Wanderi & 106 others v Engineers Registration Board & 8 others; Egerton University & another (Interested Parties) (Application 39 of 2019 & Petition 4 of 2016 (Consolidated)) [2020] KESC 44 (KLR) (15 May 2020) (Ruling)

Martin Wanderi & 106 others v Engineers Registration Board & 5 others; Egerton University & 43 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KESC 44 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 39 OF 2019 & PETITION 4 OF 2016 (CONSOLIDATED)

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

MAY 15, 2020

BETWEEN

MARTIN WANDERI ..... 1ST PETITIONER

JOEL RUTTO SUTTER ..... 2ND PETITIONER

ALFRED CHOMBAH ..... 3RD PETITIONER

ALFRICK OTIENO ..... 4TH PETITIONER

ANGELA MURIGI ..... 5TH PETITIONER

ANTHONY OKAVA ..... 6TH PETITIONER

ANTHONY OMARI ..... 7TH PETITIONER

BEATRICE WANGARI ..... 8TH PETITIONER

BEN ODHIAMBO ..... 9TH PETITIONER

BRIAN MABATUK & 96 OTHERS ..... 10TH PETITIONER

AND

ENGINEERS REGISTRATION BOARD ..... 1ST RESPONDENT

MOI UNIVERSITY ..... 2ND RESPONDENT

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... 3RD RESPONDENT

COMMISSION FOR HIGHER EDUCATION ..... 4TH RESPONDENT

MINISTRY OF HIGHER EDUCATION SCIENCE AND TECHNOLOGY ..... 5TH RESPONDENT

AND

EGERTON UNIVERSITY ..... INTERESTED PARTY

JESSE WAHOME WAWERU, GEOFFREY NANGILLAH MAKANGA, MAURICE OTIENO OLOO, ALFRED KIPKOECH KIBET, RICHARD GITURO GICHAGA, PATRICK KARANJA MBUGUA & 37 OTHERS ..... INTERESTED PARTY

AS CONSOLIDATED WITH

PETITION 4 OF 2016

BETWEEN

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... PETITIONER

AND

THE ENGINEERS REGISTRATION BOARD ..... 1ST RESPONDENT

JESSE WAHOME WAWERU & OTHERS ..... 2ND RESPONDENT

MOI UNIVERSITY ..... 3RD RESPONDENT

EGERTON UNIVERSITY ..... 4TH RESPONDENT

COMMISSION FOR HIGHER EDUCATION ..... 5TH RESPONDENT

MINISTRY OF HIGHER EDUCATION SCIENCE AND TEHNOLOGY ..... 6TH RESPONDENT

(Being an application for review of our Judgment delivered on 17th July 2018)

The difference in registration mechanism for engineers and engineering technologists and technicians.

The main issue for determination was what were the circumstances under which the Supreme Court could review its decisions. The Supreme Court held that such circumstances were limited to situations 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.

Reported by Chelimo Eunice

Jurisdiction *– jurisdiction of the Supreme Court - jurisdiction of the Supreme Court to review its judgments, orders and rulings – scope of the Supreme Court's power to review its decisions – circumstances which the Supreme Court could review its decisions – application seeking orders for Supreme Court to review its judgment which compelled the Engineers Registration Board to register persons who did not qualify as engineers to be registered as such – where the existence of the Engineering Technology Act was not brought to the attention of the court at the time it rendered the impugned judgment - Supreme Court Act, section 21 (4); Supreme Court Rules, rule 20 (4).*

Statutes *– interpretation of statutory provisions – Engineers Registration Act and Engineering Technology Act - interpretation of section 11 of the Engineers Registration Act on registration of engineers vis-à-vis section 15 of Engineering Technology Act on registration of engineering technologists or technicians – whether there was a difference in registration mechanism for engineers and engineering technologists and technicians – whether the Engineers Registration Board had the mandate to register engineering technologists and technicians – whether engineering technologists and technicians qualified to be registered under the Engineers Registration Act - Engineers Registration Act, sections 2 and 11; Engineering Technology Act, sections 2 and 15.*

Brief facts

The Engineers Registration Board (the applicant) sought a review of the court's judgment dated July 17, 2018 directing it to register the respondents as engineers under the Engineers Registration Act, arguing that in compliance with the impugned judgment, the applicant took various steps, but in the process realized that some of the respondents did not graduate with engineering degrees but had bachelor of industrial technology degrees which made it difficult to register them as graduate engineers without breaching the law which limited registration of graduate engineers to persons holding engineering degrees. Further, that persons who held bachelor of industrial technology degrees and were therefore technologists and technicians were registered under the Engineering Technology Act (ETA) by the Kenya Engineering Technology Registration Board and not itself, hence the need for the court to review its judgment and remove the anomaly noted in the implementation of the same.

