Okoiti v Portside Freight Terminals Limited & 12 others (Petition (Application) E011 of 2024) [2025] KESC 67 (KLR) (14 November 2025) (Ruling)

Neutral citation: [2025] KESC 67 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION (APPLICATION) E011 OF 2024

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ

NOVEMBER 14, 2025

BETWEEN

OKIYA OMTATAH OKOITI ..... APPELLANT

AND

PORTSIDE FREIGHT TERMINALS LIMITED ..... 1ST RESPONDENT

PORTSIDE CFS LIMITED ..... 2ND RESPONDENT

HEARTLAND TERMINALS LIMITED ..... 3RD RESPONDENT

KENYA PORTS AUTHORITY ..... 4TH RESPONDENT

CABINET SECRETARY FOR NATIONAL TREASURY & ECONOMIC PLANNING ..... 5TH RESPONDENT

KILINDINI TERMINALS LIMITED ..... 6TH RESPONDENT

MOMBASA GRAIN TERMINAL LIMITED ..... 7TH RESPONDENT

KAPA OIL REFINERY ..... 8TH RESPONDENT

AFRICA PORTS & TERMINALS ..... 9TH RESPONDENT

MULTISHIP INTERNATIONAL ..... 10TH RESPONDENT

KIPEVU INLAND CONTAINERS EPZ LIMITED ..... 11TH RESPONDENT

DOCK WORKERS UNION ..... 12TH RESPONDENT

KATIBA INSTITUTE ..... 13TH RESPONDENT

(Being an application for Review of the Judgment of the Supreme Court (Mwilu; DCJ & VP, Ibrahim, Wanjala, Lenaola, & Ouko, SCJJ) dated 30th June 2025 in Petition No. E011 of 2024)

RULING

1. Upon considering this application brought pursuant to Section 21(4) of the *Supreme Court Act*, Cap 9B, Rules 28(5) and (6) of the Supreme Court Rules, 2020 and Article 159 of *the Constitution* for orders that: this Court be pleased to correct its Judgment dated and delivered on 30th June 2025 to align the wording of the Court's Order in paragraph 175 (iii) with the Court's finding at paragraph 173 (v); and that the costs of the application be in the cause; and

2. Upon reading the affidavit by the applicant, sworn on 28th July 2025 and his submissions of even date in support of the application to the effect that: the Court in its Judgment in paragraph 173 found that: "(v) The decision of KPA to grant Portside the license and wayleave to establish a second grain bulk facility through the Specially Permitted Procurement Procedure under Section 114A of the PPAD Act was inconsistent with Articles 10(2)(c), 201 (a) and 227 (1) of *the Constitution*."; the Court further issued Orders captured under paragraph 175 stating that: "(iii) The decision of KPA to grant Portside the license to establish a second grain bulk facility through the Specially Permitted Procurement Procedure under Section 114A of the PPAD Act was inconsistent with Articles 10(2)(c), 201 (a) and 227 (1) of *the Constitution*."; from these two paragraphs it is apparent that there is a clerical error in the finding and the final orders; though the paragraphs are identical, the words "and wayleave" are missing in the final orders; that the omission is a minor error that is apparent on the face of the Judgment which ought to be corrected to align the two paragraphs; and that such correction will not generate controversy on the decision of the Court; and

3. Furthermore, the applicant submits that Section 21(4) of the *Supreme Court Act* empowers the Court either on its own motion or on application by any party with notice to the other parties, to correct any oversight or clerical error of computation or other error apparent on the face of such judgment, ruling or order and such correction shall constitute part of the judgment, ruling or order of the Court; that the error in the Judgment falls under the slip rule by which the Court has the jurisdiction to review under Section 21(4) and as confirmed in Outa Vs Okello & 3 others [2017] KESC 25 (KLR) (Outa Case); that the Orders do not reflect the Court's intention of departing from its findings; and that it is proper that the Judgment be corrected to present the true findings of the Court; and

4. Noting the 5th respondent's submissions (the Cabinet Secretary for National Treasury and Economic Planning) in support of the application to the effect that: the correction sought by the applicant shall not alter, negate, and/or depart from the intention of the Court as it merely seeks to imbue the Order with the spirit of the Judgment; and that the application is meritorious having demonstrated that the error is exceptional and that the matter involves public procurement which is in the public interest; and

5. Further noting that the application is also supported by the 13th respondent, (Katiba Institute), who relies on the applicant's submissions; and

6. In view of the foregoing, we now opine as follows:

    i. Section 21 (4) of the *Supreme Court Act* embodies the slip rule, which permits the Court to correct errors that are apparent on the face of the Judgment, Ruling or Order. It provides that:

> " 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."

ii. The error to be corrected must be self-evident, and its rectification should not grant the Court any authority to sit on appeal over its own judgment, ruling, or order, nor should it amount to a substantive review that alters the decision itself.

iii. On the authority of Section 21(4) aforesaid as augmented by Rule 28(5) of the Supreme Court Rules and the Outa Case, the Court may correct any clerical mistake, accidental slip, or omission, or vary its judgment, ruling, or order to reflect its true intention, essentially guiding the decision "towards logical or clerical perfection."

iv. Any party may apply to the Court or the Court, on its own motion, for correction of an error after giving notice to all the parties. The error must arise from an oversight, clerical mistake, computational inaccuracy, or similar slip, and it must be apparent on the face of the judgment, ruling, or order in question.

v. The Court may also correct obvious errors in exceptional circumstances in order to meet the ends of justice and to give effect to the intention of the judgment, ruling or order.

vi. Bearing in mind that the 1st to 3rd respondents, through their letter to the Registrar of the Court dated 14th July 2025, and filed in the registry on 17th July 2025, were the first to bring the error to the attention of the Court, requesting the Court to "clarify" it.

vii. In response to the letter, the applicant, by his letter dated 15th July 2025, and filed in the registry on 17th July 2025, urged the Court not to act on the letter as the proper procedure was to file a formal application for review.

Instead of the 1st to 3rd respondents, it is the applicant who has moved the Court.

viii. Recognizing that the omission was regrettably occasioned by the Court itself, and being guided by the principles enunciated in Wanderi & 106 others Vs Engineers Registration Board & 8 others; Egerton University & another (Interested Parties) [2020] KESC 44 (KLR); 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 [2022] KESC 19 (KLR); and the Outa Case, to the effect that, while finality in litigation is essential, exceptional circumstances may arise where failure to intervene would occasion a miscarriage of justice.

ix. By resorting to this power, it is not the intention of the Court to reopen or alter the substance of the Judgment, but only to correct an omission that would otherwise compromise the fair and just determination of the appeal.

x. The correction is consistent with the terms of the tender awarded to the 1st respondent for "License and Wayleave Agreements for the Development of a Grain Handling Facility and Development of an Island Berth at G- Section Area Kenya Port Authority Port of Mombasa."

xi. The reliefs sought and orders issued before the High Court were in respect of "the proposals for wayleave and license of a second bulk grain handling facility." The appeal to the Court of Appeal by the 1st to 3rd respondents challenged the prohibitory orders issued by the High Court restraining the 4th respondents from granting and "approving the proposals for wayleave and license of a second bulk grain handling facility at the Port of Mombasa."

xii. This Court, having nullified the tender, anything that flows from the tender process, license and wayleave would be of no effect. Portside cannot validly hold a license or wayleave arising from that tender.

xiii. Consequent upon our findings above, we amend Order No. (iii) contained in paragraph 175 of the Judgment to include the words "and wayleave" to read as follows:

> "175 (iii) The decision of KPA to grant Portside the license and wayleave to establish a second grain bulk facility through the Specially Permitted Procurement Procedure under Section 114A of the PPAD Act was inconsistent with Articles 10(2)(c), 201 (a) and 227 (1) of *the Constitution*."

7. Accordingly, we make the following Orders:

i. The Notice of Motion dated 28th July, 2025 be and is hereby allowed.

ii. The Judgment dated 30th June 2025 is hereby corrected to include the words "and wayleave" in paragraph 175 Order No. iii, which shall now read as follows:

"iii. The decision of KPA to grant Portside the license and wayleave to establish a second grain bulk facility through the Specially Permitted Procurement Procedure under Section 114A of the PPAD Act was inconsistent with Articles 10(2)(c), 201 (a) and 227 (1) of *the Constitution*."

iii. Each party to bear its own costs of this Application.

It is so Ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2025.

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

.....

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