

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION NO. 4 (E010) OF 2022**

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

BETWEEN

THE SENATE OF

THE REPUBLIC OF KENYA.....1ST APPLICANT/RESPONDENT

THE SPEAKER OF

THE SENATE.....2ND APPLICANT/RESPONDENT

SENATE MAJORITY LEADER.....3RD APPLICANT/RESPONDENT

SENATE MINORITY LEADER.....4TH APPLICANT/RESPONDENT

-AND-

THE SPEAKER OF THE NATIONAL ASSEMBLY

OF THE REPUBLIC OF KENYA.....1ST RESPONDENT/APPLICANT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT/APPLICANT

THE COUNCIL OF COUNTY GOVERNORS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....5TH RESPONDENT

INSTITUTE FOR SOCIAL ACCOUNTABILITY.....6TH RESPONDENT

MISSION FOR ESSENTIAL

DRUGS AND SUPPLIES.....7TH RESPONDENT

KATIBA INSTITUTE.....8TH RESPONDENT

PHARMACEUTICAL SOCIETY OF KENYA.....9TH RESPONDENT

ELIAS MURUNDU.....10TH RESPONDENT

THE COMMISSION ON REVENUE ALLOCATION.....11TH RESPONDENT

*(Being An Application for Review of the Ruling and order of the Supreme Court
(Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola, Ouko, SCJJ) Application No.
1(E002) of 2022 delivered on 19th May 2022)*

RULING OF THE COURT

[1] Before the Court is a Notice of Motion Application dated on 25th May 2022, and filed on 27th May 2022, under Sections 3, 21 (2) and 24 (1) of the Supreme Court Act, and Rules 28(5) of the Supreme Court Rules, 2020 seeking this Court to review/vary and set-aside a Ruling and Orders issued on 19th May 2022 in **Application No. 1 (E002) of 2022; *The Senate of the Republic of Kenya & Others vs. The Speaker of the National Assembly & Others*** allowing the application for stay of the Court of Appeal Judgment.

[2] A brief background is that the 1st to 4th applicants/respondents approached this Court vide Petition No. 19(E027) of 2021 appealing against the entire Judgement of the Court of Appeal (*Murgor, Nyamweya & Lesiit JJ. A*). Before the main suit could be heard, the 1st to 4th applicants/respondents filed Application No. 1 (E002) of 2022 seeking the following orders:

1. ...

2. *Pending the hearing and determination of this application, an order be issued to stay the execution of order 1, 3 and 9 of the Court of Appeal at Nairobi in civil Appeal No. E084/2021; National Assembly & another v. Senate of Kenya & others pending the hearing and determination of Supreme Court Petition No. 19(E027) of 2021; Senate of Kenya & others v. National Assembly & others.*

3. *Pending hearing and determination of Supreme Court Petition No. 19(E027) of 2021; Senate of Kenya & others v. National Assembly & others, an order be issued to stay the execution of order 1, 3 and 9 Court of Appeal at Nairobi in civil Appeal No. E084/2021; National Assembly another & Senate of Kenya & others.*

4. *The costs of and incidental to this application abide the result of the said appeal.*

[3] Upon considering the application and the submissions in support thereof, this Court rendered its Ruling on 19th May 2022 where we held that:

a. Pending hearing and determination of Supreme Court Petition No. 19(E027) of 2021; Senate of Kenya & others v. National Assembly & others, an order is issued to stay the execution of order 1, 3 and 9 Court of Appeal at Nairobi in Civil Appeal No. E084/2021; National Assembly another & Senate of Kenya & others.

b. The costs of this application shall abide the Court's decision in the appeal.

[4] Dissatisfied with the Ruling, the 1st and 2nd respondents/applicants filed a Notice of Motion Application dated on 25th May 2022, and filed on 27th May 2022, under Sections 3, 21 (2) and 24 (1) of the Supreme Court Act, and Rules 28(5) of the Supreme Court Rules, 2020 seeking this Court to review/vary and set-aside Ruling and Orders issued on 19th May 2022 in **Application No. 1 (E002) of 2022.**

[5] The 1st and 2nd respondents/applicants submit that this Court has jurisdiction to set aside and/or review its orders of 19th May 2022. In this regard, reliance is placed in the case of ***Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 Others***, SC Petition No. 6 of 2014 [2017] where this Court held that:

“..... 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”.

[6] The 1st and 2nd respondents/applicants argued that there was an error apparent on the face of the record on the ground that this Court stated that the application was unopposed while in fact the application was strenuously opposed by the 1st and the 2nd respondents/applicants on the basis that a detailed affidavit sworn by Michael Sialai, the Clerk of the National Assembly on 28th April 2022. It was further argued that in failing to consider the applicants’ opposition to the application, the Court arrived at an erroneous decision.

[7] In addition, 1st and 2nd respondents/applicants argued that the stay orders issued by this Court on 19th May 2022 are prejudicial to them, in that the Court stayed the enforcement of Orders No. 1, 3 and 9 of the Judgment of the Court of Appeal thereby reinstating orders of the High Court which were pegged on an erroneous interpretation of the provisions of Article 110 (3) of the Constitution and holding that it was a condition precedent for a Speaker of one House of Parliament to seek the concurrence of the Speaker of the other House of Parliament on whether a bill concerns counties. It was submitted that following a determination of the Appeal on its merits, the Court of Appeal held that the concurrence process under Article 110 (3) of the Constitution was only applicable to bills concerning counties and not the national government. Therefore, the orders of this Court have the effect of paralyzing the work of the National Assembly

as they reinstate the orders of the High Court resulting in cessation of all Bills pending before it, at an interlocutory stage.

