



**Senate of Kenya & 3 others v Speaker of the National Assembly & 10 others
(Application 7 (E013) of 2022) [2023] KESC 1 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KESC 1 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION 7 (E013) OF 2022
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
JANUARY 18, 2023**

BETWEEN

**SENATE OF KENYA 1ST PETITIONER
SPEAKER OF THE SENATE 2ND PETITIONER
SENATE MAJORITY LEADER 3RD PETITIONER
SENATE MINORITY LEADER 4TH PETITIONER**

AND

**SPEAKER OF THE NATIONAL ASSEMBLY 1ST RESPONDENT
NATIONAL ASSEMBLY OF KENYA 2ND RESPONDENT
COUNCIL OF COUNTY GOVERNORS 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
KENYA MEDICAL SUPPLIES AUTHORITY 5TH RESPONDENT
INSTITUTE FOR SOCIAL ACCOUNTABILITY 6TH RESPONDENT
MISSION FOR ESSENTIAL DRUGS AND SUPPLIES 7TH RESPONDENT
KATIBA INSTITUTE 8TH RESPONDENT
PHARMACEUTICAL SOCIETY OF KENYA 9TH RESPONDENT
ELIAS MURUNDU 10TH RESPONDENT
COMMISSION FOR REVENUE ALLOCATION 11TH RESPONDENT**

(Being an application for review and setting aside of the Ruling and Order of this Court (Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, Ouko SCJJ) delivered on 3rd June 2022 in Application No. 4 (E010) of 2022)



Circumstances in which the Supreme Court can review its judgments, rulings or orders

The instant application sought to review, vary and/or set aside the ruling and order of the court which orders allowed an application for review and set aside the orders of stay issued by the court. The court in this case pointed out the circumstances in which the Supreme Court can review its judgments, rulings and orders. The court held that it had not been demonstrated by the applicants that the impugned ruling was obtained by fraud or deceit, was a nullity, or that the court was misled into giving its ruling on review under a mistaken belief that the parties had consented.

Reported by Kakai Toili

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction to review judgments, rulings or orders - what were the circumstances in which the Supreme Court could review its judgments, rulings or orders - Supreme Court Act, 2011, section 21(A).

Brief facts

The 1st, 2nd, 3rd and 4th applicants filed the instant application seeking to review, vary and/or set aside the ruling and order of the court delivered on June 3, 2022 in Application No. 4(E010) of 2022; *Senate of Kenya & Others v National Assembly & Others*, which orders allowed an application for review and set aside the orders of stay issued by the court. The applicants argued that the court erred in allowing the respondents' application by failing to consider the effect of the same on the legality of the Bills that the National Assembly had been given latitude to enact.

The applicants further argued that the impugned ruling had given the National Assembly latitude to pass Bills without the concurrence between the two houses, an issue that was the subject of the main petition before the court. The 1st and 2nd respondents contended that they did not make provisions for a review of a decision which was the subject of another application for review as that would amount to inviting the court to sit on appeal of its own decision.

Issues

What were the circumstances in which the Supreme Court could review its judgments, rulings or orders?

Held

1. As a general rule, the Supreme Court had neither jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner contemplated by section 21(A) of the . The court in exercise of its inherent powers could review any of its judgments, rulings or orders so as to meet the ends of justice where;

1. The judgment, ruling, or order, was obtained, by fraud or deceit;
2. the judgment, ruling, or order, was a nullity, such as, when the court itself was not competent;
3. the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto.

2. It had not been demonstrated by the applicants that the impugned ruling was obtained by fraud or deceit, was a nullity, or that the court was misled into giving its ruling on review under a mistaken belief that the parties had consented as per the guidelines set in ; SC Petition No. 6 of 2014, [2017] eKLR.

Application dismissed.

Orders

Each party be bear its own costs.

