Mwambeja Ranching Company Ltd & another v Kenya National Capital Corporation (Civil Appeal (Application) 30 of 2018) [2023] KECA 660 (KLR) (9 June 2023) (Ruling)

Neutral citation: [2023] KECA 660 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 30 OF 2018

HA OMONDI, M NGUGI & KI LAIBUTA, JJA

JUNE 9, 2023

BETWEEN

MWAMBEJA RANCHING COMPANY LTD ..... 1ST APPLICANT

PROJECT ADVISORY SERVICES LIMITED ..... 2ND APPLICANT

AND

KENYA NATIONAL CAPITAL CORPORATION ..... RESPONDENT

(Application for review of the judgment of the Court of Appeal (Koome, Warsame and Kiage, JJ.A.) or, in the alternative, certification to the Supreme Court that a matter of general public importance is involved in the said judgment dated 6th August, 2019 in Civil Appeal No.30 of 2018)

RULING

1. A brief history of this protracted litigation culminating in the applicants' application dated 9th September, 2019, the subject of this ruling, is necessary so as to put into proper context the diametrically opposed arguments pressed by the parties in support of their respective positions. Fortunately, the factual background is substantially, if not wholly, common ground and uncontroverted.

2. In the opening paragraph of his judgment dated 29th November, 2017, Tuiyot, J. (as he then was) rendered his judgment in Nairobi High Court Civil Suit No. 566 of 2013, *Mwambeja Ranching Company Ltd v Kenya National Capital Corporation Limited (Kenya) and National Bank of Kenya*,

the proposed defendant. Both the decision of the learned Judge and the subsequent appeal aptly captured the chequered history of this prolonged litigation as follows:

> "This case typifies how a rather straightforward dispute can remain unresolved for years on end. The proceedings herein are a culmination of other proceedings between the same parties involving the same subject matter."

3. Briefly stated, the 2nd appellant, M/s. Project Advisory Services Ltd, borrowed a sum of Kshs.30,000,000/= from Kenya National Capital Corporation Ltd (the respondent herein) to finance development of sisal farming on 1800 acres of land. As per the letter of offer dated 3rd April, 1992, the following securities were to be provided:

   a. an all assets debenture;

   b. a fixed legal charge for Kenya shillings 30 million over the suit land; and

   c. personal guarantees of Kshs.30 million from the directors of the company, corporate guarantees for Kshs.30 million from the appellant, Majani Mingi Sisal Ltd, and Lomolo Ltd.

4. In furtherance of the agreement, the appellant executed a legal charge dated 10th July, 1992, in favour of the respondent, which was registered over its property described as land reference number 16659 (C.R. No.22939). Before the High Court, the appellant claimed that it only secured the sum of Kshs. 30,000,000/= with interest, and that it was only a guarantor to the debtor.

5. Following the borrower's default in repayment of the said loan, the applicant instituted various suits seeking injunctions to restrain the respondent from exercising its statutory power of sale. However, the injunction applications were dismissed. Nonetheless, a compromise was reached in Milimani HCCC No. 225 of 1998 pursuant to which the parties recorded a consent on 22nd July, 1998, the effect of which was that the 1st applicant would pay the respondent Kshs.22,083,908/= in three installments, the last of which was to be paid by 31st December, 1998. It was a term of the said consent that, in default of payment, of any installment on its due date, the respondent was at liberty to execute to recover the sums payable without further recourse to the court. Even though it is common ground that the said consent was recorded during an interlocutory session, its effect is contested in this appeal.

6. The 1st applicant only paid Kshs.500,000/= contrary to the terms of the said consent, prompting the respondent to exercise its statutory power of sale. However, the respondent withdrew the sale because the reserve price could not be realised. By an application dated 13th October, 2006, filed in the above suit, the 1st applicant applied to restrain the respondent from exercising its statutory power of sale. The reasons cited were, inter alia, that the respondent had no claim against the principal debtor in respect of the guarantee because the guarantee was statute barred, thereby rendering it unenforceable against the 1stapplicant.

7. Vide a ruling dated 29th February, 2008, the High Court dismissed the said application for two reasons, namely failure to establish a prima facie case with a probability of success; and that the 1st applicant did not deserve an equitable relief.

8. On 24th December, 2012, the respondent sold the suit property by way of a private treaty to Shimbaland Ranching for Kshs. 256,159,660/=. Upset by the sale, the 1st applicant instituted Nairobi High Court Civil Suit No. 566 of 2013 against the respondent and a proposed second defendant, (the National Bank) by a plaint dated 20th December, 2013. The gravamen of its suit was that the charged property was undersold. The basis of this contestation was a valuation of the property undertaken by the 1st applicant's valuer who placed its market value at Kshs. 550 million and a forced sale value of

Kshs.350 million. Accordingly, the 1st applicant accused the respondent of breaching its statutory duty under sections 90, 96, 98(1) (d) and 97(1) of the *Land* Act.

9. A further complaint was that the respondent had failed to avail to the applicant a complete statement of accounts from 31st August, 1996. Other information alleged to have been sought but not provided included the list of potential buyers prior to the sale and the offers made, the valuation report relied on, and an explanation why a fresh statutory notice was not served. Lastly, the 1st applicant sought to know why the court was not informed that the suit property had been sold notwithstanding pendency of judicial proceedings.

10. In consequence of the foregoing, the 1st applicant sought the following orders:

    a. a declaration that the sale of L.R No.16659 (CR No.22939) for the sum of Kshs.256,159,660/= was at a gross under value and below the market value of Khs.550,000,000, which was contrary to section 98(1)(d) of the *Land* Act, 2012 and the duty of care imposed by section 97(1) of the *Land* Act;

    b. a declaration that the defendant did not issue any valid statutory notice either under section 69(1) of the repealed *Indian Transfer of Property* Act, or under sections 90 and 96 of the *Land* Act 2012 prior to the sale by private contract;

    c. a declaration that the defendant was only entitled to the compromise sum of kshs.22,083,908 less the sum of Kshs.500,000 that was paid pursuant to the consent order dated 22nd July, 1998, recorded in Milimani HCCC No.225 of 1998 - *Mwambeja Ranching Company v Kenya National Capital Corporation Ltd*;

    d. a declaration that, pursuant to section 4(4) of the *Limitation of Actions* Act, payment of the sum of Kshs.22,083,908 or such other outstanding balance following the taking of accounts and inquiries became time barred on or about 1st January, 2011, following the end of 12 years after the default payment of the last instalment that was due and payable by 31stDecember 1998 in Milimani HCC No.225 of 1998 - *Mwambeja Ranching Company v Kenya National Capital Corporation Ltd*;

    e. a declaration that, pursuant to sections 4(4) and 19(4) of the *Limitation of Actions* Act, the defendant was not entitled to charge any arrears or interest for more than 6 years on the sum of Kshs.22,083,908 or on such other outstanding balance following the taking of accounts and inquiries;

    f. an account and inquiry be undertaken on the final sum due to the defendant pursuant to the Consent Order in Milimani HCC No.225 of 1998 - *Mwambeja Ranching Company v Kenya National Capital Corporation Ltd*, or such other outstanding balance following the taking of accounts and inquiries, taking into consideration the provisions of sections 4(4) and 19(4) of the *Limitation of Actions* Act, and the in duplum Rule and, following the taking of accounts and inquiries, the final sum due to the defendant be paid out of the purchase price of Kshs.256,159,660/=, and that the difference be paid to the plaintiff with interest at court rates from when the payment lawfully fell due;

    g. damages for the unauthorized, improper and irregular power of sale of L.R No.16659 (C.R No.22939) be assessed at Kshs.550,000,000, or at such sum as may be found due, and that credit be given for any lawful sum that may be found due and owing to the defendant, and the same be deducted from the award of damages; and

    h. costs of the suit on a full indemnity basis with interest at court rates until payment in full.

11. The respondent filed a counterclaim against the applicants herein and 4 others seeking, inter alia, an order for the lifting of the corporate veil against the 1st applicant and its directors plus costs.

12. In a judgment dated 29th November, 2017, the High Court (Tuiyot, J. (as he then was) decreed as follows:

> " 70. This now is the outcome.
>
> 1. The court declares that the sale of LR.No.16659 (CR.No.22939) for the sum of Kshs.305,000,000 was at an undervalue and below the market value of Kshs. 461,938,000/= and the defendant shall indemnify the plaintiff for the difference being Kshs.156,938,000/-. This amount shall attract interest at Court rates from the date of filing of this suit.
> 2. All the other prayers in the plaint are dismissed.
> 3. Judgement is entered in favour of the defendant as against Mwambeja Ranching Company Limited (the 1st defendant to the counterclaim) and Project Advisory Services Limited (the 5th defendant to the Counterclaim) jointly and severally for the sum of Kshs.307,327,455,455.15 as at 1st May, 2001, with further interest at reserved commercial rates up to 1st December 2012 less the sale proceeds of Khs.305 million, and further interest thereon at Court commercial rates until payment in full but which sum shall not exceed Ksh.1,694,676,615.13.
> 4. To whatever sum shall be due from Mwambeja Ranching Company Limited under paragraph 71.3 above credit shall be given for the sums due to it under paragraph 71.1.
> 5. The defendants claim against the 2nd, 3rd and 4th defendants to the Counterclaim is hereby dismissed with costs.
> 6. As the plaintiff's claim partly succeeded and partly failed each party shall bear its own costs.
> 7. The costs of the counter-claim shall be to the defendant as against Mwambeja Ranching Company Limited and Project Advisory Services Limited."

13. Aggrieved by the above verdict, the applicants appealed to this Court vide a memorandum of appeal dated 8th February, 2018, against the whole decision citing 14 grounds of appeal from which this Court distilled the following issues:

    a. whether the trial court erred in law by failing to find that the 1st appellant's debt was limited to the sum stated in its guarantee of Kshs.30 million together with interest from the date of call up of the guarantee;

    b. whether the learned Judge erred in his interpretation of the effect of consents dated 14thJuly, 1988 and 22ndJuly, 1998, and if the same compromised the debt;

c. whether the Judge erred in law by failing to order the taking of accounts to determine the amounts that the appellants were obligated to pay and determine whether the principle of in duplum was applicable to the debt herein; and

d. whether the learned Judge erred in law by entering judgment to grant prayers that were not pleaded, or failed to consider that the counterclaim was time barred as against the appellants;

14. The respondent filed a notice of cross-appeal dated 23rd February, 2018, which raised 8 grounds which this Court condensed into the following issues:

i. whether the counterclaim under separate and continuing corporate guarantees were stale;

ii. whether the learned Judge was correct in finding that the sale price of the suit property was below market value and directing a refund of the surplus; and,

iii. whether the learned Judge erred in limiting recovery of the resultant shortfall to Kshs. 1,694,676,615.13/=.

15. This Court condensed the issues into 5 main issues as follows:

a. whether the corporate and individual guarantees were time barred;

b. whether the 1st appellant's debt was limited to 30 Million plus interest as stated in its guarantee;

c. the effect of the consent and the rights and liabilities of the parties;

d. the applicability of the in duplum principle to the debt herein; and

e. whether the suit property was sold at an undervalue.

16. Regarding issue number (a) above, this Court held that the counter-claim against the guarantors (the 2nd, 3rd and 4th defendants in the High Court) was statute barred. This was because the guarantees were called by letters dated 13th September, 1994, after the 2nd applicant defaulted, while the High Court suit was filed in 2013, 20 years after notices of default were issued. This was contrary to section 4 of the *Limitation of Actions* Act, which bars a suit founded on contract from being brought after 6 years from the date the cause of action accrued. However, the court held that the position did not apply to the 1st applicant since a cause of action under a continuing security never dies or lapses.

17. Regarding the question as to whether the 1st appellant's debt was limited to Kshs.30 million plus interests as stated in the guarantee, this Court held that the consent provided that it was premised on the payment of the drawdown sum in order to stop the auction. Accordingly, it did not preclude payment of the contractual interest or the exercise of the respondent's statutory power of sale in the event of default.

18. On the applicability of in duplum rule, this Court agreed with the trial court's finding that there was no evidence tendered to rebut the contention that the sums due were double the principal owed and interests from the date the section came into operation.

19. Addressing the 1st applicant's argument that the suit property was undervalued, the court observed that the sale price to Shimbaland Ranching Company Limited of Kshs.305,000,000/= was premised on the valuation report by Premier Valuers undertaken as at 25th October, 2011. This valuation placed the value of the suit property at Kshs.365,000,000/-. On the other hand, this Court noted that the appellant produced a valuation report by Lloyd Masika Limited prepared on 8th April, 2013, placing the true market value as at 30th June, 2012, at Kshs. 550,000,000/=. The court held that the trial judge

exercised his discretion correctly in determining the market value and came to a correct decision, given that the respondent did not produce any evidence before it to rebut the appellant's valuation, which was current. The court held that the trial judge correctly held that the respondent should indemnify the appellant for the difference of Kshs.156,938,000/=. It also found no basis to interfere with the learned Judge's decision and upheld the judgment by dismissing the appeal and cross-appeal with no orders as to costs.

20. Dissatisfied by the above judgment, the applicants moved this Court vide their application dated 9th September, 2019, the subject of this ruling. The application is founded on Articles 10, 40, 50, 163(4) and 159 of the *Constitution*, Rule 24 of the *Supreme Court Rules*, Sections 3A & 3B of the *Appellate Jurisdiction* Act, rules 42, 43 and 44 of the *Court of Appeal* Rules. The applicants seek the following orders:

    a. leave to amend the notice of appeal dated 8th August, 2019;

    b. this Court be pleased to recall, review and/or set aside the decision of this Court contained in this Court's judgment delivered on 6th August 2019 by Koome, Warsame & Kiage, JJA. in Nairobi Civil Appeal No. 30 of 2018 between *Mwambeja Ranching Company Limited & Ano. v Kenya National Capital Corporation*, and allow the appeal as prayed; and

    c. in the alternative, and in the event the application for review is disallowed, the Court be pleased to certify that the applicants' intended appeal against the said judgment raises matters of general public importance and grant the applicants leave to appeal to the Supreme Court against the whole judgment.

21. The motion is supported by the grounds set out on its body and the supporting affidavit of Harry Horn Junior, the applicants' director, sworn on 9th September 2019 and the annexures attached thereto. We have considered the grounds in support of the application and the replying affidavit of Daniel Mundia, the respondent's Director, Legal Services, dated 21st March, 2023.

22. First, we will address the applicants' prayer for review of this Court's judgment dated 6th August, 2019. This plea is premised on the following grounds:

    a. this Court failed to consider the grounds of appeal that clearly proved that the 1st appellant's position as a guarantor was compromised when the redemption amount was agreed at Kshs.22,083,905 and adopted as a consent of the court in HCCC No. 225 of 1998 - *Mwambeja Ranching Company v Kenya National Corporation Ltd*;

    b. this Court erred by failing to find that the respondent was estopped from increasing the 1st appellant's indebtedness to that of the 2nd appellant;

    c. this Court erred by failing to order the taking of accounts to limit interest on the consent amount up to a maximum period of 6 years from 12th June, 1998 in accordance with sections 4(4) and 19(4) of the*Limitation of Actions* Act;

    d. this Court erred by failing to find that the respondent had on two occasions limited the sum it could recover from the 1st appellant to Kshs.30 million - in Nairobi HCCC No. 1469 of 2000 - *Kenya National Corporation Ltd v Lomolo Ltd & 4 others* (1962) where it sought the sum of Kshs.30 million with interest at commercial rates from 1st January, 2000, and HCCC No. 566 of 2013 - *Mwambeja Ranching Company Ltd v Kenya National Capital Corporation* where it sought Kshs. 30 million from the date of institution of the counterclaim until settlement in full;

e. that this Court erred in failing to apply the in duplum principle on the redemption amount pursuant to the consent;

f. that this Court failed to find that both the legal charge and a guarantee for the Kshs.30 million are inseparable and should be considered together; and

g. that this Court failed to find it inequitable conduct on the part of the respondent to allow a debt to escalate from an agreed consent sum of Kshs.22,083,905 to Kshs. 1,694,676,615.13 –

23. In support of the above prayer, the applicant's counsel, Mr. Gichuhi, SC., relied on his written submissions and the cited authorities, which we have considered. In his oral highlights, Mr. Gichuhi urged that rule 1(2) of the *Court of Appeal* Rules mandates this Court to, inter alia, use its inherent power to grant such orders as may be necessary for the ends of justice. He cited the holding in this Court's decision in *Standard Chartered Financial Services & Another v Manchester Outfitters (Suiting Division) Ltd (now known as King Woollen Mills Ltd) & 2 Others* (2014) eKLR that it can reopen/ review its final decisions and hoisted high the principle of fairness and justice over the principle of finality. The Court was clear that its holding found basis in the 2010 *Constitution*.

24. Mr. Gichuhi, further submitted that the consent for Kshs. 22,083,908/= amounted to a preliminary decree in that, if the redemption amount was paid, then the property would have been discharged but that, if not settled, interest would accrue on the sum. Accordingly, the respondent is estopped from denying the redemption amount. To buttress his submission, Mr. Gichuhi relied on *Alba Petroleum Limited v Total Marketing Kenya Limited* (2019) eKLR where this Court held, inter alia, that a preliminary decree can arise from an interlocutory order that affects a substantial right of either of the parties. Since no appeal was filed against the preliminary decree, counsel argued that the issue was conclusively determined as between the parties.

25. Regarding the accrual of interest, Mr. Gichuhi faulted the court for not considering that sections 4(4) and 19(4) of the *Limitation of Actions* Act, which provide, inter alia, that "no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due." Counsel argued that the redemption amount of Kshs.22,083,908 could only have attracted interest for a maximum of 6 years. He argued that the counter-claim was filed on 31st January 2014, 16 years after the consent was recorded. To buttress his argument, Mr. Gichuhi cited this Court's decision in *Habib Bank A.G. Zurich v Rajnikant Khetshi Shah* (2018) eKLR where the respondent, who was both the chargor and guarantor, alleged that the debt was time barred. In the said case, the bank waited for 33 years before selling the property, thus accumulating a debt of Kshs.5 million to Kshs.150 million. The court ordered that, because of the delay, the interest should be limited to three years on the sum of Kshs.5 million.

26. Further, Mr. Gichuhi cited the case of *National Bank of Kenya Limited v Devji Bhimji Sanghani & Another Trading Under the Style of Sanghani Builders* (2016) eKLR in which this Court agreed with the High Court's finding in *Rachel Mwikali Mwandia v Ken Wameu Kasinga* (2013) eKLR that a claim to recover interest is time barred after six years from the date on which interest became due in accordance with section 4(4) of the *Limitation of Actions* Act.

27. On the retrospective application of the in duplum rule, counsel argued that the court erred by failing to apply the in duplum principle on the redemption amount as per the consent. Counsel referred to section 44A (6) of the *Banking* Act, which provides:

> This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation

28. It was counsel's submission that the court should have either held that in duplum applied on the consent amount of Kshs. 22,083,908 or on the sum of Kshs.30 million counter-claimed by the respondent, which would have capped interest computed for 6 years. Counsel referred to this Court's decision in *James Muniu Mucheru v National Bank of Kenya Limited* (2019) eKLR which affirmed that the in duplum rule applied retrospectively.

29. In opposition to the prayer for review, the respondent's counsel, Mr. Mutua, relied on the respondent's replying affidavit and submitted that the instant application is an abuse of the court process, and an affront to the overriding objective upon which this Court's jurisdiction is exercisable under section 3A of the *Appellate Jurisdiction* Act.

30. Mr. Mutua submitted that the instant application is composite in nature, and that the applicant ought to have pursued an appeal against the judgment to the Supreme Court upon obtaining the requisite certification. He submitted that having elected to pursue a remedy by way of an appeal, it is not open for the applicants at the same time to seek review of the same judgment. He argued that the appellate and review jurisdictions cannot and ought not be pursued simultaneously. In support of the foregoing argument, Mr. Mutua cited *Parag Bhabwaniighai Savani v Jitu Tribhovanshai Savani & 2 Others* (2017) eKLR.

31. Mr. Mutua also argued that all the grounds cited by the applicants reflect their dissatisfaction with the judgment, which is an invitation to this Court to sit on appeal on its own judgment. He relied on *Kamau James Gitutho & 3 Others v Multiple LCD (K) Limited & Another* (2019) eKLR, and added that the applicants having failed to establish that the impugned judgment "occasioned injustice or miscarriage of justice" which "...has eroded public confidence in the administration of justice and that no appeal lies against the decision." It was his position that the application does not meet the threshold to trigger this Court's residual review jurisdiction to grant the orders sought.

32. In addressing the prayer for review, we bear in mind that the general principle recognized 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. 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 that provides for correction of clerical or arithmetical mistakes in any judgment or error arising from accidental slip or omission.

33. However, as 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 only because we are final." The significance of the above pronouncement is that errors can creep into judgments necessitating correction by the Court, albeit in rare and extremely exceptional cases. Perhaps, that's why, even as Lord Wilberforce proclaimed the general approach which upholds the finality of Court decisions in *Ampthill Peerage Case* (1976) 2 All ER 411, (1977) AC 547, he was categorical that judgments may be attacked in rare and limited cases where the facts justifying the re-opening are strictly proved. He stated:

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

34. 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 its earlier decision. 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."

35. 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 stressed that a court had implicit power to do that which is necessary to achieve the dual objectives of an appellate court, which are- (a) to correct wrong decisions so as to ensure justice between the litigants involved; and (b) to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents.

36. The Nigerian Supreme Court in *Amalgamated Trustees Ltd. v Associated Discount House Ltd.* (2007) LPELR-454 (SC) 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) if a judgment is obtained by fraud or deceit; (ii) if a judgment is a nullity, such as when the court itself was not competent; (iii) if the Court was misled into giving judgment under a mistaken belief that the parties had consented to it; (iv) if the judgment was given in the absence of jurisdiction; or (iv) if 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 set forth the following principles to be preferred in applications for review:

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

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

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

38. 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)

39. Previously, this Court expressed the view in several cases that it had no jurisdiction to review its decisions. For example, in *Rafiki Enterprises Ltd v Kingsway & Automart Ltd*, Civil Application No. NAI 375 of 1996, this Court held that it had no jurisdiction to review its own decisions. However, in 2005, in *Musiara Ltd v Ntimana* (2005) EA 317, this Court held that it had 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), this Court reiterated its position that it had residual jurisdiction to review, vary or rescind its decisions in exceptional circumstances. However, in 2007 in *Jasbir Singh Rai v Tarlochan Singh Rai*, Civil Application No. Nai. CA 307 of 2003 (154/2003), this Court by unanimous decision denied review jurisdiction – in effect overruling the Court's earlier holdings in the two cases of 2005, thereby reinstating the law in the Rafiki case (i.e denial of review of jurisdiction).

40. Subsequently, in *Nguruman Ltd v Shompole Group Ranch & Another* (2014) eKLR, this Court placed fair hearing as the anchor of its discharge of judicial function and, therefore, ruled that it had the right to revisit its past decisions. (see also *Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited*, (2014) eKLR for a similar holding).

41. In *Standard Chartered Financial Services Limited & 2 Others v Manchester Outfitters (Suiting Division) Limited (now known as King Woollen Mills Limited & 2 Others* (Supra), this Court underscored the position that the principle of fairness and justice must take priority over the principle of finality. In addition, in *Kamau James Gitutho & 3 Others v Multiple Icd (K) Limited & Another* (2019) eKLR, this Court acknowledged the residual jurisdiction of this Court to re-open its own decisions. However, it stressed that such jurisdiction is to be exercised with caution and only in exceptional cases.

42. A review of this Court's post-2010 decisions shows that it has affirmed that it has residual jurisdiction to re-open its decisions. Sir Jack Jacob in The Court's Inherent Jurisdiction (1970) 23 CLP 23) defines residual power as:

> "...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."

43. However, as was observed by this Court in *Cecilia Situmai Ndeti and Michael Kyende Ndeti v Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti (Deceased) & 4 Others*, Civil Application No. E064 of 2019, this 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. This Court also observed that the residual powers of this Court are not an open license for the court to exercise unlimited discretion. It stated that residual powers are invoked to effect fairness between the parties where a statute falls short of doing so, or where there is a gap in the law. Further, it observed that the "residual jurisdiction" of this Court is available at a stage in which the court is normally deemed to have lost jurisdiction over the case or the subject matter involved in the appeal.

44. Similarly, this Court in *AVH Legal LLP v Raballa & 8 Others* Civil Appeal (Application) 117 of 2018 delivered on 3rd March, 2023, confirmed its 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) that it was rendered with fundamental irregularity.

45. As decided cases suggest, a party is not entitled to seek a review of a judgment delivered by a Court of Appeal merely for the purpose of a rehearing and obtaining a fresh decision in the case. Departure from the general principle of finality of court decisions is justified only when circumstances of a substantial and compelling character make it necessary to do so. The question before us is whether the instant application has surmounted the requirements categorized as falling within the exceptions to the general rule.

46. A summary of the applicants' grounds in support for the plea for review is as follows: (a) this Court erred in failing to consider its submissions that a guarantor's liability is liable to the extent of the sum fixed; (b) this Court erred by failing to consider that there cannot be a merger of the guarantor's debt with that of the borrower; (c) this Court erred in failing to find that the consent order for Kshs. 22,083,908/= was admitted to be a consent judgment and, therefore, the redemption amount of Kshs. 22,083,908/= could only have attracted interest for a maximum of 6 years pursuant to sections 4(4) and 19(4) of the *Limitation of Actions* Act; (d) this Court erred in failing to retrospectively apply the in duplum principle pursuant to section 44 A(6) of the *Banking* Act on the redemption amount pursuant to the consent amount of Kshs.22,083,908/=, or the sum of Kshs.30 million that was counterclaimed by the respondent, which would have capped interest computed for 6 years; (f) that the respondent's actions amount to unjust enrichment; and (g) that the court failed to appreciate that the consent amounted to a preliminary decree, and that the respondent is estopped from denying the redemption amount.

47. It is on the foregoing grounds that the applicants beseech this Court to review its orders. The exercise of the jurisdiction to review by a final court is discretionary, and the grounds for review are limited. In 1940, Chief Justice Gwyer, speaking for the Federal Court of India in *Raja Prithwi Chand Lall Choudhry etc v Rai Bahadur Sukhraj Rai & Others* AIR 1941 FC. 1, observed:

> " This Court will not sit as a court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard: "There is a salutary maxim which ought to be observed by all courts of last resort ... Interest reipublicae ut sit finis litium. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this."

48. We are alive to the fact that neither the rules of procedure nor technicalities of law stand in the way of justice being dispensed. We have scrutinized all the grounds cited in support of the review sought. We find nothing to suggest that the judgment sought to be reviewed was obtained by fraud or deceit,

or that it was a nullity. We find nothing in the above grounds to suggest that the judgment was given under a mistaken belief that the parties consented to it, nor has the absence of jurisdiction been demonstrated. There is nothing in the cited reasons to suggest that the proceedings were undertaken in such a manner as to deprive the decision or judgment of the character of a legitimate adjudication. It was not established that the judgment was rendered with fundamental irregularity. Accordingly, the applicants have failed to demonstrate any exceptional circumstances to merit the review sought.

49. Indeed, our reading of all the reasons cited in support of the prayer for review show that the grievances are principally grounds of appeal and not for review. In effect, the applicants are inviting this Court to sit on appeal against its own decision. We decline the invitation to do so. Accordingly, we find and hold that the prayer for review is totally unmerited.

50. We now turn to the prayer for certification to the Supreme Court on the proposition that a matter of general public importance is involved in the impugned judgment. The applicants' grounds in support of the said prayer are as follows:

    a. Does in duplum apply retrospectively and if so, how is the debt to be computed when a consent judgment is recorded before the rule came into force?

    b. Can a guarantor's liability exceed that of the principal debtor?

    c. Does failure to apply the in duplum principle and Sections 4(4) and 19 of the *Limitation of Actions* Act contravene Article 40 of the *Constitution* where a party is deprived of its right to property by exaggerated computation of interest.

    d. Is a chargee liable to pay interest at commercial lending rates or interest at court rates in respect of the surplus of proceeds of sale that it unreasonably withholds from the chargor?

    e. Is there a duty of care imposed on a chargee to institute recovery proceedings within reasonable time to avoid a debt escalating to astronomical amounts in accordance with equity and social justice pursuant to Article 10 of the *Constitution*?

    f. Can a bank recover interest in arrears in excess of 6 years when there is a consent judgment?

    g. Does a continuing security attract the 6-year limitation rule on the application of interest?

51. Mr. Gichuhi argued that the application meets the threshold set by the Supreme Court in *Hermanns Phillipus Steyn v Giovanni Gnecchi-Ruscone* (2013) eKLR. He argued that the above grounds are self-evident and rehashed them by posing the following questions: (a) Does the in duplum rule apply retrospectively to periods before Section 44A of the *Banking* Act came into force? (b) What are the limits of a surety's liability- is there a difference between a personal/corporate guarantee and a legal charge over land covering the same amount guaranteed? (c) Can a surety assume primary liability of a debt because he has offered land as security? (d)What interest should be applied to surplus monies held in trust by a chargee who refuses to account and refund the excess? Should it be interest at court rates, the bank's fixed deposit rates or the bank's commercial lending rates? (e) Is a chargee a constructive trustee of surplus following a sale of charged property and is it guilty of unjust enrichment when it retains the surplus without any lawful accounting of the redemption amount? and (f) Does the limitation period of 6 years apply to a debt secured by a continuing security and to any consent recorded in court that amounts to a preliminary decree?

52. Lastly, Mr. Gichuhi urged that, under section 101(e) of the *Land* Act, the residue of the surplus and damages for wrongful sale under section 97 of the *Land* Act are lawfully payable to the 1st appellant. He submitted that the Court failed to consider the appellant's submissions on the case of *Margaret*

Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) eKLR where the bank's interest rate was found to be contrary to section 44 of the *Banking* Act, morally wrong and manifestly excessive. He wondered how else one could describe a debt that escalated from Kshs.22 million to over Kshs.1. 6 billion over a span of 22 years?

53. In opposition to the prayer for certification, Mr. Mutua argued that the applicants have not met the requisite threshold for certification because the dispute arose from contractual dealings between the parties and, therefore, what the applicants are pursuing is a narrow private interest relating to their adjudged contractual liability to the respondent. Lastly, counsel submitted that a matter that turns on determination on the facts in a dispute does not merit certification as one raising an issue of general public importance.

54. The Constitution defines the Supreme Court's jurisdiction in precise terms. The Supreme Court has jurisdiction in respect of all appeals involving the interpretation or application of the Constitution. It has ordinary appellate jurisdiction, but that jurisdiction is limited to matters certified as being "of general public importance". It has "exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140;" and lastly, it may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning County Government.

55. Germane to the issue before us is Article 163(4) (b) of the *Constitution* which provides:

> (4) Appeals shall lie from the Court of Appeal to the Supreme Court- .... In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved subject to clause (5).' (Emphasis added)

56. The applicants have invoked the above Article by seeking leave to appeal to the Supreme Court. In effect, we are invited to determine whether the intended appeal raises issue(s) of general public importance. Simply put, does the application meet the tests for certification? In *Hermanus Philipus Styen v Giovanni Gnecchi- Ruscone* (supra), this Court held:

> " The test for granting a certificate to appeal to the Supreme Court as a court of the last resort is different from the test for granting leave to appeal to an intermediate court-for example, from the High Court to the Court of Appeal. In such cases, the primary purpose of the appeal is correcting injustices and errors of fact or law and the general test is whether the appeal has realistic chances of succeeding. If that test is met, leave to appeal will be given as a matter of course. (See Machira t/a Machira & Company advocates v Mwangi & Ano (2002) 2KLR 391 and The Iran Nabuvat (1990) 3 ALL ER 9) .... In contrast, the requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court. The role of a Supreme Court was succinctly stated by the House of Lords in R v Secretary of State Exp. Eastaway (Lord Bingham) (2001) 1 ALL ER 27."

57. The Supreme Court in *Malcolm Bell v Hon. Daniel Torotich arap Moi and Another*, Supreme Court Application No. 1 of 2013 stated the governing principle as follows:

> " For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

i. Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have significant bearing on the public interest;

ii. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;

iii. Where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

iv. Mere apprehension of miscarriage of justice, a matter most apt for resolution [at earlier levels of the] superior Courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4)(b) of the Constitution;

v. The intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought;

vi. Determinations of fact in contests between parties are not, by [and of] themselves, a basis for granting certification for an appeal before the Supreme Court;

vii. Issues of law of repeated occurrence in the general course of litigation may, in proper context, become 'matters of general public importance', so as to be a basis for appeal to the Supreme Court;

viii. Questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;

ix. Questions of law that are destined to continually engage the workings of the judicial organs, may become 'matters of general public importance', justifying certification for final appeal in the Supreme Court;

x. Questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance', justifying final appeal in the Supreme Court."

58. The duty before us is to consider and evaluate if the foregoing principles have been met in this case. For starters, there is no submission before us that there are conflicting decisions of this Court that raise a substantial point of law the determination of which will have a significant bearing on the public interest.

59. The only ground cited is that the issues raised in the application are matters of general public importance. On identification of specific elements of general public importance, the mere enumeration of issues as matters of general public importance does not suffice; there must be cogent

demonstration that the issues identified are within the ambit and definition of matters of general public importance.

60. Appreciating what constitutes general public importance, the erudite words of Madan, J. in *Murai v Wainana* (1982) KLR 38 are useful. He stated:

> " We do not want to have a wilted legal system in this country. We want to have a legal system for the common will. A question of general public importance is a question which takes into account the well-being of society in just proportions." (Emphasis added)

61. The Supreme Court in the *Hermanus Steyn* case (Supra) at para. 58 stated:

> " ...Before this Court, "a matter of general public importance" warranting the exercise of appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad based, transcending the litigation interests of the parties, and bearing upon the public interest. As the categories constituting public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

62. In *Strouds Judicial Dictionary*, Volume 4 (IV Edition), 'Public Interest' is defined thus:

> " Public Interest (1) a matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

63. In *Black's Law Dictionary* (6thEdition), "public interest" is defined as follows:

> " Public Interest is something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or National Government."

64. The Supreme Court in *Dhanjal Investment Limited v Cosmos Holidays PLC* (2021) eKLR was uncompromising that evidentiary matters are specific to the parties involved and,therefore, are not grounds for grant of certification. Likewise, in *Housing Finance Company Limited & Another v Sharok Kher Mohamed Ali Hirji & Another* (2021) eKLR, the Supreme Court held that it cannot resolve factual disputes.

65. The issues urged by the applicants citing the extent of the guarantor's liability under the guarantee instrument are evidentiary matters which can be perfectly resolved by interpreting the charge document, the guarantee document and the letter of offer. As the learned judge of the High Court observed at paragraph 52 of his judgment, the 1st applicant herein guaranteed the principal debt by way of a charge and a deed of guarantee and indemnity. A reading of the charge instrument shows that it clearly provides that the guarantor (the 1st applicant) bound himself to pay the lender such sum not exceeding Khs.30,000,000/= together with commission and other usual bank charges and other costs charges and expenses, and together with interest at such rate or rates (subject to a minimum of 21%) per centum as the lender shall in its sole discretion from time to time decide with full power to the lender to charge different and penal rates for different accounts, such interest to be calculated on daily balances and debited monthly by way of compound interest provided always that the lender shall not

be required to advise the borrower prior to any change in the rate of interest so payable, nor shall any failure by the Lender to advise the borrower as aforesaid prejudice in any way howsoever the recovery by the lender of interest charged subsequent to any such change.

66. Clearly, the extent of a guarantor's liability is an issue of fact between the parties. It can be resolved by way of evidence and by interpreting the letter of offer, the guarantee instrument and the charge document. Such an issue, in our humble view, is not by itself a basis for granting certification for an appeal before the Supreme Court.

67. In any event, the extent of a guarantors' liability under a guarantee instrument is not novel nor are there conflicting decisions on the issue to merit clarification by the apex Court. The legal position is that, unless the guarantee instrument otherwise provides, the guarantor's liability only extends to the extent therein guaranteed. Upholding this position, this Court in its judgment dated 28th April, 2022, in *Basil Criticos v National Bank of Kenya Limited & Another*, Nairobi Civil Appeal No. 80 of 2017, (Nambuye, Karanja & Kiage JJ.A.) stated as follows:

> 31. The interpretation that lends itself to us with regard to the above provisions in the context of the two legal instruments is that it is by way of guarantee that the appellant undertook to pay the loan amount together with interest, costs and any charges thereof upon the borrower defaulting. The same undertaking by the appellant was restated in the charge instrument. This deduction is further informed, and logically so, by the fact that the loan amount and the guaranteed amount was the same, that is, Ksh. 20 million. We find the decision in Rajnikantkhetshi Shah (supra) quite decisive in this regard, that is, unless otherwise provided, where a guarantee limits the guarantor's liability to a fixed sum, the guarantor will be liable to the extent of the guaranteed sum only and not the entire debt. Further, a guarantor's liability is secondary to that of the principal debtor. See Lalji Karsan Rabadia (supra). Consequently, we hold the view that the appellant's liability rested with the guarantee only. (Emphasis added?) (Also, for a similar holding, see this Court's decision in National Bank of Kenya Limited (as the Successor in Business of Kenya National Capital Corporation Limited) & Kenya National Capital Corporation Limited V Basil Criticos, Civil Application No. E158 OF 2022 and Javaid Igbal Khan & Another v Igbal Transporters Limited & Another (2018) eKLR)

68. Additionally, the instant dispute is a private claim between the parties. It has not been shown how the dispute will affect the public. The law prescribes a clear remedy in the event of an improper exercise of a statutory power of sale. The fact that large sums of money are involved in litigation has been held not to be a ground for granting certification. The Supreme Court in *Glencore Energy (UK) Ltd v Kenya Pipeline Company Ltd* (2018) eKLR stated that the test is not whether a large sum of money is involved in litigation.

69. The question is whether the applicants have raised a substantial point of law. It is noteworthy that, to be substantial, a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way. (See *State Bank of India & Others v S. N. Goyal*, AIR 2008 SC 2594, the Supreme Court of India).

70. This Court has the duty to ensure that the case does not involve a mere question of law, but a substantial question of law. Hence, an applicant must satisfy this test to assume jurisdiction under Article 164 (4) of the *Constitution*. (See Supreme Court of India in *Chunila v Mehta & Sons Ltd v Century SPG & Manufacturing Co Ltd* 1962 AIR 1314, 1962 SCR Supl. (3) 549).

71. To qualify as a question of law arising from the case, there must have been a foundation laid in the pleadings, the question should emerge from the findings of facts arrived at by the court so as to make it necessary to determine that question of law and arrive at a just and proper decision. If the question is settled by the highest court, or if the general principles to be applied in determining the question are well settled, and there remains the question as to the application of those principles, or that the plea raised is palpably absurd, the question ought not to be viewed as a substantial question of law.

72. Regarding the question as to whether the in duplum principle applies retrospectively, this Court stated as follows:

> " With regard to the application or non-application of the in duplum rule which is the third issue, Section 44A (6) of the Banking Act, allows for retrospective application with respect to non-performing loans made before the section came into operation on 1st May, 2007. We however do not agree with the appellant's interpretation of the section that the maximum that the respondent could recover was twice the compromise sum in the consent. The in duplum principle came into operation 15 years after the appellants took the loan from the respondent and after the interest applied to the debt had accrued. The rule could only apply on the sum due as at that date of effect. Section 6 (a) and (b) of the Banking Act are very precise. We shall reproduce them here for emphasis:
>
> "Provided that where loans become non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following—
>
> a. the principal and interest owing on the day this section comes into operation; and
>
> b. interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and" ...
>
> The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides. Ironically, in this case the creditor was the one facing exploitation through numerous legal proceedings and unnecessary delays by being kept out of reach from its money. The calculation of interest at 21% per annum on the loaned sum of Kshs.30 Million and the interest on the guarantee over the years has been painstakingly outlined in the record before us. This has been enumerated for both appellants yet as rightly observed by the trial Judge, no evidence has been tendered to rebut the sums due were double the amount that was owed in principal and interest from the date the section came into operation. We therefore find that in the circumstance of this case it is not applicable."

73. We have examined the foregoing finding and the relevant provisions of the *Banking* Act and the tests for certification as enumerated in the cases discussed above. We are persuaded that section 44A of the *Banking* Act is clear on its application. In any event, the said section has been the subject of interpretation by our Superior Courts.

74. Regarding the applicants' question as to whether proceedings should be instituted within a reasonable period, this Court in the preceding excerpt was candid on the applicants' conduct when it stated: "Ironically, in this case the creditor was the one facing exploitation through numerous legal proceedings and unnecessary delays by being kept out of reach from its money." The applicants cannot, as they have been doing, keep using court processes by filing multiple court proceedings thereby forestalling or delaying recovery of the loan and, on the other hand, purport to complain about accrued interests.

75. In short, we find and hold that none of the grounds cited by the applicants merit certification to lodge an appeal to the Supreme Court. Flowing from our analysis of the facts of this case, the law and the conclusions arrived at above, we are not satisfied that the applicants have identified and concisely set out the specific elements of general public importance to merit the leave sought to lodge an appeal to the Supreme Court. The dispute between the parties was a commercial loan between a lender, borrower and guarantor. The applicant has not shown how a private commercial agreement between the parties, and failure to repay a loan, is a matter of general public importance.

76. Lastly, we now address the prayer for leave to amend the Notice of appeal, which included a wrong party. The applicants contend that it was an innocent mistake, which is not prejudicial to the respondent. However, having found that the applicants' intended appeal does not meet the threshold for certification as sought, we find that it will be an academic exercise for this Court to determine the prayer for leave to amend the notice of appeal to the Supreme Court dated 8th August, 2019.

77. Even if we had allowed the prayer for certification, the prayer for leave to amend the notice of appeal is still not sustainable before this Court because this Court has already considered all the issues in the applicants' appeal and pronounced itself on all the issues in its final judgment.

78. In view of the foregoing, we are of the considered view that rules 16 and 44 of this Court's *Rules*, 2010 would have been applicable in this case if this Court was yet to render itself on the merits of the appeal. In this case, the applicants have already filed a notice of appeal dated 8th August, 2019. It is trite law that the jurisdiction of an Appellate Court is invoked by filing of a notice of appeal. The centrality of a notice of appeal was amplified by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* (2004) eKLR as follows:

> " A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant's notice of appeal as having been filed out of time in Silverbrand vs County of Los Angeles (2009) 46 Cal. 4th 106, 113 stated inter alia:
>
> "As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice is actually or constructively filed within the appropriate filing period, an Appellate Court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all."

79. From the foregoing, we find and hold that the jurisdiction to grant leave to amend a notice of appeal regularly filed against the decision of this Court lies with the Supreme Court because this Court is now functus officio.

80. In view of our findings on the three issues addressed above, the upshot is that the application dated 9th September, 2019, lacks merit and it is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

H. A. OMONDI

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR