IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPLICATION NO. 2 OF 2019

BETWEEN

KAMAU JAMES GITUTHO

NJENDU t/a GITUTHO ASSOCIATES .....1ST APPLICANT

HARRY NJOROGE GAKUYA t/a

GAKUYA &ASSOCIATES .....2ND APPLICANT

MAXAD CONSULTING ENGINEERS LTD.....3RD APPLICANT

PRIMECONSULT ENGINEERS LIMITED.....4TH APPLICANT

AND

MULTIPLE ICD (K) LIMITED .....1ST RESPONDENT

MULTIPLE HAULIERS (E.A) LIMITED.....2ND RESPONDENT

(An application for review of the Judgment of the Court of Appeal at

Mombasa (Visram, Karanja & Koome, JJ.A) dated 27th June, 2018 ***in Civil Appeal No. 77 of 2017)***

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RULING OF THE COURT

1. Prior to the promulgation of our current ***Constitution***, this Court was the apex court in the land as well as the court of last resort in respect of disputes lodged in the judicial system. As such, decisions of this Court were considered final and binding. Therefore, save for the limited jurisdiction prescribed under ***Rule 35*** of the ***Court of Appeal Rules***, to correct clerical or arithmetical errors, this Court could not re-open or look back into itsdecisiononce it was made.

2. The above position was informed by the principle of finality which is hinged on the public interest policy that litigation must come to an end. Bosire, J.A in ***Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2007] eKLR*** succinctly described the principle as follows:

> ***"This is a doctrine which enables the courts to say litigation must end at a certain point regardless of what the parties think of the decision which has been handed down."***

Further, the finality principle dealt with the all-too human predilection to keep trying until something gives. See this Court's decision in ***William Koross vs Hezekiah Kiptoo Komen & 4 Others [2015] eKLR***.

3. Be that as it may, the above position was altered by the current constitutional dispensation as discussed in ***Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 Others***

***[2016] eKLR* (*the Standard Chartered case*)**. In that case, this Court was alive to the fact that despite the establishment of the Supreme Court as the highest court in the land, this Court still remained as the court of last resort in most disputes. It therefore observed as follows:

> ***"We have deliberately quoted extensively from the Rai case, the Nguruman case, and the Benjoh case in order to bring out the position that this Court has taken in the past and the reason for any deviations. From the analysis it is evident that although the facts in the Rai case were similar to the Benjoh case, to the extent that in both instances there was a motion seeking to reopen a concluded judgment of the Court, the new constitutional dispensation justified a departure from the Rai case as it called for an interpretation of the Court's jurisdiction in a manner that brings it into conformity with the principles of the 2010 Constitution, and gives allowance for the development of the law… We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands."*** *[Emphasis added].*

4. Nonetheless, the above development did not do away with the principle of finality. It simply calls upon the Court to take into account the principles of finality and justice in determining whether to exercise the abovementioned residual jurisdiction.See this Court's decision in ***Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited [2014] eKLR (the Benjoh Amalgamated case)***. In addition, the scope of this residual jurisdiction was aptly set out as follows in the ***Benjoh Amalgamated case***:

> ***"It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."***

5. It is the aforementioned jurisdiction that the applicants herein are asking this Court to exercise vide an application dated 4th February, 2019. In particular, the applicants are praying for the following orders:

> ***a) THAT the honourable Court be pleased to recall and/or reopen, Civil Appeal No. 77 of 2017;***
>
> ***b) THAT upon recalling and/or reopening, this honourable Court be pleased to review, vary, and/or set aside its judgment made on 27th June, 2018 in Civil Appeal No. 77 of 2017;***
>
> ***c) THAT upon reviewing, varying and or setting aside its decision made on 27th June, 2018 this honourable Court be pleased to order Civil Appeal No. 77 of 2017 be heard afresh.***

6. The application is premised on the grounds that there are errors of law and facts in the said judgment; the errors have not only resulted in a miscarriage of justice but have also eroded public confidence in the administration of justice. Furthermore, it is in the interest of justice for the orders sought to be granted.

7. A synopsis of the pertinent facts will place the application in context. The dispute between the parties stems from the terms of engagement of the applicants in the 2nd respondent's projectfor construction of office blocks in Makupa Causeway. By a letter of commissioning dated 2nd November, 2007 (the initial contract) the applicants were appointed as consultants in their respective fields of expertise over the said project. The terms under the initial contract were as follows:

> ***"RE: PROPOSED MAKUPA CAUSE WAY ICD FOR M/S MULTIPLE HAULIERS (E.A) LIMITED***
>
> ***We hereby confirm your appointment as the Consulting Team for our above project.***
>
> ***Your terms of engagement will be as per our discussions and agreement with Mr. Gakuya of Gakuya & Associates on October 26, 2007 in our offices.***
>
> ***The total consolidated fees for the Consulting Team was agreed at 8.50% of the cost of the project plus Value Added Tax and disbursements.***
>
> ***Your fees and disbursements will be paid directly by the Employer to each team member against tax invoices raised in stages as recommended by the Team Member's respective Registration bodies, and will be paid to each Team Member in the following proportions relative to the total agreed fees:-***

Team Member/Consultant	***Fee %***
Gitutho Associates, Architects	***3.40***

	%
Gakuya Associates, Quantity Surveyors	*1.99%*
Maxcad Consulting Engineers, Civil & Structural	*1.98%*
Primeconsult Engineers, Electrical & Mechanical	*1.13%*
TOTAL FEES AGREED	*8.50%"*

8. Subsequently, there was a meeting held on 8th May, 2010 between the parties' representatives with respect to the project. It would appear several issues touching on the terms of the applicants' engagement were discussed as per the 1st applicant's letter dated 11th May, 2010, which we set out the relevant portion as herein under:

"During the meeting, we confirm that the following was agreed:

> ***1) In view of the enhanced project size vis-a-vis what has been previously contemplated, both parties agreed that the total fees for all consultations will be 6.75% of the project cost reduced from the original 8.5%.***
>
> ***2) 75% of the fees which becomes due at tender award stage will be based on a total project cost of Kshs. 3,638,829,626.***
>
> ***3) Supervisory fees will be 25% of 6.75% of the actual works contracted, and paid in stages as the project construction progresses…"***

9. The respondents concurred that the above letter reflected what the parties had agreed on save for the issue of supervision. That position was articulated by the 1st respondent in a letter dated 14th May, 2010 in the following manner:

> ***"We believe that the discussions held thereof were both cordial and fruitful and which have been very eloquently captured in the summary brief of your captioned letter of 11th May, 2010.***
>
> ***However, our attention is drawn to item 3) under the caption of 'supervisory fees' which does not reflect the true nature of our discussions. In view of the foregoing, we would like to clarify as follows:***
>
> ***1) As intimated in the meeting, the project consultants would not be required to carry out supervision of the works contracted.***
>
> ***2) The responsibility has been given to the Project Manager, GAUFF Ingenieurres,…***
>
> ***…***
>
> ***4) The role of the Consulting Team employed by MIDKL is to purely confirm that whilst the works are being carried out, there is no major deviation from the final approved design."***

10. Disagreeing with the respondents' stand, the applicants through a letter dated 27th May, 2010 under the hand of the 1st applicant, stated in part as follows:

> ***"We took note of your financier's stipulations as argued by you that they will attach consultants to carry out independent***

supervision. We are and have in the past executed projects by external and internal financiers and have not come across such arrangements…

We therefore, with respect, regret that we will not play the role suggested in paragraph 4. Under such circumstances and with regard to the situation you are in where your financier would want to have full independent supervision the following will need to be done, bearing in mind that we are extending full respect to you as a Client:

1) You will be required to decommission the design team, after successfully executed pre-contract assignment.

2) You will be required to enter into a disclaimer agreement (approved by the consultants' lawyers) with regard to the construction works to be executed, and which will inter alia require you indemnify the consultants for any misrepresentation by others of the submitted and approved design drawings…

3) You will be required to pay the consultants of on a one-off basis (sic) for the services rendered as per contract (arrangements gentlemanly made at our meeting with you on 8th May, 2010 were on the assumption that we would still be in contract with you during the post-contract period. This not being the case the remuneration concessions and arrangements made at the meeting would be void in subsequence)."

11. Thereafter, there was no further communication with regard to the above issue. Nonetheless, during the course of the project some payments were made to the applicants. Of relevance, is that at some point the applicants demanded payment of an aggregate figure of Kshs.259,029,151.70 which they believed was their outstanding fees as per the terms of the initial contract. Conversely the respondents disputed the amount claimed. As far as they were concerned, the initial contract had been varied by the agreement made on 8th May, 2010 (variation agreement). Therefore, in line with the variation agreement the amount due to the applicants was Kshs.83,798,196.39, which they contended the 2nd respondent had always been willing to pay.

12. On account of the stalemate, the applicants sought redress in the High Court by instituting **H.C.C.C. No. 521 of 2011** against the respondents. In their defence, the respondents remained steadfast that the applicants were only entitled to Kshs.83,798,196.39, which sum the applicants declined to receive. Towards that end, the respondents filed a statement and counter-claim seeking a declaration to that effect.

13. The trial court (Otieno, J.) in a judgment dated 4th August, 2017 held that the initial contract had not been varied and thus found in favour of the applicants. The learned Judge went on to find that the applicants were entitled to a total sum of Kshs.219,170,713 as the outstanding balance of their professional fees. In the end, the learned Judge dismissed the respondents' counter-claim with costs and awarded the applicants interest on the outstanding feesat the rate of 14% per annum effective from 1st May, 2010 until payment in full.

14. The above decision did not go down well with the respondents who in turn preferred an appeal in this Court, **Civil Appeal No. 77 of 2017** which was allowed by a judgment dated 27th June, 2018. In doing so, this Court expressed that the fundamental issue was whether the initial contract had been varied as contended by the respondents. In the court's view, the discussions held on 8th May, 2010 gave rise to a valid oral agreement which varied the initial contract and which was relied upon by both the parties in the conduct of their affairs thereafter. The court noted the applicants' conduct of raising fresh fee notes based on the variation agreement indeed confirmed that both parties had accepted the variation of the initial contract.

15. This Court also found that the outstanding fees due to the applicants was Kshs.83,798,196.39 as advanced by the respondents. Further, taking into account that by the time the appeal came up for hearing, the respondents had so far paid the applicants an additional amount of Kshs.174,114,783, this Court held that the applicants were not entitled to any more fees. Likewise, the court found that the applicants were not entitled to an award of interest. This was mainly because it was not in dispute that the respondents were always willing to pay the adjudicated outstanding fees but the applicants had declined to accept such payment. Last but not least, this Court held that the 1st respondent was not privy to the contract between the applicants and the 2nd respondent hence liability thereunder could not attach to the 1st respondent.

16. Ultimately, this Court rendered itself as follows:

"We set aside the judgement dated 4th August, 2017 in its entirety. We substitute the same with an order dismissing the respondents' suit with costs and allow the appellants' counterclaim in the following terms:

a) A declaration is hereby issued that the 2nd appellant stands discharged from its obligations under the agreements dated 2nd November, 2007 and 8th May, 2010 having paid the sum of Kshs. 83,798,196.39

b) We also allow costs of this appeal to the 1st and 2nd appellants against each of the four respondents."

It is this judgment that the applicants want to be set aside.

17. On their part, the respondents opposed the application by filing grounds of opposition, a preliminary objection and a replying affidavit sworn by Kalpesh Sevantilal Doshi, the branch manager of the respondents. The gist of their opposition was that the applicants did not meet the requisite standard to justify the exercise of this Court's residual jurisdiction in their favour.

18. At the plenary hearing of this application, Mr. Inyangu appeared for the applicants while Mr. Ndegwa appeared for the respondents. Counsel relied entirely on the written submissions on record.

