



Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation (Application E022 of 2023) [2024] KESC 28 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KESC 28 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION E022 OF 2023

PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ

JUNE 28, 2024

BETWEEN

MWAMBEJA RANCHING COMPANY LIMITED 1ST APPLICANT

PROJECT ADVISORY SERVICES LIMITED 2ND APPLICANT

AND

KENYA NATIONAL CAPITAL CORPORATION RESPONDENT

(Being an application for Review of the Ruling and Orders of the Supreme Court (Mwilu, DCJ & VP, Ibrahim, Wanjala, Lenaola & Ouko, SCJJ) delivered on 6th October 2023 in Application No. E022 of 2023)

Supreme Court declines to review its own decision on grounds that the application for review failed to meet the requisite threshold.

The Supreme Court highlighted circumstances in which it could review its own decisions and when an oral hearing for such review applications was warranted. The application did not meet the required threshold and was dismissed.

Reported by John Ribia

Civil Practice and Procedure – review – circumstances in which the Supreme Court may review its own decision - what were the circumstances in which the Supreme Court may review its own decision - Supreme Court Act, Cap 9B, section 21A; Supreme Court Rules 2020, rule 28(5)

Civil Practice and Procedure – applications - determination of applications by the Supreme Court – circumstances in which one may get an oral hearing of an application before the Supreme Court - what were the circumstances in which one may warrant an oral hearing of their application at the Supreme Court - Supreme Court Rules 2020, rule 31(1)

Brief facts

The applicant filed an application that sought an oral hearing by a full bench, review and/or setting aside of the Supreme Court’s ruling on certification that the case raised matters of general public importance, leave to



appeal against the whole judgment, and costs. The applicant contended that the Supreme Court's impugned Ruling failed to consider the applicant's grounds for certification, particularly the uncertainty caused by conflicting judgments on the retrospective application of the *in duplum* principle, and erroneously found that the applicants had filed a composite application at the Court of Appeal, thus forfeiting their right of appeal.

Issues

- i. What were the circumstances in which one may warrant an oral hearing of their application at the Supreme Court?
- ii. What were the circumstances in which the Supreme Court may review its own decision?

Held

1. The applicants had not demonstrated any special and compelling circumstances to warrant an oral hearing of the instant application, in exception to the provisions of rule 31(1) of the Supreme Court Rules, 2020, which required that applications before the Supreme Court shall be determined by way of written submissions.
2. The application had not met the conditions enunciated in section 21A of the Supreme Court Act and rule 28(5) of the Supreme Court Rules. The applicants had not demonstrated the exceptional circumstances that would warrant a review of this Supreme Court's Ruling. Specifically, the applicants had not established that the ruling of the Supreme Court dated October 6, 2023 was obtained by fraud, deceit or rendered *per incuriam*.

Application dismissed; the applicant bore the costs.

Citations

Cases

Kenya

1. *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* Application No 16 of 2012; [2014] eKLR - (Followed)
2. *Muriithi & 4 others v Law Society of Kenya & another* Civil Application 12 of 2015; [2016] eKLR - (Followed)
3. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR) - (Followed)
4. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR) - (Followed)
5. *Senate of Kenya & 3 others v Speaker of the National Assembly & 10 others* Application 7 (E013) of 2022; [2023] KESC 1 (KLR) - (Followed)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 10(2)(b); 25(c); 48; 50(1); 159; 259- (Interpreted)
2. Supreme Court Act (cap 9B) sections 3A, 21(A) - (Interpreted)
3. Supreme Court Rules, 2012 (cap 9B Sub Leg) rules 28(5); 31(1)- (Interpreted)

Advocates

Mr Otieno h/b for *Mr Allen Waiyaki Gichuhi* Senior Counsel for the applicant
Mr George Mutua for the respondent

RULING

Representation:

Mr Otieno h/b for Mr Allen Waiyaki Gichuhi SC for the applicant (Wamae & Allen Advocates)

Mr George Mutua for the respondent (G Mutua Molo & Co Advocates)



1. Upon perusing the notice of motion dated February 26, 2024 and filed on March 4, 2024, pursuant to articles 10(2)(b), 25(c), 48, 50(1), 159 and 259 of the Constitution, sections 3A and 21(A) of the Supreme Court Act 2011, and rule 28(5) of the Supreme Court Rules 2020, seeking the following orders, that the matter be orally heard by a full bench of the court; the court be pleased to recall, review and/or set aside its ruling delivered on October 6, 2023 in Application No E022 of 2023; certification that the case raises matters of general public importance and leave to appeal to the court against the whole Judgment; and costs; and
2. Upon reading the grounds on the face of the application, and supporting affidavit sworn by Harry Horn (Junior) on February 26, 2024, wherein he avers that; by its impugned ruling, the court failed to consider the applicant's grounds for certification, in particular, the uncertainty caused by conflicting judgments on the retrospective application of the in duplum principle; the court erroneously found that the applicants had filed a composite application at the Court of Appeal seeking amendment of the notice of appeal, review of the Judgment of the court dated August 6, 2019 and certification in the alternative, yet certification was an alternative prayer only applicable in the event the prayer for review was disallowed; and the court erroneously held that the applicants forfeited their right of appeal to the Supreme Court when they opted for review of the Court of Appeal's Judgment; and
3. Upon considering the applicants' submissions dated February 26, 2024 and filed on 2 February 9, 2024, wherein they restate their arguments for certification and further argue that the court has inherent jurisdiction to hear the instant application premised on their right to a fair hearing, access to justice, property and the fair determination of contractual rights, which imperatives override the narrow confines of section 21A of the Supreme Court Act and the principles delimiting circumstances for review established in the case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 others SC Petition No 6 of 2014; [2017] eKLR (the Fredrick Outa case). Additionally, the applicants submit that the court retains residual jurisdiction to depart from its own decision in order to correct a miscarriage of justice. In support of this submission, they cite the cases of Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited SC Application No 16 of 2012; [2014] eKLR; Deynes Muriithi & 4 Others v Law Society of Kenya & another SC Application No 12 of 2015; [2016] eKLR; and Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others SC Petition No 4 of 2012; [2013] eKLR; and,
4. Upon considering the respondent's grounds of objection and written submissions both dated March 11, 2024, and filed on March 12, 2024, to the effect that the application, is misconceived in view of the course adopted by the applicants at the Court of Appeal, in effect forfeiting their right to appeal to this court; does not disclose any circumstance under which the court's jurisdiction to review its decisions as delineated in law would be exercisable in the manner sought; is a disguised appeal against the court's ruling dated October 6, 2023 and therefore an abuse of court process; and, has been filed after an unexplained, inordinate and inexcusable delay of 6 months after the Ruling was delivered. Ultimately, it is urged that the application has failed to meet the threshold for review of the court's own decisions under section 21A of the Supreme Court Act, and as established in the Fredrick Outa Case and Senate of Kenya & 3 Others v the Speaker of the National Assembly & 10 others; (Application 7 (E013) of 2022) [2023] KESC 1 (KLR); and
5. Noting this court's ruling dated October 6, 2023, on the question whether the issues raised by the applicants, now restated in the instant application amounted to matters of general public importance, wherein we pronounced ourselves thus:

“(7) ...The motion lacks merit as the applicant has not satisfactorily highlighted any issues, the determination of which, would transcend the circumstances of the matter at hand so as to justify a review of the Court of Appeal's ruling denying



certification. Neither has the applicant raised any substantial question of law, the determination of which, would have a significant bearing on the public interest”

6. Appreciating the provisions of section 21A of the Supreme Court Act, rule 28(5) of the Supreme Court Rules, 2020 as well as the principles established by this court in Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [*Supra*] where the court delineated the following as exceptional circumstances which would warrant the exercise of its limited jurisdiction for review:

- “(92) ... However, in exercise of its inherent powers, this court may, upon application by a party, or on its own motion, review, any of its judgments, rulings or orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations 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;
 - iv. the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.”

7. We now determine as follows:

- i. Having carefully appraised the application, the responses thereto and submissions by the parties, we find that the applicants have not demonstrated any special and compelling circumstances to warrant an oral hearing of the instant application, in exception to the provisions of rule 31(1) of the Supreme Court Rules, 2020, which require that applications before this court shall be determined by way of written submissions;
- ii. More importantly, guided by the provisions of section 21A of the Supreme Act, rule 28(5) of the Supreme Court Rules and the principles established by this court in the Fredrick Outa case, we find that the application has not met the conditions enunciated therein; and
- iii. The applicants have not demonstrated the exceptional circumstances that would warrant a review of this court’s ruling. Specifically, the applicants have not established that the ruling of this court dated October 6, 2023 was obtained by fraud, deceit or rendered per incuriam;

8. Consequently and for the aforestated reasons, we make the following orders:

- i. The notice of motion dated February 26, 2024 and lodged on March 4, 2024 is hereby dismissed;
- ii. The applicants shall bear costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH 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

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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

