

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

(Coram: Mwilu, DCJ & VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)

APPLICATION NO. E 019 OF 2021

– BETWEEN –

WILLIAM MUSEMBI.....1ST PETITIONER
FRED NYAMORA.....2ND PETITIONER
VINCENT ONYUNO.....3RD PETITIONER
ELIJAH MEMBA.....4TH PETITIONER
JOSHUA KIBE.....5TH PETITIONER
MONICA WANJIRU.....6TH PETITIONER
MWENI KISINGU.....7TH PETITIONER
PAMELA ATIENO.....8TH PETITIONER
PURITY WAIRIMU.....9TH PETITIONER
BEATRICE WANJIRU.....10TH PETITIONER
GERTRUDE ANGOTE.....11TH PETITIONER

(Suing on their own behalf and on behalf of 326 persons formerly residing in City Cotton village and Upendo City Cotton village and their 90 school going children)

MARGARET KANINI KELI.....12TH PETITIONER
ROSELINE MISINGO.....13TH PETITIONER
JOSEPH MWAURA KARANJA.....14TH PETITIONER

(Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi)

-AND-

MOI EDUCATIONAL CENTRE CO. LTD.....1ST RESPONDENT
INSPECTOR-GENERAL OF POLICE.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
CABINET SECRETARY, LANDS, HOUSING &
URBAN DEVELOPMENT.....4TH RESPONDENT

(Being an Application for Review of Judgment of the Supreme Court dated and delivered on 16th July 2021 in Supreme Court Petition No. 2 of 2018)

RULING OF THE COURT

[1] UPON perusing this application brought pursuant to Article 159(2)(d) of the Constitution, Section 3, (d), (e), 14 (5) and 21 (1) (a), (2) (4) of the Supreme Court Act and Rule 28(5) and (6) of the Supreme Court Rules 2020, and supported by the annexed affidavit of Mbugua Mureithi, the Applicant's Advocate sworn on 9th September, 2021, for orders that:

- i. *this Court be pleased to review, clarify, rectify and correct the determination at paragraph 81 of the judgment of this Court delivered on 16th July, 2021 (as amended by Court suo moto to correct Order (vi) to read Kshs. 100,000 instead of Kshs.100,0000) to include an order for interest on damages awarded to the applicants/petitioners while upholding and affirming the judgment of the **High Court in High Court Petition No 264 of 2013 (as consolidated with Petition No. 274 of 2013)**;*
- ii. *In the alternative to prayer (1) above, the Honourable Court be pleased to invoke its inherent power and deem this application as the application filed by the Petitioners on 30th July 2021 in Supreme Court **Petition No. 2 of 2018** under section 21(4) of the Supreme Court Act and Rule 28 (5) and (6)*

of the Supreme Court Rules, 2020 seeking orders for correction and/ or rectification of the judgment by including an order for interest on damages after this Court upheld and affirmed judgment of the High Court;

[2] UPON considering the applicants' submissions to the effect that on 16th July, 2021, this Court delivered judgment explicitly affirming the High Court award of damages to the applicants, after setting aside the judgment of the Court of Appeal, but was silent on the ancillary orders of interest on damages as awarded by the High Court; that from the drift and thrust of the judgment, this Court did not intend to deny the applicants the award of interest; that the omission was inadvertent, an apparent error on the face of the judgment or a slip by the Court and; that had the Court intended not to award interest, it would have explicitly stated so and explained why; and that the review sought in the instant application is minor, as it does not seek to re-litigate the concluded dispute or to alter the substance of the judgment of this Court, but merely to align it with that of the High Court in order to realize the true intention of the Court; and

[3] FURTHERMORE, considering the applicants' averment that on 30th July, 2021, they filed an application under Section 21 (4) of the Supreme Court Act and Rule 28(5) and (6) of the Supreme Court Rules 2020 to include an order for interest on damages but despite payment of filing fees, the payment has not been acknowledged on the Judiciary portal necessitating the filing of the instant application; and

[4] NOTING that the 1st Respondent is opposed to the application, and has placed on record a Replying Affidavit sworn by Paul K. Chemngorem and written submissions, in which they maintain that, while Section 21 (4) of the Supreme Court Act confers upon the Court the limited power to correct a clerical error or slip in any of its judgments, rulings or orders once delivered, this power is subject to the following conditions; that the correction can only be sought within fourteen days of delivery of judgment, ruling or order; that the relevant parties have been

notified, and, that the substance of review must relate to any oversight, errors of clerical computation, or errors apparent on the face of the judgment, ruling or order, with the aim of giving effect to the intention of the Court; and

[5] NOTING further that in view of the foregoing, an omission to award interest on damages does not meet the threshold laid by Section 21(4); that an award for interest is not apparent, but is in fact a substantive issue which has to be computed, varied and involves discretionary consideration and; that the applicants do not deserve to be awarded any interest on the damages as the 1st respondent cannot be said to have kept them out of money owed to them or to have deprived them of the funds; that an award on interest which has accrued for eight years would soar the decretal sum disproportionately and would adversely burden the innocent children who attend the 1st respondent and could prejudice the quality of education offered to them; and

[6] FURTHER NOTING that the 2nd, 3rd and 4th Respondents are also opposed to the application and contend that, had the Court intended to award interest on the award to the applicants, it would have done so while *suo moto* amending the Order on the 19th of July, 2021, and, that by failing to do so, was a manifestation that the Court did not find reason to amend the orders to grant interest. They urge that the applicants do not meet the criteria in the ***Outa Case*** as they have neither demonstrated an error or mistake that is apparent on the face of the judgment, neither has the applicant demonstrated that the Court was not competent or that the judgment was obtained by fraud or deceit.

In view of the foregoing, **WE NOW OPINE AS FOLLOWS:**

[7] CONSIDERING that this application has been brought pursuant to Article 159(2)(d) of the Constitution which requires courts to administer justice without undue regard to procedural technicalities, Section 14 (5) on the inherent power of the Court to make such orders as may be necessary for the ends of justice to be met or to prevent abuse of the due process of the Court, Section 21 (4) on the general

powers of the Court to correct any oversight or clerical error of computation or other error apparent on such judgment, ruling or order, Rule 28 (6) of the Supreme Court Rules, 2020, made pursuant to Section 21(4) and sub-rule (5) which deals with the review of any decision of the Court and with formal correction of a judgment, ruling or order; and

[8] UPON considering the circumstances of this case, looking at the grievance, the correct provision should be Section 21 (4) of the Supreme Court Act which provides that:

“Within fourteen days of delivery of its judgment, ruling or order, the Court may, on its own motion or on application by any party with notice to the other or others, correct any oversight or clerical error of computation or other error apparent on such judgment, ruling or order and such correction shall constitute part of the judgment, ruling or order of the Court.” [our emphasis]; and

[9] NOTING that this section embodies the “Slip Rule”, which allows the Court to correct errors that are apparent on the face of a judgment, ruling, or order of the Court. Such errors must be obvious, the correction of which does not confer upon the Court any jurisdiction or powers to sit on appeal over its own judgment, ruling or order or, to review such judgment, ruling or order as to substantially alter it; and

[10] ACKNOWLEDGING that this Court can correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the judgment, ruling or order so as to give effect to its intention in terms of its decision in ***Fredrick Otieno Outa v. Jared Odoyo Okello***, SC Petition No. 6 of 2014; [2017] eKLR, namely, to steer a judgment, ruling, or order **“towards logical, or clerical, perfection”**, pursuant to Rule 28(5) of the Supreme Court Rules; and

[11] THEREFORE, to succeed in an application for the correction of errors, the application must be brought within fourteen days of delivery of the judgment, ruling or order, whether it is the Court itself that wishes to do so on its own motion or upon being moved by a party. Secondly, the applicant or the Court must give notice to the other parties before seeking to make the correction. Thirdly, the error to be corrected must relate to an oversight or clerical error of computation or other error. Finally, the error must be apparent on the judgment, ruling or order in question; and

[12] SATISFIED from the uncontroverted averment by the applicants that they had made attempts to notify the Court of the omission in the order of interest on damages in the email correspondence sent to the Court on 22nd July, 2021, which the Court failed to acknowledge receipt of; and further that subsequently on 30th July, 2021, they also unsuccessfully filed an online application on the Judiciary portal seeking orders to correct and rectify the Judgment under Section 21(4) of the Supreme Court Act and Rule 28(5) and (6) of the Supreme Court Rules to include an order for interest on damages; and

[13] BEARING in mind that the present application dated 9th September, 2021 was brought 55 days after the date of judgment and 51 days after the correction of the same; and

[14] COGNIZANT of the fact that the applicants, having noted the omission made genuine attempts, within the time stipulated, to have the Court correct this error, but for failure by the Court to acknowledge receipt of the application; appreciating that the omission, regrettably was committed by the Court, and guided by the principles enunciated in our own decisions in *Martin Wanderi & 106 others v. Engineers Registration Board & 5 others; Egerton University & 43 others (Interested Parties)*, SC Application 39 of 2019; [2020] eKLR, and *Outa* (supra), where in the latter we explained that;

“[91] ...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 from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all.”; and

[15] FURTHER, we are guided by Rule 3(5) of this Court Rules which provides that:

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”; and

[16] IN the end, we find that there is exceptional circumstance which requires that we invoke this Court’s inherent powers to review the Judgment in the relevant part as prayed, in order to meet the ends of justice and to give effect to the intention of the Judgment in accordance with Section 21(4) of the Supreme Court Act as read with Rule 28(5) of the Supreme Court Rules.

[17] CONSEQUENT, upon our findings above, we review the order to include ***interest on damages awarded in (v) and (vi) in the Judgment from the date of judgment of the High Court until payment in full.***

[18] ACCORDINGLY, we make the following Orders:

- i) *The Notice of Motion dated 9th September, 2021 and filed on 21st October, 2021, is hereby allowed.*
- ii) *Consequently, the Judgment dated 16th July, 2021 and amended on 19th July, 2021 is hereby reviewed to include, Order No. vii which shall now read as follows:*

“vii. The petitioners shall also have interest on damages in (v) and (vi) above from the date of judgment of the High Court until payment in full.”

- iii) *Each party to bear its own costs of this Application.*

DATED and DELIVERED at NAIROBI this 19th Day of May, 2022.

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P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA