Judicial Service Commission v Oduor & 5 others (Petition (Application) 18 (E025) of 2021) [2024] KESC 53 (KLR) (30 August 2024) (Ruling)

Neutral citation: [2024] KESC 53 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION (APPLICATION) 18 (E025) OF 2021

PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

AUGUST 30, 2024

BETWEEN

THE JUDICIAL SERVICE COMMISSION ..... APPELLANT

AND

MICHAEL KIZITO ODUOR ..... 1ST RESPONDENT

WILSON KABERIA NKUNJA ..... 2ND RESPONDENT

OKELLO TIMOTHY ODIWUOR ..... 3RD RESPONDENT

BERNARD JAMES NDEDA ..... 4TH RESPONDENT

THE JUDGES AND MAGISTRATES VETTING BOARD ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

(Being an application for Review of the Judgment and Order of the Supreme Court (Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ), delivered on 21st April, 2023 in Petition No. 18 (E025) of 2021)

RULING

Representation:

Mr. Bernard Ndeda, the applicant, appearing in person (C/O Billy Amendi & Co. Advocates)

Mr. Edwin Musyoka h/b for Mr. Charles Kanjama for the appellant (Muma & Kanjama Advocates)

Mr. Christopher Marwa for the 5th and 6th respondents

(Attorney General's Chambers)

Non-appearance by the 1st, 2nd and 3rd respondents

1. Bearing in mind that the 1st to 4th respondents, then serving magistrates, were vetted by the Judges and Magistrates Vetting Board (the Board) and found unsuitable to continue serving; and that the Board dismissed their request for review of its decision, and were consequently removed from office. In affirming the Board's decision, the High Court ruled that courts lacked jurisdiction to review the vetting process unless the Board exceeded its constitutional mandate. On a first appeal, the Court of Appeal by a majority decision disagreed with the High Court and held that the Supreme Court in Judges and Magistrates Vetting Board and 2 Others vs. Centre for Human Rights and Democracy and 11 Others, SC Petition No.13A of 2013 as consolidated with Petition No.14 of 2013 and 15 of 2013; [2014] eKLR ('JMVB (1)') and in *Judges and Magistrates Vetting Board vs. Kenya Magistrates and Judges Association & another, SC Petition No. 29 of 2014*; [2014] eKLR ('JMVB (2)') had not conclusively settled the question of whether courts could review the Board's decisions; that in the two cases the Supreme Court was concerned with the removal of a judge and not a magistrate. Ultimately, when the appellant (JSC) brought a second challenge to this Court in Judicial Service Commission vs. Oduor & 5 others, (Petition 18 (E025) of 2021) [2023] KESC 32 (KLR) (21 April 2023) (Judgment), the Court clarified in its judgment delivered on 21st April 2023, that its findings apply to magistrates, reaffirming that the Board's decisions are not subject to review by the High Court. Consequently, the decision of the Court of Appeal was set aside, and the High Court's decision was affirmed thereby validating the removal from office of the applicant and 1st to 3rd respondents; and

2. Upon reading the applicant's present application, which is one of its kind since the establishment of this Court, and brought after the Court's Registrar had advised him against approaching the Court by a letter in which he had sought a "tier 2 application/petition to this honourable court for criterion review either suo moto or as the Apex Court deems fit." The application itself is strangely headed "Notice of Review/Reversal/Overturn", dated 10th October 2023 and erroneously referred to, throughout the pleadings, as a Petition for Review. It is, in any event, expressed to be brought pursuant to Article 163(7) of *the Constitution* and Rule 28 (5) and (6) of the Supreme Court Rules, 2020 for orders, inter alia, that:

> "i. The Judgment issued on 21st April 2023 in SC Petition No. 18 (E025) of 2021 (the judgment) is in error of law and in error of jurisdiction thus ripe for review;
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> ii. A declaration be made that the judgment is rendered in error of construction and interpretation of Section 23(1)(2) of the Sixth Schedule, Section 22(4) of the *Vetting of Judges and Magistrates Act*, 2011 (VJMA) and Articles 163(7) and 165 of *the Constitution*;
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> iii. A declaration that the judgment lacks the requisite legal legitimacy and validity as the bench intermeddled with the main transitional constitutional provision. The main source of vetting on jurisdictional mandate is already created, delineated and circumscribed on the effective date (sic);
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> iv. A declaration that the denial or limitation or obstruction of jurisdiction under Section 23(2) of the sixth schedule, the main vetting clause, to any court to question in or review the final decision of the vetting board on the removal or process leading to removal of a judge from office applies to a judge only. To extend this limitation or ouster by courts or judges (JMBV I) to apply to magistrates is to act without jurisdiction;
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> v. A review of the wrongful judgment by this Court to correct its own errors to conform with the rule of law and constitutionalism;

vi. A declaration that Section 23(2) an ouster of jurisdiction is to all courts over a specific group, judges only but not magistrates and no court has discretion or authority to extend this constitutional transitional ouster to magistrates;

vii. A declaration that Section 22(4) of the VJMA, a retrospective statutory law, cannot amend Section 23 of the Sixth Schedule to *the Constitution*;

viii. That paragraph 70 of the judgment (which are the final orders), has occasioned a travesty of justice and the judgment is a nullity or voidable as its effect is to infringe on the constitutional rights and freedoms of the four magistrates"; and

3. Upon considering the supporting affidavit sworn by Bernard Ndeda, the applicant, on 12th September 2023 together with his written submissions dated 3rd June 2024 to the effect that; upon delivery by this Court of its judgment on 21st April 2023, he was aggrieved and filed what he has described as "a two-tier rare and exceptional public interest review petition brought pursuant to Articles 37 and 163(7) of *the Constitution* on a novel approach only applied in a situation where it is the Supreme Court, in its normal discharge of duties, has infringed or contravened *the Constitution* to correct the errors of the Court"; that the first tier being a petition to the Legislature and the Speaker of the National Assembly to co- opt three other national institutions being the Chief Justice, the President of the Law Society of Kenya and the President of the Kenya Judges and Magistrates Association (KMJA) in order to review the decision of the Supreme Court made in excess of its jurisdiction; and the second tier being the one being pursued in the instant Motion, for the Supreme Court to review its own judgment; that both petitions were to run pari passu; that the first tier petition to the National Assembly having been rejected by the Clerk of the National Assembly for lack of jurisdiction, the applicant has elected to institute the instant Motion for this Court to review its judgment; and

4. Noting the 15 grounds on the face of the application which can be summarized as follows: that the impugned judgment was delivered on 21st April 2023, being a public holiday, Idd ul fitr, therefore without jurisdiction; that it eroded the gains made in the case of 'JMVB (2)' which had allowed a review of the Board's decision on the grounds that the Board did not operate within the provisions of Section 23 (1) and (2) of the Sixth Schedule to *the Constitution* and also because the Board improperly construed and interpreted Section 23 (1) and (2) of the Sixth Schedule to *the Constitution*; that in those circumstances, the judgment of this Court is ultra vires and ought to be reviewed ex debito justitiae, as it has divested and denied the four magistrates of their constitutionally guaranteed rights of review or appeal against the final decision of the Board; that the judgment failed to take into account applicable, relevant constitutional and transitional laws regarding the magistrates which are Section 23 (2) of the Sixth Schedule to *the Constitution* as read with Articles 165 (3)(c), 172 and 260 of *the Constitution* and as cross referenced with Article 262 and Section 7 of the Sixth Schedule in a holistic, purposive and harmonious manner as prescribed by *the Constitution*. Consequently, the applicant urges that, since this is a petition for reversal, the issues for determination remain the same as those in the original petition, again another alien proposition; and

5. Upon reviewing the appellant's (the JSC's) grounds of opposition dated 24th June 2024 and submissions dated 28th June 2024 to the effect that; the application is filed belatedly, nearly 6 months after the date of delivery of judgment sought to be reviewed; this Court lacks the jurisdiction to determine the petition/application as framed because it is functus officio and lacks jurisdiction to sit on appeal on the issues it determined in respect of the applicability of Section 23 (2) of the Sixth Schedule of *the Constitution* to magistrates; the issues raised regarding the unconstitutionality of Section 22 (4) of the VJMA and misapplication of Articles 163(7) and 165 of *the Constitution* were not in issue before both superior courts below; the application does not demonstrate or establish any of the circumstances

for the grant of a remedy of review of the judgment under Section 21A of the *Supreme Court Act* and as enunciated in the cases of Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2014] eKLR (Rai Case) and Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 others [2017] eKLR (Outa Case); the application is a disguised appeal from the Court's judgment and does not fall within the confines of review; that the application is an affront to the principle of finality of litigation, is defective, untenable, an afterthought, a gross abuse of the court process and should accordingly be dismissed; and

6. Upon perusing the 5th and 6th respondents' submissions dated 24th June 2024 to the effect that; the two-tier petition does not disclose any of the grounds for review under Section 21A of the *Supreme Court Act* or as expressed in the Outa Case rather, they are grounds of appeal on the merit of the impugned judgment and the court is being invited to sit on appeal of its own judgment; there are no compelling reasons to review the judgment; and that once a judgment is delivered, it can only be reviewed under the slip rule. For these reasons, they urge that the application be dismissed with costs to the 5th and 6th respondents; and

7. Further noting the applicant's rejoinder and supplementary submissions dated 27th June 2024 to the effect that; the application is not a second appeal or an application for the Court to sit on appeal on its prior decision; that the Rai and Outa Cases are distinguishable as they were litigated under Section 20(1) of the Supreme Court Rules, 2012 which have since been repealed by Section 28 (5) of the Supreme Court Rules; that the amendment now allows merit review as sine qua non; and that contrary to JSC's and the 5th and 6th respondents' assertions, the applicant has established valid grounds for review as envisioned in the Rai and Outa Cases; and

