



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G. B. M. KARIUKI, MUSINGA & OUKO, J.J.A

CIVIL APPLICATION NO.SUP. 16 OF 2012

BENJOH AMALGAMATED LIMITED..... 1ST APPLICANT

MUIRI COFFEE ESTATE LIMITED..... 2ND APPLICANT

AND

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(An application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya against the Judgment and Decree of the Court of Appeal dated 10th March 1998 and/or to recall, review and set aside the Judgment and Decree.

in

Civil appeal No.276 of 1997)

RULING OF THE COURT

1. The two applicants, Benjoh Amalgamated Limited and Muiri Coffee Estate Limited (hereinafter referred to as “Benjoh and Muiri”) are limited liability companies. They lodged their application in this Court on 9th November 2012 by way of a Notice of Motion dated 7th November 2012 seeking orders in the following two prayers besides the prayer for costs:-

1. That leave be granted to lodge an appeal in the Supreme Court against the decision of this court contained in this court’s judgment delivered on 10th March 1998 in Nairobi in Civil appeal No.276 of 1997.
2. That further or in the alternative the court be pleased on its own Motion to recall review or set aside court’s said judgment delivered on 10th March 1998 in Nairobi Civil appeal No.276 of 1997.

2. The application was made on the grounds, inter alia;

- i. THAT, the Court of Appeal lacked jurisdiction to conclusively make a finding of fact and laws

that there was a Consent Order entered into before Hon. Justice Githinji, as he then was, without reference to a record of the said Consent Order.

- ii. THAT, the Court of Appeal lacked jurisdiction to interfere with the Ruling of Hon. Justice E. M. Githinji of 31st October, 1997 without evidence to confirm the existence of an alleged consent Order at all.
 - iii. THAT, the Court of Appeal judges were overwhelmed and erroneously considered extraneous matters that were not before it for determination by presuming that the appellant in Nairobi HCCC No.1219 of 1992 was responsible for the loss of record without evidence.
 - iv. THAT, the Applicants were deprived of a fair trial by a competent independent and impartial court contrary to article 10 of the Constitution and Article 50 and also contrary to the International Human Rights Law by the Court of Appeal in depriving the applicants of the judgment given in Nairobi HCCC No.1219 of 1992.
3. The application was supported by an affidavit sworn on 7th November 2012 by Capt. Kungu Muigai, a director of Benjoh Amalgamated Limited, the 1st applicant. The affidavit had 4 short paragraphs as set out hereunder;
1. ***THAT, I am a Director of Benjoh Amalgamated Limited, the 1st applicant herein and hence I am competent to swear this Affidavit.***
 2. ***THAT, the superior court in Nairobi HCCC No.1219 of 1992 ably held on evidence and facts before it that inter alia it is impracticable for the Court to determine an application judicially without a record and difficult to make a finding whether or not the consent was done by an Advocate lawfully acting as an agent and that in the absence of the records judicial decision cannot be made on the application, the Court of Appeal in civil appeal No.276 of 1997 were erroneously unanimous in deciding that there was a Consent order between the parties yet the said Court of appeal judges did not have evidence or record of the consent as the record in HCCC no.1219 of 1992 disappeared. Attached are copies of the High Court Civil Suit No.1219 of 1992 and Civil appeal No.276 of 1997 and marked as K1.***
 3. ***THAT, I have been advised by counsel on record Mr. Tom Wachakana and in whose advise I verily believe that under Section 16 2 (b) of Supreme Court Act among reasons for criteria for leave to appeal to Supreme Court is a mandatory requirement that it shall be in the interest of justice for the Supreme court to hear and determine a proposed appeal if a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard as shown by the attached draft of the proposed grounds of Petition before the supreme court and marked K2.***
 4. ***THAT, whatever I have stated herein is true to the best of my knowledge and information.”***

4. Among the annexures to the supporting affidavit by Capt. Kungu Muigai was the ruling by Githinji, J. as he then was, dated 31st October 1997 and the judgment of this Court (Kwach, Tunoi and Bosire JJA) delivered on 10th March 1998 in Civil appeal No.276 of 1997. Needless to emphasis, it is the High Court ruling by Githinji J, as he then was, that gave rise to Civil Appeal No.276 of 1997 in which this Court reversed the High Court and set aside the ruling by Githinji J and in lieu thereof substituted an order dismissing the application by Benjoh and Muiri for review of the consent order with costs.

5. When the application came up for hearing before us Mr. Wachakana, learned counsel for the applicants, referred us to the case of **Chris Mahinda v. Kenya Power & Lighting Co. Ltd. (Civil Appli Nai 174 of 2005)** in support of the fact that we have jurisdiction to review. It was his submission that we are not a court of final resort and that we can therefore review our judgments. He submitted that there was bias shown in the judgment sought to be reviewed. He further contended that the Court erred in law in endorsing a judgment given on the basis of a consent that was not there. In any case, he said, the

decree that ensued from the impugned consent judgment was ambiguous and was therefore unenforceable. It was his submission that if the court record was not there, as was the case, no judicial decision could be made without it. Although he conceded that there must be an end to litigation, he contended that justice should not be hurried or side-stepped.

6. Mr. Nyachoti, learned counsel for the respondent, opposed the application and submitted that this Court has no jurisdiction to grant the orders sought in the application. He contended that the Court is *factus officio*. It was his submission that the only avenue open to the applicant is to move to the Supreme Court under Article 163(4)(b). He submitted that this Court cannot revisit the issue of the consent and he drew our attention to the fact that the issue was tried in the High Court and that a considered judgment was delivered by Lenaola, J. He also drew the attention of the Court to the long litany of cases filed and determined by the High Court and this Court and submitted that there has to be finality in litigation. He referred the Court to the surfeit of suits instituted by the applicants against the respondent, reflected in the replying affidavit relating to the same subject-matter. The replying affidavit shows that while many of the cases have been determined in the High Court some have been concluded in this Court but all of them have been determined in favour of the respondent.

7. In Civil Appeal No.239 of 2004, involving the parties herein (i.e. Benjoh Amalgamated Ltd & Muiri Coffee Estate Ltd. v. Kenya Commercial Bank Ltd) this Court (R.S.O. Omollo, Waki & Deverell, JJ.A.) in considering the judgment of the High Court (Lenaola, J.) given on 23.7.2004 in NBI Suit No.1219 of 1992 (in which the applicants herein prayed for payment of damages which they quantified at Ksh.13.125 million on the basis that the respondent had breached the loan agreement by withholding the payment of the balance of the loan proceeds) stated:

“...He (the Judge) appreciated the correct legal position with respect to that issue and in our view was right to conclude that the only issue which was raised by the summons before him was the claim for special damages. That claim, in our view, and we agree with the Judge on it, ought to have been raised in the first suit. In any case, even in the first case, there was a claim for Ksh.13.125 million (paragraph (c)) and a separate claim for general damages (paragraph (d)). We take it that the claim for Ksh.13.125 million was either special damages or was in the nature of special damages. So there was a claim for special damages even in the first suit, i.e. No.1219 of 1992; there was also a claim for special damages in No.1576 of 1999; the only difference was the amount claimed in each case. That could not take the claims in No.1576 of 1999 outside the purview or operation of the doctrine of res judicata. On our part, we are satisfied the learned trial Judge came to the correct and the only possible conclusion on the issue of res judicata, based on the material placed before him...”

“...we think the Appellants will not like it but we also must point out to them that irrespective of how many cases they may wish to bring on the same issues, the answer will and can only be one and they already know what the answer shall be. This appeal fails and we order that it be and is hereby dismissed with costs thereof to the Respondent...”

8. For completeness of the picture, we should add a little more background reflected in the application. Benjoh and Muiri applied to the High Court for an order that the consent order entered on 4.5.1992 be set aside and in the alternative be reviewed. The High Court had a reconstructed file pursuant to an order of the Deputy Registrar dated 16th May 1997 as the latter could not trace the court file despite the efforts made. The reconstructed file contained, inter alia, a copy of the plaint, a copy of an affidavit by Capt. Kungu Muigai sworn on 4.3.1992 in support of an application for injunction to restrain the defendant, Kenya Commercial Bank Limited, from selling the two properties known as L.R. 1211/1 and 12411 Kiambu for a meagre Shs.70 million when the properties were worth more than 700 million. The application itself was not there, but there was a copy of the order given on 4th May 1992 (issued on 25th November 1992) which shows that in the missing application, Benjoh and Muiri were seeking orders-

1. ***That Benjoh be allowed to negotiate for the sale of the principal security by private treaty and discharge the loan, alternatively there be a rescheduling of the loan repayment on such terms***

as the court would direct and

2. *That an injunction restraining the defendant, Kenya Commercial Bank Ltd, from selling the suit premises by public auction when negotiations for sale by private treaty are underway.”*

9. The consent order was as follows:

“This suit and the application dated 4.3.92 be and is hereby marked as settled on the following terms:-

- a. *The plaintiffs (Benjoh and Muiri) to pay the total outstanding sums, principal and interest to the defendant on or before 31st July 1992*
- b. *In default the defendant (KCB) be at liberty to proceed with the realization of the two securities*
- c. *The plaintiffs (Benjoh and Muiri) to pay the defendant the costs of this application to be agreed on or taxed.....*
- d. *The plaintiff (Benjoh and Muiri) to pay the auctioneers charge on the abortive sale to be agreed.”*

10. Benjoh’s stand in relation to the consent was that the consent was fraudulent as Benjoh and Muiri had not consented to it and their advocate, Mr. D. M. Kinyua, did not instruct advocate Meenye to appear for it. On the other hand, Kenya Commercial Bank Ltd. through its advocate, Mr. Ougo, contended that it disputed neither the consent order, nor the instructions to counsel to enter into the consent on behalf of K.C.B. whose stand was that there were no grounds for setting aside the consent.

11. Githinji J, as he then was, delivered himself as follows in setting aside the consent order:-

“In the present case, the original record is lost or misplaced. There is no copy or certified copy of the proceedings leading to the recording of the consent order (DECREE). Although there is a photostat copy of the Decree, the Original Decree is not available. There is no way to vouch for the correctness of the Photostat copy of the Decree. It is apparent from the copy of the plaint that plaintiffs lawyers were D. M. Kinyua and Company advocates. It is conceded that the consent order impugned was recorded in the presence of Mr. Menye advocate and not in the presence of Mr. .D. M. Kinyua. Mr. Kungu Muigai states that plaintiffs have never engaged Mr. Menye advocate. In the absence of the original record, it is not known in what circumstances Mr. Menye advocate attended the court and entered into the consent order. It is not known whether or not he had filed a Notice of change of advocate or whether he was holding brief for Mr. D. M. Kinyua. The application and the replying affidavit of G. M. O. Ochino which preceded the consent order are not available though it is conceded that defendant had not filed a defence by the time the consent order was recorded.

In the above circumstances, it is impracticable for the court to determine the present application judicially. For instance, it is difficult to make a finding whether or not the consent was entered into by an advocate who was lawfully acting as an agent of the plaintiffs. It is also difficult to decide, without the record, whether or not grounds on which a consent order can be set aside exist.

A very large sum of money is involved in this dispute. The High Court is a court of record. In the absence of the records just judicial decision cannot be made on the application. For those reasons, I set aside the consent order (Decree) allegedly given on 4.5.92 with no orders as to costs. The result of this order is that the plaintiffs shall serve the summons to enter appearance on the defendant and make a fresh application for injunction if necessary.”

12. This Court (Kwach, Tunoi and Bosire JJA) in its judgment delivered on 10.03.98 setting aside the ruling and order of Githinji J had this to say about the decision.

“The application for the review of the consent order was heard by Githinji J, on 27th October, 1997, and Kungu Muigai, who is not an advocate but only a director of the second respondent, was allowed by the Judge to argue the application without being required to comply with the mandatory provisions of Order 3 rule 2(c) of the Civil Procedure Rules. He told the Judge that his lawyer was Mr. D. N. Kinyua, and not Mr. Meenye who apparently appeared for the respondents when the consent order was recorded before Githinji J, on 4th May 1992. The learned Judge allowed the application and set aside the consent order. And it is from that decision that the appellant know appeals to this Court.....The Judge relied on the case of Gerald Gikonyo and another vs Wamuchege Gatu and Others H.C.C.C. NO.2002/96) (unreported) a decision of his own in which he had held that where the original record is lost and CERTIFIED copies of the record and judgment or order made by the court are not available at the time of hearing, an application by a party challenging the judgment or order allegedly made by the court in the original record has to succeed ex debito justitiae so that a retrial can be held to facilitate the making of a proper record. If the learned Judge was trying to lay down a general principle in that case then we must disabuse him of any notion he might have entertained that he had succeeded in doing so. So general a statement as he adumbrated can only bring the law into disrepute and provide a field day for unscrupulous litigants who wish to obstruct the courts of justice. If by simply arranging for the court records to disappear you can put back the clock and postpone the day of reckoning, the courts will be forced to enlist the services of armed guards to secure the safety of its files.”.....With regard to the appearance of Mr. Meenye before him we do not understand how the learned Judge could have had difficulty with that because the consent was recorded by the Judge himself, and in the ordinary course of events counsel must have told him on whose behalf he appeared. The fact that the learned Judge accepted and recorded the consent is the clearest demonstration that he was satisfied that the counsel who appeared before him had authority to appear for the parties they claimed to represent.

The Judge also said that it was not known whether or not Mr. Meenye had filed a notice of change of advocate or whether he was holding Mr. Kinyua’s brief. Again, that presented no insurmountable difficulty. We are told D. M. Kinyua died in 1993 but Mr. Meenye is alive and well and still practicing as an advocate. The easiest thing would have been for the respondents to ask him to clarify the matter by way of an affidavit. They chose not to do so, and the only inference we can draw from that is that Mr. Meenye’s response would have been adverse to their case. But even in the unlikely event that Mr. Meenye had no authority to represent the respondents, it cannot be the appellant’s fault, and in any event, they are not left without a remedy at law. This takes care of the only reason given by the Judge for setting aside the consent order and would suffice to dispose of this appeal, but as there appears to be some confusion in the mind of Mr. Thiongo, for the respondent, as to the principles which should govern applications to set aside consent orders, we think we ought to state them again.

The respondents took five years before bringing the application. During that period they were busy filing frivolous suits to ward off the appellant, one of which was filed as far afield as Nyeri, quite obviously to exasperate the appellant and drive it to despair. A litigant with that kind of track record is not entitled to any equitable remedy. The Judge should have taken that into account. He did not, and in failing to do so, he was clearly wrong. There can be no doubt about that.

The respondents’ case is that they did not instruct Mr. Meenye. We cannot see how he could have intruded into the suit without being asked to do so by Mr. Kinyua.”

13. In the said judgment, this Court went on to decide-

“.....Those, in essence, are the principles which the learned Judge should have applied to determine the application before him. Applying those principles to this case, we can find no circumstances that could have entitled the Judge to vary or rescind the consent order. Accordingly, we allow this appeal, set aside the ruling and order of

Githinji, J. and in lieu thereof substitute an order dismissing the respondents' application for the review of the consent order with costs. The appellant will also have the costs of appeal."

14. The applicants, Benjoh and Muiri, now seek leave to appeal to the Supreme Court and in the alternative, review of this court's said judgment and orders of 10th March 1998. Are they entitled to the orders they seek?

15. The first prayer is for leave to appeal to the Supreme Court. The Constitution has in Article 163(4) conferred jurisdiction on the Supreme Court to hear appeals from this court;

- a. as of right in any case involving the interpretation or application of the Constitution; and
- b. in any other case in which the Supreme Court, or this Court, certifies that a matter of general public importance is involved subject to the power of the Supreme Court to review a certificate by this Court and to either affirm, vary or overturn it.

16. The ruling and decision by Githinji, J. (on 31.10.1997) preceded the Constitution of Kenya which was promulgated on 27th August 2010. The Supreme Court was established by the 2010 Constitution in Article 163(1) and was conferred with exclusive original jurisdiction to hear and determine disputes relating to election to the office of the President arising under Article 140 and appellate jurisdiction in Article 163(3) to hear and determine appeals from (i) the Court of Appeal and subject to clauses 4 and 5 of Article 163 any other court or tribunal as prescribed by national legislation. Article 163(4)(b) confers jurisdiction on the Supreme Court to hear appeals in which the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved subject to the power vested in the Supreme Court to review a certificate by this court and to either affirm, vary or overturn it.

17. The jurisdiction of this Court under Article 163(4) (b) of the Constitution is to determine whether, in an application seeking certification to appeal to the Supreme Court, **a matter of general public importance is involved**. The jurisprudence that has emerged in relation to the threshold under Article 163(4) (b) on what constitutes "a matter of general public importance" in an intended appeal to the Supreme Court shows that such matter must transcend the interest of the parties to the litigation and impact on society and/or have consequences that bear on public interest. This is what the Supreme Court held in the case of **Hermanus Phillippus Steyn vs Giovanni Gnechi-Ruscione (Civil Application No.Sup.4 of 2012 (UR 3/2012))** when it succinctly stated;

"1. At law, there is no exhaustive definition of what amounts to "a matter of general public importance".

2. *In Kenya, the Court of Appeal has dealt with what amounts to "a matter of general public importance" on at least three occasions.*
3. *As early as 8th March 1979, the Court of Appeal (Madan, Wambuzi & Miller Ag JA stated per Madan JA in Murai v. Wainaina (No.4) (1982) KLR at page 48-49 that:*

".....A question of general public importance is a question which takes into account the well-being of the society in just proportions. Apart from personal freedom, what is more important than the system of land holding in a society? Landmarks are the basis of continuity of life in human society.

.....the question is obviously made one of general public importance for the subject affects the land rights of a large number of people not merely the portion to the appeal.

.....Indeed it is of general public importance that the exact status of Ahoi be

resolved by the court.”

In **Esso Standard v Income Tax [1971] EA 127** Duffus, P. said at page 141 as follows:

“The appeal having been set down for hearing we had the advantage of full consideration of the proceedings and in our view the points for decision in this case were on a matter of public importance; the point involved the circumstances in which foreign investors have to pay income tax on loans made abroad for the purposes of development in East Africa. This is undoubtedly a question which should be clearly defined from the point of view of foreign investors and it is also a matter of great importance to the three States of the Community that there should be no doubt about the position in future. We therefore, in all the circumstances of this case, granted the extension and reserved our decision on the costs until we heard the substantive appeal.”

18. Applying these principles, can it be said that the issues involved in the intended appeal by Benjoh and Muiri relate to a matter of general public importance to warrant certification under Article 163 (4) (b) of the constitution? For starters, the substratum of the intended appeal is the validity of a consent order and whether there was evidence on the basis of which it could be said not to bind Benjoh and Muiri and therefore justify its being set aside. These issues are not issues that transcend the interest of the parties in the litigation, nor do they impact in any way on society, much less bear on public interest. Clearly the issues affect only the parties to the dispute. They are not unique. They are commonplace in litigation. It is our holding that they do not amount to a matter of general public importance. Clearly, it would be remiss of us to certify that the intended appeal involves a matter of general public importance. We therefore decline to issue a certificate under Article 163(4)(b) of the Constitution. We observe that counsel for the applicants did not show any enthusiasm with regard to the prayer on leave to appeal to the Supreme Court and perhaps this is why there was paucity of submissions on this point.

19. Moreover, the ruling of Githinji. J, as he then was, was delivered on 31.03.1998 and the ensuing judgment from its appeal was delivered on 10.10.1998 long before the Supreme Court was brought into being by Article 163(1) of the 2010 Constitution which was promulgated on 27th August 2010. In the case of **Samuel Macharia & Another versus Kenya Commercial Bank Limited & 2 others** (Supreme Court Application No.2 of 2012 (unreported) the Supreme Court posed the question; *“Can the Supreme Court entertain appeals from cases that had already been heard and determined by the Court of appeal before it came into existence?”* The supreme Court then proceeded to answer that question in the negative by stating that decisions of the Court of Appeal made before 27th august 2010 cannot be reopened through an appeal to the Supreme Court as a certification to appeal to the Supreme Court cannot issue even if the intended appeal raises a matter of general public importance.

20. The Supreme Court after considering interpretation of section 15(1) of the Supreme Court Act and Article 163(4) of the Constitution stated as follow:-

“Applying these legal principles to the matter before us, it is clear that what is in question is not the seeming retroactive elements (if any) of section 15(1) of the Supreme Court Act; but whether, Article 163 (4) (b) of the Constitution was intended to confer appellate jurisdiction upon the Supreme Court the exercise of which would have retrospective effect upon the vested rights of individuals. At the outset, it is important to note that a constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order. In this way, a constitution may and does embody retrospective provisions or provisions with retrospective ingredients. However, in interpreting the constitution to determine whether it countenances retrospective application of any of its provisions, a court of law must pay due regard to the language of the constitution. If the words used in a particular provision are forward looking and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the constitution. Such caution is even more necessary if the importation of restrospectivity would have the effect of divesting an individual of their rights which had legitimately become vested before the commencement of the constitution.”

“In the matter before us, the question is not whether the appellants seek to rely on a law that has retrospective effect. The issue for us to consider is whether the applicants can reopen a case that was finalized by the Court of Appeal (by then the highest court in the land) before the commencement of the Constitution of 2010. The Supreme Court is a creature of the new Constitution. Before then, decisions of the Court of appeal were final. The parties to the appeal derived rights and incurred obligations from the judgments of that Court. If this Court were to allow appeals from the cases that had been finalized by the Court of Appeal before the Commencement of the Constitution of 2010, it would trigger a turbulence of unmanageable proportions in the private legal relations of the citizens of this country. Every party against whom the Court of appeal delivered judgment in the past, however far in history, would be entitled to approach the Supreme Court and seek a reversal of the same.”

21. In light of the above, the applicants, Benjoh & Muiri, cannot succeed in their prayer for certification to appeal the decision of this Court dated 10th March 1998 to the Supreme Court.

22. It remains for us to consider whether the applicants have made out a case for review of the judgment of this Court dated 10th March 1998. What is the law on review by this Court of its decisions? To answer this question one must look at the amplitude of this Court’s jurisdiction on the subject. The jurisdiction of the Court of Appeal, like that of other courts, must be traced from statute. First, Article 164(3) of the 2010 Constitution confers jurisdiction to the Court of Appeal as follows:

“164(3) The Court of Appeal has jurisdiction to hear appeals from

- a. *the High Court, and*
- b. *any other court or tribunal as prescribed by an Act of Parliament.”*

23. The Appellate Jurisdiction Act, Cap 9, is the Act of Parliament that reiterates the conferment on the Court of Appeal of jurisdiction to hear appeals from the High Court and for purposes incidental thereto. In section 3, the Act stipulates;

“3(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.

(3) In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court.”

24. Rule 1(2) of the Court of Appeal Rules (which are made by the Rules Committee pursuant to Section 5 of the Appellate Jurisdiction Act) stipulates that the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court shall not be limited or affected by the Rules. What is the extent of the inherent power? Does it include power to review judgments?

25. What emerges from these provisions of the law is that this Court has only appellate jurisdiction which arises and crystallizes once an appeal is filed or a Notice of appeal is lodged manifesting intention to appeal. The Court has in addition inherent power re-echoed in rule 1(2) of the rules of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Can this inherent power be invoked outside the purview of an appeal? Does this Court have jurisdiction to review its decisions? Exactly what is the amplitude of this Court’s judicial power? If it has power to review its decisions, have the applicants made out a case for review of the judgment?

We ask these questions alive to the fact that unless the answer is in the affirmative, the prayer by the

applicants seeking review of this Court's judgment of 10th March 1998 will be dead in the water. It was, with respect, Musinga JA, who, correctly in our view, held in **Equity Bank v West Link MBO Limited (Civil application No.78 of 2011)** that;

“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute.”

The learned judge proceeded to quote JEROLD TAITZ in “The Inherent Jurisdiction of the Supreme Court (Cape Town South Africa, Juta Publishers, 1985) who stated as follows:-

“The inherent jurisdiction of the Supreme Court may be described as the unwritten power without which the court is unable to function with justice and good reason.”

26. The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice.

27. In the High Court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review. There is no similar statute law in this Court.

28. In this Court, save for the *slip rule* embedded in rule 35 of the Court of Appeal Rules which enables the Court to effect its manifest intention in a judgment or order, there is no apparent jurisdiction to review orders or judgments. And even in exercise of its inherent jurisdiction in the application of the slip rule, it seems that the Court could not travel beyond correcting errors in the judgments. Sir Charles Newbold in **Lakhamshi Brothers Ltd v. Raja & Sons** case (1966) E.A. 313 reiterated the words of the predecessor of this court in **Raniga v. Jivraj [1965] EA 700 (K)** where the court stated that;

“a court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

29. The question whether the Court of Appeal has jurisdiction to review its judgments has been divided. Decisions prior to the promulgation of the 2010 Constitution show that the Court held conflicting views on the matter. As long ago as 1966, the predecessor of this Court (The East Africa Court of Appeal) sitting in Nairobi in Civil Appeal No.6 of 1966 involving **Lakhamshi Brothers Ltd. v R. Raja & Sons (supra)** dealt with the issue of review. The applicants applied to recall, review and set aside a judgment of the court on grounds which made it quite clear that the review asked for would result in a new judgment contrary to the intention of the Court in the original judgment. A preliminary objection was taken on the ground that the Court had no jurisdiction to entertain the application. The Court held that it had an inherent jurisdiction to recall its judgments in order to give effect to its manifest intention or to what clearly would have been the intention of the Court had some matter not been inadvertently omitted, but it would not sit on appeal against its own judgment in the proceedings. The Court struck out the application on the ground that it had no jurisdiction to entertain it. In the judgment by the President of the Court (Sir Charles Newbold) signed by all the three judges, the Court, ostensibly irked by the matter before it, started by stating;

“This is the third or fourth application of this nature within the past two years, and in my view, the time has come to give, beyond any question of doubt, a quietus to motions of this nature.”

30. The Court made it clear that it would invoke its inherent jurisdiction to apply the slip rule only where the intention is to give effect to its judgment. The court expressed itself thus on the matter.

“there has been a multitude of decisions by this court, on what is known generally as the slip rule, in which the inherent jurisdiction of the court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to judgment to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted.”

31. In 1970, this Court sitting in Mombasa was asked by the applicants in the case of **SOMANI’S V. SHIRINKHANU (2) [1971] EA 79** to review its civil judgment reported in [1970] EA 580 on the ground that it was given per *incuriam*, the attention of the court not having been drawn to a statutory provision. The court held that it had no power to review its completed judgments as none was given to the court. Further it held that the court was a creature of statute and had only such jurisdiction as was conferred on it. It had no inherent jurisdiction. Law, Ag. V.P. expressing his agreement with the judgment of Spry, Ag. P stated;

*“The only circumstances in which this court will alter the text of a judgment which it has pronounced is where it is necessary to do so to give effect to the intention of the court at the time when judgment was given. We are now asked to review our judgment and to alter it in such a way as to give effect to what was not the intention of the court at the time when judgment was given. SIR CHARLES NEWBOLD has laid down the clearest of terms in **Lakhamshi Bros. Ltd. v. R. Raja & Sons (2)** that this court has no such jurisdiction, which would in effect involve this court sitting in appeal on its own decision. To allow this application would be to open the doors to all and sundry to challenge the correctness of the decisions of this court on the basis of arguments thought of long after the judgment was delivered. There would be no finality to litigation.”*

“.....this court has always refused invitations to review its own decisions except so as to give effect to its intention at the time the judgment was written. To depart from this rule would in my opinion be to adopt a most dangerous course. The only exception I can envisage is where the applicant has been wrongly deprived of the opportunity of presenting his argument on any particular point, which might lead to the proceedings being held to be null and void, a consideration which is absent in this case.”

32. But the Supreme Court of Uganda in the case of **SEWANYANA V. MARTIN ALKER (Civil application No.4 of 1991)** noted that the Somani’s judgment was given *ex tempore*....as the court followed an obsolete law....it had acted *pro tonto* without jurisdiction....(therefore) certainly the issues between the parties could not have been fairly and properly tried between them.

33. In 1996 the Court of Appeal had in **RAFIKI ENTERPRISES LTD V. KINGSWAY & AUTOMART LTD. Civil application No. 375 of 1996** held that it had no jurisdiction to review its own decisions. But in 2004, the Court of Appeal in **MUSIARA LTD. V. WILLIAM OLE NTIMAMA Civil Application No.271 of 2003** held that it had jurisdiction to review its own decisions. In that case, the court was called upon by the applicant to declare that its ruling or order dated 3.10.2003 made in Civil application No. Nai 228 of 2008(UR 112/03) was null and void and/or was invalid and an order was sought to recall it and cancel it or alternatively rescind it.

34. In **MUSIARA’S** case an appearance of bias was alleged on the part of the members of the Bench that had determined the appeal. The decision was buttressed on the ground that “the House of Lords held so in **R v. Bowstreet Metropolitan Stipendiary Magistrate, Ex. P. Pinochet Ugarte (No 2) (1999) 1 All E R 577**. The court also fortified its decision by citing section 77 of the former Kenya Constitution which provided that every person was entitled to a fair trial by an independent and impartial court established by law. The court observed that the impugned order was made by a Bench which included

Mr. A. B. Shah, then a Judge of Appeal sitting as the presiding judge, who had a past intimate relationship with the respondent in the case, having acted for the party as his advocate including representing him in an election petition and it was contended that justice had been perverted or obstructed. The court (Tunoi, O’kubasu and Onyango Otieno JJA) stated;

“The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such residual jurisdiction and the need to have finality in litigation, such that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established and that might justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. It should however be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy.”