19. The applicants reiterated that this Court has residual jurisdiction to entertain the application for review of the judgment in issue. To bolster that line of argument reference was made to this Court's decisions in the ***Benjoh Amalgamated case*** and the ***Standard Chartered case***.

20. Drawing further support from other jurisdictions, the applicants cited the English case of **Taylor & Another vs Lawrence & Another [2003] QB 528**. They contend that the English court recognized that such residual jurisdiction kicks in where it is established that significant injustice has occurred due to a decision made by the court and there is no alternative remedy to correct the error. In such circumstances, they argued, a court is allowed to re-open proceedings in a matter which had already been heard and determined. In their opinion, the judgment in issue fell squarely within that category since it is not appealable to the Supreme Court.

21. Addressing the requisite criteria to warrant the exercise of this Court's residual jurisdiction, reliance was placed on the ***Standard Chartered case*** and **Somani vs Shirinkhanu (No. 2) [1971] E.A 79**. In the applicants' view, all they needed to establish is that firstly, the existence of exceptional circumstances and/or secondly, that the decision in issue manifests an error(s) on the face of the record resulting in miscarriage of justice. It was the applicants' contention that they had met both prerequisites.

22. By way of illustration, the applicants submitted that the impugned judgment negated the applicability of the provisions of the ***Architects and Quantity Surveyors Act*** (the Act) relating to reduction of professional fees. This is because the judgment, as they put it, 'applauded' the respondents' conduct of unilaterally reducing their fees without a prior written agreement to that effect as prescribed under ***Clause A.2 (d)*** of the fourth schedule to the Act. According to them, the judgment, if left to stand will not only affect the application of the Act but will also have negative consequences on professionals in the building and construction industry practising under the said Act since they will be left to the whims of an employer.

23. The applicants went on to set out the perceived apparent errors on the face of the judgment. To them, the first was the finding that there was *consensus ad idem* to vary the initial contract. In their view, the letters dated 11th May, 2010, 14th May, 2015 and 27th May, 2010 exchanged between the parties coupled with the lull in communication thereafter substantiated that there was no meeting of the minds as far as the alleged variation was concerned.

24. The second error was the finding that the discussions held on 8th May, 2010 constituted an oral agreement which varied the initial contract. As per the applicants, the lack of consensus on what had been discussed by itself could not give rise to an agreement capable of being recognized as a valid contract, at least one capable of varying the initial contract. To bolster that proposition, we were referred to the case of ***Kenya Breweries Limited vs Kiambu General Transport Agency Limited [2000] eKLR***.

25. It was argued that the discussions of 8th May, 2010 were merely a gentlemen'sagreement which was based on the assumption that the applicants would carry out the supervisory works over the project. As such, once the respondents objected to the applicants carrying out the supervisory works, the applicants were discharged from any obligation placed upon them by the discussions held on 8th May, 2010.

26. In the alternative, the applicants submitted that by virtue of ***section 98*** of the ***Evidence Act & Clause A.2 (d)*** of the fourth schedule to the Act, the alleged oral agreement could not vary the initial contract. It is on that basis that this Court was also faulted, as per the applicants, for relying on ***Halsbury Laws of England*** over the provisions of the Act, in finding the contrary.

27. The third error was the application of the doctrine of estoppel. In that regard, this Court held that the applicants were estopped from denying that they had not agreed to the variation because they had raised invoices in consonance with the variation. According to the applicants, the doctrine was never pleaded at the trial court but was raised for the first time in the appeal before this Court. Therefore, this Court should not have applied or invoked that doctrine in its decision as held in the case of ***Diamond Trust Bank Kenya Ltd vs Said Hamad Shamisi & 2 Others [2015] eKLR.*** In any event, the applicants submitted, this Court failed to appreciate that the applicants had opted out of the gentlemen's agreement of 8th May, 2010 by their letter dated 27th May, 2010 and most importantly, that the alleged fee notes were raised on a without prejudice basis.