[8] The 1st and 2nd respondents/applicants contended that the National Assembly is scheduled to adjourn *sine die* from 9th June 2022 while the Senate is scheduled to go on recess *sine die* on 17th June 2022 ahead of the August 2022 General Elections and unless the stay orders are set aside/varied or reviewed, the National Assembly will not be able to discharge its constitutional mandate to process and pass numerous critical Bills currently before it in different stages, including Bills relating to the budgetary circle and touching on the three arms of government, county government and constitutional commissions leading to a constitutional crisis. Some of the critical Bills pending before the National Assembly are: the Appropriation Bill, 2022, the Finance Bill, 2022, the County Allocation Bill of Revenue Bill, 2022, the Public Finance Management (Amendment) Bill, 2022, the Petroleum Products (Taxes and Levies) Amendment Bill, 2022, the Supreme Court (Amendment) Bill, 2022 and the Children Bill, 2022. In conclusion, the 1st and 2nd respondents/applicants submit that the facts of this case satisfy the criteria for grant of the orders for review sought.

[9] Two issues arise for determination in this matter, namely:

- (i) *Whether this Court has jurisdiction to determine this review application; and if yes*
- (ii) *Whether a case has been made to warrant that review?*

[10] Section 21(4) of the Supreme Court Act, 2011 provides as follows:

“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”.

[11] Additionally, Section 24(4) of the Supreme Court Act, provides that:

“The judges of the Supreme Court who together have jurisdiction to hear and determine a proceeding may—

(a) discharge or vary an order or direction made or given under subsection (1); or

(b) confirm, modify, or revoke a decision confirmed or modified under subsection (2).”

[12] This Court settled the question of its jurisdiction to review its own decisions in *Fredrick Otieno Outa v Jared Odoyo Okello and 3 Others*, Supreme Court Petition No 6 of 2014; [2014] eKLR where it observed that:

*“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.....***

*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, Rulings or Orders, in exceptional***

circumstances, so as to meet the ends of justice.” [Emphasis added]

[13] Flowing from the above, we do find that this Court has jurisdiction to review any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice.

[14] This Court also set the guiding principles for applications for review in the case of ***Parliamentary Service Commission vs. Martin Wambora & Others***, SC. Application No. 8 of 2017 [2018] eKLR as follows:

“(i) *A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.*

(ii) *Review of exercise of discretion is not a right; **but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;***

(iii) *An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.*

(iv) *In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.*

(v) *During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review...*”

[15] Be that as it may, this Court has *inherent powers*, if called 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. In this context, it was the applicants’ contention that the stay orders issued by this Court on 19th May 2022 are prejudicial to them, in that the Court stayed the enforcement of Orders

No. 1, 3 and 9 of the Judgment of the Court of Appeal thereby reinstating orders of the High Court which were pegged on erroneous interpretation of the provisions of Article 110 (3) of the Constitution and holding that it was a condition precedent for a Speaker of one House of Parliament to seek the concurrence of the Speaker of the other House of Parliament on whether a bill concerns counties.

[16] Furthermore that the National Assembly is scheduled to adjourn *sine die* from 9th June 2022 while the Senate is scheduled to go on recess *sine die* on 17th June 2022 ahead of the August 2022 General Elections and unless the stay orders are set aside/varied or reviewed, the National Assembly will not be able to discharge its constitutional mandate to process and pass numerous critical Bills currently before it in different stages, including Bills relating to the budgetary circle and touching on the three arms of government, county government and constitutional commissions leading to a constitutional crisis.

[17] We note the 1st to 4th respondents'/applicants' opposition to this Application, in which they state that the 1st and 2nd respondents/applicants ought to have filed a response within the timeframe given by the Deputy Registrar and within the parameters of the Rules of this Court. We agree. However, it is also our view that this Court can, in exceptional circumstances, invoke Rule 3(4) and (5) of the Supreme Court Rules, 2020 which state:

“(4) The Court shall interpret and apply these Rules without undue regard to technicalities and procedure.

(5) 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.”

[18] Having considered the submissions from all parties, and taking into account the prejudice likely to be suffered by the 1st and 2nd respondents/applicants if the said orders are not reviewed, varied or set aside given the fact that failure to deliberate on some of those Bills might cripple the running of the government, we find that this matter calls for review, variation or setting aside as there would be apparent injustice not only to the applicants but Kenyans as a whole. Consequently, we do find that the application is merited.

ORDERS

[19] Upon considering the application our final Orders are as follows:

a. The application for review dated 25th May 2022 is hereby allowed.

b. The orders of this Court issued on 19th May 2022 staying the execution of order 1, 3 and 9 Court of Appeal at Nairobi in Civil Appeal No. E084/2021; National Assembly another & Senate of Kenya & others is hereby set aside and substituted with an order dismissing the said application No 1 (E002) of 2022.

c. The costs of this application and also No 1 (E002) 2022 shall abide the Court's decision in the appeal.

[20] It is so, ordered.

DATED and DELIVERED AT NAIROBI this 3rd day of June 2022.

.....
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