8. Appreciating that under this Court's Rules, a party can only file the following pleadings to move the Court, a petition, reference, originating motion or notice of motion. Therefore, the so-called "Notice of Review/Reversal/ Overturn" or "Tier-Two Review Petition" are unknown phenomena and procedures in this Court; and

9. Taking into account the jurisdiction of this Court under 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 Outa Case, it is now firmly established that, as a general rule, the Supreme Court cannot sit on appeal over its own decisions, or review its decisions, save to correct obvious errors apparent on the face of the decision. However, in exercise of its inherent powers, the Court may, review its decision(s) in exceptional circumstances, so as to meet the ends of justice. It will only do so in instances where:

> "(i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
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> ii. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
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> iii. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
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> iv. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision."; and

10. In addition Rule 28(5) of the Supreme Court Rules stipulates that; "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".

11. Having considered the application, affidavits and rival arguments summarized in the preceding paragraphs we now opine as follows:

i. Apart from the fact that the application as filed is wanting in form, the reliefs it seeks are unavailable as they do not meet the criteria for review. Instead, going by the prayers and grounds on the face of the application, there is no doubt that the applicant has merely regurgitated the original petition hoping that the Court would arrive at a different conclusion. The applicant did not hide his conviction that what he had filed was a petition; he headed it as such and in the entire application he has repeatedly made reference to a petition.

ii. Secondly, we note that the application was filed almost 6 months after the delivery of our judgment. Although Rule 28(5) of the Supreme Court Rules places no time within which an application for review must be brought, it is a principle of statutory and constitutional construction that where a law does not prescribe a particular time for performing an act, the act must nonetheless be done without unreasonable delay. It cannot be an open-ended thoroughfare. It must follow that an application for review must be brought within a reasonable time, determined on a case- by-case basis and delay in bringing an application for review must be explained to the satisfaction of the Court. The applicant has not offered any explanation for the delay.

iii. On the merits of the application and applying the provisions of Section 21A of the *Supreme Court Act* as well as Rule 28(5) of the Supreme Court Rules, 2020, as interpreted in the Outa Case, we find that as framed and presented, the application falls short of the exceptional circumstances or public interest and therefore lacks merit.

iv. Generally, when this Court gives a judgment in a case on merit, it becomes functus officio in relation to that judgment upon its pronouncement. An invitation to the Court to re-open the case must be founded on firm grounds. A strong case must be established based on the provisions of Section 21A of the *Supreme Court Act* and Rule 28(5) of the Supreme Court Rules, before the Court can consider reviewing its decision. It is not sufficient to merely allege fraud, incompetence, or deceit without giving the particulars thereon.

v. It should be apparent from the provisions of Section 21A and Rule 28(5) aforesaid that the conditions precedent for review are extremely stringent and exceptional in terms because it is a serious matter to allege that a decision of this Court has been obtained by fraud or deceit; or that the Judgment, Ruling, or Order, is a nullity; or that the Court itself was not competent or was misled when it made the decision; or that the decision was rendered on the basis of a repealed law. Where these allegations are proved, the power of the Court in granting the relief of review is inherent.

vi. The applicant has not only failed to meet the criteria for review but seems to have set out to re-litigate the very matters canvassed and determined on merit in the appeal, namely whether Section 23(2) of the Sixth Schedule to *the Constitution* applied to magistrates and whether in so far as it implicates the function of the Board in the vetting of judges and magistrates, it is subject to the review jurisdiction of the High Court. These questions, we reiterate were settled by this Court with finality not only in Judges and Magistrates Vetting Board and 2 Others vs. Centre for Human Rights and Democracy and 11 Others, SC Petition No.13A of 2013 as consolidated with Petition No.14 of 2013 and 15 of 2013 [2014] eKLR ('JMVB (1)') and in Judges and Magistrates Vetting Board vs. Kenya Magistrates and Judges Association & another, SC Petition No. 29 of 2014; [2014] eKLR ('JMVB (2))' but also in our judgment, the subject of this application.

vii. Finally, the applicant challenged the validity of the judgment, arguing that it was delivered on a public holiday being Idd ul fitr. We wish to clarify that delivering a judgment on a public

holiday does not invalidate the judgment. The essence of a decision is its content and the legal reasoning behind it, not the specific day on which it is delivered, especially when the same was delivered virtually, on email and not in open court.

viii. For all the reasons proffered, we find no merit in the application, and we accordingly dismiss it.

ix. As for the costs, we are guided as always by this Court's pronouncement in Jasbir Singh *Rai & 3 others vs. Tarlochan Singh Rai & 4 others, SC Petition No 4 of 2012*; [2014] eKLR, that an award of costs is an exercise of judicial discretion. Taking into account the circumstances of this matter, we make no orders as to costs.

12. Accordingly, we make the following Orders:

i. The application dated 10th October 2023 is hereby dismissed.

ii. There shall be no orders as to costs.

It is so ordered

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

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF KENYA

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

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