Citations

Cases

1. Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others ([2017] eKLR) — Explained
2. Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others ([2013] eKLR) — Explained

Statutes



1. Supreme Court Act — Article 21(A) — Interpreted

Advocates

None mentioned

RULING

1. Upon perusing the notice of motion dated July 1, 2022 filed by 1st, 2nd, 3rd and 4th applicants on July 27, 2022, seeking to review, vary and/or set aside the ruling and order of this Court delivered on June 3, 2022 in Application No 4 (E010) of 2022; Senate of Kenya & others v National Assembly & others, which orders allowed an application for review and set aside the orders of stay issued by this court on May 19, 2022; and
2. Having read the affidavit in support of the application sworn by Hon Kenneth Makelo Lusaka, the second applicant on July 1, 2022 and filed on July 27, 2022; and
3. Further considering the grounds in support of the application for review and the applicants written submissions, urging that this court erred in allowing the respondents' application dated May 25, 2022, by failing to consider the effect of the same on the legality of the Bills that the National Assembly has been given latitude to enact; the said ruling has given the National Assembly latitude to pass Bills without the concurrence between the two houses, an issue that is the subject of the main petition before this court; that some of the Bills the National Assembly seeks to pass without the requisite concurrence are clearly in contravention of the Constitution; that they together with other parties were extensively limited by time to respond to application whose orders they seek reviewed; that the Supreme Court Petition No 19(E027) will be rendered nugatory if the prayers sought are not allowed; and that both houses had proceeded on sine die recess; and
4. Further considering the replying affidavit of the 1st and 2nd respondents sworn by Serah M Kioko on August 2, 2022 and filed on August 4, 2022 and their written submissions, which in opposing the application for review contends, inter alia, that the *Supreme Court Act* does not make provisions for a review of a decision which is the subject of another application for review as that will amount to inviting the court to sit on appeal of its own decision; that the court is functus officio regarding the issue of stay and or review of the said orders; that pursuant to rule 28(5) of the Supreme Court Rules, any review by the court is final and not subject to further review; and that the instant application is an abuse of the process of court;
5. Noting the legal position as regards this court's power to review its own decision as was settled in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition (App) No 4 of 2012; [2013] eKLR and *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*; SC Petition No 6 of 2014, [2017] eKLR (*Outa* case) wherein this court found that, as a general rule, the Supreme Court has neither jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner contemplated by section 21(A) of the *Supreme Court Act* and as enunciated in the *Outa* case; and
6. Considering the legal principles as set out in *Outa* case under which this court, in exercise of its inherent powers, may review, any of its judgments, rulings or orders so as to meet the ends of justice, that is where: (i) The judgment, ruling, or order, is obtained, by fraud or deceit; (ii) the judgment, ruling, or order, is a nullity, such as, when the court itself was not competent;
(iii) the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto; and



7. We do find, having considered the application, the submissions of all parties, in response and opposition to the application, that it has not been demonstrated by the applicants that the impugned ruling was obtained by fraud or deceit, is a nullity, or that the court was misled into giving its ruling on review under a mistaken belief that the parties had consented as per the guidelines set in the Outa case;
8. The above finding notwithstanding, we note with concern that learned counsel for the applicants seek this court to exercise a jurisdiction it lacks, namely, to review or re-litigate the question of stay, which has been settled by this court with finality. Consequently, we find that the present application lacks merit and is for dismissal.
9. As for the costs before this court, award of the same is discretionary as determined by this court in *Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012; [2014] eKLR. However, this being public interest litigation challenging the constitutionality of the Bills pending before Parliament and noting that the main appeal is yet to be determined, there shall be no order as to costs.
10. In the circumstances, we make orders as follows:
 - a. The notice of motion application dated July 1, 2022 is hereby dismissed;
 - b. Each party shall bear its costs.
11. Orders accordingly.

DATED AND ISSUED AT NAIROBI THIS 18TH DAY OF JANUARY, 2023.

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P. M. MWILU

DCJ & VP

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S.C WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR,

SUPREME COURT OF KENYA

