



REPUBLIC OF KENYA



KENYA LAW
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**Sonko v Clerk, County Assembly of Nairobi City & 11 others (Petition
11 (E008) of 2022) [2022] KESC 38 (KLR) (8 August 2022) (Ruling)**

Neutral citation: [2022] KESC 38 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 11 (E008) OF 2022

**MK KOOME, CJ & P, PM MWILU, DCJ & VP, MK IBRAHIM,
SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

AUGUST 8, 2022

BETWEEN

MIKE MBUVI SONKO APPELLANT

AND

CLERK, COUNTY ASSEMBLY OF NAIROBI CITY 1ST RESPONDENT

SPEAKER, NAIROBI CITY COUNTY ASSEMBLY 2ND RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT

CLERK OF THE SENATE OF KENYA 4TH RESPONDENT

SPEAKER OF THE SENATE OF KENYA 5TH RESPONDENT

SENATE OF KENYA 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 8TH
RESPONDENT**

**ASSUMPTION OF THE OFFICE OF THE COUNTY GOVERNOR COMMITTEE
NAIROBI CITY COUNTY 9TH RESPONDENT**

**BENSON MUTURA, THE ACTING GOVERNOR, NAIROBI CITY
COUNTY 10TH RESPONDENT**

**ANN KANANU MWENDA, THE DEPUTY GOVERNOR, NAIROBI CITY
COUNTY 11TH RESPONDENT**

OKIYA OKOITI OMTATAH 12TH RESPONDENT



(Being and application for Review of the Judgment and Order of the Supreme Court (Koome, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, & Ouko SCJJ) delivered on 15th July, 2022 in Petition No. 11 (E008) of 2022)

RULING

1. Upon perusing the Notice of Motion application dated 18th July, 2022 and filed on even date, anchored on Articles 163(1) and (4), 159(2)(d) and (e) of the Constitution, Sections 3 and 21 (2) of the Supreme Court Act and Rule 3 as well as Rule 28(5) of the Supreme Court Rules 2020 and all enabling provisions of the law seeking the following orders
 - a. That this Court be pleased to review and/or set aside its Judgment of 15th July 2022;
 - b. That the Hon. Chief Justice, Martha Koome be pleased to recuse herself in this matter;
 - c. That this Court be pleased to issue any further orders as it may deem fit in the circumstances; and
 - d. Costs of this application.
2. Upon perusing the grounds on the face of the application; the supporting affidavit of Hon. Mike Mbuvi Sonko, the applicant, dated 18th July, 2022; a further affidavit of 21st July, 2022; and a supplementary affidavit dated 26th July, 2022, all in support of the motion; and his submissions dated 26th July, 2022, to the effect that this application meets the strictures set out in the decision of Fredrick Otiemo Outa v. Jared Odoyo Okello & 3 others, SC Petition No. 6 of 2014; [2017] eKLR; that the judgment was obtained by fraud or deceit and secondly, that the judgment was a nullity as the Court was not competent to entertain it. According to the applicant, Chitembwe, J. the presiding judge in High Court Constitutional Petition E425 of 2020 which judgment has culminated in this appeal, is under investigations for judicial misconduct by a tribunal appointed under Article 168(5)(b) of the Constitution; that the determination of the tribunal will be crucial in ascertaining whether the Judge was biased against the applicant and whether the judgment of the High Court in Constitutional Petition E425 of 2020 can stand should the tribunal find Chitembwe, J. to have been biased and to be liable for misconduct. These, in the applicant's view, constitute exceptional circumstances for review of the judgment as provided for under Rule 28 of the Supreme Court Rules.
3. Further, the applicant submits, in support of the second relief, that the Hon. President of the Court presided over his appeal with a pre-determined mind on the question of his removal; that he has procured and now intends to produce evidence which elaborates on the perception of bias on the part of the President of the Court that could not be availed in the oral application for recusal which he made; and that had the President of the Court recused herself, the applicant submits, the Court would still be properly constituted with a quorum of five judges; and
4. Upon considering the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, 10th and 11th respondents' separate grounds of opposition and submissions, whose combined effect is that, having rendered the judgment of 15th July, 2022, the Court is now functus officio, unless the applicant demonstrates exceptional circumstances; that the applicant has not done so; that the application has not met the conditions for the grant of an order for review under Rule 28(5) of the Supreme Court Rules; that with the finding that the Court's jurisdiction was not properly invoked, a review application cannot confer jurisdiction on the Court; that review jurisdiction of the Court does not envisage substantial alteration of the judgment, as sought in this application; that since the Court is yet to release the reasons for the judgment, the application



is premature; and that public interest demands an end to litigation on matters the Supreme Court has pronounced; and

5. Noting further the respondents' submissions that the application for recusal of the Hon. President of the Court is res-judicata, the Court having considered it and rendered itself on its merit in an ex tempore Ruling of 14th July, 2022 with reasons thereof following on 18th July, 2022.

We now pronounce as follows, bearing in mind all these submissions:

6. Appreciating the provisions of Section 21A of the Supreme Court (Amendment) Act, No.26 of 2022 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 case (supra), on which nearly all the parties have relied, we can 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 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 do so in 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 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 judgment. A review as envisaged by Section 21A and Rule 28(5) aforesaid, concerns the decision of this Court and not any other court below it. The applicant cannot demonstrate that the judgment of this Court of 15th July, 2022 was obtained by fraud and or deceit or in what way it is a nullity.
8. Noting that only a summarized version of the judgment, without reasons was delivered on 15th July, 2022, there can be no basis to seek to review it. See Jimi Wanjigi v. Wafula Chebukati & 2 Others, SC Application 6 (E012) of 2022.

But more fundamentally, the Court having found as a main reason that its jurisdiction was not properly invoked, a review application cannot confer on it jurisdiction.

9. Upon considering the second ground for review for the reason that the President of the Court ought to have recused herself, in a sentence, we reiterate that this question is res judicata, having previously been raised and finally determined in a ruling rendered on 14th July, 2022 culminating in detailed reasons on 18th July, 2022. That ruling, a distinct and separate decision, is not the subject of this application.
10. Consequently, the conditions for review under Section 21A, Rule 28(5) aforesaid and elaborately explained in the Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others case (supra) have not been met. All this application is intended to achieve is to avail a second bite at the cherry to the applicant. The numerous applications and affidavits are aimed at vexing the rest of the parties in clear abuse not only of the court's process but also of the constitutional guaranteed access to court.



11. For reasons given above, the application lacks substance and is disallowed.
 12. Costs follow the event as such, the applicant shall bear the costs of the 1st, 2nd, 10th, 4th, 5th, 6th, 7th, 8th and 11th respondents who have participated in this application.
 13. Accordingly, we make the following orders:
 - i. The Notice of Motion application dated 18th July, 2022 is hereby dismissed.
 - ii. The Applicant shall bear costs of this application in terms of paragraph 12.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF AUGUST 2022.

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M.K KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE JUSTICE OF THE SUPREME COURT 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

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR

SUPREME COURT OF KENYA

