



Tawai Limited v Eldoret Express Limited; National Land Commission (Interested Party) (Application 9 of 2021) [2021] KESC 24 (KLR) (3 December 2021) (Ruling)

Neutral citation: [2021] KESC 24 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION 9 OF 2021
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & N NDUNGU, JJA
DECEMBER 3, 2021**

BETWEEN

TAWAI LIMITED APPLICANT

AND

ELDORET EXPRESS LIMITED RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

(Being an application for review of the Ruling and Orders of the Court (Mwilu; DCJ & V-P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ) delivered in on 17th March, 2021 in Application No. 23 of 2020)

Circumstances in which the Supreme Court could vary its decisions.

Reported by Ribia John

Civil Practice and Procedure – review – review of court rulings – review of Supreme Court decisions - under what circumstances could the Supreme Court vary of its judgments, rulings or orders.

Brief facts

The applicant sought to review, vary and or set-aside the Supreme Court’s ruling that upheld the Court of Appeal’s decision denying certification and to reinstate it for fresh hearing.

Issues

Under what circumstances could the Supreme Court vary of its judgments, rulings or orders?

Held

1. The extent of the Supreme Court’s review of certification jurisdiction was provided for in article 163(5) of the Constitution which provided that a certification by the Court of Appeal under clause 4(b) could be reviewed by the Supreme Court, and either affirmed, varied or overturned. Where one applied to the Court of Appeal for leave to appeal to the Supreme Court, and the party was not satisfied by the



- decision of the Court of Appeal, no appeal lay. The only recourse was for the party to apply for review of the matter to the Supreme Court.
2. The Supreme Court could only vary any of its judgments, rulings or orders under the following instances:
 1. where the judgment, ruling or order was obtained by fraud or deceit.
 2. Where the judgment, ruling or order was a nullity, such as when the court itself was not competent;
 3. where the court was misled into giving judgment, ruling or order under a mistaken belief that the parties had consented;
 4. where the judgment or ruling was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.
 3. The applicant had not laid any basis, upon which the court should review its ruling. None of the conditions had been demonstrated as prevailing so as to warrant a review or variation of the court's ruling.

The application for a second review was not merited

Orders

- i. *The Motion dated July 22, 2021 and filed on July 27, 2021, was dismissed.*
- ii. *The Supreme Court's Ruling delivered on March 17, 2021 in Application No. 23 of 2020, was affirmed.*
- iii. *The costs of the application were to be borne by the applicant.*

Citations

Cases

East Africa;

1. *Outa, Fredrick Otieno v Jaren Odoyo Okello & 3 others* Petition No 6 of 2014; [2014] eKLR — (Cited)
2. *Steyn, Hermanus Phillipus v Giovanni Gneccchi Ruscone* Application No 4 of 2012; [2012] eKLR — (Cited)

Statutes

East Africa;

1. Constitution of Kenya, 2010 articles 27, 40(6); 65(1)(3); 159; 163(4)(b)(5) — (Interpreted)
2. Registration of Titles Act (cap 281) (Repealed) In general — (Cited)
3. Supreme Court Act, 2011 (Act No 7 of 2011) sections 15, 16, 21 (4); 23, 24, 26 — (Interpreted)
4. Supreme Court Rules, 2020 (Act No 7 Sub Leg) rules 27-33 — (Interpreted)
5. Transfer of Property Act, 1882 chapter I-IX — (Interpreted)
6. (cap 281) parts XIX — (Interpreted)

Advocates

None mentioned

RULING

- [1] Upon reading the motion dated July 22, 2021 and lodged on July 27, 2021, seeking to review, vary and or set-aside this court's ruling, upholding the Court of Appeal's decision denying certification, issued in SC Application No 23 of 2020 and to reinstate it for fresh hearing or in the alternative, to allow Application No 23 of 2020 with no Orders as to costs; and
- [2] Upon noting that the application is brought pursuant to articles 27, 40(6), 65(1) (3), 159, 163 (4) (b) and 163 (5) of the *Constitution*, sections 15, 16, 23 24 and 26 of the *Supreme Court Act, 2011*, rule



27-33 of the *Supreme Court Rules, 2020*, Chapter I-IX of the Transfer of Property Act, 1882 of India (Group 8), and Parts XIX of the *Registration of Titles Act, 2012* cap 281 laws of Kenya; and

- [3] Upon reading the applicant’s Supporting Affidavit, sworn on 22nd July 2021 by one of its directors, Mathew Juma Khisa; and
- [4] Upon considering the written submissions by the applicant dated 22nd July 2021 and filed on 27th July 2021, wherein the applicant contends that pursuant to section 21(4) of the Supreme Court Act, the court has jurisdiction to review its decisions. Further, that the application is not only meritorious and exceptional, but is also in public interest for reasons:
- (i) that the impugned Ruling was in breach of article 50 of the Constitution of Kenya;
 - (ii) that the ruling was as a result of an oversight by the court which failed to invoke its legal and investigative inherent powers;
 - (iii) that there are errors apparent on the face of the Record;
 - (iv) that the ruling was made on whimsical exercise of the court’s discretion which failed to appreciate that mortgages, leases and charges are areas of general public importance, transcending this particular case; and
- [5] Upon noting that despite several compliance mentions before the Deputy Registrar of the court, specifically on 4th August 2021, 11th August 2021 and 10th September 2021, the respondent has not filed submissions or any response; and
- [6] UPON considering that this court identified only two issues for its consideration, that is, whether the issues raised by the applicant were of general public importance as envisaged by article 163(4)(b) of the Constitution; and whether it could grant an Order for Stay of Execution. Further noting that the court found that Application No 23 of 2020, could not be sustained on the basis of article 163 (4) (b) of the Constitution and the principles settled in *Hermanus Phillipus Steyn v Giovanni Gneccchi Ruscone, SC Application No 4 of 2012; eKLR*.

We therefore find as follows:

- [7] The extent of this court’s review of certification jurisdiction is provided for in article 163(5), which provides that:
- “a certification by the Court of Appeal under clause 4 (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”
- [8] In *Hermanus [Supra]*, the court stated:
- “[31] ...Consequently, it is our opinion that where one applies to the Court of Appeal for leave to appeal to the Supreme Court, and the party is not satisfied by the decision of the Court of Appeal, “no appeal” lies. The only course is for the party to apply for review of the matter to the Supreme Court...”
- [9] Having already invoked this court’s jurisdiction under article 163 (5) of the Constitution, vide Application No 23 of 2020, the applicant is now back, seeking a review of our decision pursuant to which its application was dismissed.
- [10] Be that as it may, the question as to whether this court has jurisdiction to review its own decisions, was settled in *Fredrick Otieno Outa v Jaren Odoyo Okello and 3 Others, Supreme Court Petition No 6*



of 2014; [2014] eKLR. The court held that it could vary any of its judgments, rulings or orders, in the following instances only:

- (i) where the judgment, ruling or order is obtained by fraud or deceit;
- (ii) where the judgment, ruling or order is a nullity, such as when the court itself was not competent;
- (iii) where the court was misled into giving judgment, ruling or order under a mistaken belief that the parties had consented thereto;
- (iv) where the judgment or ruling was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.”

[11] Applying these principles, it is clear to us that the applicant has not laid any basis, upon which this court should review its ruling. None of the conditions as set out in *Outa (supra)* have been demonstrated as prevailing so as to warrant a review or variation of the court’s ruling. Consequently, we find that the application for a second review is not merited, and make the following orders:

- (i) The motion dated July 22, 2021 and filed on July 27, 2021, is hereby dismissed;
- (ii) This court’s ruling delivered on March 17, 2021 in Application No 23 of 2020, is hereby affirmed;
- (iii) The costs of this application shall be borne by the applicant.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 3rd Day of December, 2021.

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P. M. MWILU
DEPUTY CHIEF JUSTICE &
VICE 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

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I. LENAOLA
JUSTICE OF THE SUPREME COURT



I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

