Mills Ltd) & Another v Standard Chartered Financial Services Ltd & 2 Others* (*supra*) in which this Court stated that it may, upon application by a party, or on its own motion, review any of its judgments, rulings or orders in exceptional circumstances, so as to meet the ends of justice. Lastly, Mr. Chigiti SC submitted that the judgment is a nullity because:

    (i) it was rendered by the court bereft of jurisdiction;

    (ii) it offends Articles 25 (c), 27 (1), 47 (1), 50 (1) and 48 of *the Constitution*, sections 107,109 and 112 of the *Evidence Act* and Rule 89 (1) of the *Court of Appeal Rules, 2022*.

19. The submissions of counsel for the respondents were three- fold. One, this Court is functus officio because the applicants are raising the same issues which have been determined by this court in its judgment. Two, this Court has no jurisdiction to review its own judgement (*Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR). Three, the applicants have not shown any section of the *Appellate Jurisdiction Act* which permits this Court to review its judgement.

20. We start by acknowledging that this application raises a vital jurisprudential issue. The questions which have to be considered are whether this Court has the power to vary a final order made by it after fully hearing an appeal or an application, and if so, whether it is a power which should be exercised in the circumstances of this case. The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that the court thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject- matter has ceased. The only exception to this general principle is the limited jurisdiction under the slip rule under rule 37 of the Court of Appeal Rules, 2022 which provides for correction of clerical or arithmetical mistakes in any judgments or any error arising from accidental slip or omission.

21. As we confront the issue at hand, we may usefully benefit by sampling a few decisions from various jurisdictions in the world just to see how they have confronted the issue before us. Undoubtedly, the rule in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489 is an example of a fundamental principle of our common law that the outcome of litigation should be final. Justice Robert Jackson of the Supreme Court of the USA in *Brown v Allen* 344 US 443, 540 [1953] famously wrote: "We are not final because we are infallible, but we are infallible because we are final."

22. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. Simply put, litigants are required to put their best foot forward. If they do not, they will not normally be permitted to have a second bite at the cherry (see Henderson v Henderson [1843] 3 Hare 100, [1843-60] All ER Rep 378).

23. The reasons for the above general approach was vigorously proclaimed by Lord Wilberforce and Lord Simon of Glaisdale in the *Ampthill Peerage Case* [1976] 2 All ER 411, [1977] AC 547.

For reasons of economy, we will cite only Lord Wilberforce, who presided. Lord Wilberforce said:

> "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed on the right of citizens to open or to reopen disputes. The principle which we find in the (Legitimacy Declaration Act 1858) is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognizes, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so; these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. 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."

24. In England, the final, ultimate court of appeal (The House of Lords) has on appropriate occasions, re-opened its concluded judgments for rehearing asserting that it has power to correct any injustice caused by an earlier decision of the house. For example, in *R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochete Ugarte* (No 20 [1999] 1 All E. R. 577, Lord Browne-Wilkinson stated:

> "...In principle it must be that your Lordships, as the ultimate Court of Appeal, have power to correct any injustice caused by an earlier order of this house. There is no relevant statutory limitation on the jurisdiction of the house in this regard and therefore its inherent jurisdiction remains unfettered."

25. The Court of Appeal (England and Wales) in *Taylor and another v 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 underscored that the court had implicit powers to do that which was necessary to achieve the dual 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.

26. In Nigeria, the court's approach in most cases has been that it does not have the power to review its own decisions except for the minor reasons specified in the rules. The rationale behind this approach is that there is no constitutional provision which expressly donates to the court, powers to review its own decisions. This approach was adopted in *Adigun v Attorney- General of Oyo State* [1987] 2 NWLR (PI.56) 197 at 212. However, in *Amalgamated Trustees Ltd. v Associated Discount House Ltd.* ;[2007] LPELR-454 (SC) the Supreme Court while reaffirming the general principle embodied in Order 8, Rule 16 of that court's rules, and the ratio decidendi in Adigun and other decisions, stated that it was categorical that like other Superior Courts of record, it possesses inherent power to set aside its judgment in appropriate cases and provided the following examples:

(i) When a Judgment is obtained by fraud or deceit.

(ii) When the Judgment is a nullity such as when the Court itself was not competent;

(iii) When the court was misled into giving Judgment under a mistaken belief that the parties had consented to it;

(iv) When Judgment was given in the absence of jurisdiction; (v) where the procedure adopted was such as to deprive the decision or Judgment of the character of a legitimate adjudication.

27. In Australia, the case of *Autodesk Inc v Dyason* (No 2) [1993] HCA 6; [1993) 176 CLR 300, is instructive in setting forth the following principles:

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.

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.

28. The Supreme Court of India, in *Rupa Ashok Hurra v 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." (Emphasis added)

29. Also, in India in *Sow Chandra Kanta and Another v Sheik Habib* 1975 AIR 1500, 1975 SCC (4) 457, the Supreme Court delineated the boundaries for review using the following words:

> "A review of a Judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over-ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

30. Again in India in *Northern India Caterers (India) v Lt. Governor of Delhi* 1980 AIR 674, the Supreme Court had to decide whether it could review its own decision based on the ground that the decision was based on an erroneous appreciation of facts. In dismissing the review application, the court remarked:

> "It is well settled that a party is not entitled to seek a review of a Judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a Judgment pronounced by the court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so."

31. In Rwanda, enactment No 21/2012 of 14th June, 2012 relating to the civil, commercial, labour and administrative procedure of the country, puts the point beyond dispute. An application for review of a court's own decision can be made, but only with respect to judgments of the final court of resort, on the grounds of:

(i) fraud;

(ii) false evidence, testimony or oath;

(iii) a criminal judgment which was subsequently quashed

(iv) absence of permission to approve or confirm a party's participation in the proceedings/ procedure;

(v) error(s) of procedure or of law.

32. The position for setting aside or modifying a court's judgments would appear to be no different in both Zimbabwe and South Africa even though both those countries apply Roman-Dutch law. Helpful comments to that effect are found in the Court of Appeal of Tanzania in the *Transport Equipment Case* (*supra*) in which the Court quoted the leading textbook by Herbstein & Van Wanes: The Civil Practice of the Superior Courts in South Africa, 3rd Edition thus: "A final judgment being res judicata is not easily set aside, but the Court will do so on various grounds such as fraud, discovery of new documents, error and irregularities in procedure."

33. In South Africa Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG.* 1977 (4) SA 298 (A) at 306F–G. accepted that the list of exceptions might not be exhaustive and that a court might have a discretionary power to vary its orders in other appropriate cases. He stressed, however, that the assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded.

34. The predecessor of this Court, the East African Court of Appeal (EACA) ably stated the case law position especially in the cases of *Lakamshi Brothers v Raja & Sons* [1966] EA 313 and *Somani v Shirinkhanu* (No 2) [1971] EA 79. In Lakamshi, Sir Charles Newbold, P. was categorical that

judgments of the EACA were the end of litigation subject only to the limited application of the "slip rule". The Court observed that:

> "This Court is now the final Court of Appeal and when this Court delivers its judgment, that judgment is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject, as I have said to the limited application of the slip rule."

35. In the *Somani* case, the court (both Spry, Ag. P., and Law Ag. VP) recognized that:

    (a) the finality of its decisions was paramount, subject only to one exception - (see (b) below;

    (b) the Court had limited inherent jurisdiction to review its own decisions where a party is wrongly deprived of the opportunity to be heard;

    (c) failure to hear a party was not the only ground for that court's review power. The Court could do so in every case in which, for one reason or another, its decision is a nullity.

36. The above exposition of the law has been found to be too restrictive. Both the Supreme Court of Uganda (in the case of Sewanyana v Martin Aliker, Civil Application No 4 of 1991), and the Court of Appeal of Tanzania (in the case of

    Transport Equipment Limited v Devra P. Valambhia, 1998 TLR 89) preferred reconsideration of the holding in the Somani Case. Indeed, the Ugandan Supreme Court noted that:

    > "Somani's judgment was given ex tempore... as the court followed an obsolete law,...it had acted pro tonto without jurisdiction. ...[Therefore] certainly the issues between the parties could not have been fairly and properly tried between them".

37. Back at home, the Kenya experience has been a mixed bag of jurisprudence, with a series of conflicting holdings by the then highest court in the land: The Court of Appeal. In 1996 in *Rafiki Enterprises Ltd v Kingsway & Automart Ltd*, Civil Application No Nai 375 of 1996, the court held that it had no jurisdiction to review its own decisions. In 2005, in *Musiara Ltd v Ntimana* [2005] EA 317, the court found jurisdiction to reopen an appeal particularly if judicial bias in the impugned/proceedings is established. In 2005 in *Chris Mahinda v Kenya Power & Lighting Co. Ltd*, Civil Application No Nai 174 of 2005 (unreported), the Court of Appeal reiterated its position that it had residual jurisdiction to review, vary or rescind its decisions in exceptional circumstances, as held in the *Musiara's* Case (*supra*).

    However, in 2007 in *Jasbir Singh Rai v Tarlochan Singh Rai*, Civil Application No Nai. CA 307 of 2003 (154/2003), the Court of Appeal by unanimous decision denied review jurisdiction – in effect overruling the court's earlier holdings in the two cases of 2005; and, thereby, reinstating the law in the Rafiki Case (i.e denial of review of jurisdiction).

38. Subsequently, in Nguruman Ltd v Shompole Group Ranch & Another [2014] eKLR the Court of Appeal 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. (Also see Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited, [2014] e KLR). Again 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 (8th April 2016) the Court of Appeal (Karanja, Okwengu, Mwera, GBM Kariuki & Mwilu, JJ.A) took the view that *the Constitution* of Kenya, 2010, introduced interpretive provisions that obligate the court to go beyond the letter of the law, by interpreting the Constitution in a manner that promotes the purpose, values, and principles

espoused in *the Constitution*. The learned justices at paragraph 43 of the judgment accentuated that where applicable, the principle of fairness and justice must take priority over the principle of finality.

39. Also, this Court in *Kamau James Gitutho & 3 Others v Multiple Icd (K) Limited & Another* [2019] eKLR (Visram, Karanja & Koome, JJ.A.) on 21st August, 2019 acknowledged the residual jurisdiction of this Court to re-open its own decision. It however stressed that such jurisdiction is to be exercised with caution and only in exceptional cases. The learned justices stated:

> "It follows therefore, that this residual jurisdiction can only be set in motion once the established threshold is met. In other words, the following must be demonstrated:
>
> (1) The decision in issue has occasioned injustice or a miscarriage of justice; and
>
> (2) The said injustice or miscarriage of justice has eroded public confidence in the administration of justice; and
>
> (3) No appeal lies against in the decision in issue. See also this Court's decision in *Jimnah Mwangi Gichanga v Attorney General* [2015] eKLR."

40. The Supreme Court of Kenya in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others* [2017] eKLR was categorical that it had no jurisdiction to sit on appeal over, or to review its own judgments. The relevant holding is at paragraph 90 where it stated:

> [90] "Flowing from the above analysis, and taking into account the elaborate submissions by counsel, and the practice in the Commonwealth and beyond, the inescapable conclusion to which we must arrive, is that this Court, being the final Court in the land, has no jurisdiction to sit on appeal over, or to review its own Judgments, Rulings, or Orders, save in the manner contemplated by Section 21(4) of the *Supreme Court Act*. The court becomes functus officio once it has delivered Judgment or made a final decision. The stamp of finality with which this Court is clothed should not be degraded except in exceptional circumstances as determined by the Court itself. Were we to hold otherwise, there would be no end to litigation, thus, severely compromising the integrity of the judicial process, and the integrity of this Court."

41. At this point we are compelled to point out that Mr. Chigiti's argument that the Supreme Court of Kenya in *Fredrick Otieno Outa v Jared Odoyo Okello & 2 Others*, (*supra*) held that the court could review its judgments, rulings or orders in exceptional circumstances, so as to meet the ends of justice, but limited to where the judgment, ruling, or order, is a nullity, such as, when the court itself was not competent is incorrect. Counsel appears to have read the decisions referred to by the Apex Court as opposed to its finding reproduced above. We say no more on this point.

42. The East African Court of Justice (EACJ), unlike its predecessor the East African Court of Appeal (EACA), the *Treaty* in its Article 35 (3) expressly provides for review of the Court's decisions and judgments. The EACJ In the matter of Application No 2 of 2012 between Independent Medico Legal Unit and Attorney General of the Republic of Kenya dated 1st March, 2013 held inter alia that:

(a) review of a judgment has a limited purpose; it must not be allowed to be an appeal in disguise;

(b) the purpose of review is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cause.

43. A review of our decisional law (particularly post 2010 decisions of this Court) shows that this Court has acknowledged its residual jurisdiction to re-open its decisions. For the sake of succinctness, reserved powers, residual powers, or residual powers are the powers that are neither prohibited nor explicitly

given by law. Some concepts in the common law such as "residual" are frequently invoked yet they remain nebulous. Sir Jack Jacob in The Court's Inherent Jurisdiction [1970] 23 CLP 23] defines the concept of residual power as:

> " ...residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

44. However, this residual power is inked 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. The residual powers of this Court are not an open license for the court to exercise unlimited discretion. 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 residual power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.

45. 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. (See the Supreme Court of Manila in George v Manuel Palanca jr., Lorenzo Agustin, Jesus Gapilango and Juan Fresnillo G.R. No 151149, September 7, 2004). 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.

46. 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. The question before us is whether the instant application has surmounted this requirement to be categorized as falling within the exceptions to the general rule.

47. The above question requires us to examine the grounds cited by the applicants. The applicants argued that the Record of Appeal was defective because it omitted some documents. To them, the said defect rendered the appeal incompetent thereby di-vesting the court the requisite jurisdiction to adjudicate the dispute. This argument is out rightly misleading and incorrect. At paragraph 9 of the judgment, the learned justices stated:

> " The appellants made an application to this Court, seeking inter alia: that they be granted leave to file a supplementary record of appeal to incorporate documents left out in the appeal and to amend the memorandum of appeal to include the question of the jurisdiction of the trial court when there is a dispute as to ownership of property. That application was allowed, and by an order of this Court dated 20th January, 2020, the appellants were granted leave to file a supplementary record of appeal together with an amended memorandum of appeal. We shall proceed on the grounds set out in the amended memorandum of appeal, grounds which we have set out in summary above."

48. The above paragraph confirms that the appellants in the appeal (now the respondents herein) applied for leave to file a Supplementary Record of Appeal. The leave was granted. The underlined paragraph extinguishes the argument that the record of appeal was incompetent or that the Court did not

consider the Supplementary Record of Appeal. Also, the applicants' argument that the court was divested of its jurisdiction on account of an incompetent record of appeal collapses.

49. Equally legally frail and unsustainable is the applicants' argument that because the court observed: "we have considered the record of appeal, the submissions by the learned counsel, the authorities cited and the law" it did not consider the supplementary record of appeal. First, had the applicants read paragraph 9 of the judgment, they would have hesitated to mount such an argument. Second, if we were to find merit in this assertion, it is basically a ground of appeal which falls outside the ambit of review. Third, to require a court to consider all the material before it does not mean that the udgment will be a complete embodiment of all the documents filed. Some material may be found to be irrelevant and disregarded. What matters is the reasons for the judgment.

50. The other arguments mounted by the applicants are;

    (i) the learned judges did not properly interpret provisions of the *Law of Succession Act*;

    (ii) the judges failed to re-evaluate, re-assess nor re-analyze evidence in the supplementary record of appeal;

    (iii) there is nothing to show how the learned judges arrived at their conclusions or how as a first Appellate Court they proceeded by way of a rehearing;

    (iv) the judges failed to address their minds to the fact that the applicants had already transferred or charged most of the suit properties based on the confirmed Grant;

    (v) had the court considered Cecilia Situmai Ndeti's replying affidavit, the supplementary record of appeal and reply to applicant's submissions, they would have arrived at a different finding;

    (vi) the judges did not pay attention or consider the evidence;

    (vii) the dispute fell within the ambit of the Environment and Land Court;

    (viii) the respondents did not approach the court with clean hands. The above grounds are pure grounds of appeal. An invitation to this Court to invoke its residual power is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected.

51. Lastly, the applicants argue that the decision was rendered per incurium. In *Young v Bristol Aeroplane Company Limited* (1994) All ER 293, the House of Lords observed that 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. In *Halsbury's Laws of England* (4th Edn.) Vol. 26: (pp. 297-98, para 578) per incuriam has been elucidated as under:

> " A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow."

52. Like the other grounds discussed above, the argument that the decision was rendered per incurium is a ground of appeal. The applicants are inviting this court to exercise appellate jurisdiction over its own decision which is impermissible. The residual jurisdiction of this Court can only be set in motion once the established threshold is met. The following must be demonstrated:

    (1) The decision in issue has occasioned injustice or a miscarriage of justice; and

    (2) The said injustice or miscarriage of justice has eroded public confidence in the administration of justice; and

(3) No appeal lies against in the decision in issue. (See *Kamau James Gitutho & 3 Others v Multiple Icd (K) Limited & Another* [2019] eKLR (*supra*) and *Jimnah Mwangi Gichanga v Attorney General* [2015] eKLR).

53. The residual jurisdiction which we are satisfied is vested in this Court to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. The ability to re-open proceedings after the ordinary appeal process has been concluded can also create injustice. Proceedings will only be reopened when there is a real requirement for that to happen.

54. 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. Any system of justice that is fair to all parties requires that a time should come when it is time to call it a day. Thus the time should come when the losing party must accept an adverse decision for better or worse.

55. The grounds cited by the applicants do not fall anywhere near the permissible exceptional circumstances to trigger this Court's exercise of "residual" jurisdiction normally exercisable after the final determination of the appeal. We find and hold that the application for review is totally unmerited. There is no basis at all upon which we can invoke the residual powers of this court and review or re-open the judgment. The prayer for review having collapsed, it will serve no utilitarian value for us to address the prayer seeking to re-open the case and remit it back for re-hearing. The upshot is that the application dated 12th May, 2022 is hereby dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR*