



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**APPLICATION NO. E017 OF 2023**

— BETWEEN —

**DARI LIMITED.....1<sup>ST</sup> APPLICANT**  
**RAPHAEL TUJU.....2<sup>ND</sup> APPLICANT**  
**MANO TUJU.....3<sup>RD</sup> APPLICANT**  
**ALMA TUJU.....4<sup>TH</sup> APPLICANT**  
**YMA TUJU.....5<sup>TH</sup> APPLICANT**  
**S.A.M COMPANY.....6<sup>TH</sup> APPLICANT**

-AND-

**EAST AFRICAN DEVELOPMENT BANK.....RESPONDENT**

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*(Being an application for review of the Ruling of the Supreme Court  
(Mwilu;DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko, SCJJ) delivered on 6<sup>th</sup>  
October 2023 in Petition (Application) No. E012 of 2023 and Application No.  
E017 of 2023)*

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Representation:

Paul Muite, SC and Mr. Nyamodi for the Applicants  
*(V.A. Nyamodi & Company Advocates)*

Prof. Githu Muigai, SC and Mr. Wakhisi for the Respondent  
*(Mohammed Muigai LLP)*

**RULING OF THE COURT**

**[1] RECALLING** that on 6<sup>th</sup> October 2023 this Court *(Mwilu;DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko, SCJJ)* dismissed the applicants' application

dated 25<sup>th</sup> August 2023 for conservatory orders on the grounds that: although the applicants had satisfied the arguability test, they had failed to demonstrate that the appeal would be rendered nugatory if the conservatory orders were denied. They also failed to satisfy the public interest threshold. Now, aggrieved by parts of that ruling, the applicants have applied for review in the instant Notice of Motion dated 12<sup>th</sup> October 2023 and filed on 13<sup>th</sup> October, 2023; and

**[2] UPON** reading the said Notice of Motion expressed to be brought under Articles 50, 163(1) and (4), 159(2)(d) and (e) of the Constitution, Sections 3A, 21(2), 21A(a), 23A and 24(1) of the Supreme Court Act 2011 and Rules 28(5), 31 and 32 of the Supreme Court Rules 2020 for orders that;

*i) Spent...*

*ii) This Court be pleased to review, vary, vacate and/or set aside Paragraph 34 of its ruling dated 6<sup>th</sup> October 2023 and grant the orders sought by applicants in their application dated 25<sup>th</sup> April 2023.*

*iii) This Court be pleased to issue any further orders it may deem fit in the circumstances as shall meet the ends of justice.*

*iv) The costs of this application be provided for; and*

**[3] UPON** perusing the grounds on the face of the application, the supporting affidavit of Raphael Tuju, the 2<sup>nd</sup> applicant, and the submissions filed on their behalf on 13<sup>th</sup> October 2023 and further submissions dated 31<sup>st</sup> October 2023, to the effect that in paragraph 34 of the ruling, the Court made erroneous factual suppositions that: first, the respondent is a reputable international bank; second, the respondent will have no difficulty compensating the applicants if the applicants succeed in their claim; and third, the diplomatic immunity enjoyed by the respondent did not suffice in the instance. In the applicants' view, although the findings were sound deductions of law, the same did not aptly construe factual realities, especially with regard to both the reputational and financial status of the respondent; that had the Court been seized of these realities, it may not have reached the conclusion in question; and that now that the Court's attention has

been drawn to the factual position, the applicants have urged the Court to vacate, vary and or set aside the specific findings in contention; and

**[4] FURTHER**, the applicants contend that the ruling inadvertently violated their constitutionally guaranteed rights by arrogating to the respondent a heightened legal advantage incapable of being reversed. To support their grounds, the applicants have produced a Moody's Agency Rating Report indicating the respondent has a 'BAA Rating' being a TIER 4 rating as to its ability to service its debts, suggesting in fact, that the respondent is in financial distress and has severally defaulted in its payment obligations. On the respondent's diplomatic immunity, the applicants have made reference to two cases within the East African Community states' jurisdictions, where the respondent raised the defence of immunity against attachment of its assets preventing its creditors from recovering a debt. Relying on this Court's decision in *Deynes Muriithi & 4 Others v. Law Society of Kenya & Another* [2016] eKLR on the test for review, they have urged us to find that this application meets the threshold for review as exceptional circumstances have arisen; and that this Court on the discovery of novel facts, can exercise its inherent decision to review its decision; and

**[5] UPON** considering the respondent's Replying Affidavit sworn on 24<sup>th</sup> October 2023 by Justa Kiragu, the respondents Principal Investments Officer and submissions dated 24<sup>th</sup> October 2023 in opposition to the application, to the effect that: the applicants have failed to satisfy the requisite statutory and procedural threshold for review as set out in Section 21A of the Supreme Court Act, Rule 28(5) of the Supreme Court Rules and the principles enunciated in *Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others* [2017] eKLR; that the applicants have neither demonstrated a meritorious and/or exceptional case nor public interest which would warrant the review sought; that the application is veiled as one for review when in essence, it is a disguised appeal which seeks to relitigate the application for conservatory orders; that this Court lacks the jurisdiction to sit on appeal against its decision in the Ruling; and that the documents annexed to the application were not annexed as part of the applicants evidence in the application for conservatory orders and do not form part of the record in Petition

No. E012 of 2023 therefore, ought not to be considered for purposes of this application; and

**HAVING** considered the application, affidavits, and rival arguments by both parties, **WE NOW OPINE** as follows:

**[6] GUIDED** by the provisions of Section 21A of the Supreme Court Act as well as Rule 28(5) of the Supreme Court Rules, 2020, together with the principles enunciated in *Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others* (supra), we restate this Court’s power to review its own decisions as follows. As a general rule, the Supreme Court cannot sit on appeal over its own decisions, or to review its decisions, save to correct obvious errors apparent on the face of the decision. However, in the exercise of its inherent powers, the Court may review its decision(s) **“in exceptional circumstances, so as to meet the ends of justice”** in the following instances 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.”***

**[7] APPLYING** these conditions to this application, we find that the applicants have failed to demonstrate that the Ruling of this Court of 6<sup>th</sup> October 2023 was obtained by fraud, deceit, misrepresentation of facts or in what way it is a nullity. What the applicants have tried to do is to introduce new evidence, which was not before the Court during the application for conservatory orders, in the quest to persuade this Court to change its mind and rule in their favour.

**[8] CONSEQUENTLY**, we have no hesitation in declaring that, as framed, the application falls short of the exceptional circumstances, and we decline the invitation to exercise the Court’s limited discretion to review the ruling. The aim of this application is to avail the applicant a second bite at the cherry. For these reasons, the application lacks substance and is disallowed.

**[9]** On costs, the award of the same is discretionary and follows the principle set out by this Court in ***Jasbir Singh Rai & 3 other v. Tarlochan Singh Rai & 4 others***, SC Petition No. 4 of 2012; [2014] eKLR that costs follow the event. In exercise of our discretion, the applicants shall bear the costs of this application.

**[10] ACCORDINGLY**, we make the following orders:

- i) The Notice of Motion dated 12<sup>th</sup> October 2023 and filed on 13<sup>th</sup> October 2023 is hereby dismissed.***
- ii) The costs of this application shall be borne by the applicants.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 7<sup>th</sup> Day of November 2023.**

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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**

.....  
**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**