



REPUBLIC OF KENYA



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Member of Parliament Balambala Constituency v Abdi & 7 others (Petition 21 (E023) of 2020) [2023] KESC 80 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KESC 80 (KLR)

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 21 (E023) OF 2020
MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
SEPTEMBER 22, 2023

BETWEEN

MEMBER OF PARLIAMENT BALAMBALA CONSTITUENCY APPLICANT

AND

ABDI AHMED ABDI 1ST RESPONDENT

CABINET SECRETARY FOR INTERIOR & COODINATION OF NATIONAL GOVERNMENT 2ND RESPONDENT

COUNTY COMMISSIONER GARISSA COUNTY 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

MEMBER OF PARLIAMENT DAADAB CONSTITUENCY ... 5TH RESPONDENT

MEMBER OF PARLIAMENT GARISSA TOWNSHIP CONSTITUENCY 6TH RESPONDENT

THE GOVERNOR GARISSA COUNTY 7TH RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 8TH RESPONDENT

(Being an Application for Review of the Judgment and Orders of the Supreme Court of Kenya (Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ.) delivered on 16th June 2023 in SC Petition No. 21(E023) of 2020)

Circumstances under which the Supreme Court would review its own decisions.

In an application for review of the Supreme Court's judgement, the Supreme Court held that it would only review its decision if it was obtained by fraud or deceit, where the court issuing it was not competent, where the court was misled to enter into a consent or where the decision was issued based on a repealed statute or a deliberately



concealed statutory provision. The court held that the applications had not met the conditions and dismissed the application with costs.

Reported by John Ribia

Civil Practice and Procedure – review – review of the Supreme Court’s decisions – grounds for review - under what circumstances would the Supreme Court review its own judgments, rulings or orders - , section 21A;

Brief facts

The matter arose from a dispute of the division of 3 constituencies within Garissa County. The matter was resolved by the Supreme Court On June 16, 2023. The applicant was aggrieved by the findings of the court and filed the instant application for review in which he sought for the Supreme Court to vary the judgment or set it aside.

The respondents opposed the application on grounds that the applicant was attempting to relitigate the matter. They contended that the applicant had not met the threshold for the Supreme Court to review its own decision.

Issues

Under what circumstances would the Supreme Court review its own decisions?

Held

1. As a general rule, the Supreme Court had no jurisdiction to sit on appeal over its own decisions, nor review its own decisions, other than in the manner contemplated by section 21(4) of the . However, in exercise of its inherent powers, the 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. The exceptional circumstances were limited to instances where:
 1. the judgment, ruling, or order was obtained, by fraud or deceit;
 2. the judgment, ruling, or order was a nullity, such as, when the court itself was not competent;
 3. the court was misled into giving judgment, ruling, or order, under a mistaken belief that the parties had consented thereto;
 4. the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.
2. The applicant had not demonstrated how the judgment delivered on June 16, 2023 that he sought to have impugned met the exceptional circumstances above. Ground 3 of the motion introduced a new cause of action. Review could never issue in such circumstances. The application for review did not meet the requisite threshold.
3. The applicant had disguised his application as a review but it was in fact an appeal. An application for review, was not meant to afford the losing party, an opportunity to re-litigate or re-open a matter merely because such party was unhappy with the outcome.
4. The Supreme Court lacked jurisdiction to entertain a second appeal over its own judgment. Once the court had determined an appeal from the Court of Appeal, it became *functus officio*, and such a judgment stood until it was departed from in a future case or reviewed with the exceptional circumstances outlined earlier.

Notice of motion dismissed.

Orders

Applicant to bear the appellant’s, 5th and 8th respondents’ costs.

Citations

Cases

1. Outa, Fredrick Otieno v Okello, Jared Odoyo , Independent Electoral And Boundaries Commission, Returning Officer, Nyando Constituency & ODM Party (Petition 6 of 2017; [2017] KESC 25 (KLR) [2017]eKLR) — Mentioned



2. Rai, Jasbir Singh & 3 others -v- Rai, Tarlochan Singh Rai Estate & 4 others [([2013] eKLR) — Mentioned

Statutes

1. Constitution of Kenya, 2010 — article 50(1),159,163(7) — Interpreted
2. Supreme Court Act (act no 7 of 2011) — section 3,21A,21A — Interpreted
3. Supreme Court Rules (act no 7 of 2011 sub leg) — rule 28(5) — Interpreted

Advocates

Mr. Mokuu for Applicant

Mr. Ongoya for Appellant

Mr. Otieno for 5th Respondent

Mrs. Maina for 6th Respondent

Mr. Kiprotich for 8th Respondent

RULING

1. Upon perusing the notice of motion dated June 29, 2023 and filed on July 3, 2023 by Abdi Ahmed Abdi, the 1st respondent/applicant under the provisions of articles 50(1), 159 and 163(7) of the Constitution, sections 3, 21 and 21A of the Supreme Court Act and rule 28(5) of the Supreme Court Rules seeking Orders;
 1. That this honourable court be pleased to review, vary and set aside the judgment and order of this court delivered on June 16, 2023;
 2. That this court be pleased to dismiss with costs the Petition dated December 16, 2020 and filed on December 21, 2020;
 3. In the alternative, a declaration does issue that;
 - a. Abdisamit location is in Dertu Division in Daadab Constituency within Garissa County.
 - b. Auliya Sub-location is in Dertu Location in Dertu Division in Daadab Constituency in Garissa County.
 - c. Laago Sub-location is in Alango Arba Location in Dertu Division/Ward in Daadab Constituency in Garissa County.
 4. The costs of this application and interest thereon be provided for.
 5. Any other and further relief that this honourable court may deem fit and just to grant in the circumstances of this case; and
2. Upon also considering the grounds in support of the application for review and the grounds in the supporting affidavit by the applicant sworn on June 29, 2023 as well as the applicant's written submissions dated and filed on July 3, 2023 wherein the applicant claims that the judgment rendered on June 16, 2023 was made based on misrepresentation of the geographical location of the impugned location and sublocations; that there exist meritorious, exceptional and public interest circumstances that warrant this court to review its determination of June 16, 2023; and that in the absence of an express order of this Court as to the exact location of the impugned location and sub-locations, confusion lingers amongst the residents of Daadab Constituency and Balambala Constituency; that



- this court has jurisdiction to review its judgment; and that the applicant has met the requirements set out under section 21A of the [Supreme Court Act](#) as well as rule 28(5) of the Supreme Court Rules; and
3. Further considering the appellant's grounds of opposition dated July 27, 2023 opposing the application on the grounds that it is an attempt by the applicant to relitigate the appeal; that the application does not meet the standard for review of judgment; that the application is an abuse of the court process; and that the applicant is seeking to introduce grounds and prayers that were never the subject of litigation before the superior courts, hence not a ground for review before this court; and
 4. Also noting the appellant's written submissions dated July 10, 2023 and filed on July 11, 2023 wherein the appellant denies that the judgment was obtained through misrepresentation of facts; that the applicant is seeking an opportunity to relitigate or reopen the matter; that the applicant is asking this court to issue new prayers despite his appeal having been concluded; and that this court lacks original jurisdiction to handle this application as it is *functus officio*, having rendered its judgment; and
 5. Further considering the 5th respondents' grounds of opposition and written submissions dated July 11, 2023 and filed on July 14, 2023 where the application is opposed on grounds that the application has failed to meet the threshold set out in Section 21A of the [Supreme Court Act](#) and rule 28(5) of the Supreme Court Rules; that the application is vexatious as it seeks to re-litigate issues after a judgment has been rendered; that the mere dissatisfaction of a party with the court's judgment is not a ground to invoke this court's power to review its judgment; that this court is *functus officio*; that the application is akin to a second appeal and the court lacks jurisdiction to entertain it while relying on this court's decision in [Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others; SC Petition No 6 of 2014](#);[2017] eKLR ; and
 6. Noting the written submissions by the 6th respondent dated August 4, 2023 and filed on August 8, 2023, supporting the application by submitting that first, this court has jurisdiction to review this application under rule 28(5) of this court's rules and the finding by this Court in [Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others](#) [2013] eKLR and [Fredrick Otieno Outa v Jared Odoyo Okello & 3 others](#) that set out the guiding principles to be considered by the Supreme Court while determining review of its decisions; that the applicant has demonstrated exceptional circumstances that warrant review as a matter of public interest and sufficient grounds laid out warranting such review; and
 7. Also noting the grounds of opposition and the written submissions by the 8th respondent opposing the application on grounds that the application falls short of the threshold set out in [Fredrick Otieno Outa -v- Jared Odoyo Okello & 3 others](#); that the application fails to show how the Supreme Court made a glaring omission, patent mistake or grave error; that the application violates the principle that litigation must come to an end and; that the application is an attempt to appeal the matter.

We Now Opine as follows:

- i. This Court set out its power to review its own decision in the [Fredrick Otieno Outa](#) decision where we held that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor review its own decisions, other than in the manner contemplated by section 21(4) of the [Supreme Court Act](#). We however did set out that in exercise of its inherent powers, the 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 exceptional circumstances in which the court can vary any of its judgments, rulings, or orders are limited to instances 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.
- ii. Having considered the notice of motion, its grounds in support, and the applicant’s submissions, we fail to see how the conditions set out in *Fredrick Otieno Outa* decision have judgment delivered on June 16, 2023 that he seeks to have impugned meets the exceptional circumstances reiterated above. Ground 3 of the motion speaks for itself-a whole new cause of action has been introduced at this late hour. Review can never issue in such circumstances. No other ground reproduced above also meets the *Outa* threshold.
- iii. Instead, the applicant has disguised his application as a review one but it is in fact an appeal, seeking to restate and re-argue the appeal and reopen matters already determined with finality, while asking the court to grant orders to that effect. The court in *Fredrick Otieno Outa* specifically warned on this when it held:
- ‘ We have unambiguously held, that an application for review, is not meant to afford the losing party, an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome.’
- iv. It is therefore disconcerting that the applicant is asking this court to relitigate issues already determined with finality and issue declarations to that effect. It needs restating that this court lacks jurisdiction to entertain a second appeal over its own judgment. As we did state in *Fredrick Otieno Outa*, once the court has determined an appeal from the Court of Appeal, it becomes functus officio, and such a judgment stands until it is departed from in a future case or reviewed with the exceptional circumstances outlined earlier. Consequently, we find that this application lacks merit as no such grounds for review have been established and is therefore for dismissal.
- v. As for costs, the same follow the event, the applicant shall bear the costs of the motion.
8. Consequently, and for the reasons aforesaid, we make the following orders:
Orders:
- i. The notice of motion dated June 29, 2023 and filed on July 3, 2023 be and is hereby dismissed;
 - ii. The applicant shall bear the appellant’s, the 5th and 8th respondents’ costs.
9. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2023

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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

.....

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

