



Dari Limited & 5 others v East African Development Bank (Application E017 of 2023) [2023] KESC 93 (KLR) (7 November 2023) (Ruling)

Neutral citation: [2023] KESC 93 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION E017 OF 2023
MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
NOVEMBER 7, 2023**

BETWEEN

**DARI LIMITED 1ST APPLICANT
RAPHAEL TUJU 2ND APPLICANT
MANO TUJU 3RD APPLICANT
ALMA TUJU 4TH APPLICANT
YMA TUJU 5TH APPLICANT
SAM COMPANY 6TH APPLICANT**

AND

EAST AFRICAN DEVELOPMENT BANK RESPONDENT

(Being an application for review of the Ruling of the Supreme Court (Mwilu;DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko, SCJJ) delivered on 6th October 2023 in Petition (Application) No. E012 of 2023 and Application No. E017 of 2023)

Circumstances in which the Supreme Court can review its own decisions

The application sought the review of the Supreme Court’s decision to decline an application for conservatory orders. The Supreme Court held that in the exercise of its inherent powers, it may review its decision(s) in exceptional circumstances so as to meet the ends of justice. The court proceeded to highlight the exceptional circumstances.

Reported by Kakai Toili

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction to review its decisions - under what circumstances could the Supreme Court review its own decisions.

Civil Practice and Procedure - review - grounds for review at the Supreme Court - where a review of a ruling of the Supreme Court declining to grant conservatory orders was sought - whether an applicant had met the threshold for the Supreme Court to grant a review application.



Brief facts

On October 6, 2023 the Supreme Court (the court) dismissed the applicants' application for conservatory orders on the grounds that: although the applicants had satisfied the arguability test, they had failed to demonstrate that the appeal would be rendered nugatory if the conservatory orders were denied. They also failed to satisfy the public interest threshold. Aggrieved by parts of that ruling, the applicants filed the instant application for review.

Issues

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

Held

1. As a general rule, the Supreme Court could not sit on appeal over its own decisions, or to review its decisions, save to correct obvious errors apparent on the face of the decision. However, in the exercise of its inherent powers, the court may review its decision(s) in exceptional circumstances, so as to meet the ends of justice in the following instances where;
 - a. the judgment, ruling, or order, was obtained, by fraud or deceit;
 - b. the judgment, ruling, or order, was a nullity, such as, when the court itself was not competent;
 - c. the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto;
 - d. 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 applicants had failed to demonstrate that the ruling of the court of October 6, 2023 was obtained by fraud, deceit, misrepresentation of facts or in what way it was a nullity. What the applicants had tried to do was to introduce new evidence, which was not before the court during the application for conservatory orders, in the quest to persuade the court to change its mind and rule in their favour.
3. As framed, the application fell short of the exceptional circumstances, and the court declined the invitation to exercise the court's limited discretion to review the ruling. The aim of the application was to avail the applicant a second bite at the cherry. The application lacked substance.

Application dismissed.

Orders

Costs to be borne by the applicants.

Citations

Cases

1. Muriithi & 4 others v Law Society of Kenya & another (Civil Application 12 of 2015; [2016] eKLR) — Explained
2. Outa v Okello & 3 others (Petition 6 of 2017; [2017] KESC 25 (KLR)) — Explained
3. Rai & 3 other v Rai & 4 others (SC Petition No 4 of 2012; [2014] eKLR; [2013] 2 KLR 142) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 50, 159(2)(d)(e), 163(1)(4), — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — section 3A, 21(2), 21A(a), 23A, 24(1) — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011 sub leg) — rule 28(5), 31, 32 — Interpreted

Advocates

Paul Muite, SC and Mr. Nyamodi for Applicants

Prof. Githu Muigai, SC and Mr. Wakhisi for Respondent



RULING

Representation:

Paul Muite, SC and Mr Nyamodi for the applicants (VA Nyamodi & Company Advocates)

Prof Githu Muigai, SC and Mr Wakhisi for the respond (Mohammed Muigai LLP)