The respondents opposed the application arguing, among other points, that it was filed inordinately, that the application was misguided and did not meet the threshold set out in rule 20(4) of the Supreme Court Rules (Rules) and that all the affected parties had been registered as graduate engineers and the impugned judgment had been fully implemented meaning that there was nothing left to review.

Issues

i. Whether the Supreme Court had jurisdiction to review its decisions.
ii. What were the circumstances under which the Supreme Court could review its decisions?
iii. What was the difference in registration mechanism for engineers and engineering technologists and technicians?
iv. Whether engineering technologists and technicians qualified to be registered under the Engineers Registration Act.

Relevant provisions of the Law

Engineers Registration Act:

Section 11;

11. (1) Subject to this Act, a person shall be entitled, on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register as a registered engineer if he is—

(b) a person who—

(i) is the holder of a degree, diploma or licence of a university or school of engineering which may be recognized for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering; and

(5) Subject to this Act, a person shall be entitled on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee to be registered under this Act and to have his name entered in the register as a registered technician engineer if—

(a) he is the holder of a higher national diploma or an equivalent qualification in engineering obtained from an engineering polytechnic or college recognized for the time being by the Board as furnishing evidence of adequate academic training; and

Engineering Technology Act:

Section 15;

15. (1) A person may be registered in the engineering technology profession as a—

(a) professional, which includes –

(i) a professional engineering technologist; or

(ii) a certified engineering technician.

Supreme Court Rules:

Rule 20(4);

The Court may, in circumstances it considers, exceptional, on an application by any party or on its motion, or review any of its decisions.

Held

1. Rule 20(4) of the Supreme Court Rules (Rules) gave the Supreme Court power, in circumstances it considered exceptional, to review any of its decisions. Unlike section 21(4) of the Supreme Court Act, rule 20(4) of the Supreme Court Rules would on its face, appear to confer upon the Supreme Court jurisdiction or powers, to review its own judgments, or decisions beyond the confines of the *slip rule.*
2. Neither the Constitution, nor the Supreme Court Act, explicitly, or in general terms, conferred upon the Supreme Court, powers to sit on appeal over its own decisions or to review such decisions. That being the case, no rule of the Supreme Court, not even rule 20(4) of the Supreme Court Rules as worded, could confer upon the Supreme Court jurisdiction to review its own decisions. If that were the intent of rule 20(4) of the Rules, then the said rule would be of doubtful constitutional validity. Therefore, rule 20(4) of the Rules was not capable of conferring upon the Supreme Court powers to review its decisions beyond the confines of the *Slip Rule*, as embodied in section 21(4) of the Supreme Court Act. At best, that rule could only be understood to be echoing section 21(4) of the Supreme Court Act.
3. The Supreme Court, being the final court in Kenya, had no jurisdiction to sit on appeal over, or to review its own judgments, rulings or orders, save in the manner contemplated by section 21(4) of the Supreme Court Act. It became *functus officio* once it had delivered judgment or made a final decision.
4. Nonetheless, there were situations so grave and exceptional that could arise, that without the Supreme Court's intervention, could seriously distort its ability to do justice. Litigation had to come to an end, but it ought not come to an end in the face of an absurdity. The Supreme Court was the final court, but most importantly, it was a final court of justice. That being the case, it was clothed with inherent powers which it could invoke, if circumstances so demanded, to do justice. The Constitution from which the Supreme Court, and indeed all courts derived their legitimacy, decreed that justice had to done to all.
5. Taking into account the edicts and values embodied in chapter 10 of the Constitution, as a general rule, the Supreme Court had no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, save in the manner contemplated by section 21(4) of the Supreme Court Act. However, in exercise of its inherent powers, it could, upon application by a party, or on its own motion, review any of its judgments, ruling or orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances were limited to situations 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.

6. It had not been claimed by the applicant that the impugned judgment was obtained by fraud or deceit. Neither had it been termed a nullity nor that it was made in the mistaken belief that the parties had consented thereto.
7. Section 11 of the Engineers Registration Act (ERA) dealt with registration of engineers. Section 2 of the ERA defined engineering as the creative application of scientific principles to design or develop structures, machines, apparatus, or manufacturing processes, or works utilizing them singly or in combination or to construct or operate the same with full cognizance of their design or to forecast their behavior under specific operating conditions or aspects of intended function, economics of operation and safety to life and property.
8. Section 15 of the Engineering Technology Act (ETA) on the other hand dealt with the registration of engineering technologists or technicians. Section 2 of ETA defined engineering technology as part of the engineering profession in which knowledge of applied mathematical and natural science gained by higher education, experience and practice was devoted to application of engineering principles and the implementation of technology education for the professional focusing primarily on analyzing, applying, implementing and improving existing technologies and was aimed at preparing graduates for the purpose of engineering technology practices closest to the product improvement, manufacturing and engineering operational functions.
9. The two professions, while related, were different. Engineering technology focused on the applied and practical application of engineering principles whereas engineers emphasized the theoretical aspects of mathematical scientific and engineering principles. That partly explained why the degrees conferred on each were different so was the registration of graduates on qualification.
10. There was no issue with implementation of the impugned judgment and orders in as far as graduate engineers were concerned because the applicant had the jurisdiction and mandate to do so.
11. In the impugned judgment, the dichotomy between engineering technologists and engineers was not addressed at all. All the respondents were addressed as engineers seeking registration as graduate engineers under the ERA and the court's orders were specific in that regard.
12. To allow registration of engineering technologists and technicians under the ERA by judicial fiat would not be in the interests of justice. The legislature in creating a separate registration mechanism for such professionals did not also intend that a court, without any technical expertise, would ignore the laid down procedure for registration and order a professional entity, such as the applicant, to flout the law in the conduct of its affairs. In any event, nowhere in the impugned judgment was the applicant ordered to do so. Court's orders were limited to the registration of graduate engineers and not engineering technologists or technicians. The existence of ETA was not brought to the attention of the instant court at the time it rendered the impugned judgment and how its enactment affected implementation of section 11 of ETA which was the operative law at all material times. That non-disclosure was an important consideration on whether to grant a review or not.
13. An exceptional circumstance had arisen which required that the impugned judgment, in the relevant part, had to be reviewed as prayed. All the petitioners and interested parties as were engineering technologists and technicians could not be the beneficiaries of some orders in the impugned judgment. Those orders were reviewed to exclude those persons and the said orders were limited to the benefit of graduate engineers only to be registered under the ERA. That was because the applicant was not to blame for the position that those persons found themselves in.
14. The applicant had undertaken various actions in a bid to implement the impugned judgment until it hit a wall. Those actions took time and so the delay in filing the instant application was understandable and excusable.
15. The applicant's invitation for the court to expand the principles for review of the Supreme Court judgments to include apparent errors of law and of fact and inability to implement judgment without breaching law and public interest would not be allowed. That was because the issue relating to the

import of the ERA as read with the Engineering Technology Registration Act as well as double registration under existing statutes was never the subject of determination in the impugned judgment. Had the court addressed those issues, which were never disclosed to it, the impugned judgment would have been significantly different. That was an exceptional circumstance necessitating a review of the impugned judgment. The already laid down principles applied to the instant application and there was no reason to depart from any other principle nor create additional principles for review of the Supreme Court's judgments.

16. No evidence proving that the impugned judgment had already been implemented, hence the argument that there was nothing to review could not stand. In any event, the 2nd interested parties did not participate in the instant application to authenticate that claim, hence that issue would not be addressed.

Application allowed with no orders as to costs.

Orders

i) Order no. (b) (3) in the judgment dated July 17, 2018 was reviewed as followed:

"An order of mandamus do hereby issue directing the Engineers Registration Board to register such petitioners and 2nd interested parties, as are qualified as engineers, under the Engineers Act forthwith. Such petitioners and 2nd interested parties as are Engineering Technologists and Technicians shall be registered as Technologists and Technicians by the Engineering Technologist Registration Board and the Engineers Registration Board shall transmit this order to that Board for implementation forthwith. In default, the said petitioners and interested parties shall be at liberty to apply to this court for any appropriate orders for enforcement thereof".

ii) Such respondents as were engineering technologists and technicians would not be the beneficiaries of orders nos. (b) 1, 2, and 4 as well as (c) of the judgment dated July 17, 2018.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Background

1. On 17th July 2018, we delivered a Judgment in this matter and Our final orders were as follows:

    (a) The Judgment of the Court of Appeal dated 12th June, 2015 is hereby set aside in toto.

    (b) The decision of the High Court issued on 15th October, 2012 is hereby affirmed in the following specific terms:

        (1) A declaration hereby do issue that the power of the Engineers Registration Board under the provisions of section 11(1)(b) of the Engineers Registration Act (now repealed) to register graduate engineers did not include the power to accredit and approve engineering courses offered by public universities incorporated under the Laws of Kenya.

        (2) A declaration hereby do issue that in refusing to register the Applicants, the Board violated the Petitioners' right to fair administrative action under Article 47(1) of the

Constitution and the Petitioners' right to human dignity under Article 28 of the Constitution as read with Article 55 (a) and (c) of the Constitution.

(3) An order of mandamus do hereby issue directing the Engineers Registration Board to register the Petitioners and 2nd Interested Parties in Petition No.19 of 2015, as Engineers under the Engineers Registration Act within the NEXT TWENTY-ONE DAYS (21) and in default the said Petitioners and 2nd Interested Parties be at liberty to apply to this Court for any appropriate Orders for enforcement of the Orders herein.

(4) The Engineers Registration Board shall pay general damages assessed at Kshs.200,000/- to each of the Petitioners and 2nd Interested Parties. The sum shall carry interest at a rate of 12% per annum from the date of the High Court Judgment.

(c) The Engineers Registration Board, shall bear the costs of the Petitioners and 2nd Interested Parties in Petition No. 19 of 2015, in the High Court, Court of Appeal and in this Court. The said costs shall carry interest at a rate of 12% per annum respectively from the date of judgment in each respective judgment until payment in full.

(d) All other parties shall bear their own costs.

2. The 1st Respondent, the Engineers Registration Board, on 20th December 2019 (a year and a half after the above orders were issued), filed a Notice of Motion under Rule 20(4) of the Supreme Court Rules, 2011 as well as Article 159(2) of the Constitution seeking a review of the Judgment aforesaid.

B. The Application

3. The Notice of Motion, dated 17th December 2019, is supported by the Affidavit of Eng. Nicholas Musuni, the Registrar/CEO of the Applicant herein and it is his deposition that, in compliance with the Judgment in issue, the Applicant did the following:

i) It issued to some of the Petitioners and 2nd Interested Parties, Certificates of Registration as Graduate Engineers.

ii) It invited some of the Petitioners and Interested Parties to make applications to be registered as Graduate Engineers if they had graduated on or before the effective date i.e. 14th September 2013, the date the Engineers Act, 2011 came into effect.

iii) Upon scrutinizing the applications made, it was noted that some of the Petitioners and 2nd Interested Parties did not graduate with Engineering degrees but had Bachelor of Industrial Technology degrees which made it difficult to register them as Graduate Engineers without breaching the law to wit Section 11(1) (b) of the Engineers Registration Act, Cap.530 (now repealed) as well as Section 18 of the Engineers Act, 2011 which limit registration of Graduate Engineers to persons holding Engineering degrees.

4. The Applicant has also noted that persons who hold Bachelor of Industrial Technology Degrees and are therefore Technologists and Technicians are registered under the Engineering Technology Act No.23 of 2016 by the Kenya Engineering Technology Registration Board and not itself.

5. That therefore it is imperative to review the Judgment aforesaid and remove the anomaly noted in the implementation of the same.

C. Response to the Application

6. Martin Wanderi, the 1st Petitioner, in his Replying Affidavit sworn on 19th February 2020, has stated that the Motion for review was filed inordinately and should not be granted for that reason alone. In any event, he has deponed, the Motion is misguided and does not meet the threshold set out in Rule 20(4) of the Supreme Court Rules, 2011.

7. In addition, Mr. Wanderi has stated that, all the affected parties have been registered as Graduate Engineers and the Judgment therefore fully implemented meaning that there is nothing left to review. In any event, he has urged, the proceedings before the Superior Courts, including this one, were all about "accreditation" of the respective graduating universities and not the quality or content of the Petitioner's and 2nd Interested Parties' "degree credentials".

8. Furthermore, it is Mr. Wanderi's deposition inter alia that:

   i) Registration under the Engineers Registration Act Cap.530 (Repealed), Engineering Act 2011 on one hand, and registration under the Engineering Technology Registration Act No.23 of 2016 is/are not exclusive and or monopolistic to the Applicant.

   ii) Further, that eligibility to be registered as Engineering Technologists and Technicians does not oust the Petitioners' and 2nd Interested Parties' right to be registered as Graduate Engineers and in any event, in its own resolution made on 9th November 2018, in its 172nd Board meeting, the Applicant resolved to register graduates of Bachelor of Industrial Technology (BIT) degrees as Graduate Engineers.

9. For the above reasons, the Petitioners seek dismissal of the Motion for review.

D. Submissions of Parties

i. The Applicant's Submissions

10. In submissions filed on 30th January 2020, the Applicant has submitted that this Court, like all Supreme Courts (Apex Courts), has "inherent jurisdiction" to review its own Judgments in exceptional circumstances so as to meet the ends of Justice. For this submissions it relies on Benjoh Amalgamated Limited and Anor v KCB [2014] eKLR; Girdhari Lal Gupta v D. H. Mehta & Anor (no citation given); Brown v Board of Education 347 V.S. 483 (1954); Charles Lawrence Quist v Ahmed Dawani J7/8/2015; Sindh High Court Bar Association & Nadeem Ahmed v Federation of Pakistan, Supreme Court of Pakistan Petitions Nos.8 & 9 of 2009 and Re Pinnochet [1998] UKHL 41.

11. Furthermore, relying on Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others [2017] eKLR, the Applicant has submitted that it has met the principles for a review of this Court's Judgment and prays that those principles should be expanded to include "apparent errors of law and of fact, [and] inability to implement [a] Judgment without breaching law and public interest" as further grounds for grant of review.

ii. The Petitioners' Submissions

12. In submissions filed on 21st February 2020, the Petitioners as Respondents have stated that this Court does not have the jurisdiction to review its decision of 17th July 2018 because Rule 20(4) of this Court's Rules does not donate such powers to it. In any event, that the Applicant has not presented any exceptional circumstances warranting such an action.

13. Further, relying on Fredrick Otieno Outa, the Respondents, state that none of the principles set out in that decision can be applied to the circumstances set out by the Applicant as the basis for its review application. Furthermore, citing Parliamentary Service Commission v Martin Nyaga Wambora & Others [2018] eKLR, they state that there is no basis for this Court to exercise its discretion in allowing the prayer for review.

14. Lastly, reiterating their contention that the Application before us was brought inordinately, they rely on Nairobi City Council v Thabiti Enterprises Ltd [1997] eKLR to urge the point that it is akin to misuse of this Court for a party to seek review of a decision made one and a half years ago. They furthermore rely on Benjoh Amalgamated on the same point and add that where a right has vested on the opposing party and an applicant is guilty of laches, then its prayers should not be acceded to.

E. Analysis

15. We note that save for the Applicant and the Petitioners – represented by Mr. Wanderi, no other party participated in the Application before us. Noting the submissions by those parties, Rule 20(4) of the Supreme Court Rules provides as follows:

> " The Court may, in circumstances it considers, exceptional, on an application by any party or on its motion, or review any of its decisions"

16. In Fredrick Otieno Outa, this Court had this to say on the import of that Rule:

> (87) The other provision that we must interrogate, is Rule 20(4) of the Supreme Court Rules: which provides that: "The Court may, in circumstances it considers, exceptional, on an application by any party or on its motion, or review any of its decisions.
>
> (88) Unlike Section 21(4) of the Supreme Court Act, Rule 20(4) of the Supreme Court Rules would on its face, appear to confer upon this Court, jurisdiction or powers, to review its own Judgments, or decisions beyond the confines of the Slip Rule.
>
> (89) Yet, the issue is not as simple or direct as it appears, given the fact that, here, we are dealing with subsidiary legislation. Such legislation must flow from either the Constitution or a parent Act of Parliament. Neither the Constitution, nor the Supreme Court Act, explicitly, or in general terms, confer upon the Supreme Court, powers, to sit on appeal over its own decisions or to review such decisions. This being the case, no rule of the Court, not even Rule 20(4), as worded, can confer upon this Court, jurisdiction to review its own decisions. If this were the intent of Rule 20(4), then the said Rule, would be of doubtful constitutional validity. We must therefore hold, that Rule 20(4) is not capable of conferring upon this Court, powers to review its decisions, beyond the confines of the Slip Rule, as embodied in Section 21(4) of the Supreme Court Act. At best, this Rule can only be understood to be echoing Section 21(4) of the Supreme Court Act.
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> The Court then concluded thus:
>
> (90) Flowing from the above analysis, and taking into account the elaborate submissions by Counsel, and the practice in the Commonwealth and beyond, the inescapable conclusion to which we must arrive, is that this Court, being the final court in the land, has no jurisdiction to sit on appeal over, or to review its own Judgments, Rulings, or Orders, save in the manner contemplated by Section 21(4) of the supreme Court Act. The Court becomes functus officio once it had delivered Judgment or made a final decision.

17. The Court having so stated, went further to clarify its review jurisdiction in the following words;

> (91) Having reached this conclusion, based largely on the fact that, neither the Constitution, nor the law, explicitly confers upon the Court, powers to review its decisions, does this render this Court entirely helpless, Aren't there situations, so grave, and exceptional, that may arise, that without this Court's intervention, could seriously distort its ability to do justice, of course, litigation must come to an end. But should litigation come to an end, even in the face of an absurdity, the Supreme Court is the final Court in the land. But most importantly, it is a final Court of justice. This being the case, the Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution form which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all.
>
> It then settled the law on review as follows:
>
> (92) Taking into account the edicts and values embodied in Chapter 10 of our Constitution, we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Ruling or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations 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.
>
> These principles are no doubt informed by various judicial authorities, in other jurisdictions, such as the ones we have cited from Nigeria, United Kingdom, India and South Africa.

18. We reiterate the above holdings and would only add that, we have seen no reason to depart from the above principles and we shall apply them to the present Motion. In that regard, it has not been claimed by the Applicant that the Judgment in issue was obtained by fraud or deceit. Neither has it been termed a nullity nor that it was made in the mistaken belief that the parties had consented thereto. What of the fourth principle that the Judgment was rendered on the basis of a repealed law or as result of a deliberately concealed statutory provision? The Applicant has submitted in that context that the provisions of the Engineers Registration Act (now repealed) should have been read alongside the provisions of the Engineering Technology Act, No.23 of 2016 and the Engineers Act to reach a conclusion that Technologists and Technicians cannot and should not be registered under the latter Act as to do so would be an illegality. What should we make of that submission which is only opposed on the main ground that double registration is not unlawful and therefore we should decline the prayer for review?

19. In the above context, the Applicant has stated that it is unable to implement the Judgment without breaching the law to wit the Engineers Registration Act as read with the Engineering Technology Act No.23 of 2016. That therefore, such a situation coupled with the fact that the Court, in rendering its Judgment, was not made aware of the existing contradiction in registering Technologists and

Technicians as Graduate Engineers, ought to move the Court to expand the principles in Outa and allow the Motion for review on these grounds. The Petitioners have taken a different view contending that in fact the registration of the Appellants as Graduate Engineers has already been done and there is therefore nothing to review.

20. In any event, the Petitioners have added, registration of Engineering Technologists and Technicians as such and also as Engineers is not unlawful and the double registration is therefore proper in their view and our Judgment should not be disturbed.

21. In Outa, we asked ourselves this question: "Aren't there situations, so grave, and exceptional, that may arise, that without this Court's intervention, could seriously distort its ability to do Justice? Of course, litigation must come to an end. But should litigation come to end, even in the face of an absurdity? The Supreme Court is the final Court in the land. But most importantly, it is a final Court of justice. This being the case, the Court is clothed with inherent powers which it may invoke, if the circumstances so demand, to do justice."

22. We reiterate our position as succinctly expressed above. Are the circumstances presently obtaining so exceptional as to warrant a review of our Judgment? In our view, the matter is straightforward.

23. In our Judgment, and relevant to the issue at hand, we had ordered the Applicant "to register the Petitioners and 2nd Interested Parties in Petition No.19 of 2015 as Engineers under the Engineers Registration Act within the NEXT TWENTY-ONE DAYS". It is now obvious, and this fact has not been contested, that, not all the Petitioners and 2nd Interested Parties were actually trained and qualified to be registered as Graduate Engineers. They were trained and qualified as Engineering Technologists and Technicians and therefore graduated with a Bachelors degree in Industrial Technology (BIT).

24. According to the Applicants, a fact conceded by the Petitioners, registration of the latter falls outside the ambit of the Applicant and instead, is the responsibility of another entity known as the Kenya Engineering Technology Registration Board created by the Engineering Technology Act No.23 of 2016. Are these facts so exceptional as to warrant a review of our Judgment? Should the Petitioners and Interested Parties benefit from double registration under two different statutory regimes only because of this Court's Judgment which did not at all address this apparent contradiction and conflict? We think not.

25. We have perused both the Engineers Registration Act Cap.530 which was the law applicable at the material time. Section 11 therefor provides as follows:

> " 11.
>
> (1) Subject to this Act, a person shall be entitled, on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register as a registered engineer if he is—
>
> (a) a member of an institution of engineers the membership of which is recognized for the time being by the Board as furnishing a sufficient guarantee of academic knowledge of and practical experience in engineering; or
>
> (b) a person who—

(i) is the holder of a degree, diploma or licence of a university or school of engineering which may be recognized for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering; and

(ii) has had not less than three years' practical experience of such a nature as to satisfy the Board as to his competence to practise as a registered engineer:

Provided that not less than two years of the practical experience required by this subparagraph shall have taken place after obtaining the academic qualification specified in subparagraph (i).

(2) Subject to this Act, a person shall be entitled, on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register as a registered graduate engineer if he is a person to whom subsection (1) (b) (i) applies but is not yet a person to whom either subsection (1) (a) or subsection (1) (b) (ii) applies. Rev. 2010] Engineers Registration CAP. 530

(3) Once a person has been registered as a registered graduate engineer under subsection (2) he shall be deemed for all purposes to have been accepted by the Board as being academically qualified for registration as a registered engineer and subsequent acceptance of his name for registration as a registered engineer under subsection (1) (b) (ii) as distinct from its acceptance under the other provisions of subsection (1) shall not be challenged.

(4) Subject to this Act, a person shall be entitled on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register as a registered graduate technician engineer if he is the holder of a higher national diploma or an equivalent qualification in engineering obtained from an engineering polytechnic or college recognized for the time being by the Board as furnishing evidence of adequate academic training.

(5) Subject to this Act, a person shall be entitled on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee to be registered under this

Act and to have his name entered in the register as a registered technician engineer if—

(a) he is the holder of a higher national diploma or an equivalent qualification in engineering obtained from an engineering polytechnic or college recognized for the time being by the Board as furnishing evidence of adequate academic training; and

(b) has had not less than three years practical experience of such a nature as to satisfy the Board as to his competence to practise as a registered technician engineer.

(6) Subject to this Act, a registered engineer shall be entitled on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register as a registered consulting engineer in a particular classification and grade if—

(a) he has practised in a specialized engineering field as a registered engineer for a period determined by the Board; and

(b) he has satisfied the Board as to his having achieved a standard of competence to enable him to practise as a consulting engineer in a particular specialization and grade.

(7) The Board may require an applicant for registration to satisfy CAP. 530 8 Engineers Registration [Rev. 2010] it that his professional and general conduct have been such as, in the opinion of the Board, to make him a fit and proper person to be registered under this Act and the Board may direct the Registrar to postpone the registration of an applicant until so satisfied." [Emphasis added]

26. Section 15 of the Engineering Technology Act No.23 of 2016 on the other hand provides as follows:

" 15.

(1) A person may be registered in the engineering technology profession as a—

(a) professional, which includes –

(i) a professional engineering technologist; or

(ii) a certified engineering technician.

(b) candidate, which includes – (i) a candidate engineering technologist; or

(ii) a candidate engineering technician.

(2) A person may not practice in any of the categories contemplated in subsection (1), unless he or she is registered in that category.

(3) A person may only practice in a consulting capacity if registered in the category of consulting engineering technologist.

(4) A person who is registered in the category of candidate must perform work in the engineering technology profession only under the supervision and control of a professional of any category as prescribed."

27. Engineering technology is then defined in the same Act in Section 2 as follows:

> "engineering technology" means part of the engineering profession in which knowledge of applied mathematical and natural science gained by higher education, experience and practice is devoted to application of engineering principles and the implementation of technology education for the professional focusing primarily on analysing, applying, implementing and improving existing technologies and is aimed at preparing graduates for the purpose of engineering technology practices closest to the product improvement, manufacturing and engineering operational functions;

28. Engineering in Section 2 of the Engineers Act is defined as follows:

> "engineering" means the creative application of scientific principals to design or develop structures, machines, apparatus, or manufacturing processes, or works utilizing them singly or in combination or to construct or operate the same with full cognizance of their design or to forecast their behavior under specific operating conditions or aspects of intended function, economics of operation and safety to life and property"

29. It is obvious to us that the two professions, while related, are different. Engineering technology focuses on the applied and practical application of engineering principles whereas Engineers emphasizes the theoretical aspects of mathematical scientific and engineering principles. That partly explains why the degrees conferred on each are different so is the registration of graduates on qualification.

30. From submissions made before us, there would seem to be no issue with implementation of our Judgment and orders in as far as Graduate Engineers are concerned because the Applicant, as we have shown above, has the jurisdiction and mandate to do so. The Applicant however states that it cannot register Engineering technologists and technicians because they do not qualify to be registered under the Engineers Act but ought instead to be registered under the Engineering Technology Registration Act. The Petitioners are however quite happy to be registered under both Statutes on the authority of our Judgment only and not the two Statutes which demarcate the registration of engineers and engineering technologists as well as technicians.

31. It is imperative to note that in our Judgment, that dichotomy was not addressed at all and we addressed all the Petitioners and 2nd Interested Parties as engineers seeking registration as Graduate Engineers

under the Engineers Registration Act and our orders were specific in that regard. Should we now review those orders?

32. In our view, to allow registration of Engineering Technologists and Technicians under the Engineers Registration Act by judicial fiat would not be in the interests of justice and we so hold. The Legislature, in creating a separate registration mechanism for such professionals did not also intend that, a Court, such as this one, without any technical expertise, would ignore the laid down procedure for registration and order a professional entity, such as the Applicant, to flout the law in the conduct of its affairs. We have in any event stated that nowhere in our Judgment did we do order it to do so. Our orders were limited to the registration of Graduate Engineers and not Engineering Technologists or Technicians. The existence of the Engineering Technology Act No.23 of 2016 was not brought to the attention of this Court at the time it rendered its Judgment and how its enactment affected implementation of Section 11 of the Engineers Registration Act Cap.530 which was the operative law at all material times. In our view, that non-disclosure is now an important consideration on whether to grant a review or not.

33. Having so held, it is obvious than an exceptional circumstance premised on the principles in Outa has arisen which requires that our Judgment, in the relevant part, must be reviewed as prayed. In doing so, we must now revisit order No.(b)(3) in our Judgment which reads as follows:

> "An order of mandamus do hereby issue directing the Engineers Registration Board to register the Petitioners and 2nd Interested Parties in Petition No.19 of 2015, as Engineers under the Engineers Registration Act within the NEXT TWENTY-ONE DAYS (21) and in default the said Petitioners and 2nd Interested Parties be at liberty to apply to this Court for any appropriate Orders for enforcement of the Orders herein."

34. From our findings above, this order ought to be reviewed to read as follows:

> "An order of Mandamus do hereby issue directing the Engineers Registration Board to register such Petitioners and 2nd Interested Parties, as are qualified as Engineers, under the Engineers Act forthwith. Such Petitioners and Interested Parties as are Engineering Technologists and Technicians shall be registered as Engineering Technologists and Technicians by the Engineering Technologist Registration Board and the Engineers Registration Board shall transmit this order to that Board for implementation forthwith. In default, the said Petitioners and 2nd Interested Parties shall be at liberty to apply to this Court for any appropriate orders for enforcement thereof".

35. Consequent upon those orders, it follows that all the Petitioners and Interested Parties as are Engineering Technologists and Technicians shall not be the beneficiaries of orders Nos.(b) 1, 2, 4 and (c). In other words, those orders are hereby reviewed to exclude those persons and the said orders shall be limited to the benefit of Graduate Engineers only to be registered under the Engineers Registration Act. The reason for this decision is obvious to us; the Applicant is not to blame for the position that those persons now find themselves in.

36. As for costs, this long running litigation must come to an end and since no party can be faulted for the review proceedings, each shall bear its own costs.

37. Before we dispose of the Motion before us, we must address three issues that were raised during submissions:

> First, on whether the Application was filed late and inordinately, we have elsewhere above narrated the actions taken by the Applicant in a bid to implement our Judgment until it hit a wall. Those actions took time and so the delay is understandable and excusable.
>
> Second, we have been asked by the applicant to expand the principles in Outa to include "apparent errors of law and of fact [and] inability to implement a Judgment without breaching law and public interest" as further grounds.

38. We decline the invitation to do so. In the present Ruling, we have shown that the issue relating to the import of the Engineers Registration Act (now repealed) as read with the Engineering Technology Registration Act 2016 as well as double registration under existing Statutes was never the subject of our determination in the Judgment. Had we addressed those issues, which were never disclosed to us, our Judgment would have been significantly different. That is certainly an exceptional circumstance necessitating a review of that Judgment.

39. We therefore find and hold that Principle (iv) in Outa applies to the Motion before us and we see no reason to depart from any other principle nor create additional principles for review of our Judgments as was the Applicant's prayer in submissions.

40. Thirdly, it has been urged by the Petitioners that the Judgment of the Court has already been implemented and so there is nothing to review. No evidence of such implementation was tendered before us and so Mr. Wanderi's bare statement is insufficient. In any event, the 2nd Interested Parties did not participate in the present Application to authenticate that claim. In the event, we shall not address that issue at all.

F. Disposition

41. Flowing from our findings above, the final orders to be made are that:

i) The Notice of Motion dated 17th December 2019 is hereby allowed.

ii) Consequently, Order No.(b)(3) in our Judgment dated 17th July 2018 is hereby reviewed and shall now read as follows:

> " An order of Mandamus do hereby issue directing the Engineers Registration Board to register such Petitioners and 2nd Interested Parties, as are qualified as Engineers, under the Engineers Act forthwith. Such Petitioners and 2nd Interested Parties as are Engineering Technologists and Technicians shall be registered as Technologists and Technicians by the Engineering Technologist Registration Board and the Engineers Registration Board shall transmit this order to that Board for implementation forthwith. In default, the said Petitioners and Interested Parties shall be at liberty to apply to this Court for any appropriate orders for enforcement thereof".

iii) In addition, such Petitioners and Interested Parties as are Engineering Technologists and Technicians shall not be the beneficiaries of Orders Nos.(b) 1, 2, and 4 as well as (c) of our said Judgment.

iv) Each Party shall bear its own costs of the present Application.

41. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY, 2020.

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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

.....

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

SUPREME COURT OF KENYA