Wanderi & 106 others v Engineers Registration Board & 6 others; Egerton University & another (Interested Parties) (Petition (Application) 19 of 2015 & Petition 4 of 2016 (Consolidated)) [2024] KESC 24 (KLR) (31 May 2024) (Ruling)

Neutral citation: [2024] KESC 24 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION (APPLICATION) 19 OF 2015 & PETITION 4 OF 2016 (CONSOLIDATED)

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ

MAY 31, 2024

BETWEEN

MARTIN WANDERI & 105 OTHERS & 105 OTHERS & 105 OTHERS & 105 OTHERS & 105 OTHERS & 105 OTHERS & 105 OTHERS ..... PETITIONER

AND

THE ENGINEERS REGISTRATION BOARD ..... 1ST RESPONDENT

MOI UNIVERSITY ..... 2ND RESPONDENT

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... 3RD RESPONDENT

COMMISSION FOR HIGHER EDUCATION ..... 4TH RESPONDENT

MINISTRY OF HIGHER EDUCATION SCIENCE AND TECHNOLOGY ..... 5TH RESPONDENT

AND

EGERTON UNIVERSITY ..... INTERESTED PARTY

JESSE WAHOME WAWERU & 42 OTHERS ..... INTERESTED PARTY

AS CONSOLIDATED WITH

PETITION 4 OF 2016

BETWEEN

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... PETITIONER

AND

THE ENGINEERS REGISTRATION BOARD ..... 1ST RESPONDENT

JESSE WAWERU WAHOME & OTHERS ..... 2ND RESPONDENT

MOI UNIVERSITY ..... 3RD RESPONDENT

EGERTON UNIVERSITY ..... 4TH RESPONDENT

COMMISSION FOR HIGHER EDUCATION ..... 5TH RESPONDENT

MINISTRY OF HIGHER EDUCATION SCIENCE AND TECHNOLOGY ..... 6TH RESPONDENT

(Being an application to clarify the award of costs to the Petitioner in Petition No. 4 of 2016 arising from the Judgment delivered on 17th July, 2018)

RULING

Representation:

Ms. Murunga h/b for Mr. Wesonga for the Applicant

(Wekesa & Simiyu Advocates)

N/A for the other parties

1. Upon perusing the Notice of Motion application dated 6th February, 2024 and filed on 12th February, 2024 pursuant to Articles 159 and 163(8) of the *Constitution*, Section 3A of the *Supreme Court Act*, and Rules 3(2), (4) and (5) of the *Supreme Court Rules* 2020, seeking, *inter alia*, to have this Court clarify that the applicant, who is the petitioner in Petition No. 4 of 2016, was awarded costs of the petition in this Court, the Court of Appeal and in the High Court pursuant to paragraph 259(c) of the Judgment of this Court delivered on 17th July, 2018; and

2. Upon perusing the grounds on the face of the application and the supporting affidavit sworn on 6th February, 2024 by Edmond Wesonga, the Advocate on record for the applicant, where he contends that: the applicant filed Petition No. 4 of 2016 seeking to set aside the decision of the Court of Appeal in Civil Appeal No. 240 of 2013; the petition was subsequently consolidated with Petition No. 19 of 2015 filed by Martin Wanderi and 105 others, which became the lead file; that the Supreme Court allowed the consolidated petition and awarded costs to the petitioners as stated at paragraph 259 of the Judgment; and

3. Upon perusing the applicant's further grounds that: the applicant subsequently filed a Bill of Costs dated 16th July, 2019 seeking costs; when the parties appeared before the Registrar of this Court on 5th August, 2019 for taxation of the applicant's Bill of Costs, the Registrar, at the 1st respondent's urging, declined, failed and/or neglected to tax the Bill of Costs on the ground that the applicant was not awarded costs by the Court; and the parties were directed to seek clarification from the Court, which position was reiterated by the Deputy Registrar on 27th November, 2023 when the matter came up for mention; and

4. Considering the applicant's further contention that the Registrar taxed the Bill of Costs filed by the petitioners in Petition No.19 of 2015 except the applicant's Bill of Costs; the Registrar has misinterpreted, misunderstood and misapprehended the order of the Court and is imposing illegal strictures into the Judgment of the Court; the refusal to tax the applicant's Bill of Costs violates the

Judgment of this Court and the elementary principle that costs follow the event; and that it is in the interest of justice that the applicant's Bill of Costs be taxed this Court having awarded costs to the petitioners, who included the applicant in Petition No.4 of 2016;

5. Taking into account the applicant's submissions dated 7th February, 2024 and filed on 12th February 2024, the applicant urges that: this Court has inherent jurisdiction to clarify its judgment so as to give effect to its meaning, scope or intention pursuant to Section 3A of the *Supreme Court Act* and Rules 3(2), (4) and (5) of the *Supreme Court Rules* 2020; that this Court has in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus)*(Petition 15 & 16 of 2015)[2021] KESC 31 (KLR) (6 July 2021) (Direction) clarified the extent of the application of its judgment; and further relies on this Court's decisions in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* Election Petition No. 1 of 2017 [2017] eKLR and *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012 [2014] eKLR;

6. Noting that the respondents, despite service of the application, neither filed responses, submissions nor participated in these proceedings. However, from the Court's proceedings of 5th August, 2019 when the matter was mentioned before the Deputy Registrar, we note that Counsel for the 1st respondent objected to the applicant's Bill of Costs being taxed on the ground that this Court did not grant the applicant costs;

7. Bearing in mind the provisions governing this Court's jurisdiction under the Constitution and the *Supreme Court Act*; the general principle is that once a Court has duly pronounced a final order, it becomes functus officio and has no power to alter the Order; and this Court's decision in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* SC Petition No. 6 of 2014 [2017] eKLR where we stated that, "The stamp of finality with which this Court is clothed should not be degraded except in exceptional circumstances as determined by the Court itself."

8. We have considered the application, affidavit in support and the submissions filed and now opine as follows:

    i. In *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others* SC Petition No. 2 and 4 of 2017 [2017] eKLR this Court found it necessary to clarify certain aspects of the Court's Judgment. In *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* Election Petition No. 1 of 2017 [2017] eKLR, a Ruling delivered on 17th October, 2017 on an application seeking a clarification of the Court's Judgment, we stated as follows:

        > "(56) ... This Court has no jurisdiction to interpret its decisions or those of other courts. On the face of it therefore, in ordinary circumstances, an application, which is based on tenuous jurisdictional foundations, such as the one before us ought ...to be dismissed."

    ii. In the same decision, however, while noting the public interest generated in the matter, in the exercise of the Court's inherent powers, we proceeded to determine whether there was a matter to be clarified, stating that:

        > "(58) ...To that limited extent of great public interest, we think that the submissions by the two counsel are not without merit. In exercise of the inherent powers of this Court, we shall therefore proceed to determine whether there is any matter to be clarified, and if so, to what extent. This assumption of jurisdiction, is all the more necessary, so

as to avert the danger of an impression being created in the mind of the public, that there exists an ambiguity, in the Court's Judgment, even where there might be none. If indeed there is an ambiguity, the assumption of jurisdiction will help eliminate the same. Having so decided, we now turn to the two questions as framed in the Notice of Motion."

iii. Similarly, in *Cogno Ventures Limited v Bia Tosha Distributors Limited & 6 Others* as consolidated with *Andrew Kilonzo & 2 others v Bia Tosha Ditributors Limited; Kenya Breweries & Limited & 6 others (Interested parties)* & *Bia Tosha Ditributors Limited v Kenya Breweries Limited & 11 others; Javier Feran & 24 others (Contemnors); Kamahuha Limited & Another (Interested Parties)* SC Application Nos. E005; E006 & E012 of 2023 (as consolidated) (unreported) we stated as follows:

"(38) It emerges that the parties either misunderstood our judgment rendered on 17th February 2023 or are outrightly mischievous. Having authoritatively made our decision on the issues before us in Petition No. 15 of 2020, it was this Court's expectation that all parties thereto, would act in accordance with what the Court meant. It is not for this Court to interpret its decisions or those of other courts to the different litigants. With the issuance of the judgment, the Court became functus officio. The only narrow opportunity for the court's jurisdiction is by way of review vide an application as permitted by the *Supreme Court Act* and *Rules*.

(39) However, to the extent that there is need to avert protracted legal battles, more so when the substantive dispute is pending at the High Court, we shall invoke the inherent powers of this Court to determine whether there is any matter for clarification and if so, to what extent we can exercise the power of review as sought in the two applications or deal with contempt as raised in the third application..."

iv. In the exercise of this Court's inherent powers pursuant to Section 3A of the *Supreme Court Act* Cap 9B, we proceed to determine whether indeed there is ambiguity in the Court's Judgment delivered on 17th July, 2018, in respect to the award of costs to the applicant, to warrant clarification. The relevant portion of the paragraph to be clarified as sought by the applicant states as follows:

"(259) In the premises, Petition No.4 of 2016 dated 22nd April, 2016 and Petition No. 19 of 2015 dated 30th November, 2015 are hereby allowed and the High Court Judgment reinstated to the extent of our orders below:

.....

c. The Engineers Registration Board, shall bear the costs of the Petitioners and 2nd Interested Parties in Petition No. 19 of 2015, in the High Court, Court of Appeal and in this Court. The said costs shall carry interest at a rate of 12% per annum respectively from the date of judgment in each respective judgment in each respective judgment until payment in full.

d. All other parties shall bear their own costs."

v. According to the applicant, it was awarded costs as entitled, having succeeded in the appeal. A plain reading of this order does not infer any ambiguity as alleged by the applicant, requiring this Court's clarification, or at all. At paragraph 259 of the said Judgment, we did allow the

consolidated petition, that is, Petition No. 4 of 2016 and Petition 19 of 2015. The Court was, however, categorical on which party was entitled to costs in the consolidated petition by specifically making reference to the petitioners and 2nd Interested Parties in Petition No.19 of 2015. These were the affected students who had resorted to court action. This can be drawn from the Court's reasoning in the judgment as follows:

> "(170) Lastly, as the students have been successful in their appeal as against the Board; we allude to the general principle on award of costs: that costs follow the event and find that the Board shall bear the costs of the students." (Emphasis ours)

Further, paragraph 259(d) was to the effect that all the other parties (including the applicant) would bear their own costs.

(v) To avoid any further misapprehension, misinterpretation or misunderstanding of the Court's Judgment, and in order to settle any doubts on the part of the applicant, including apprehension on the taxation of its Bill of Costs dated 16th July 2019, no order was made by this Court granting the applicant costs. At any rate, the applicant is not a student. We find the application to be wrought in mischief and reiterate, as we held in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012 [2014] eKLR, that costs are granted at the discretion of the Court. We stated:

> "(22) Although there is eminent good sense in the basic rule of costs
>
> – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases."

(v) Taking into account the age of the dispute, we are mindful not to protract the same any further on account of costs. We find it appropriate to make no order as to costs as regards the present application.

9. Consequently, for reasons aforesaid, we make the following orders:

i. The Notice of Motion dated 6th February, 2024 and filed on 12th February, 2024 be and is hereby dismissed; and

ii. There shall be no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 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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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA