



REPUBLIC OF KENYA



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**AVH Legal LLP v Raballa & 8 others (Civil Appeal (Application)
117 of 2018) [2023] KECA 232 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 232 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 117 OF 2018
HM OKWENGU, LA ACHODE & JM MATIVO, JJA
MARCH 3, 2023**

BETWEEN

AVH LEGAL LLP APPLICANT

AND

DONALD RABALLA 1ST RESPONDENT

**GODFFREY OTIENO ONYANGO (SUING ON BEHALF OF RONALD
ONYANGO) 2ND RESPONDENT**

HARVEY AGUMBAH 3RD RESPONDENT

CRISPIN ODUOR OBUDO 4TH RESPONDENT

GEORGE OMONDI KAGUMBA 5TH RESPONDENT

GRIFFIN LEGAL KENYA LIMITED 6TH RESPONDENT

GRIFFIN CLAIM MANAGEMENT LIMITED 7TH RESPONDENT

GRIFFIN LEGAL UK 8TH RESPONDENT

MIS TANDEM LAW T/A XJA (IN LIQUIDATION) 9TH RESPONDENT

*(Being an application to set aside the consent order dated 11th October, 2017 recorded
in court on 2nd October, 2017 (Waki, Ouko & M'inoti, JJ.A.) dated 2nd October, 2011)*

RULING

1. This ruling determines a notice of motion dated 17th April, 2018 filed by AVH LEGAL LLP (the applicant) expressed under section 3A of the [Appellate Jurisdiction Act](#), Rules 41, 42 and 47 of the [Court of Appeal Rules](#). Essentially, the applicant prays that this Court sets aside the consent order recorded before this Court on October 2, 2017. In the alternative, the applicant prays that the said consent be



set aside in as far as it affects the applicant. The applicant also prays for any other order this Court may deem fit to grant. Lastly, it prays for costs of the application to be provided for.

2. The application is founded on the grounds listed on the face of the application, the supporting affidavit of Antony Victor Hodari sworn on March 29, 2018 and supplementary affidavits sworn on April 26, 2018 and 11th June, 2018 by Cecil Guyana Miller, the applicant's advocate together with the annexures thereto. We shall shortly highlight the said grounds in detail.
3. The application was canvassed through rival pleadings, written submissions and legal authorities relied upon by advocates for the respective parties. Learned counsel Mr. Miller appeared for the applicant, learned counsel Mr. Raballa held brief for Mr. Arwa for the 1st respondent while learned counsel Mr. Alao appeared for the 2nd respondent. There was no appearance for the 3rd, 4th, and 5th respondents despite having been served with hearing notices. A notice of appointment of advocate was filed by the firm of George Gilbert & Mombo Advocates on behalf of the 6th, 7th and 8th respondents though no pleadings were filed on their behalf. During the hearing, Mr. George Gilbert informed the court that he had nothing to do with the case.
4. The applicant, is a law firm in Manchester in the United Kingdom. By an application dated July 3, 2014 filed in court on July 4, 2014 the plaintiffs in Nairobi HCCC NO. 86 of 2013 who are now the 1st, 2nd and 3rd respondents sought to amend their plaint to include the applicant herein as a defendant in the said suit. Vide a ruling delivered on 31st October, 2014, Ogola, J. declined the application. Subsequently, the High Court on 28th January, 2015 allowed the joinder of the applicant as the 11th defendant and ordered that an amended plaint be filed and served upon all the parties including the applicant herein within 7 days.
5. The applicant claims that it was not served with any court papers as ordered by the Superior Court as aforesaid, a fact acknowledged by the Superior Court in its Judgment delivered on April 8, 2016. Consequently, the applicant maintains that no Judgment could be entered against it for want of service. Aggrieved by the finding of the Superior Court delivered on April 8, 2016 the 2nd respondent moved the Superior Court for review of the Judgment. However, the application for review was dismissed by Nzioka J, prompting the 2nd respondent to file Civil Appeal No.155 of 2017 against the ruling dismissing the application for review. The applicant was still not a party to that appeal.
6. The applicant is aggrieved by the consent order recorded on October 2, 2017 in this Court in Civil Appeal No. 155 of 2017. It is averred that the said consent was entered into ex-parte without notice and it stands to be prejudiced by the said consent because it requires the applicant to comply with agency agreements that it was not party to and it also requires it to release monies held or received by it when there is no legal basis to do so.
7. It is the applicant's case that it was not party to the ruling by Nzioka, J. a ruling that gave rise to the above appeal. Further, the applicant was never served with any court papers nor was it represented in the appeal when the impugned consent was recorded. Even though the applicant's counsel was absent, he was served with the consent order, which is adverse to the applicant's interests as well as those of its 21,000 clients for a matter that is currently being heard in the United Kingdom, in Eloise Mukami and James Karanja Nyoro and Others v Foreign & Commonwealth Office, Claim HQ13X02162 Royal Courts of Justice England and Wales. Further, the effect of the consent order is that this Court awarded Kshs.36,045,750 x 142 = 858,496,500. Consequently, once the Mau Mau case in the United Kingdom is concluded, the award will be paid to the respondents herein as a consequence of the said consent order yet the respondents cannot claim lien over the monies collected by the applicant as their claim consists of legal fee for which the same can be claimed against the right parties by way of taxation or as damages as awarded by the court against other parties in the said suit and not the applicant.



8. The application is opposed by a replying affidavit sworn on 2nd March, 2018, a notice of preliminary objection dated May 3, 2018 and supplementary affidavits sworn on June 18, 2018 and November 8, 2018 by Donald Odhiambo Rabala, the 1st respondent. The application is also opposed vide the replying affidavit of Godfrey Otieno Onyango, the 2nd respondent, sworn on May 31, 2018.
9. The 1st respondent in his preliminary objection stated that this Court lacked jurisdiction to entertain the instant application for review because it has no original jurisdiction, since it is an Appellate Court and if at all the instant application is to be entertained, then the same should be heard before the bench that adopted the consent; that the instant application is bad in law as it offends the provisions of the [Appellate Jurisdiction Act](#) and owing to the manner in which the instant application was filed, parties have not been given an opportunity to select lawyers of their choice.
10. In his replying affidavit, the 1st respondent claimed that the instant application had open lies, malicious allegations, and misleading assertions calculated at tricking this Court to issue orders against the respondents; that the applicant has not demonstrated the prejudice it stands to suffer if the monies are paid; that it is evident that the applicant was served with the consent on 21st November, 2017 yet the instant application was filed on 18th April, 2018 and served on 28th April, 2018; that this Court is functus officio having adopted the consent as the order of the court; and, the only remedy available to any aggrieved party is to go back to the High Court to revisit any issue since the appeal before this Court has already been withdrawn.
11. Further, the 1st respondent averred that the applicant voluntarily withdrew from the proceedings before the High Court leaving its clients Tandem law XJA LLP exposed, so, the applicant cannot be seen to oppose the course of justice he took; that the applicant, the 9th respondent and Ashton Fox have always been the same entity all along and they were even represented by the same advocate who obtained leave to withdraw from the proceedings; that it is not true that the monies due to the 1st respondent are the same as the monies due to the victims; in any event the lawyers and the victims payments are separate; the applicant should deposit Kshs.2 billion in a joint interest earning account in the name of the respondents and/or their advocates as security. Lastly, the documents relied on by the applicant are falsehoods aimed at misleading the court.
12. In his supplementary affidavit, the 1st respondent states that the applicant has misunderstood the consent for the following reasons: that the application focuses on 21,000 claimants while the consent is premised on 8,061 claimants; the application is focusing on claimant's money while the consent is premised on lawyers' fees; the total figure in the consent is £6,045,750, while the applicant is focused on £200,000,000.
13. The 1st respondent also maintained that the applicant bought XJA and Ashton Fox Solicitors as going concerns when both suits in London and in Kenya were in existence, therefore, they ought to have known about the suit in Kenya, since the applicant's counsel was on record for XJA, and both Ashton Fox and XJA handled the Mau Mau claims with Griffins Legal Companies and Rabala & Co. Advocates; that they went into self-liquidation and into receivership and administration carried out by the same receivers and administrators after being bought by the applicant, and that the applicant trading as XJA continued with Mau Mau cases uninterrupted and both the applicant and XJA were represented by the same Kenyan advocates. Consequently, it is obvious that what has been taking place since 2011 is a game of musical chairs aimed at avoiding liability, defrauding the respondents and defeating justice as demonstrated by the organization chart attached to the supplementary affidavit.
14. The 1st respondent also attached the judgment in *Kimathi & Ors-and –The Foreign and Commonwealth Office* and averred that the said Judgment demonstrated that the Hon. Stewart (J) did



not allow any claims and that XJA issued a statement after judgment explaining the position of the case, and also XJA sought leave to be allowed to file an appeal. However, the application No. B3/2018/2224 was dismissed and XJA also issued a statement explaining the position of the case.

15. Essentially, the 2nd respondent's contestation is that the instant application has been made six months' after the applicant was served with the impugned consent and the applicant has not explained the failure to pursue the matter after being served on 2nd October, 2017. Further, the 2nd respondent avers that this dispute concerns fees for work carried out by the 2nd, 6th and 8th respondents in pursuit of compensation claims on behalf of victims who suffered torture at the hands the Mau Mau; and, that the respondents approached Ashton Fox Solicitors limited to represent the Mau Mau claimants before the English Courts against the British foreign and common wealth office. As a result, the first agency agreement dated 20th September, 2011 and signed on October 20, 2011 was entered into and the 6th and 8th respondents were tasked with handling the Mau Mau victims and obtaining witness statements from them. The first agency agreement also provided at clause 6 that the 6th respondent was entitled to receive £250 upon a Mau Mau claimant being accepted by Ashton Fox and an additional £750 upon completion of the Mau Mau claimant's case. Pursuant to the said agreement, the 6th respondent introduced 4000 Mau Mau claimants.
16. Also, the 2nd respondent averred that on or around August, 2012, Ashton Fox transferred the 4000 Mau Mau claimants to XJA and the 6th respondent entered into a second agency agreement dated August 13, 2012 in which the 6th respondent was engaged on similar terms as in the first agency agreement. Further, the 6th respondent went on to procure a further 4061 claimants for XJA. However, in March, 2013, Ashton Fox went into administration and its entire business was transferred to XJA. Also, XJA went into administration in May, 2013 and its businesses and assets were transferred to the applicant which had considerable experience in class actions in a pre-pack type of sale and the 8016 Mau Mau claimants were transferred to the applicant who is pursuing the compensation claims of about 24,464 Mau Mau claimants before the English High Court.
17. The 2nd respondent also averred that the allegations by the applicant that they are not party to the agency agreements because of privity of contract is misleading since the applicant wrote a letter dated May 20, 2013 to the 8061 Mau Mau claimants informing them that they had acquired XJA and that their claims would be dealt with on the same basis as before and that the lawyers responsible for dealing with their case both in the UK and in Kenya remained the same. In support of the claims that XJA transitioned into the applicant, the 2nd respondent produced a number of publications.
18. It also averred that there is a conspiracy between the applicant, Miller advocate and the 4th respondent to defraud the 2nd and 6th respondent since apparently Miller is entitled to receive payment in respect of the claims pursued on behalf of the 8061 Mau Mau claimants despite the applicant having no legal liability to make such payments and notwithstanding Miller having had no involvement in acting or carrying out any works on behalf of XJA Mau Mau claimants. The 2nd respondent maintained that the 6th and 8th respondents are entitled to be paid their fees which totals to £6 Million out of the proceeds of the legal fees recovered by the applicant in Mau Mau Action and no prejudice will be suffered by the Mau Mau claimants since the injunction only pertains to legal costs recovered by the applicant in the Mau Mau action and does not extend to the compensation to the claimants.
19. The 2nd respondent also contends that the applicant was a party to the proceedings in Nairobi Civil Appeal No. 155 of 2017 and in HCCC No. 86 of 2013. That is because the applicant and XJA are one and the same and were held out as such at all material times and it is from those proceedings that the consent order of 2nd October, 2017 culminated and by the applicant's own admission, they have been represented in the aforementioned proceedings by the firm of Miller and in any case, in Civil Appeal



- No. 155 of 2017, the court issued hearing notices to all the parties on record including the applicant herein, a fact ascertained by the Judge(s) before the consent was recorded and adopted by this Court.
20. In its rejoinder, the applicant vide a supplementary affidavit sworn on June 11, 2018 by Cecil Miller advocate averred that having noted that this Court was misled in believing that the applicant had been served with pleadings, vide a letter dated June 6, 2018, Mr. Cecil Miller wrote to the Registrar, Court of Appeal requesting for the following documents: Mention Notice dated August 21, 2017; case management form dated July 28, 2017; notice of case management dated July 10, 2017; the cover and second page of the record of appeal filed on June 5, 2017 drawn by the firm of Rachier Amollo and Company Advocates; notices issued by the court to the various firms as per the drawn consent; copy of letters dated 11th and October 12, 2017 by Rachier Amollo and Company Advocates; and the copy of the impugned consent dated October 2, 2017.
 21. He deposed that a casual glance at the mention notice dated August 21, 2017 demonstrates that the applicant was not listed as one of the parties served with the notice to attend court, therefore, the applicant was not served and as a result they did not attend court during the adoption of the consent. Further, the cover page of the record of appeal filed on 5th June, 2017 shows the parties to be served and the applicant was not one of them. Lastly, from the letter dated October 12, 2017 by Rachier Amollo Advocates LPP, the 1st respondent misled the Court that all parties had gone through the draft consent order and they were all agreeable to the terms therein, but the said letter was not copied to the applicant.
 22. Submitting on the preliminary objection, Mr. Miller argued that section 3(2) of the *Appellate Jurisdiction Act* gives this Court jurisdiction to review vary, and or set aside decisions made by it in special circumstances, while under Rule 1(2) of this Court's Rules, this Court has inherent power to make such orders as may be necessary for the ends of justice such as correcting fraud. He relied on *Benjob Amalgated Limited & Another v Kenya Commercial Bank Limited* [2014] eKLR in which this court held that it has power to review its decisions to correct oversights that occasion injustice or where the decision injures public interest.
 23. Furthermore, Mr. Miller argued that Rule 35(2) and 57(2) gives this Court power to correct an order made if that order does not correspond with the Judgment. He submitted that in adopting the said consent, this Court did not anticipate a situation where the consent would adversely affect a person who did not take part in coming up with the terms of the consent.
 24. On the issue of counsel for the respondents not being given an opportunity to select lawyers of their choice, Mr. Miller reiterated the contents in the applicant's affidavit and submitted that the said ground does not meet the threshold in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* [1969] E.A 696 because it raises issues of facts as opposed to a pure point of law.
 25. Mr. Miller further argued that the applicant was condemned unheard in violation of Article 50(1) of *the Constitution*. He also argued that the court orders do not bind persons who are not parties to the suit. He cited the Court of Appeal for East Africa decision in *Hirani v Kassam* [1952] EACA 131 which held:

“Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and on those claiming under themand cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court Or, if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”



26. Mr. Raballa holding brief for Mr. Arwa for the 1st respondent opposed the application and submitted that this Court lacks jurisdiction to entertain it because it is functus officio. To him, the only remedy available to the applicant is to revisit the matter before the High Court. He cited the Canadian case of *Chandler v Alberta Association of Architects* [1989] 2 S.C.R. 848 which held that the general rule is that a final decision of a court cannot be reopened and there are only two exceptions to that rule: where there had been a slip in drawing it up; and whether there was an error in expressing the manifest intention of the court. He argued that the applicant has failed to meet the threshold of setting aside a consent order set out in *M V Z M S & 3 Others* [2017] eKLR and contended that the applicant denied being parties in the Nairobi Civil Appeal No. 155 of 2017.
27. On whether the applicant was privy to the impugned consent, Mr. Raballa reiterated the argument made in the 1st and 2nd respondents' affidavits and submitted that counsel for the applicant withdrew from the proceeding before the High Court leaving the applicant exposed. He submitted that the applicant was privy to Civil Appeal 155 of 2017 and therefore they cannot emerge on appeal and plead not to be privy. He submitted that the applicant is guilty of laches having not explained the delay in bringing the instant application. He cited *Antony Kiberenge Kamau v Kibuchi Wamunyi & 3 Others* [2010] eKLR which found an applicant guilty of laches for failing to explain delay.
28. Mr. Raballa reiterated that the consent order relates to legal fees in relation to 8061 claimants and not the victims' compensation and in any case, the applicant has not denied owing the 1st respondent any monies as per the impugned consent, instead the applicant is talking about taxation which is an admission of liability. In conclusion, counsel submitted that the applicant should not be allowed to seek this Court's intervention while it has constantly and blatantly devised schemes to defeat justice because he who comes to equity must come with clean hands.
29. Mr. Alao, learned counsel for the 2nd respondent associated himself with the submissions made on behalf of the 1st respondent.
30. We have considered the notices of preliminary objection, the application, the affidavits and the parties' submissions. First we will address the issue of jurisdiction. The 1st respondent's argument as we understand it is that this Court lacks jurisdiction to review, set aside and or vacate the consent order adopted on October 2, 2017. On the other hand, the applicant invited this Court to exercise its residual jurisdiction and review the said consent.
31. A useful starting point is to underscore the established principle that once a court has 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 ceases. The particular type of finality that concerns us here is the finality that attaches when appellate process has run its course. This type of finality is important because it marks the point at which a case outcome is no longer routinely subject to revision or appeal.
32. Finality of Judgments is a concept (or, a legal principle), according to which the decision taken by the court at some point becomes permanent, immutable, binding and open to enforcement. It cannot be disputed again, the parties may not lodge similar claims and give another interpretation to the established facts in subsequent proceedings on an interrelated matter. (See *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489, an example of a fundamental principle of the common law that the outcome of litigation should be final).
33. The only exception to the above general principle is the limited jurisdiction under the slip rule (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. However, like many other common law principles, finality – or rather, *res judicata*, is not absolute. There are other considerations which could influence the status of a final Judgment. These are specific exceptions to the ‘principle of finality.’

34. So, when is a final Judgment “final”? In an article entitled “When is Finality . . . Final? Rehearing and Resurrection in the Supreme Court published in the *Journal of Appellate Practice and Process*, Volume 12, Aaron-Andrew P. Bruhl states:-

“...And yet the question remains: When, exactly, is it over? Perhaps the safest answer, when it comes to litigation, is that it is never over, at least if we mean absolutely and irretrievably over. Nonetheless, while recognizing that absolute repose might not be found in this world, we often say that a case is over once the judgment becomes “final.” Now, finality is a word of many meanings, so one has to be careful in using it.”

35. Two important principles stand out in this discussion. These are the principle of “finality” and the “justice principle.” For example, what of the case where the losing party cries ‘foul’ concerning some aspects of a case where the winner won the case by breaking the rules of litigation? In *AIC Ltd v The Federal Airports Authority of Nigeria* [2020] EWCA Civ 1585 the Court of Appeal of Nigeria provided useful guidance in cases of this nature. Allowing the appeal, Coulson LJ held that there were two distinct questions which the court must ask itself. The first was whether the application to reconsider should be entertained in principle; if the court answered the question in the negative that was the end of the matter. If the court concluded that reconsideration was appropriate in principle, then it became an open-ended matter of discretion, to be exercised in accordance with the overriding objective, as to whether the order should be changed. Coulson LJ provided further guidance on first question when he said:

“In my view, the court should be looking for a sufficiently compelling reason that may justify reconsideration; something which might outweigh the importance of finality and justify the opening up of a question or questions which, following the pronouncement of the order in open court, appeared to have been finally answered. Of course, it is quite right to say, as the authorities stress, that those categories of case are not closed. But, assuming that the request to reconsider comes from the parties and not the court, the court should instinctively be looking for something which has been missed or otherwise gone awry: a mistake or a fundamental misapprehension; a fundamental piece of evidence or a point of law that was overlooked. The court’s undoubted jurisdiction to reconsider its earlier order cannot be permitted to become a gateway for a second round of wide-ranging debate.”

36. In *Amalgamated Trustees Ltd v Associated Discount House Ltd*. (2007) LPELR-454 (SC); the Nigerian Supreme Court 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; or
- iii. When the court was misled into giving Judgment under a mistaken belief that the parties had consented to it; or
- iv. When Judgment was given in the absence of jurisdiction; or



- (iv) Where the procedure adopted was such as to deprive the decision or Judgment of the character of a legitimate adjudication.
37. 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.
38. In India, the Supreme Court 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)
39. In *Ngurumani 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 ruled that it had the right to revisit its past decisions. (Also see *Benjob Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited*, [2014] eKLR). 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 the Court of Appeal held 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 were categorical that where applicable, the principle of fairness and justice must take priority over the principle of finality.
40. Also, the Court of Appeal in *Kamau James Gitutho & 3 Others v Multiple Icd (K) Limited & Another* [2019] eKLR on August 21, 2019 acknowledged the residual jurisdiction of this Court to re-open its own decision. However, it stressed that such jurisdiction is to be exercised with caution and only in exceptional cases. Recently, in *Matei Julius Mulili Ndeti & Nzioki & Others v Cecilia Situmai Ndeti & Others*, Civil Application No. E064 of 2019 this Court after reviewing a long list of decided cases both local and foreign was categorical that it is vested with residual jurisdiction to re-open its decisions to avert real injustice in exceptional circumstances.
41. We join the long list of the above cited cases by affirming that this Court has residual jurisdiction to re-open a decided case in appropriate and exceptional cases such as when Judgment;



- a. was obtained by fraud or deceit;
 - b. was a nullity;
 - c. was given under a mistaken belief that the parties consented to it;
 - d. was given in the absence of jurisdiction;
 - e. the proceedings adopted were such as to deprive the decision or Judgment of the character of a legitimate adjudication; or
 - f. it was rendered with fundamental irregularity.
42. The second issue for our consideration is whether the threshold requirements for setting aside the consent order have been met. This issue is intertwined with the issue whether the applicant has met the threshold for this Court to exercise its residual jurisdiction to review its decision.
43. The applicant's case is that it has been condemned unheard since the impugned consent was adopted in the absence of its advocate, they were never served with the appeal and they did not participate in the appeal, yet the impugned consent adversely affects it. It is the applicant's case that the respondents deliberately mislead this Court and obtained the consent order through fraud or collusion or by an agreement that is contrary to the policy of court.
44. The averments by the applicant make it clear that the application is based on misrepresentation or non-disclosure of material facts by the respondents. It is common ground that the dispute between the parties concerns fees for work done in relation to the procuring of 8061 Mau Mau claimants. It is the respondent's case that they deserve to be paid as per the first and second agency agreements and that the respondent claim that the applicant in collusion with Cecil Miller advocate have hatched a scheme to deprive them their fees which they have already earned. The applicant in the rejoinder has reiterated that if at all the respondent are legally owed legal fees, then their remedy lies in taxation and not through the impugned consent.
45. In response to the claims by the applicant that they were not party to Nairobi HCCC No. 86 of 2013 and Nairobi Civil Appeal 155 of 2017, the 2nd respondent averred that the applicant admitted that Miller & Company were advocates on record in Milimani HCCC. No. 86 of 2013. The 2nd respondent also maintained that this Court in Nairobi Civil Appeal 155 of 2017, ascertained the hearing notices had been issued to all the parties on record including the applicant.
46. The decisive question is whether the applicant was a party to the impugned consent adopted by this Court on October 2, 2017. As the record shows, vide a letter dated 6th June, 2018, the applicant's counsel wrote to the Registrar of this Court requesting for the following documents: Mention Notice dated 2 August 1, 2017; case management form dated 28th July, 2017; notice of case management dated 10th July, 2017; the cover and second page of the record of appeal filed on June 5, 2017 drawn by the firm of Rachier Amollo and Company Advocates; notices issued by the court to the various firms as per the drawn consent; copy of letters dated 11th and October 12, 2017 by Rachier Amollo and Company Advocates; and a copy of the impugned consent dated October 2, 2017.
47. We have carefully considered the aforementioned documents to satisfy ourselves whether the applicant was served with the proceedings which culminated in the adoption of the impugned consent. We find that the mention notice dated August 21, 2017 clearly shows that the applicant was not listed as one of the parties served with the notice to attend court on October 2, 2017 and as a result, the applicant was not served. We have also perused the cover page of the record of appeal filed on 5th June, 2017, and it



is evident that though the applicant through M/s. Tandem law (XJA) was listed as the 8th respondent in Civil Appeal No. 155 of 2017, the applicant and/or its counsel M/s Miller were not listed as the respondents to be served with the record of Appeal. Finally, we find that vide a letter dated 11th October, 2017 Rachier Amollo Advocates LPP wrote to all the counsel for the respondents, where the Registrar of this Court was misled that all parties had carefully gone through the draft consent order and were agreeable to the terms therein. However, looking at the said letter it is noteworthy that the applicant was not party to the consent dated August 1, 2017 which was adopted on October 2, 2017 by this Court.

48. In the circumstances, we find that the applicant has met the threshold set in *Kamau James Gitumbo & 3 Others v Multiple Ltd (K) Limited & Another (supra)* because the applicant has demonstrated that the decision in issue has occasioned injustice or a miscarriage of justice; and the said injustice or miscarriage of justice can erode public confidence in the administration of justice; and no appeal lies against the decision in issue. Consequently, we find that the impugned consent adopted on October 2, 2017 is a proper candidate for review. On this ground alone, we find and hold that the application succeeds.
49. In addition, the guiding principles used by courts in setting aside consent judgments or orders are well established. In *Flora N. Wasike v Destimo Wamboko* [1988] eKLR Hancox, JA, as he then was, said:
- “It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside or certain conditions remained to be fulfilled which are not carried out”
50. Similarly, in *Brooke Bond Liebig v Mallya* (1975) EA 266, Mustafa Ag. VP stated thus;
- “...It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”
51. This position is clearly articulated in the English Case of *Purcel v F. C. Trigell Ltd*, (trading as Southern Window and General Cleaning Co. & Another), (1970) 3 ALL ER671, where Winn, LJ, opined:
- “It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”
52. Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. So, was this a case of non-disclosure of material facts or misrepresentation or mistake by the respondents that would lead to setting aside of the consent order adopted on October 2, 2017? *Blacks’s Law Dictionary* 10th Edition defines the term
- “fraud” as;



“1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.”

53. The same dictionary defines misrepresentation as;

- “1. The Act or an instance of making a false or misleading assertion about something, usu. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.
2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.

54. And “mistake” as;

- “1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.

55. The consent of October 2, 2017 was entered into on the assumption that all the respondents had been served with the mention notice and that all the parties were privy to the terms of the consent dated August 17, 2017 despite the fact that the terms of the consent adversely affected the applicant. Therefore, it is evident that there was a total lack of transparency and failure to disclose that the applicant was not served with the mention notice. Consequently, the applicant was never represented in the said appeal. We therefore find and hold that the impugned consent order was obtained through misrepresentation by the 1st and 2nd respondents.

56. In conclusion, we find and hold that applicant has demonstrated exceptional grounds to warrant review and setting aside of the consent order adopted on October 2, 2017. Accordingly, the application dated 17th April, 2018 is allowed. We set aside the consent order recorded before this Court on October 2, 2017 to the extent it affects the applicant herein. The 1st and 2nd respondents shall pay the applicant the costs of this application.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

LYDIA ACHODE

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