28. The fourth error, as per the applicants, was this Court allowing the respondents' counter-claim which they contend was fatally defective because of non-compliance with ***Order 7 Rule 3*** of the ***Civil Procedure Rules***. It was the applicants' assertion that other than the counter-claim not being accompanied by a verifying affidavit it also did not disclose any reasonable cause of action against the applicants.

29. Fifth was the alleged interference with the trial court's discretion to award interest under ***section 26*** of the ***Civil Procedure Act***. In the applicants' opinion there was no basis for such interference. Last but not least, the sixth error identified by the applicants was what they believed was the unwarranted discharge of the 1st respondent from its obligations under the contract. It was urged that from the correspondences on record, it was patently clear that the 1st respondent had played a major role in the execution of the contract and even went as far as making payments on behalf of the 2nd respondent. It was therefore, as the applicants' term it, absurd for this Court to find that the 1st respondent was not privy to the contract.

30. It is on account of the above errors that the applicants allege that the impugned judgment continues to violate their fundamental rights and freedoms as enshrined under the ***Constitution***. Expounding further, the applicants argued that their right to fair administrative action and fair hearing under ***Articles 47 & 50*** were infringed to the extent that firstly, this Court failed to analyse the evidence on record and secondly, for making determination on new issues which they were never given an opportunity to address.

31. They added that the impugned judgment as a whole denied them their right to property as protected under ***Article 40*** and subjected them to unfair labour practices which are prohibited under ***Article 41***. They claimed that they were entitled to the fruits of their labour, expertise and professional input into the respondents' project.

32. All in all, the applicants argued that the aforementioned errors together with the resultant infringement of their rights not only amount to

miscarriage of justice but also give rise to exceptional circumstances warranting the review sought.

33. In opposing the application, the respondents urged that the applicants had not met the necessary threshold to warrant this Court to re-open its judgment. In other words, the alleged errors of law and facts advanced by the applicants do not fall within the restricted category which would call for the invocation of this Court's residual jurisdiction. The respondents emphasised that the threshold in question is quite high because if exercised it undermines the important principle that there has to be finality in litigation.

34. Citing the ***Benjoh Amalgamated case***, the respondents reiterated that the residual jurisdiction of this Court is to be exercised cautiously and in exceptional circumstances to promote public interest and enhance public confidence in the administration of justice. According to the respondents, the alleged errors of law could not form the basis for the exercise of the residual jurisdiction. To them, the application was simply asking this Court to sit on an appeal against its own decision. To buttress that proposition, reference was made to case of ***Mukuru Munge vs Florence Shingi Mwawana & 2 Others [2016] eKLR*** wherein this Court held:

> ***"The primary ground upon which the Court is being asked to exercise its residual jurisdiction is that its application of the law of limitation is erroneous. That, with respect, cannot constitute a ground for re-opening the judgment for two reasons. Firstly to proceed as the applicant invites us to do amounts to this Court sitting in appeal from its own decision, which clearly is not the purpose of the Court's special and residual jurisdiction."***

35. Moreover, it was urged that the applicants had failed to establish that the doctrine of estoppel had not been pleaded in the High Court. Contrary to the applicants' assertion, the respondents' statement of defence which was filed at the High Court set out the facts which gave rise to the doctrine.

36. Relying on the decision of the Supreme Court of Jamaica in **San Souci Ltd. vs VRL Services Ltd. – Supreme Court Civil Appeal No. 20 of 2006**, the respondents posited, the applicants could not call upon this Court to review the judgment based on their own omissions or mistakes. It was submitted that in so far as the allegations to the effect that this Court did not consider the provisions of the Act or the alleged infringed constitutional rights were concerned, the same were never pleaded or raised by the applicants in the High Court. Nonetheless, the applicants were barred from raising the aforementioned grounds, which the respondents believe was an afterthought, in the application by virtue of ***section 7*** of the ***Civil Procedure Act***.

