



REPUBLIC OF KENYA



**Kenya National Highway Authority v Cycad Properties Limited & 33 others  
(Application 6 of 2021) [2021] KESC 8 (KLR) (8 October 2021) (Ruling)**

Neutral citation: [2021] KESC 8 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION 6 OF 2021  
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ  
OCTOBER 8, 2021**

**BETWEEN**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... APPLICANT**

**AND**

**CYCAD PROPERTIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**ELIZABETH WAMBUI GITHINJI ..... 2<sup>ND</sup> RESPONDENT**  
**KEVIN KARIUKI ..... 3<sup>RD</sup> RESPONDENT**  
**JOHN MWANGI ..... 4<sup>TH</sup> RESPONDENT**  
**JONATHAN QUAIL ..... 5<sup>TH</sup> RESPONDENT**  
**JANE WAIKENDA ..... 6<sup>TH</sup> RESPONDENT**  
**GERALD MUIGAI ..... 7<sup>TH</sup> RESPONDENT**  
**DAVID THIGE ..... 8<sup>TH</sup> RESPONDENT**  
**AUGUSTINE AGHAULOR ..... 9<sup>TH</sup> RESPONDENT**  
**SUSAN WANGECHI KANYORA ..... 10<sup>TH</sup> RESPONDENT**  
**JAMES GACHARIA KIRURI ..... 11<sup>TH</sup> RESPONDENT**  
**IBRAHIM THIAW ..... 12<sup>TH</sup> RESPONDENT**  
**ANN NJERI NDUMU ..... 13<sup>TH</sup> RESPONDENT**  
**MICHAEL NDONG'O KANYOGO ..... 14<sup>TH</sup> RESPONDENT**  
**IAN FERNANDES ..... 15<sup>TH</sup> RESPONDENT**  
**FRANCIS KIARIE ..... 16<sup>TH</sup> RESPONDENT**  
**MICROLAND INVESTMENTS LIMITED ..... 17<sup>TH</sup> RESPONDENT**



SAMUEL OMARI .....	18 <sup>TH</sup> RESPONDENT
DO IT QUALITY MANAGEMENT LIMITED .....	19 <sup>TH</sup> RESPONDENT
ASAKA NYANGARA .....	20 <sup>TH</sup> RESPONDENT
RAEL LUMBASI .....	21 <sup>ST</sup> RESPONDENT
DAVID MUSILA .....	22 <sup>ND</sup> RESPONDENT
RAJESH JOSHI .....	23 <sup>RD</sup> RESPONDENT
ATIF DARR .....	24 <sup>TH</sup> RESPONDENT
LEONARD ANGAINE .....	25 <sup>TH</sup> RESPONDENT
THOMAS NJUGUNA .....	26 <sup>TH</sup> RESPONDENT
PILLAMART PROPERTIES LIMITED .....	27 <sup>TH</sup> RESPONDENT
PATRICK NDIRANGU KIMEMIA .....	28 <sup>TH</sup> RESPONDENT
PETER NJENGA MUHIKA .....	29 <sup>TH</sup> RESPONDENT
TEXCAL HOUSE SERVICE STATION LIMITED .....	30 <sup>TH</sup> RESPONDENT
ATTORNEY GENERAL .....	31 <sup>ST</sup> RESPONDENT
MINISTER, MINISTRY OF ROADS .....	32 <sup>ND</sup> RESPONDENT
MINISTER, MINISTRY OF LANDS .....	33 <sup>RD</sup> RESPONDENT
KENYA URBAN ROADS AUTHORITY .....	34 <sup>TH</sup> RESPONDENT

*(Being applications for review of the Supreme Court Ruling (Mwilu, DCJ & VP; Ibrahim, Wanjala, Njoki & Lenaola, SCJJ) delivered on 17th March 2021 in Application No. 26 of 2020 and for expungement of the respondents' replies and submission to the application for review.)*

## **Jurisdiction of the Supreme Court to review its own decisions.**

Reported by John Ribia

***Jurisdiction*** – jurisdiction of the Supreme Court – review jurisdiction – jurisdiction to review its own decisions - under what circumstances would the Supreme Court review its own decisions - Supreme Court Act, section 21(4).

### **Brief facts**

The applicant sought a review of a Supreme Court's ruling delivered on March 17, 2021 in Application No. 26 of 2020. The applicant's main ground for review was that the Supreme Court failed to give reasons for its impugned ruling, and thereof breached its rights to fair hearing and fair administrative action protected by the Constitution and the Fair Administrative Actions Act. The applicant then described how that had occasioned an injustice. In essence, it is the applicant's argument that the summarized ruling was issued in error on its face, on the whimsical exercise of discretion, inadvertently or as a result of an oversight on the part of the court.

### **Issues**

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

### **Held**

1. Compliance with directions by the Supreme Court demanded adherence by all litigants at all times to ensure orderly and expeditious conduct and disposal of disputes. However, if the applicant's prayer



- to expunge was granted, the 1<sup>st</sup> and 2<sup>nd</sup> to 30<sup>th</sup> respondents would be entirely shut out of justice and would be denied a right to complete and effectual resolution of the instant matter.
2. The applicant had not suffered any prejudice and the delay of one to two days had been satisfactorily explained while noting in particular they had a challenge with e-filing. Therefore, in the interests of justice to all parties, the court was inclined to invoke its inherent jurisdiction in favour of retaining the pleadings in question on the court record.
  3. As a general rule, the Supreme Court had neither jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner contemplated by section 21(4) of the Supreme Court Act. In exercise of its inherent powers, the Supreme Court could, 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 in which it could vary any of its judgments, rulings or orders, 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.
  4. The assertion that the Supreme Court failed to give reasons for its impugned ruling, and thereof breached its rights to fair hearing and fair administrative action was misplaced and made in disregard of the provisions of Paragraph 30 of the Supreme Court's Practice Directions, 2020 which allowed the adoption of summarized rulings by the court. There was nothing irregular with the instant decision to warrant review.
  5. The applicant had not satisfactorily explained the inordinate delay in filing the Record of Appeal. The reasons given by the applicant for the delay did not provide a sufficient basis for the Supreme Court to exercise its discretion in the applicant's favour. Consequently, the application was one for dismissal.
  6. The applicant in the instant matter had failed to meet the conditions for review.

*Application for review and expungement dismissed.*

### **Orders**

- i. *The Notice of Motion dated March 29, 2021 and filed on March 31, 2021 was dismissed*
- ii. *The Notice of Motion dated April 10, 2021 and filed on April 12, 2021 was dismissed.*
- iii. *The applicant would bear the 1<sup>st</sup>, 2<sup>nd</sup> to 30<sup>th</sup> respondent's costs*

### **Citations**

#### **Cases**

1. Ferdinand Ndung'u Waititu Babayao v. Republic — Cited
2. Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others — Cited
3. Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others — Cited
4. Judicial Service Commission v. Mbalu Mutava & Another — Cited
5. Kenya Human Rights Commission & Another v. Non-Governmental Organization Co-ordination Board & Another — Cited
6. Multiple Hauliers East Africa Limited v. Attorney General & others — Cited
7. Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others — Cited
8. Parliamentary Service Commission v. Martin Nyaga Wambora & Others — Cited
9. Republic v. County Government of Mombasa Ex Parte Outdoor Advertising Association of Kenya — Cited
10. Teachers Service Commission v. Simon P Kamau & 19 Others — Cited



## Statutes

1. Constitution — article 10, 20, 25, 27 (1), 28, 47(1), 50, 259(5) — Interpreted
2. Fair Administrative Actions Act — section 3, 4(3)(d), 5(2)(b)(c), 6,7, 12 — Interpreted
3. Interpretation and General Provisions Act — section 57 — Interpreted
4. Supreme Court Act — section 3, 5 (1), 14 (5), 21 (2), 21(4), — Interpreted
5. Supreme Court Rules — Rule 3 (5), 15 (1),25,28(5), 31(1)(3),32 (1),64 (2) — Cited

## Advocates

None mentioned

## RULING

### A. Introduction

- [1] Before this court are two applications, the first is dated 29th March 2021 and filed on 31st March 2021 seeking review of this court’s ruling delivered on 17th March 2021 in Application No 26 of 2020. The second is dated 10th April 2021 and filed on 12th April 2021 seeking expungement of the respondents’ replies and submissions to the application for review.
- [2] The applications are brought pursuant to articles 10, 20, 25, 27 (1), 28, 47 and 50 of the *Constitution*, sections 3, 4, 5, 7, 12 of the *Fair Administrative Actions Act*, sections 3, 5 (1), 14 (5), 21 (2), 21 (4) of the *Supreme Court Act* 2011, rules 28(5), 31 (1) and 64 (2) of the *Supreme Court Rules*, 2020 and articles 47 (1) , 259(5) of the Constitution, sections 57 of the *Interpretation and General Provisions Act* and rules 3 (5), 15 (1), 31 (3), 25 and 32 (1) of the *Supreme Court Rules*, 2020, respectively.

### B. The Application

- [3] The motions are grounded on the supporting affidavits sworn by Jessica Mbae on 29th March 2021, and Prof Albert Mumma on 10th April 2021, respectively. In support, the 31st to 34th respondents filed their submissions dated 8th April 2021, while in opposition, the 1st respondent filed its replying affidavits sworn by Radia Vinayak and Ronald Mwanja on 7th April 2021 and 15th April 2021 respectively and submissions dated 7th April 2021 and 16th April 2021. The 2nd to 30th respondents filed their notice of preliminary objection dated 7th April 2021, replying affidavit sworn by Elizabeth Wambui Githinji on 8th April 2021 and submissions dated 9th April 2021. The 2nd, 3rd, 4th, 6th, 7th, 9th to 22nd, 24th to 26th and 28th to 30th respondents filed their replying affidavit sworn by Geoffrey Imende on 12th April 2021 and submissions dated 16th April 2021.

### C. Parties’ Respective Cases

#### (i) The Applicant

- [4] The applicant submits that this court has inherent jurisdiction to review its decisions, which by dint of article 159 (2) (e) of the Constitution is to be exercised in line with the duty to ensure protection of the purpose and principles of the Constitution. It relies on this court’s decision in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others* (*Fredrick Outa Case*), the provisions of section 21 (4) of the *Supreme Court Act*, 2011, rule 28 (5) of the *Supreme Court Rules*, 2020, and sections 3, 5 (2) (b) and (c) of the *Fair Administrative Actions Act* to support this submission.
- [5] It contends that the motion is meritorious, exceptional, is in public interest and meets the criteria for review of the court’s exercise of discretionary powers. It relies on this court’s decision in *Parliamentary Service Commission v Martin Nyaga Wambora & others*



(*Parliamentary Service Commission Case*) and *Fredrick Outa Cases* [*supra*] to support its argument. The applicant urges that this court did not provide reasons for its finding, and as a result violated its constitutional and statutory rights to fair hearing and fair administrative actions protected under articles 47 and 50 of the Constitution and sections 4 and 6 of the Fair Administrative Actions Act.

- [6] It is the applicant's further case that all court decisions must be subjected to constitutional standards of legality, reasonableness and procedural fairness. It relies on the Court of Appeal decisions in *Judicial Service Commission v Mbalu Mutava & Another* and High court decision in *Kenya Human Rights Commission & Another v Non-Governmental Organization Co-ordination Board & another; Petition No 404 of 2017, [2018] eKLR* to persuade that it is in the interest of justice and good governance for a court of law to give reasons for its finding.
- [7] The applicant submits that the impugned decision was arrived at; in error on the face of the ruling, on whimsical exercise of discretion, inadvertently or as a result of an oversight. It further urges that this court, without providing reasons, departed from its principles for extension of time established in *Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* and *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others.*, It is also submitted that there is public interest in ensuring that the applicant is not left to suffer an injustice. It urges the court to allow the application for review and admit the application dated 17th September 2020 seeking extension of time for fresh hearing or in the alternative determine and allow it without orders as to costs.
- [8] On the prayer to expunge pleadings, the applicant submits that the respondents had been directed to file their replies and submissions to the application for review on or before 7th April 2021 but instead and without leave, the 1st respondent filed the same on 8th April 2021 while the 2nd to 30th respondents filed their preliminary objection and reply on 8th April 2021 and submissions on 9th April 2021. It relies on this court's decisions in *Ferdinand Ndung'u Waititu Babayao v Republic* and *Teachers Service Commission v Simon P Kamau & 19 others*, to urge that the respondents having failed to seek leave to file their pleadings out of time, their responses are of no legal consequence and ought to be expunged from the record.

(ii) **The Respondents**

- [9] The Attorney General, for the 31st to 34th respondents support the application and entirely agree with the applicant's submissions. In addition, it is submitted that the application ought to be allowed in public interest, and in order to give the court an opportunity to determine the issues arising from an absurdity and contradiction of the appellate court's decisions. It is the Attorney General's submission that the impugned Ruling was not guided by the purpose and principles of the Constitution hence is in contravention of article 159 (2) of the Constitution.
- [10] The 1st respondent admits this court's jurisdiction to review its decisions.

However, it submits that the present application is an appeal disguised as an application for review and amounts to an attempt to relitigate the application for extension of time. It submits that the applicant has not demonstrated to this court how the decision it seeks to review was; obtained by fraud or deceit; or that the court was incompetent; or that the court was misled into giving a ruling under the mistaken belief that the parties consented to it; or that the decision was rendered on the basis of a repealed law or as a result of a deliberate concealment of a statutory provision.



- [11] It opposes the contention that this Court failed to give reasons for its ruling and urges that a summarized form of ruling is not irregular to warrant review. It relies on this Court's decision in the *Parliamentary Service Commission Case [supra]* to support this argument. It further asserts that a summarized form of ruling has now been adopted under this Court's Practice Directions, 2020 at paragraphs 29 and 30, which provide that applications shall be determined through written submissions except in such cases as the court may determine, and shall be in the form annexed to the Practice Directions. It is urged that the impugned ruling is in conformity with this provision.
- [12] It further submits that public interest cannot operate in a vacuum but within the dictates of the Constitution and the law. It relies on the High Court decisions in *Multiple Hauliers East Africa Limited v Attorney General & others; Petition No 88 of 201, [2013] eKLR* and *Republic v County Government of Mombasa ex parte Outdoor Advertising Association of Kenya* to persuade the court that the applicant's assertion of public interest cannot be a satisfactory ground for review. In conclusion, it urges that in any event, this court has had the occasion to address and determine the issue of public interest in its summarized decision which therefore cannot be the basis for review.
- [13] The 2nd to 30th respondents agree with the 1st respondents' submissions on jurisdiction. They urge that section 21 (4) of the *Supreme Court Act* as read with rule 28 (5) of the Supreme Court Rules, 2020 does not confer any broader jurisdiction for review outside the slip rule, that is to correct any oversight, clerical error of computation or an error apparent on the decision. They rely on this Court's decision in the *Fredrick Outa Case [supra]* to urge that rule 28 (5) can only be understood to be echoing section 21 (4) the *Supreme Court Act*.
- [14] Without prejudice to the jurisdictional arguments, the respondents submit that the applicant has failed to meet the criteria for review. They contend that this Court properly exercised its discretion, directed itself to the issues and facts in dispute as presented in the parties' pleadings and properly applied the principles in the *Nicholas Salat Case [supra]*. It is the respondents' further submissions that the applicant's contestation that its rights under articles 47 and 50 of the Constitution were violated is unfounded and unsubstantiated. It is urged that the applicant was given a fair hearing and that the Court rendered its ruling together with its reasons. The 2nd to 30th respondents urge that the decision in the Parliamentary Service Commission Case [supra] is inapplicable to the instant application as it settles the guiding principles for review of a limited bench decision by a full bench of this Court.
- [15] On the issue of expungement of pleadings, the respondents join issues and urge that the delay of one and two days was not inordinate and was occasioned by difficulties in having the matter mapped in the Court's E-filing portal and a delay in obtaining authority letters for the numerous respondents. They submit that no prejudice has been suffered by the applicant and that the delay has been satisfactorily explained. They urge the Court to exercise its discretion and allow the questioned pleadings as properly on record.

#### **D. Issues for Determination**

- [16] On the basis of the pleadings and submissions by the parties herein, we consider that three issues merit this Court's determination; these are:
- i. Whether an order to expunge the respondents' pleadings should issue;
  - ii. Whether the application meets the threshold for grant of review orders; and



- iii. If the answer to (ii) above is in the affirmative, what remedies are available.

PARA

## E. Determination

### (i) Expungement of pleadings

[17] It is the applicant's contention that the 1st and 2nd to 30th respondents disregarded this court's directions and filed their responses and submissions to the application for review out of time and without leave. They urge that the same ought to be expunged. In response, the 1st and 2nd to 30th respondents submit that the delay of one to two days was occasioned by technical challenges with the court's E-filing portal and delay in obtaining instructions. They submit that the delay was not inordinate, has been satisfactorily explained and has occasioned no prejudice to the applicant. They urge the Court to exercise its discretion and allow the pleadings as properly on record.

[18] We have considered the application, the affidavits in support thereof, and the submissions by all the parties and support the applicant's contention that the respondents ought to respect and comply with this court's directions. Indeed, compliance with directions by this court demand adherence by all litigants at all times to ensure orderly and expeditious conduct and disposal of disputes. However, if the applicant's prayer to expunge is granted, the 1st and 2nd to 30th respondents will be entirely shut out of justice and will be denied a right to complete and effectual resolution of this matter. We also note that the applicant has not suffered any prejudice and the delay of one to two days has been satisfactorily explained while noting in particular they had a challenge with e-filing. Therefore, in the interests of justice to all parties, we are inclined to invoke our inherent jurisdiction in favour of retaining the pleadings in question on the court record. We therefore decline to grant an order expunging the 1st and 2nd to 30th respondents' pleadings.

### (ii) Review

[19] It is the applicant's contention that, the motion is meritorious, exceptional, is in public interest and meets the criteria for review. It submits that this court failed to give reasons for its finding and as a result breached its right to fair hearing and fair administrative action protected under articles 47 and 50 of the Constitution and sections 4 (3) (d) and 6 of the Fair Administrative Actions Act. It also urges that the impugned decision was arrived at in error on the face of the ruling, on whimsical exercise of discretion, inadvertently or as a result of an oversight on the part of the court. It adds that in the interest of justice and good governance, a court of law must give reasons for its finding. It also argues that there is public interest in ensuring that a party whose constitutional rights have been violated by the court's failure to give reasons, is not left to suffer an injustice. The 31st to 34th respondents essentially agree with these submissions.

[20] The 1st and 2nd to 30th respondents on the other hand, contend that the application fails to disclose any ground for review. It is contented that, the applicant's grounds for review fall outside the purview of section 21 (4) of the *Supreme Court Act*, and are an invitation to this Court, to without jurisdiction sit on appeal of its decision or to re-litigate the application for extension of time. It is their case that the court properly exercised its discretion, directed itself to the issues and facts in dispute as presented in the parties' pleadings and properly applied the principles for extension of time. It is also urged that a summarized form of ruling, as was applied by this court in the impugned ruling, does not warrant review and that in any case, a



summarized form of ruling has now been adopted pursuant to paragraphs 29 and 30 of this court's Practice Directions, 2020.

- [21] The legal position as regards this court's power to review its own decision was settled in the *Fredrick Outa Case*, [*supra*], wherein this court found that, as a general rule, the Supreme Court has neither jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner contemplated by section 21(4) of the *Supreme Court Act*. Therefore, in exercise of its inherent powers, this 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 in which it 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. [Emphasis added]
- [22] It is clear to us that the applicant's main ground for review is that this court failed to give reasons for its impugned Ruling, and thereof breached its rights to fair hearing and fair administrative action protected the Constitution and the Fair Administrative Actions Act. The applicant then describes how this has occasioned an injustice. In essence, it is the applicant's argument that the summarized Ruling was issued in error on its face, on whimsical exercise of discretion, inadvertently or as a result of an oversight on the part of the court.
- [23] We find that this assertion is misplaced and made in disregard of the provisions of Paragraph 30 of this court's Practice Directions, 2020 which allows the adoption of summarized rulings by the court. We also reiterate this court's decision in the *Parliamentary Service Commission Case* [*supra*] where we stated as follows:
- '[34] We note that the decision of the Two Judge Bench was in a summarized form. This might have erroneously informed the applicant's assertion that some of its issues were considered. However, that cannot be the case. In their ruling, the learned judges categorically state that they had: 'perused the application dated 24th May 2016; read the affidavit of Anthony Njoroge sworn on 24th May, 2016, and considered the written submissions of both the Applicant and the respondents.' In the ultimate the application was dismissed for the reasons that: "no compelling reasons have been presented to the Court as a justification for the inordinate delay.' We find nothing irregular with this decision to warrant review.'
- [24] In any event, we agree with the 1st and 2nd to 30th respondents that this court considered the application before it, the parties' affidavits and submissions and gave its reasoning at paragraph 13 as follows;
- '[13] ....., we find that on the basis of the principles set out by this Court for extension of time in *Nicholas Salat Case, Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others*, SC Appl 50 of 2014 and *Hassan Nyanje Charo Case*, the applicant has not satisfactorily explained the inordinate delay in filing the



Record of Appeal. The reasons given by the applicant for this delay do not provide a sufficient basis for this court to exercise its discretion in the applicant's favour. Consequently, the application before us is one for dismissal.'

[25] Having so found, we conclude that the applicant in this matter has failed to meet the conditions for review set out in the *Fredrick Outa* case [*supra*]. The upshot is that the applications for review and expungement are for dismissal. We consequently make the following orders:

- (i) The notice of motion dated 29th March 2021 and filed on 31st March 2021 is hereby dismissed
- (ii) The notice of motion dated 10th April 2021 and filed on 12th April 2021 is hereby dismissed.
- (iii) The applicant shall bear the 1st, 2nd to 30th respondent's costs

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021.**

.....

**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE &**  
**VICE-PRESIDENT**  
**OF THE SUPREME COURT**

.....

**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**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**

