

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. 7 (E013) OF 2022

—BETWEEN—

SENATE OF KENYA.....1ST PETITIONER/APPLICANT
SPEAKER OF THE SENATE.....2ND
PETITIONER/APPLICANT
SENATE MAJORITY LEADER.....3RD PETITIONER/APPLICANT
SENATE MINORITY LEADER.....4TH PETITIONER/APPLICANT

—AND—

SPEAKER OF THE NATIONAL ASSEMBLY.....1ST
RESPONDENT
NATIONAL ASSEMBLY OF KENYA.....2ND
RESPONDENT
COUNCIL OF COUNTY GOVERNORS.....3RD RESPONDENT
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
COMMISSION FOR REVENUE ALLOCATION.....11TH RESPONDENT

(Being an application for review and setting aside of the Ruling and Order of this Court (Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, Ouko SCJJ) delivered on 3rd June 2022 in Application No. 4 (E010) of 2022)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 1st July 2022 filed by 1st, 2nd, 3rd and 4th applicants on 27th July 2022, seeking to review, vary and/or set aside the Ruling and Order of this Court delivered on 3rd June 2022 in Application No. 4 (E010) of 2022; ***Senate of Kenya & Others vs. National Assembly & Others***, which orders allowed an application for review and set aside the orders of stay issued by this Court on 19th May 2022; and

[2] HAVING read the affidavit in support of the application sworn by **Hon. Kenneth Makelo Lusaka, the second applicant** on 1st July 2022 and filed on 27th July 2022; and

[3] FURTHER considering the grounds in support of the application for review and the applicants written submissions, urging that this Court erred in allowing the respondents' application dated 25th May 2022, by failing to consider the effect of the same on the legality of the Bills that the National Assembly has been given latitude to enact; the said Ruling has given the National Assembly latitude to pass Bills without the concurrence between the two houses, an issue that is the subject of the main petition before this Court; that some of the Bills the National Assembly seeks to pass without the requisite concurrence are clearly in

contravention of the Constitution; that they together with other parties were extensively limited by time to respond to application whose orders they seek reviewed; that the Supreme Court Petition No. 19(E027) will be rendered nugatory if the prayers sought are not allowed; and that both houses had proceeded on sine die recess; and

[4] FURTHER considering the Replying Affidavit of the 1st and 2nd Respondents sworn by **Serah M. Kioko** on 2nd August 2022 and filed on 4th August 2022 and their written submissions, which in opposing the application for review contends, *inter alia*, that the Supreme Court Act does not make provisions for a review of a decision which is the subject of another application for review as that will amount to inviting the Court to sit on appeal of its own decision; that the Court is *functus officio* regarding the issue of stay and or review of the said orders; that pursuant to Rule 28(5) of the Supreme Court Rules, any review by the Court is final and not subject to further review; and that the instant application is an abuse of the process of Court;

[5] NOTING the legal position as regards this Court's power to review its own decision as was settled in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others* SC Petition (App.) No. 4 of 2012; [2013] eKLR and *Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others*; SC Petition No. 6 of 2014, [2017] eKLR (*Outa case*) 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(A) of the Supreme Court Act and as enunciated in the *Outa case*; and

[6] CONSIDERING the legal principles as set out in *Outa Case* under which this Court, in exercise of its inherent powers, may review, any of its Judgments, Rulings or Orders so as to meet the ends of justice, that is 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; and

[7] **WE DO FIND**, having considered the application, the submissions of all parties, in response and opposition to the Application, that it has not been demonstrated by the applicants that the impugned ruling was obtained by fraud or deceit, is a nullity, or that the Court was misled into giving its ruling on review under a mistaken belief that the parties had consented as per the guidelines set in the *Outa Case*;

[8] The above finding notwithstanding, we note with concern that learned Counsel for the applicants seek this Court to exercise a jurisdiction it lacks, namely, to review or re-litigate the question of stay, which has been settled by this Court with finality. Consequently, we find that the present application lacks merit and is for dismissal.

[9] As for the costs before this Court, award of the same is discretionary as determined by this Court in *Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012; [2014] eKLR. However, this being public interest litigation challenging the constitutionality of the Bills pending before Parliament and noting that the main appeal is yet to be determined, there shall be no order as to costs.

[10] In the circumstances, we make **ORDERS** as follows:

(a) The Notice of Motion application dated 1st July, 2022 is hereby dismissed;

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

REGISTRAR,

SUPREME COURT OF KENYA