35. The underlined words seem to have been taken word for word from the judgment in the English case – **Taylor and another v. Laurence and another** (2002) 2 All ER 352 (Lord Woolf CJ, Lord Phillips MR, Ward, Brooke and Chadwick LJ)!!

36. In 2005, the Court of Appeal in the case of **Chris Mahinda v. Kenya Power & Lighting co. Ltd (Civil appl. Nai 174 of 2005)** (unreported) reiterated that it had residual jurisdiction to review, vary or rescind its decisions in exceptional circumstances as held in Musiara’s case (supra).

37. The Musiara case was critiqued and disapproved by a Bench of 5 judges of this court in **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others** (Civil Application No.307 of 2008) as was also the case of **Chris Mahinda**.

38. In the Rai case (supra) this Court (Omolo, Bosire, Githinji, Waki, Deverell JJA) in an unanimous decision denied review jurisdiction and after disapproving the two decisions, reinstated the law in **Rafiki Enterprises** case (i.e. denial of review jurisdiction). In his judgment, Omolo JA pointed out that in both **Musiara** and **Mahinda**, the issue of the court’s jurisdiction was not raised. The *ratio decidendi* in both was not that the Court of Appeal had the power to reopen a decided appeal as such a decision was not necessary for the decision of the respective benches. The learned judge pointed out;

“The Musiara decision was based on Rule 56(2) of the Court’s Rules which merely deals with rescission of orders made by a single judge or by the whole court with regard to the extension of time.....

The remarks made by the court with regard to the reopening and rehearing of an appeal in the Musiara case were, accordingly made obiter as they were not necessary for the determination of the issue at hand.”

The Mahinda case merely repeated those remarks and must accordingly be treated in the same manner.”

39. It seems clear that prior to the 2010 constitution, this court took the position that the court did not have jurisdiction to review its own decisions and that the only power it had with regard to review was in relation to the slip rule under rule 35 as aforesaid and further that its inherent power under rule 2(1) is exercisable in hearing appeals. In effect, therefore, the court in a Bench of five reiterated the law as stated in **Rafiki Enterprises Ltd. v. Kingsway & Automart Ltd** (supra). The above exposition of the law shows clearly that this Court held that it lacked jurisdiction to review its decisions prior to the current 2010 Constitution when it was a Court of final resort.

40. Has the position changed after the promulgation of the 2010 Constitution? What is the jurisprudence in other democracies or jurisdictions in Africa, India or England which share common law

values with us? Is there any difference in stance in relation to the power to review where the Court of Appeal is a court of final resort as opposed to when it is not, bearing in mind that prior to the promulgation of the 2010 Constitution, this court was the final court because the Supreme Court was created by the 2010 Constitution.

41. The advent of the current 2010 Constitution, besides introducing a differently structured government, also established in Article 163(1) a Supreme Court which is now the final Court on the land.

42. It is important to note that the Supreme Court is not bound by its decisions (Article 163(7)) but its decisions bind all other Courts.

43. It is plain to see that this Court's erstwhile position as a court of final resort changed with the advent of the current 2010 Constitution and it is no longer the final court on the land as it used to be. The Supreme Court is.

44. However, in view of the fact that the Supreme Court's jurisdiction is limited by the Constitution and does not encompass hearing of appeals that do not evince issues of general public importance as its jurisdiction is confined to that stipulated by Article 163 of the Constitution, it is clear to see that a lot of litigation will end up in this Court and decisions thereof will be final. Has the 2010 Constitution introduced anything to give this court power to review its judgments in cases in which there is no appeal to the Supreme Court so as to correct errors or miscarriage of justice where it may occur?

45. For starters, the 2010 Constitution expressly provides that the Judiciary as a state organ is enjoined under Article 10 to apply national values and principles which include the rule of law, equity, social justice, human rights and good governance. Article 20(3) enjoins Courts to develop the law to the extent that it does give effect to a right or fundamental freedom and adopts the interpretation that most favours the enforcement of a right or fundamental freedom while Article 159(1)(d) enjoins courts to be guided by the principle that justice must be administered without undue technicalities. In addition, Article 50 of the Constitution vests in every person the right to a fair hearing which under Article 25(c) cannot be limited. How do these constitutional provisions impact on the jurisdiction of this Court in relation to review of its decisions?

46. The case-law on the subject of review jurisdiction shows that two principles seem to be in competition. There is the "principle on finality" of litigation on the one hand which does not support review and there is "the justice principle" on the other hand which favours limited review predicated on the basis that the object of litigation is to do justice. The finality principle is urged on the basis of public interest as a public policy issue and is premised on the need for stability and consistency in law while the justice principle is urged on the basis of justice to the parties. In examining these principles, English case law on the point is of persuasive authority not only by dint of section 3 of the Judicature Act but also because of the commonality in legal values in addition to the fact that the English Court of Appeal, like this Court, is a creature of statute and has no inherent jurisdiction. It was created by the Supreme Court of Judicature Act 1873. The arguments in favour of the finality principle have featured in many English cases which were reviewed in the judgment of Lord Woolf, CJ, in **Taylor and Another v. Lawrence and Another** [2002] 2 All ER 353. In **Ladd v. Marshall** [1954] 3 All ER 745 the common law principle that the outcome of litigation should be final was emphasized. In that case, the Court of Appeal declined an application for a new trial which was sought with a view to adduction of further evidence. The Court did not totally reject the notion of review. It set a threshold in which it held that "in order to justify the reception of fresh evidence, or a new trial, three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that if given, it would probably have an important influence on the result of the case although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it need not be incontrovertible." In his judgment in the case, Hodson, L. J referred to **Brown V. Dean** [1910] AC 373 where the House of Lords affirmed a decision of the Court of Appeal and gave guidance on the topic. He quoted the passage of Lord Loreburn, L.C. where he stated at pg 374:

“when a litigant has obtained a judgment in a court of justice, whether it be a county court, or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive.”

