



REPUBLIC OF KENYA



**Nairobi Bottlers Limited v Ndungu & another (Application E006, E007, E008 & E009 of 2024 (Consolidated)) [2024] KESC 26 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KESC 26 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION E006, E007, E008 & E009 OF 2024 (CONSOLIDATED)  
PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ  
JUNE 28, 2024**

**BETWEEN**

**NAIROBI BOTTLERS LIMITED ..... APPLICANT**

**AND**

**MARK NDUMIA NDUNGU ..... 1<sup>ST</sup> RESPONDENT**

**COCA COLA CENTRAL, EAST & WEST AFRICA**

**LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being applications for review of the Ruling of this Court (Koome (CJ & P), Mwilu (DCJ & VP), Ibrahim, Wanjala & Lenaola, SCJJ) delivered on 10th November, 2023 awarding costs to the 1st Respondent)*

**RULING**

**Representation:**

Mr. Wathuta for the Applicant

(Kiragu Wathuta & Company Advocates)

Mr. Eric Thige for the 1<sup>st</sup> Respondent

(Mawira & Ndungu LLP)

Mr. Amos Odhiambo h/b for Kamau Karori SC for the 2<sup>nd</sup> Respondent

(Iseme Kamau & Maema Advocates)

1. Before the Court are four Motions all filed by Nairobi Bottlers Limited, the applicant, seeking similar orders arising from the decision of this Court in a Ruling delivered on 10<sup>th</sup> November 2023. We will therefore dispose of them together in this ruling to save on precious judicial time; and



2. Upon reading the four Motions dated 19<sup>th</sup> February, 2024 and filed on 28<sup>th</sup> February, 2024 under Section 21A of the [Supreme Court Act](#), 2011 seeking the following orders:
  1. A stay of proceedings be hereby ordered on the taxation of the Party and Party Bill of Costs dated 29<sup>th</sup> November 2023 for Civil Applications No E024, E030, E034 & E038 of 2023 pending the hearing and determination of these applications;
  2. This Court be pleased to review and vacate the order awarding costs against Nairobi Bottlers Limited in the Ruling dated 10<sup>th</sup> November, 2023;
  3. There be no costs order on these Applications; and
3. Upon perusing the grounds on the face of the applications, the supporting affidavits of Joe Mutisya, the applicant's Finance Director and the submissions dated on 27<sup>th</sup> February, 2024 filed on its behalf contending that this Court in its Ruling delivered on 10<sup>th</sup> November, 2023 struck out the applicant's appeal alongside its two applications being E030 of 2023 and E038 of 2023 seeking stay of execution of the decision of the Court of Appeal and extension of time within which the applicant should have filed its appeal, respectively; the impugned Ruling effectively allowed the 1<sup>st</sup> respondent's application seeking the striking out of the applicant's appeal for being filed out of time; the Court awarded the 1<sup>st</sup> respondent costs of the three applications and the appeal. The applicant in that regard contends that; the 1<sup>st</sup> respondent instituted proceedings before the High Court in Petition 325 of 2015, the genesis of these proceedings, not on his own behalf but rather on behalf of the public thus rendering the proceedings public interest litigation; the 1<sup>st</sup> respondent's locus standi even on appeal remained the same, that of a public interest litigant; notwithstanding the costs follow the event rule provided for in Section 27 of the [Civil Procedure Act](#), Cap 21, this Court has established legal precedent that is now trite law to the effect that courts should not award costs in public interest litigation for instance in the cases of [Okoti & 2 others v Attorney General & 14 others](#) (Petition (Application) 2(E002 of 2021) [2023] KESC, [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others](#) [2014] eKLR and [Director of Public Prosecution v Michael Siste Mwaura Kamau & 4 others](#) [2020] eKLR.
4. Further, it is argued that when the Court was preparing its impugned Ruling delivered on 10<sup>th</sup> November 2023, it had not been brought to its attention that it was deciding a public interest litigation matter, due to the issue not having arisen for determination. Citing the decision in [Martin Wanderi & 106 others v Engineers Registration Board & 5 others; Egerton University & 43 others \(Interested Parties\)](#) (Application 39 of 2019 & Petition 4 of 2016 (Consolidated)) [2020] KESC 44 (KLR), it is contended that the Court has previously ruled that not being aware of material facts is an exceptional circumstance necessitating a review of its decision. Additionally, it is urged that, despite the proceedings being public interest litigation, the 1<sup>st</sup> respondent is now claiming the sum of Kshs 90,009,290/- in his Bill of Costs dated 29<sup>th</sup> November, 2023 and yet there is no reason to warrant a departure from the current judicial precedent which the applicant considers to be the correct position in law; and
5. Upon considering the 2<sup>nd</sup> respondent's submissions dated 25<sup>th</sup> March, 2024 filed in support of the Motions on similar grounds as the applicant; and
6. Upon perusing the 1<sup>st</sup> respondent's replying affidavit sworn by Mark Ndumia Ndungu, on 7<sup>th</sup> March, 2024 together with written submissions of even date filed in opposition to the Motions and to the effect that the applications are incurably defective on account of the applicant failing to provide the specific provision of law that it alleges the Court relied on in granting costs and which had since been repealed; the applicant instead chose to rely on case law specifically on the decision in [Okoti & 2 others v Attorney General & 14 others](#)(*supra*); that the applicant conflates past jurisprudence for repealed law; Section 2



of the *Interpretation And General Provisions Act* does not apply to the construction or interpretation of laws not written down; that Parliament's intention in enacting regard to Section 21A of the *Supreme Court Act* was to limit the grounds of review to only those that may render a decision to be tainted with illegality and to bring about finality in litigation; the present review applications were disguised appeals and do not fall within the confines of Section 21A; and

7. Further, the 1<sup>st</sup> respondent urges that the present applications were filed late with no explanation offered for the delay; due to the gravity of review proceedings, any party wishing to exercise this right should do so at the earliest opportunity; the instant applications were a pure afterthought triggered by the taxation proceedings; the Court should not exercise its discretion in favour of the applicant for failing to approach the court in good faith and for taking inconsistent positions, as initially, after service of the 1<sup>st</sup> respondent Bill of Costs, the applicant sought for more time to respond; yet when parties appeared before Court on 22<sup>nd</sup> January, 2024, the applicant sought for 30 days within which to negotiate with a view to settle the Bill of Cost; but even after being granted the 30 days to do so, it did not make any efforts to engage the 1<sup>st</sup> respondent and negotiate. Instead, the applicant filed the present applications taking the 1<sup>st</sup> respondent by surprise; and
8. Finally, the 1<sup>st</sup> respondent submits that the granting of costs against the applicant is not an exceptional circumstance considering that the applicant in its Petition of Appeal and two applications had sought for costs to be granted in its favour; conversely the 1<sup>st</sup> respondent equally sought for costs; therefore if the applicant would have appreciated costs being granted in its favour then it ought to have appreciated that costs could also have been granted against it in the event it was unsuccessful; that in any event in the case of *Okoti & 2 others v Attorney General & 14 others* (*supra*) the Court did not merely declare that costs were not to be awarded in public interest litigation but created an exception to the effect that where a public interest litigant seeks for costs and that party is unsuccessful, then costs may be awarded against such a party; and further, the manner in which the applicant has sought for costs, despite claiming that the proceedings were public interest in nature, was consistent with the general rule that costs follow the event; and the applicant has failed to prove that the applications fall under any of the parameters for review as set out in Section 21A of the *Supreme Court Act*; and
9. Upon considering the applicant's rejoinder in its replying affidavit sworn by Joe Mutisya on 15<sup>th</sup> March, 2024 and supplementary submissions of even date reiterating the grounds in its applications and further contending that its applications were not delayed as there are no time limits set for filing an application for review under Section 21A of the *Supreme Court Act*; pursuant to Section 3 of the *Judicature Act*, the courts, including the Supreme Court are bound by Common Law and once this Court has rendered itself on the issue of costs in the aforesaid cases, the non-imposition of costs in public interest litigation became a set principle forming part of Common Law; though not bound by its decisions, adherence to them provides a degree of certainty and the court failed to offer any reasons for deviating from its previous position on the issue and the applicant considered this to be an unexplained, isolated and peculiar occurrence; it denied approaching the court in bad faith urging that it did engage with the 1<sup>st</sup> respondent in negotiations aimed at convincing the 1<sup>st</sup> respondent to withdraw its taxation proceedings due to the fact that the matter was by nature a public interest litigation; the issue of the 1<sup>st</sup> respondent's locus standi was not determined by this Court and therefore the finding by the Court of Appeal still stands to the effect that the proceedings were public interest litigation and the 1<sup>st</sup> respondent, a public interest litigant; and having considered the applications, affidavits, rival arguments by the parties, we now opine as follows:
10. Guided by the provisions of Section 21A of the *Supreme Court Act* as well as Rule 28(5) of the *Supreme Court Rules, 2020*, together with the principles enunciated in the cases of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*; SC Petition (Application) No 4 of 2012, [2013] eKLR and *Fredrick*



*Otieno Outa v Jared Odoyo Okello & 3 others*; SC Petition 6 of 2014 [2017] eKLR, we restate this court’s power to review its own decisions as follows: as a general rule, the Supreme Court cannot sit on appeal over its own decisions, or to review its decisions, save to correct obvious errors apparent on the face of the decision. However, in the exercise of its inherent powers, the court may review its decision(s) “in exceptional circumstances, so as to meet the ends of justice” in the following instances where:

- i. The judgment, ruling or order is obtained through fraud, deceit or misrepresentation of facts;
  - ii. The judgment, ruling or order is a nullity by virtue of having been made by a court which was not competent;
  - iii. The court was misled into giving judgment, ruling or order under the belief that the parties have consented thereto; and
  - iv. The judgment, ruling or order was rendered on the basis of repealed law or as a result of a deliberate concealment of a statutory provision.
11. Having considered the pleadings and submissions by the parties herein, and applying these conditions to the applications before us, we find that the applicant has failed to demonstrate that the Ruling of this Court of 10<sup>th</sup> November, 2023 was obtained by fraud or deceit, is a nullity, was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision, or that the court was misled into giving its Ruling under review on a mistaken belief that the parties had consented thereto, as per the legal principles settled in the Fredrick Otieno Outa case; and
12. In our view, the instant applications are appeals disguised as Motions for review, and therefore do not fall within the confines of the parameters prescribed in the foregoing paragraphs. Consequently, we have no hesitation in declaring that, as framed, the applications fall short of the exceptional circumstances, and we decline the invitation to exercise the court’s limited discretion to review the Ruling.
13. On costs, the award of the same is discretionary and follows the principle set out by this court in *Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. Since this litigation must come to an end and no party can be faulted for the review proceedings, each party shall bear its own costs.
14. Accordingly, and for the reasons aforesaid we make the following orders:
- i. The Applicant’s four motions being:
    - a. Civil Application No E006 of 2024 dated 19<sup>th</sup> February, 2024 and filed on 28<sup>th</sup> February, 2024
    - b. Civil Application No E007 of 2024 dated 19<sup>th</sup> February, 2024 and filed on 28<sup>th</sup> February, 2024
    - c. Civil Application No E008 of 2024 dated 19<sup>th</sup> February, 2024 and filed on 28<sup>th</sup> February, 2024
    - d. Civil Application No E009 of 2024 dated 19<sup>th</sup> February, 2024 and filed on 28<sup>th</sup> February, 2024Be and are hereby dismissed; and
  - ii. Each Party shall bear their costs of the present Applications.
- It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JUNE 2024.

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**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

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**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**  
**SUPREME COURT OF KENYA**

