



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram; Mwilu (DCJ & VP), Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)*

**PETITION (APPLICATION) NO. E006 OF 2023**

–BETWEEN–

**KIMANI GACHUHI .....1<sup>ST</sup> APPLICANT**

**PETER MBUTHIA GACHUHI ..... 2<sup>ND</sup> APPLICANT**

–AND–

**EVANGELICAL MISSION FOR AFRICA .....1<sup>ST</sup> RESPONDENT**

**CINDY SANYU OKOVA ..... 2<sup>ND</sup> RESPONDENT**

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*(Being an application for review of the Ruling and Orders of this Court  
delivered on 30<sup>th</sup> June 2023*

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Representation:

Mr. Ondari & Ms. Sadia ..... for the applicants  
*(Iseme, Kamau & Maema Advocates)*

Ahmednasir Abdullahi, SC & Ms. Rita Joyce .....for the respondents  
*(Ahmednasir Abdullahi Advocates LLP)*

## **RULING OF THE COURT**

**[1] UPON** perusing the Notice of Motion dated 28<sup>th</sup> July 2023 and filed on 2<sup>nd</sup> August 2023, brought pursuant to Section 21A (a) and (d) of the Supreme Court Act and Rule 31 (1) and (6) of the Supreme Court Rules 2020, seeking *to review the Ruling and Orders of this Court delivered on 30<sup>th</sup> June 2023; reinstatement for hearing of the Petition dated 10<sup>th</sup> March 2023 and filed on 16<sup>th</sup> March 2023; grant of the Motion dated 23<sup>rd</sup> March 2023 and filed on 28<sup>th</sup> March 2023; dismissal of the Motion dated 30<sup>th</sup> March 2023 and filed on 4<sup>th</sup> April 2023; and costs; and*

**[2] UPON** considering the applicants' grounds on the face of the application and affidavit sworn by the 1<sup>st</sup> applicant on 28<sup>th</sup> July 2023, in which he contends that; the Judgment of the Court of Appeal (challenged in the Petition struck-out) was premised on a non-existent public policy on free primary education; no such policy has been enacted under the Education Act, the Basic Education Act or any other statute; as a consequence, the impugned Ruling was premised on a non-existent law and misrepresentation of facts; this Court has a constitutional duty to correct the error by the Court of Appeal; and unless the said Ruling is set aside, the applicants' constitutional rights on the interpretation and applicability of public policies, the rule of law under Article 10 and to a fair hearing under Article 50 of the Constitution will be violated; and

**[3] FURTHER** considering the applicants' submissions dated 28<sup>th</sup> July 2023 and supplementary submissions dated 7<sup>th</sup> September 2023, to the effect that this Court has jurisdiction to review its decisions, and their application meets the threshold under Section 21(A) of the Supreme Court Act. Moreover, the applicants restate their grounds in support and urge that the superior courts below lacked the jurisdiction to pronounce public policy on matters of enforcement of an Award against private educational institutions, when no such policy has been enacted; the public policy alleged and relied on by the said courts violated Articles 232(1)(d)

and 10(1) (c) of the Constitution and Section 12 of the Public Service (Values and Principles) Act; this Court has an inherent jurisdiction to ensure that an injustice is not committed, as was its finding in **Dynes Muriithi & 4 Others v. Law Society of Kenya & Another**; SC (Application) No. 12 of 2015, [2016] eKLR; therefore the Court had jurisdiction to entertain the appeal dismissed by the impugned Ruling but fell in error in striking out the same; and

[5] **HAVING** read the respondents' Grounds of Opposition dated 25<sup>th</sup> August 2023, and filed on 28<sup>th</sup> August 2023, wherein it is urged that the application is an abuse of court process and should be dismissed in *limine*; this Court lacks the requisite jurisdiction to hear and determine the instant application as it does not fall within the purview of Section 21(A) of the Supreme Court Act; the said application does not meet the threshold settled in **Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others**; SC Petition No. 6 of 2014, [2017] eKLR (**Fredrick Outa Case**); and that the Appeal which was struck out did not raise any issues of contestation revolving around the interpretation or application of the Constitution, to warrant the exercise of this Court's jurisdiction under Article 163(4) (a) of the Constitution; and

[6] **UPON** considering the respondents' submissions dated 25<sup>th</sup> August 2023 and filed on 28<sup>th</sup> August 2023, wherein the respondents restate their grounds in opposition and further urge that this Court, having determined it lacked the jurisdiction to hear the appeal by the applicants under the principles settled in the **Geo Chem Middle East v. Kenya Bureau of Standards**; SC Petition No. 47 of 2019, [2020] eKLR, similarly lacks the jurisdiction to entertain the instant application; and the applicants are misleading the Court regarding several public policies on education, such as the Sessional Paper No. 1 of 2005 on Education Training and Research, and the TIVET Institutions Guidance and Counselling Policy and Operational Guidelines (2011); and

[7] **BEARING IN MIND** that the legal position as regards this Court's power to review its own decisions is well settled in the cases of **Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others**; SC Petition (Application) No. 4 of 2012, [2013] eKLR and **Fredrick Otieno Outa**; wherein this Court held that, as a general rule, the Supreme Court has neither the jurisdiction to sit on appeal over its own decisions, nor the jurisdiction to review its decisions, other than in the manner contemplated by Section 21(A) of the Supreme Court Act , that is where:

- i. *The judgment, ruling or order is obtained through fraud, deceit or misrepresentation of facts;*
- ii. *The judgment, ruling or order is a nullity by virtue of having been made by a court which was not competent;*
- iii. *The court was misled into giving judgment, ruling or order under the belief that the parties have consented thereto; and*
- iv. *The judgment, ruling or order was rendered on the basis of repealed law or as a result of a deliberate concealment of a statutory provision.*

[8] **WE NOW OPINE** as follows:

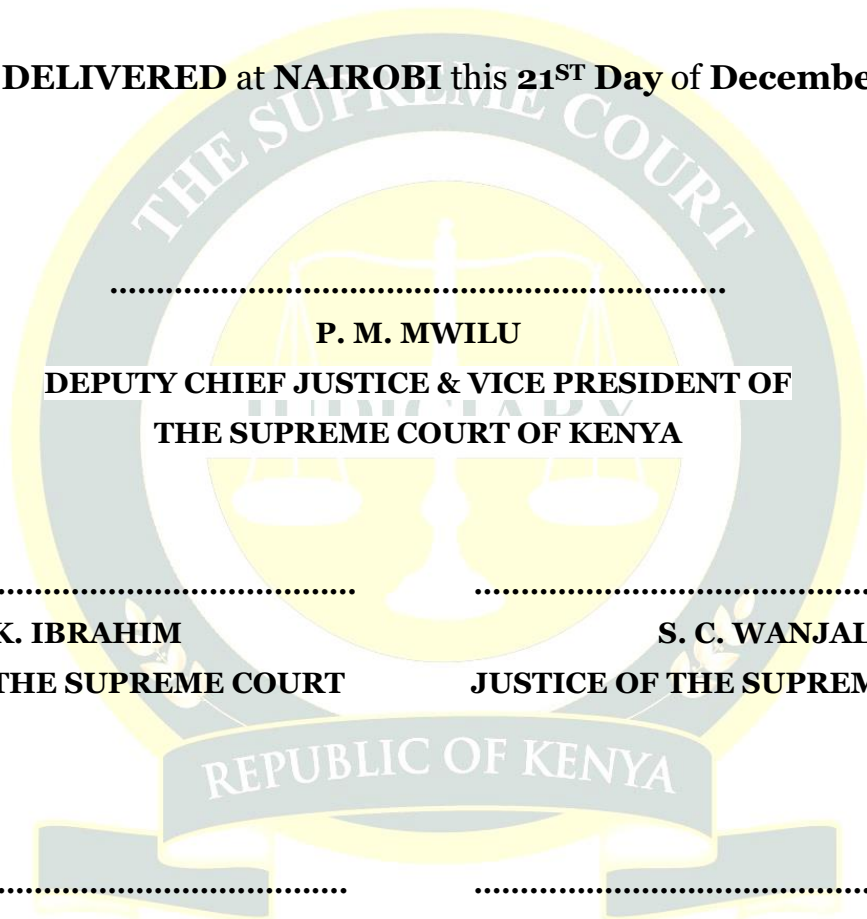
- i. Having considered the pleadings and submissions by the parties herein, we find that the applicants have not demonstrated to our satisfaction that the impugned Ruling was obtained by fraud or deceit, is a nullity, was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision, or that the Court was misled into giving its ruling under review on a mistaken belief that the parties had consented thereto (as per the legal principles settled in the **Fredrick Otieno Outa Case**); and
- ii. In our view, the instant application is an appeal disguised as a motion for review, and therefore does not fall within the confines of the parameters prescribed in the foregoing paragraphs.

**[9] CONSEQUENTLY** and for reasons aforesaid, we make the following orders:

- (i) The Notice of Motion dated 28<sup>th</sup> July 2023 and filed on 2<sup>nd</sup> August 2023 is hereby dismissed; and**
- (ii) The applicants shall bear the respondents' costs.**

**It is so Ordered.**

**DATED and DELIVERED at NAIROBI this 21<sup>ST</sup> Day of December 2023.**



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**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF**  
**THE SUPREME COURT OF KENYA**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**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**