47. **In Amptill Peerage Case** [1976] 2 All ER 411 the House of Lords held that a declaration of legitimacy pursuant to an English Act of 1858 was binding and could only be impugned if there was proof that it had been obtained by fraud in its strict legal sense.

48. **In Flower v. Lloyd** (C. A. 1877) Law Reports, Ch D, the Court of Appeal (Chancery Division) emphasized that it had no jurisdiction to rehear the appeal and that in the case of a decree or judgment being obtained by fraud, there was always power in the Courts of Law to give adequate relief.

49. **In Re Barrell Enterprises and Others** [1972] 3 All ER 631 the Court of Appeal, Civil Division, declined to open a concluded appeal and held that the discovery of fresh evidence was not a ground for allowing a further hearing before the Court of Appeal. The Court (as per Russell, L. J) stated (pg 636 letters f to g) that “...the cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present.” In **Boslow v. Bagley & Co. Ltd** [1961] 2 All ER 962, two decisions of the Court of Appeal had been given within a few days of each other giving markedly different decisions as to the appropriate damages for loss of an eye. One division thereupon reconsidered its decision and varied it to correspond with the other so as to avoid the injustice as between the two sets of litigants of one award being out of all proportion to the other. Said the Court-

“We can accept without difficulty the notion that if a judgment has been obtained by fraud an action can be brought to set it aside. But when it comes to setting aside a judgment on the ground that fresh evidence has been obtained it appears to us highly desirable that the Court of Appeal alone should have jurisdiction. Then the rules as to time for appeal, with the discretion to allow an appeal out of time, will apply. So will the code for deciding when fresh evidence should be admitted, now enshrined in the judgment of Denning LJ in Ladd v Marshall. There are however in the Supreme Court Practice and in textbooks statements to the effect that an action will lie to set aside a judgment on the ground of fresh evidence and it is necessary to consider whether these are well-founded.

The Supreme Court Practice 1970 has this sentence:

“If a judgment or order has been obtained by fraud or where evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.”

In Halsbury’s Laws of England it is stated: An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have a material effect on the decision of the court.’ Of the cases cited in the footnote the relevant ones are Boswell v Coaks and RE Scott and Alvarez’s Contract Daniell’s Chancery Practice has a section on actions of review. Nearly all the cases referred to were decided before the Supreme Court of Judicature Act 1873. The most material sentence is:

“The objections which can be taken to a judgment must be founded either upon some new matter which has been discovered after the judgment... or upon the ground that the judgment was obtained by fraud.’

None of the cases cited is relevant to the post-

Judicature Act practice in relation to ‘new matter’ except Re Scott and Alvarez’s Contract.

In Flower v Lloyd an appeal to the Court of Appeal had been heard and determined and the

order passed and entered and the plaintiff then applied to the Court of Appeal to rehear the appeal on the ground that fresh evidence had been discovered which had been fraudulently concealed. The court decided that it had no jurisdiction to hear the appeal and all three judges (Sir George Jessel MR, James and Baggallay LJJ) held that an action could be brought in the High Court to set aside the judgment obtained by fraud. Sir George Jessel MR alone made a reference to cases in which new evidence is found.”

50. In 2002 in **Taylor and another v. Lawrence and Another** (supra) the lead judgment by the Chief Justice, Lord Woolf, dealt with both the justice principle and finality principle and held that the Court of Appeal:

“had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances.

“The Court had implicit powers to do that which was necessary to achieve the due objectives of an appellate Court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A Court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was tension between a court having such residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established and that might justify the Court of Appeal in taking the exceptional cause of reopening proceedings which it had already heard and determined. It should however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy...”

51. In his lead judgment, Lord Woolf observed (at para 50, page 36) that the English Court of Appeal, (like our Court of Appeal,) was established with a broad jurisdiction to hear appeals. He further observed:

“Equally it was not established to exercise an originating as opposed to an appellate jurisdiction. It is therefore appropriate to state that in that sense it has no inherent jurisdiction. It is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate Court it has the implicit powers to do that which it is necessary to achieve the dual objectives of an appellate Court...”

“...it is desirable to note that, while, if a fraud has taken place a remedy can be obtained, even if the Court of Appeal has no “jurisdiction,” it does not necessarily follow that there are not other situations where serious injustice may occur if there is no power to reopen an appeal. We stress this point because this Court was established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, 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...”

Taylor V. Lawrence (supra) also quoted Lord Morris in **Connelly v. DPP** [1964] AC 1254 at pg 1301 where he said:

“There can be no doubt that a Court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would

regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.”

And it also quoted Lord Diplock’s approach on the subject in **Bremer Vulcan Schiffban and Maschinenfabrik v. South India Shipping Corp** [1981] All ER 289 at pg 295, [1981] AC 909 at pg 979 where, inter alia, Lord Diplock stressed the need for a Court, whether appellate or not, to have power to control its own procedure so as to prevent it being used to achieve injustice.

52. The Court of Appeal of Singapore which is a Court of final resort CA 28, in **Management Corp. Strata Title Plan No. 301 v. Lee Tat Development Pte Ltd** [2011] 1 SLR 998 held that it had the “inherent jurisdiction” to reopen and rehear an issue that it had decided in breach of natural justice as well as to set aside the whole or part of its earlier decision founded on that issue.” This case was referred to by the Singapore Court of Appeal in **Re Nalpon Zero Geraldo Mario** [2013] S GCA 28 where the Court observed that the decision in **Management Corporation Stratta Title Plan No.301 v. Lee Tat Development Ltd (supra)** was -

“no more than an instance of a Court re-examining a matter that it originally had jurisdiction to hear. It can be viewed as a continuation of the earlier proceedings. Therefore, since it was already seized of the jurisdiction requested to determine the dispute, it would be inaccurate to state that the Court had to invoke an inherent “jurisdiction” to give the authority to determine the dispute. In fact, what the Court had to do was to invoke an inherent “power” to reopen and rehear the issue, since such a power was not provided for statutorily.”

53. In **Management Corporation Stratta Title Plan No.301 v. Lee Tat Development Pte Ltd** [2009] S GHC 234, the Court of Appeal (of Singapore) examined the doctrine of re judicata in relation to decided cases and observed that the policy reasons underlying the doctrine of res judicata as a substantive principle of law are first *“the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions”* and second, *“the rights of the individual to be protected from vexatious multiplication of suits and prosecutions.”*

The Court went on to state that:

“the courts have never accepted res judicata as an absolute principle of law which applies rigidly in all circumstances irrespective of the injustice of the case. There is one established exception to this doctrine, and that is where the Court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the Court’s erroneous decision were to form the basis of an estoppel against the aggrieved party.... In such a case, the tension between justice principle and the finality principle is resolved in favour of the former.”

“... the general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (“the finality principle”) outweighs the public interest in achieving justice between the parties (“the justice principle”) and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because “a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal.”

54. In effect, the Singapore Court of Appeal held in **Management Corp-strata Title Plan case (supra)** the view that the public interest in the finality of litigation (the finality principle) outweighs the public interest in achieving justice between the parties (the justice principle). Clearly, the Singapore Court of Appeal has taken a position that is the very opposite of that taken by the English Court of Appeal in **Taylor and Another v. Lawrence & Another** [2002] 2 All ER 352.

55. In **Australia**, the High Court of Australian which is the highest Court has reserved for itself the

power to reconsider its own decision. The power is exercised cautiously only when the previous decision “*is manifestly wrong, as, for instance if it proceeded upon the mistaken assumption of the continuance of a repealed or expired statute, or is contrary to a decision of another Court which this Court is bound to follow, ...*”

56. The US Supreme Court has explicitly overruled its prior decisions in a number of cases as shown in the judgment of **Brandeis in State of Washington v. Dawson & Co.**, 264 U.S. 646; 68 L. Ed.219.

57. The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).

58. In the present application the issue was whether there was a consent lawfully executed by the parties or by their duly appointed advocates on the basis of which judgment could be entered and decree extracted. Githinji J, as he then was, found that it was difficult to make a finding whether or not consent was entered into by an advocate who was lawfully acting as an agent of Benjoh and Muiri and further that it was difficult to decide, without the record, whether or not grounds on which a consent order can be set aside existed as the file had gone missing.

59. In its judgment dated 10th March 1998, this Court noted that the consent was recorded by Githinji, J. as he then was, “*in the presence of all the parties.*” The directors of Benjoh and Muiri asserted that Advocate Meenye was not their advocate as advocate Kinyua was the one instructed. The latter passed on later. Advocate Meenye is still alive. The authority of Advocate Meenye to act for Benjoh & Muiri was presumed by this Court in its judgment dated 10th March 1998 on the ground that Githinji J. who recorded the consent must have been satisfied that the said counsel was duly instructed to act. Further, that if Advocate Meenye was not duly instructed, then the applicants should have caused him to sign an affidavit to clarify the matter but they failed to do so, and consequently the Court inferred that had that been done, the ensuing evidence would probably have been adverse to the applicants.

60. The respondent did not contest the fact that Advocate Meenye was not duly instructed. It did not contend that Meenye had instructions. Mr. Nyachoti, learned counsel for the respondent, if we understood him correctly, while contending firstly that the application was devoid of merit and secondly that the dispute had been litigated to conclusion, did not allude to the issue of validity of the consent endorsed by Advocate Meenye on behalf of Benjoh and Muiri. However, the Court held the view that Githinji, J. as he then was, must have been satisfied that Meenye advocate had instructions before recording the consent. There can be no argument that the applicants were entitled to a fair hearing. The issue of whether or not they had a good defence to the claim by the respondent was not an issue nor was it material in considering whether there was a valid consent. The enormity of the dispute was pointed out by the trial Judge when he stated:

***“a very large sum of money is involved in this dispute. The High Court is a Court of record. In the absence of the records just judicial decision cannot be made on the application.*”**

***For those reasons, I set aside the consent order (Decree) allegedly given on 4.5.92 with no orders as to costs. The result of this order is that the plaintiffs shall serve the summons to enter appearance on the defendant and make a fresh application for injunction if necessary.*”**

61. 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.

62. This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being.

63. In dealing with laches, **Halsbury's Laws of England**, 4th ed. Vol. 16(2) at §910 has this to say;

*“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation **equity aids the vigilant**, not the indolent’ or ‘delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).*

64. Lord Selbourne L.C. delivering the opinion of the Privy Council in **The Lindsay Petroleum Co v Hurd** (1874) L.R. 5 P.C. 221 said at page 240:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”

65. The applicants in this case came to Court for review after 14 years. That is a long period of time. All along they were alive to the issues relating to the review. It seems doubtful whether they would have applied to this Court for review if the 2010 Constitution had not established the Supreme Court before which they desired to ventilate their grievance. In short, the grounds on which they seek review are not dissimilar to those they intended to pursue in the Supreme Court which were all along known to them. In a review application, the length of the delay and what has transpired in the interim period is critical as it bears on the balance of justice. The titles to the properties that are the subject matter of the review application are said in the application to have been transferred to a third party and in turn charged. There is not a whiff that the third party to whom the respondent transferred the properties is tainted in any way with regard to the antecedent events relating to the issue of consent and the judgment that ensued therefrom.

66. Further, the facts of and circumstances attendant to the application herein show that while the dispute involved relates to private rights of the parties to the litigation which do not evince issues of public interest, the decision sought to be reviewed dates back to 10th March 1998, long before the 2010 Constitution was put in place. In our view, no case has been made out for the Court to invoke its residual jurisdiction to review the decision of this Court dated 10th March 1998. In the circumstances, we have no choice but to dismiss the application, which we hereby do, with costs to the respondent.

Dated and delivered at Nairobi this 20th day of June 2014.

G. B. M. KARIUKI SC

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR