



Trattoria Limited v Maina & 3 others (Petition (Application) 26 (E029) of 2022) [2024] KESC 54 (KLR) (30 August 2024) (Ruling)

Neutral citation: [2024] KESC 54 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) 26 (E029) OF 2022
MK KOOME, CJ, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ
AUGUST 30, 2024**

BETWEEN

TRATTORIA LIMITED APPELLANT

AND

JOANINAH WANJIKU MAINA 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

(Being an application for Review of the Ruling and Order of the Supreme Court (Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 25th November 2022 in SC Petition (Application) No E029 of 2022 and to award the 1st Respondent the costs of the Appeal against the Appellant)

Nature of the slip rule in the review of decisions by the Supreme Court

The application sought the review of the Supreme Court’s decision. The applicant premised her application on the fact that despite being the successful party in the appeal, she was not awarded the costs of the appeal. She classified that failure as an oversight, clerical error or an error, as costs followed the event. The court highlighted the nature of the slip rule in the review of decisions by the Supreme Court.

Reported by Kakai Toili

Civil Practice and Procedure – review – review of decisions by the Supreme Court - what was the nature of the slip rule in the review of decisions by the Supreme Court – Supreme Court Act, Cap 9B, section 21(4) and 21A; Supreme Court Rules, rule 28(5).

Brief facts

By a ruling dated November 25, 2022, the court dismissed the applicant’s appeal since it did not disclose a question touching on the interpretation and application of the Constitution and contemporaneously, the



court found that it lacked jurisdiction to entertain the application and the appeal. Ultimately, the court made the following orders; the notice of motion dated September 9, 2022 was dismissed; the petition of appeal dated September 5, 2022 was struck out for want of jurisdiction and the applicant shall bear the costs of the application.

The instant application sought for the court to review its ruling. The applicant contended that it was condemned to bear the costs of the application but the court inadvertently failed to make orders as to the costs of the substantive appeal. The applicant stated that costs followed the event and being the successful party, that the application met the test set out in the case of *Fredrick Otieno Outa v Okello & 3 Others*, SC Petition No. 6 of 2014; [2017] KESC 25 (KLR) (*Fredrick Outa* case). The applicant argued that the error in question was clerical arising from an omission which deviated from the full meaning or intention of the court's decision.

Issues

What was the nature of the slip rule in the review of decisions by the Supreme Court?

Relevant provisions of the Law

Supreme Court Act, Cap 9B

Section 21 - General powers

(4) *The Court may, on its own motion or on application by any party with notice to the other or others, correct any oversight or clerical error of computation or other error apparent on such judgement, ruling or order and such correction shall constitute part of the judgement, ruling or order of the Court.*

Section 21A - Review of own decision

The Supreme Court may review its own decision, either on its own motion, or upon application by a party in any of the following circumstances—

- (a) *where the judgement, ruling or order was obtained through fraud, deceit or misrepresentation of facts;*
- (b) *where the judgement, ruling or order is a nullity by virtue of being made by a court which was not competent;*
- (c) *where the court was misled into giving a judgement, ruling or order under the belief that the parties have consented; or*
- (d) *where the judgement, ruling or order was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision.*

Held

1. The court could only review its decision(s) in the manner prescribed in the *Fredrick Otieno Outa v Okello & 3 Others*, SC Petition No. 6 of 2014; [2017] KESC 25 (KLR) (*Fredrick Outa Case*) and section 21A of the Supreme Court Act. The applicant had not demonstrated that the subject ruling was obtained through fraud, deceit, or misrepresentation of facts; neither had she claimed nor established that the court was not competent to render the ruling. She had also not claimed nor established that the court was beguiled into believing that there existed a consent between the parties; and she had not claimed or established that the ruling was rendered on the basis of repealed law or on account of a deliberate concealment of a statutory provision. The application did not fall within the parameters enunciated in the *Fredrick Outa case* and section 21A of the Supreme Court Act.
2. Sections 21(4) and 21A of the Supreme Court Act spoke to two very different jurisdictions. The former was what was commonly referred to as the slip rule, where the court could correct errors apparent on the face of the judgment, ruling or order of the court and where such correction was obvious and did not generate any controversy on the decision of the court. The slip rule did not confer upon a court, any jurisdiction or powers to sit on appeal over its own judgment, or, to extensively review such judgment as to substantially alter it. Under the slip rule, the correction should be seen to steer a judgment, decision or order of the court towards a logical, or clerical perfection. It, however, should not change the substance of the judgment or alter the clear intention of the court.



3. A clerical error was an issue that fell squarely under the slip rule. Looking at the applicant's application, despite citing section 21A of the Supreme Court Act, the grounds thereof aligned with section 21(4) of the Act. The court invoked its jurisdiction under section 21(4) as read with rule 28(5) of the Supreme Court Rules.
4. The court maintained an open-ended mandate in the invocation of discretion to ensure that the ends of justice were met, much like section 27(1) of the Civil Procedure Act, Cap 21 of the Laws of Kenya which provided, *inter alia*, that the award of costs shall remain at the discretion of the court or judge. The court retained the discretion to award costs and in that context, the court dismissed the respondent's appeal because it did not raise any questions that involved the interpretation and application of the Constitution and had improperly invoked the court's jurisdiction under article 163(4)(a) of the Constitution. Although the matter had not progressed to an oral hearing of the appeal, costs were still expended by parties in preparing for the hearing and therefore the successful party was entitled to costs.

Application allowed.

Orders

Costs of the appeal dated September 5, 2022 shall be borne by the respondent.

Citations

Cases

Kenya

1. *Cogno Ventures Limited & 4 others v Bia Tosha Distributors Limited & 15 others; Kenya Breweries Limited & 6 others (Interested Parties); Ferran & 24 others (Contemnor)* Application E005, E006 & E012 of 2023 (Consolidated); [2023] KESC 33 (KLR) - (Mentioned)
2. *Kaluma v NGO Co-ordination Board & 5 others* Application E011 of 2023; [2023] KESC 72 (KLR) - (Mentioned)
3. *Mbugua & another (Suing as the Administrators of the Estate of Joseph Kiarie Mbugua & another) v Timber Manufacturers & Dealers Limited* Civil Application E019 of 2023; [2023] KESC 86 (KLR) - (Mentioned)
4. *Musembi & 13 others (Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi) v Moi Educational Centre Co. Ltd & 3 others* Application EO19 of 2021; [2022] KESC 19 (KLR) - (Mentioned)
5. *Outa v Okello & 3 others* Petition 6 of 2014; [2017] KESC 25 (KLR) - (Mentioned)
6. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR) - (Mentioned)

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 27(1) - (Interpreted)
2. Constitution of Kenya article 163(4)(a) - (Interpreted)
3. Supreme Court Act (cap 9B) sections 21A, 21(2)(4) - (Interpreted)
4. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 3(5); 28(5) - (Interpreted)

Advocates

Mr. Dennis Nkarichia for the appellant/respondent

Ms. Kethi Kilonzo for the 1st respondent/applicant

Mr. Agwara for the 2nd respondent



RULING

1. Cognizant that by a ruling dated November 25, 2022, this court dismissed the appellant's appeal since it did not disclose a question touching on the interpretation and application of the Constitution; that contemporaneously, the court found that it lacked jurisdiction to entertain the application and the appeal; that ultimately, the court made the following orders:
 - a. The notice of motion dated September 9, 2022 is hereby dismissed.
 - b. The petition of appeal dated September 5, 2022 is hereby struck out for want of jurisdiction.
 - c. The applicant shall bear the costs of this application.
2. Further cognizant that the 1st respondent filed her party and party bill of costs dated August 7, 2023 wherein she claimed Kshs 2,344,292 against the appellant; that by a ruling dated December 15, 2023, the Deputy Registrar declined to assess the costs of the appeal as the same were not awarded by the court, and hence taxed the bill of costs at Kshs 17,500; that dissatisfied with the same, the 1st respondent/applicant filed the instant application on 5th April 2024; and
3. Upon perusing the notice of motion by the 1st respondent/applicant dated March 27, 2024, filed pursuant to section 21A of the Supreme Court Act, cap 9B of the Laws of Kenya and all other enabling provisions of the law seeking the following orders:
 - a. That this honourable court be pleased to review its Ruling dated 25th November 2022 delivered by Honourable Justices of the Supreme Court; Honourable Deputy Chief Justice and Vice President of the Supreme Court, Honourable Lady Justice Philomena M Mwilu, Honourable Justice Smokin Wanjala, Honourable Lady Justice Njoki Ndung'u, Honourable Justice Lenaola, and Honourable Justice W Ouko in Petition No 26 (E029) of 2022.
 - b. That this honourable court award the costs of this Petition to the 1st respondent against the appellant.
 - c. That costs of this application be awarded to the 1st respondent; and
4. Upon perusing the grounds on the face of the application and the supporting affidavit and further affidavit sworn by the 1st respondent/applicant on March 27, 2024 and May 24, 2024, respectively, and the submissions and further submissions dated March 27, 2024 and June 5, 2024, respectively, to the effect that by a ruling dated November 25, 2022, this court dismissed both the appeal dated September 5, 2022 and the appellant's application dated September 9, 2022 seeking stay of execution of the orders of the High Court (Mativo, J) in High Court Petition No 132 of 2014 as consolidated with Petition No 129 of 2014; that the court condemned the appellant/Respondent to bear the costs of the application but inadvertently failed to make orders as to the costs of the substantive appeal; that costs follow the event and being the successful party, the 1st respondent/applicant is entitled to costs of the appeal and relied on the case of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others, SC Petition No 4 of 2012; [2014] eKLR in support of that submission; that the application meets the test set out in the case of Fredrick Otieno Outa v Okello & 3 Others, SC Petition No 6 of 2014; [2017] KESC 25 (KLR); that the error in question is clerical arising from an omission which deviates from the full meaning or intention of the court's decision; that notably, the 1st respondent/applicant only relied on section 21(4) of the Supreme Court Act in her supplementary affidavit; and



5. Taking Into account the appellant/respondent's replying affidavit sworn by its director, Gaetano Ruffo, on April 24, 2024 and submissions of similar date to the effect that the application lacks merit since it does not meet the conditions set out in section 21A of the Supreme Court Act and in Kaluma v NGO Co-ordination Board & 5 Others, SC Civil Application No E011 of 2023; [2023] KESC 72 (KLR); that the application was filed after inordinate delay (15 months after the delivery of the subject ruling); that the award of costs is a discretionary matter as was held in the Jasbir Singh Rai case and failure to award the same is not a ground for review neither was it an oversight or a clerical error or error apparent on the face of the record; and
6. Appreciating that the 2nd, 3rd and 4th respondents did not participate in these proceedings despite being served with the application; and
7. Having considered the application, response and submissions before us, we now opine as follows:

- i. It is a well-established principle that this court can only review its decision(s) in the manner prescribed in the Fredrick Outa Case (*supra*) and section 21A of the Supreme Court Act, which section provides as follows:

The Supreme Court may review its own decisions, either on its own motion, or upon application by a party in any of the following circumstances-

- i. where the judgment, ruling or order was obtained through fraud, deceit or misrepresentation of facts;
 - ii. where the judgment, ruling or order is a nullity by virtue of being made by a court which was not competent;
 - iii. where the court was misled into giving a judgment, ruling or order under the belief that the parties have consented; or
 - iv. where 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.
- ii. The 1st respondent/applicant premises her application on the fact that despite being the successful party in the appeal, she was not awarded the costs of the appeal. She classifies this failure as '... an oversight, clerical error or an error, as costs follow the event...'.
 - iii. Applying the above principles to the instant case, it is our view that the 1st respondent/applicant has not demonstrated that the subject ruling was obtained through fraud, deceit, or misrepresentation of facts; neither has she claimed or established that the court was not competent to render the said ruling. She has also not claimed nor established that the court was beguiled into believing that there existed a consent between the parties; and lastly, she has not claimed or established that the ruling was rendered on the basis of repealed law or on account of a deliberate concealment of a statutory provision.
 - iv. Consequently, it is our considered view that the application dated 27th March 2024 does not fall within the parameters enunciated in the Fredrick Outa Case and section 21A of the Supreme Court Act.
 - v. Notwithstanding the above findings, sections 21(4) and 21A of the Supreme Court Act speak to two very different jurisdictions. See para. 5(iv) in Mbugua & Another (Suing as the



Administrators of the Estate of Joseph Kiarie Mbugua & Another) vs Timber Manufacturers & Dealers Limited, SC Civil Application No. E019 of 2023; [2023] KESC 86 (KLR).

vi. Section 21(4) of the *Supreme Court Act* reads:

The court may, on its own motion or on application by any party with notice to the other or others, correct any oversight or clerical error of computation or other error apparent on such judgment, ruling or order and such correction shall constitute part of the judgment, ruling or order of the court.

vii. Rule 28(5) of the *Supreme Court Rules* on the other hand reads:

(5) The court may review any of its decisions in any circumstance which the court considers meritorious, exceptional, and in the public interest, either on the court's own motion, or upon application by a party.

viii. The former is what is commonly referred to as the slip rule, where this court can correct errors apparent on the face of the judgment, ruling or order of the court and where such correction is obvious and does not generate any controversy on the decision of the court. In the *Fredrick Outa* case (*supra*), we held that “... In other words, the Slip Rule does not confer upon a court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it.” We also held that under the slip rule, the correction should be seen to steer a Judgment, decision or Order of this court towards a logical, or clerical perfection. It, however, should not change the substance of the Judgment or alter the clear intention of the court.

ix. Notably, a clerical error is an issue that falls squarely under the slip rule. Looking at the 1st respondent/applicant's application therefore, despite citing section 21A of the *Supreme Court Act*, the grounds thereof align with section 21(4) of the Act.

x. In addition, like in the case of *Cogno Ventures Limited & 4 Others vs Bia Tosha Distributors Limited & 15 Others; Kenya Breweries Limited & 6 Others (interested parties); Ferran & 24 Others (Contemnor)*, SC Application Nos. E005, E006 & E012 of 2023 (Consolidated); [2023] KESC 33 (KLR), and *Musembi & 13 Others (Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton Village at South C Ward, Nairobi) vs Moi Educational Centre Co. Ltd. & 3 Others*, SC Application No. E019 of 2021; [2022] KESC 19 (KLR), we shall invoke our jurisdiction under section 21(4) of the *Supreme Court Act* as read with Rule 28(5) of the *Supreme Court Rules* and shall proceed to clarify the court's intention on the award costs of the appeal in its Ruling dated November 25, 2022 so as to steer this court's ruling towards logical perfection.

xi. In the *Jasbir Singh Rai* case (*supra*), we held in paragraph 8 that, while the general rule is that costs follow the event, this court is not bound to adhere to it. In support thereof, we relied on section 21(2) of the *Supreme Court Act* which reads:

In any proceedings, the Supreme Court may make any ancillary or interlocutory orders, including any orders as to costs as it thinks fit to award.

We also relied on rule 3(5) of the *Supreme Court Rules 2020* which reads:

Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the court.



- xii. We further emphasized that this court maintains an open-ended mandate in the invocation of discretion to ensure that the ends of justice are met, much like section 27(1) of the Civil Procedure Act, cap 21 of the Laws of Kenya which provides, *inter alia*, that the award of costs shall remain at the discretion of the court or judge. Further, Halsbury's Laws of England, 4th Ed. Re-Issue (2010) Vol 10, para 16 also provides that costs lie at the court's discretion, including, but not limited to, whether to award costs or not, and no party has a right as to costs unless and until the court awards them. Of course, this discretion, ought to be exercised judiciously and not arbitrarily.
- xiii. As noted elsewhere in this ruling, the court retains the discretion to award costs and in that context, we dismissed the appellant/respondent's appeal because it did not raise any questions that involved the interpretation and application of the Constitution and had improperly invoked this court's jurisdiction under article 163(4)(a) of the Constitution. We further note that although the matter had not progressed to an oral hearing of the appeal, costs were still expended by parties in preparing for the hearing and therefore the successful party must be entitled to costs.

Orders

- 8. Consequently, and for the reasons aforesaid, we make the following orders:
 - i. The application dated March 27, 2024 is allowed.
 - ii. The costs of the appeal dated September 5, 2022 shall be borne by the appellant/respondent.
 Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST, 2024.

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M. K. KOOME
CHIEF JUSTICE & 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

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

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