1. Recalling that on October 6, 2023 this court (Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko, SCJJ) dismissed the applicants' application dated August 25, 2023 for conservatory orders on the grounds that: although the applicants had satisfied the arguability test, they had failed to demonstrate that the appeal would be rendered nugatory if the conservatory orders were denied. They also failed to satisfy the public interest threshold. Now, aggrieved by parts of that ruling, the applicants have applied for review in the instant notice of motion dated October 12, 2023 and filed on October 13, 2023; and
2. Upon reading the said notice of motion expressed to be brought under articles 50, 163(1) and (4), 159(2)(d) and (e) of the Constitution, sections 3A, 21(2), 21A(a), 23A and 24(1) of the Supreme Court Act, 2011 and rules 28(5), 31 and 32 of the Supreme Court Rules 2020 for orders that;
 - i. Spent...
 - ii. This court be pleased to review, vary, vacate and/or set aside paragraph 34 of its ruling dated October 6, 2023 and grant the orders sought by applicants in their application dated April 25, 2023.
 - iii. This court be pleased to issue any further orders it may deem fit in the circumstances as shall meet the ends of justice.
 - iv. The costs of this application be provided for; and
3. Upon perusing the grounds on the face of the application, the supporting affidavit of Raphael Tuju, the 2nd applicant, and the submissions filed on their behalf on October 13, 2023 and further submissions dated October 31, 2023, to the effect that in paragraph 34 of the ruling, the court made erroneous factual suppositions that: first, the respondent is a reputable international bank; second, the respondent will have no difficulty compensating the applicants if the applicants succeed in their claim; and third, the diplomatic immunity enjoyed by the respondent did not suffice in the instance. In the applicants' view, although the findings were sound deductions of law, the same did not aptly construe factual realities, especially with regard to both the reputational and financial status of the respondent; that had the court been seized of these realities, it may not have reached the conclusion in question; and that now that the court's attention has been drawn to the factual position, the applicants have urged the court to vacate, vary and or set aside the specific findings in contention; and
4. Further, the applicants contend that the ruling inadvertently violated their constitutionally guaranteed rights by arrogating to the respondent a heightened legal advantage incapable of being reversed. To support their grounds, the applicants have produced a Moody's Agency Rating Report indicating the respondent has a 'BAA Rating' being a Tier 4 rating as to its ability to service its debts, suggesting in fact, that the respondent is in financial distress and has severally defaulted in its payment obligations. On the respondent's diplomatic immunity, the applicants have made reference to two cases within the East African Community states' jurisdictions, where the respondent raised the defence of immunity against attachment of its assets preventing its creditors from recovering a debt. Relying on this court's decision in Deynes Muriithi & 4 others v Law Society of Kenya & another [2016] eKLR on the test for



review, they have urged us to find that this application meets the threshold for review as exceptional circumstances have arisen; and that this court on the discovery of novel facts, can exercise its inherent decision to review its decision; and

5. Upon considering the respondent's replying affidavit sworn on October 24, 2023 by Justa Kiragu, the respondents Principal Investments Officer and submissions dated October 24, 2023 in opposition to the application, to the effect that: the applicants have failed to satisfy the requisite statutory and procedural threshold for review as set out in section 21A of the Supreme Court Act, rule 28(5) of the Supreme Court Rules and the principles enunciated in Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2017] eKLR; that the applicants have neither demonstrated a meritorious and/or exceptional case nor public interest which would warrant the review sought; that the application is veiled as one for review when in essence, it is a disguised appeal which seeks to relitigate the application for conservatory orders; that this court lacks the jurisdiction to sit on appeal against its decision in the ruling; and that the documents annexed to the application were not annexed as part of the applicants evidence in the application for conservatory orders and do not form part of the record in Petition No E012 of 2023 therefore, ought not to be considered for purposes of this application; and Having considered the application, affidavits, and rival arguments by both parties, we now opine as follows:
6. Guided by the provisions of 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 Fredrick Otieno Outa v Jared Odoyo Okello & 3 others (*supra*), we restate this court's power to review its own decisions as follows. As a general rule, the Supreme Court cannot sit on appeal over its own decisions, or to review its decisions, save to correct obvious errors apparent on the face of the decision. However, in the exercise of its inherent powers, the court may review its decision(s) "in exceptional circumstances, so as to meet the ends of justice" in the following 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."
7. Applying these conditions to this application, we find that the applicants have failed to demonstrate that the ruling of this court of October 6, 2023 was obtained by fraud, deceit, misrepresentation of facts or in what way it is a nullity. What the applicants have tried to do is to introduce new evidence, which was not before the court during the application for conservatory orders, in the quest to persuade this court to change its mind and rule in their favour.
8. Consequently, we have no hesitation in declaring that, as framed, the application falls short of the exceptional circumstances, and we decline the invitation to exercise the court's limited discretion to review the ruling. The aim of this application is to avail the applicant a second bite at the cherry. For these reasons, the application lacks substance and is disallowed.
9. On costs, the award of the same is discretionary and follows the principle set out by this court in Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others, SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. In exercise of our discretion, the applicants shall bear the costs of this application.
10. Accordingly, we make the following orders:



- i. The notice of motion dated October 12, 2023 and filed on October 13, 2023 is hereby dismissed.
- ii. The costs of this application shall be borne by the applicants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 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

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

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W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