37. Most importantly, the respondents urged, the applicants were required to establish that a significant injustice had occurred due to the impugned judgment. In the respondents' view, the applicants had not suffered any injustice because their fees as per the variation agreement had been paid in full. Equally, the setting aside of the award of interest could not be termed as injustice. For the simple reason that an award of interest is not a matter of right but lies with the discretion of the court. To buttress that proposition this Court's decision in ***Beth Muthoni Njau & Another vs City Finance Bank Ltd. [2018] eKLR*** was cited. Besides, the applicants had not established that the magnitude of the perceived injustice was such that it eroded public confidence in the administration of justice.

38. The respondents also claim that the applicants are guilty of laches, in that whilst the impugned judgment was delivered on 27th June, 2018, the application for review was filed on 4th February, 2019, about 6 months later. Furthermore, the respondents contend that the applicants have not adduced any explanation for the undue delay thus the application should be dismissed on this ground.

39. Last but not least, the respondents submitted that the alleged errors of law and violation of constitutional rights advanced by the applicants were strictly speaking matters for an appeal to the Supreme Court under ***Article 163 (4)*** of the ***Constitution***.

40. We have considered the application, submissions by counsel as well as the law. As stated in the opening paragraphs of this ruling, the residual jurisdiction of this Courtto re-open its own decision is exercised with caution and only in exceptional cases. It follows therefore, that this residual jurisdiction can only be set in motion once the established threshold is met. In other words, the following must be demonstrated:

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

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

3) No appeal lies against in the decision in issue.

See also this Court's decision in ***Jimnah Mwangi Gichanga vs Attorney General [2015] eKLR.***

41. Did the applicants in this case meet the above standard? We do not think so. This is because to begin with the applicants in our view, did not establish the alleged errors which supposedly resulted in injustice or miscarriage of justice. See the ***Standard Chartered case***.

42. It is without doubt that at the heart of the dispute between the parties was the ascertainment of the terms of the applicants' engagement in the construction projection. This obviously called for consideration of the agreements regulating the parties' relationship to not only establish the parties' intentions but to also give effect to the same. The applicants have not demonstrated that this Court erred in its application of the law or its deduction of the facts in identifying the terms of the agreement between the parties and more specifically, in finding that the negotiations which took place on 8th May, 2010 varied the initial contract.

43. Moreover, this Court's finding was in respect of the parties' relationship and did not in way, as the applicants allege, negate or hamper the application of ***Clause A.2 (d)*** of the fourth schedule to the Act. The provision which is not couched in mandatory terms stipulates:

> ***"Where work done by a client results in the omission of part of the normal service described in part 3 of this Schedule, a***

commensurate reduction in fees may be made by prior written agreement provided such an agreement schedules in detail the work to be done by the client which would otherwise have formed part of the normal service of the architect."

44. Likewise, we find that the applicants did not demonstrate any error on the part of this Court by setting aside the award of interest. Our position is reinforced by the Court's finding that the applicants were not entitled to any more fees. We are convinced that this Court correctly applied the doctrine of privity of contract with respect to the 1st respondent. Further, the applicants did not demonstrate how this Court's judgment infringed on their constitutional rights.

45. As for the issue of the competency of the respondents' counter-claim, we cannot help but note that the same was neither subject of the appeal nor was it raised before the trial court. It therefore cannot form the basis of a ground for the review sought.

46. Looking at the trajectory taken by the applicants in this application, we are convinced that all they seek this Court to do is to set aside the judgment simply because they disagree with same. Clearly that would amount to us sitting on an appeal against our own judgment which is beyond our mandate. In that regard, this Court in ***Daniel Lago Okomo vs Safari Park Hotel Ltd & Another [2018] eKLR*** expressed:

"We do not review judgments just because a losing litigant is unhappy and despondent. We have no jurisdiction to do so."

See also this Court's decision in ***Mukuru Munge vs Florence Shingi Mwawana & 2 Others [2016] eKLR***.

47. All in all, we find that the application fell short of the requisite threshold to warrant the exercise of this Court's residual jurisdiction. Accordingly, the application lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 21st day of August, 2019.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of original.

DEPUTY REGISTRAR