REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION (APPLICATION) NO. 32 (E036) OF 2022

(CONSOLIDATED WITH PETITIONS NOs. 35 (E038) & 36 (E039) OF 2022)

–BETWEEN–

SIRIKWA SQUATTERS GROUP ..... APPLICANT

–AND–

FANIKIWA LIMITED ..... 1ST RESPONDENT/APPELLANT

MARY JEPKEMBOI TOO AND

SOPHIA JELIMO TOO (Suing as joint

***Administrators' ad litem* of the Estate of**

MARK KIPTARBEI TOO) ..... 2ND RESPONDENT/APPELLANT

LONRHO AGRIBUSINESS

(EA) LIMITED ..... 3RD RESPONDENT/APPELLANT

DAVID KORIR ..... 4th RESPONDENT/APPELLANT

THE COMMMISSIONER OF LANDS .....5TH RESPONDENT

THE CHIEF REGISTRAR OF TITLES .....6TH RESPONDENT

DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT ..... 7TH RESPONDENT

DIRECTOR OF SURVEY ..... 8TH RESPONDENT

DISTRICT LAND OFFICER,

UASIN GISHU DISTRICT ..... 9TH RESPONDENT

HIGHLAND SURVEYORS ..... 10TH RESPONDENT

KENNEDY KUBASU .....11TH RESPONDENT

AHMED FEREJ & 60 OTHERS ..... 12TH RESPONDENT

RICHARD KIRUI & 15 OTHERS ..... 13TH RESPONDENT

STANBIC LIMITED .....14TH RESPONDENT

KENYA COMMERCIAL BANK LIMITED .....15TH RESPONDENT

ECO BANK LIMITED .....16TH RESPONDENT

MILLY CHEBET ..... 17TH RESPONDENT

NATIONAL BANK OF KENYA LIMITED ..... 18TH RESPONDENT

KENYA WOMEN MICRO-FINANCE BANK ..... 19TH RESPONDENT

COMMERCIAL BANK OF AFRICA .....20TH RESPONDENT

CO-OPERATIVE BANK OF KENYA ..... 21ST RESPONDENT

(*Being an application for Review of the Judgment and Order of the Supreme Court (Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 15th December 2023 in* SC *Petition No 32 (E036) of 2022 consolidated with Petition Nos. 35 (E038) & 36 (E039) of 2022)*

Representation

Mr. William Arusei for the Applicant
(*Arusei & Company Advocates*)

SC Fred Ngatia for the 1st Respondent/Appellant
(Ngatia & Associates Advocates)

Prof. Tom Ojienda for the 2nd Respondent/Appellant
(Prof. Tom Ojienda & Associates Advocates)

Ms. Karen Chesoo for the 3rd and 4th Respondents/Appellants
(Kalya & Co. Advocates)

Mr. M.W. Odongo for the 5th-9th Respondents
(The Attorney Generals Chambers)

Ms. Anne Odwa for the 12th Respondent

(Nyairo & Co. Advocates)

Ms. Anne Odwa for the 13th Respondent
(Z.K. Yego & Co. Advocates)

Ms. Arriella Saina for the 14th, 15th and 18th Respondents
(G&A Advocates LLP)

Mr. Onyango for the 16th Respondent
(Z.K. Yego Law Offices)

Ms. Barbara Gichuhi for the 21stRespondent
(Waweru Gatonye & Co. Advocates)

RULING OF THE COURT

A. INTRODUCTION

[1] The applicant, Sirikwa Squatters Group, filed a Notice of Motion dated 20th December 2023, seeking the review of this Court's judgment delivered on 15th December 2023. In particular, the applicant seeks the following orders:

a) ***Spent.***

b) ***THAT this Court sets aside or reviews its Judgment delivered on the 15th December, 2023 and make orders vacating the above Judgment in its entirety on account that the Judgment is a nullity as the court itself was not competent and further that the Judgment was obtained by fraud or deceit and misrepresentation of facts and therefore for vacation and it is vacated and/or set aside in its entirety.(sic)***

c) ***THAT the Judgment of the Environment and Land Court Eldoret of the 9th February, 2017 and the Court of Appeal of the 18th November, 2022 be reinstated in full.***

d) ***THAT the orders of permanent injunction issued against Sirikwa Squatters Group from entering, taking possession of and in any other manner interfering with Fanikiwa's (the***

1st appellant) quiet possession of the suit properties described as L.R. NO. PIONEER/NGERIA BLOCK 1(EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495 and 5902 is hereby set aside, vacated and/or discharged in its entirety.

e) And an order that the cost of and incidental to this application abide the result of the said proceeding.

f) Such other or further orders as the Honourable Court may deem fit, just and appropriate in the circumstances.

[2] The application is premised on Section 21A of the Supreme Court Act, Cap 9B of the Laws of Kenya and the following summarized grounds:

a) The Court was not competent to hear and determine the appeal as it should have restricted itself to constitutional grounds.

b) The Court considered matters that went beyond Article 163(4)(a) of the Constitution and tried facts and evidence of the case. In particular, the Court interrogated whether the applicant was a squatter, the intent of surrender of the titles to the suit properties, and whether fraud was adequately proved against the Estate of Mark Too.

c) The Court ignored and/or failed to mention or take cognizance of the letter dated 17th July 2007 contained at Vol.55 of the record of appeal from the Commissioner of Lands, M. Okungu, to the Hon. Attorney General. The letter confirmed that the said office had no objection to the allocation of the suit properties by the Late Daniel Moi, to the applicant.

d) The Court held that the dispute ought to have been resolved through *viva voce* evidence and not purely affidavit evidence thereby overstepping its mandate.

e) On fraud, the Court erroneously relied on the affidavit of R. J. Simiyu on the purpose of surrender. The said affidavit contained an annexture titled 'surrenders of land dated the 1st November 2000' which annextures were alleged to be new and additional evidence that were produced for the first time before the Supreme Court. They were allegedly not interrogated or considered by the Superior Courts below.

f) The Court condemned the Late President Daniel Toroitich Arap Moi unheard.

g) The Judgment was obtained through misrepresentation of facts. The appellants misrepresented that the land was allocated by the Late President Daniel Moi whilst the same was done by the Commissioner of Lands.

B. BACKGROUND

[3] On 15th December, 2023, this Court made a number of findings including on its jurisdiction, where it determined that the consolidated appeal met the threshold set out in Article 163(4) (a) of the Constitution. It further found that the appellant's right to a fair hearing was violated by the Superior Courts below and the trial Court ought to, in the specific circumstances of this case, have conducted the trial by taking *viva voce* evidence.

In addition, the Court stated that the applicant did not have a legitimate expectation of acquiring the suit properties as its members were not *bona fide* squatters thereon, and neither were the suit properties available for allocation as they had only been surrendered by the registered proprietor, Lonrho Agribusiness, the 3rd appellant, for purpose of conversion from leasehold interest under the *RTA* to freehold interest under the *RLA*.

[4] This Court subsequently made the following orders:

i. ***The consolidated appeal is hereby allowed.***

ii. ***The judgment and orders of the trial and appellate courts are hereby set aside in their entirety.***

iii. ***The 1st respondent herein, to wit, Sirikwa Squatters Group, its agents, members, servants, employees and/or representatives are hereby permanently restrained from entering, taking possession of and in any other manner interfering with Fanikiwa's (the 1st appellant) quiet possession of the suit properties described as LR No. Pioneer/Ngeria Block 1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495 and 5902***;

iv. ***We declare that the finding by the superior courts below to the effect that the retired President's approval of allocation of the suit parcels and the subsequent surrender of the titles was for purposes of settling Sirikwa's members, violated and arbitrarily deprived the 3rd appellant herein, Lonrho Agribusiness, of its rights over and interests in the suit parcels as guaranteed under Article 40 of the Constitution.***

v. ***All parties shall bear their own costs.***

[5] It is this decision that the applicant urges the Court to review. It should be noted at this stage, that there appears to have been some confusion during filing of pleadings, with reference to the naming and allocation of numbering of the respondents by counsel in this *application* (as opposed to the reference naming and numbering in the *appeal* which was heard before). The Court has therefore

taken the liberty of renaming and renumbering of the same for clarity, elegance and a concise reading of this ruling.

C. PARTIES' SUBMISSIONS

(a) The Applicant's (1st Respondent) Submissions

[6] The applicant (1st respondent) argued that this Court fell into error by considering factual findings and the attendant evidence thereby disregarding its decision in ***Dina Management Limited v County Government of Mombasa & 5 Others***, SC Petition No. 8(E010) of 2021; [2023] KESC 30 (KLR). Further, by allegedly condemning the Late President Daniel Toroitich Arap Moi unheard, this Court's judgment is founded on a violation of natural justice. Therefore, they argue, the same cannot stand and must be set aside, citing in support of this point, the finding in the case of ***R vs. Vice Chancellor JKUAT***, Misc. Civil Appl. No. 30 of 2007; [2008] eKLR. It was the applicant's argument that their motion has met the threshold for review as set out in Section 21A of the Supreme Court Act and in ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others***, SC Petition No. 6 of 2014; [2017] eKLR.

(b) The 1st & 2nd Respondents' /Appellants Submissions

[7] Sophia Chemengen Too swore a replying affidavit on 15th January 2024 as a director of the 1st respondent/appellant. She deponed that the applicant had not met the grounds for review and that the application was an appeal of the judgement and not a review of the same. She urged that this Court cannot sit on an appeal of its own decisions, and that a dissatisfied litigant cannot be reheard with the hope of a different outcome. She also argued that on the issue of jurisdiction, this Court had already made a determination on the same in the judgment and therefore the issue could not be subjected to an appeal.

[8] In addition, she swore a replying affidavit on 21st January 2024 on behalf of the 2nd respondent/appellant. Both the replying affidavit and submissions dated

29th January 2024 raise similar grounds to those raised by the 1st respondent/appellant.

(c) The 3rd and 4th Respondents' /Appellants Submissions

[9] The 4th respondent/appellant swore a replying affidavit on 1st January 2024 on behalf of the 3rd and 4th respondents/appellants. They filed submissions dated 12th January 2024 wherein they took a similar position as the 1st and 2nd respondents/appellants. They added that the applicant lacked *locus standi* to speak on behalf of His Excellency the Late Retired President Daniel Toroitich Arap Moi.

(d) The 5th -9th Respondents' Submissions

[10] They filed their grounds of opposition and submissions both dated 22nd January 2024. They argue that the application lacks merit.

[11] At this point, we note from the record that despite filing the above-mentioned documents electronically, the 5th-9th respondents did not file the physical copies thus running afoul the provisions of Rule 12(1) of the Supreme Court Rules, 2020. This Court has in the past held that failure to effect both physical and electronic filing means that the specific document is not properly filed. See ***Kenya Hotel Properties Limited v Attorney General & 5 Others,*** SC Application 2 (E004 of 2021) of 2021; [2021] KESC 49 (KLR) and ***Sonko v Clerk, County Assembly of Nairobi City & 11 Others,*** SC Petition (Application) 11 (E008) of 2022; [2022] KESC 28 (KLR). Notably, to this day, there is no indication that the 5th - 9th respondents have filed the physical copies. In the circumstances, the documents are not properly filed and not properly before Court. The same are hereby expunged from the record. In any event, the 5th-9th respondents will not be prejudiced given that their submissions are similar to those of the 1st - 4th respondents/appellants.

(e) The 12th, 13th, 14th, 15th, 18th and 21st Respondents' Submissions

[12] Ahmed Ferej swore a replying affidavit on 4th January 2024 on behalf of the 12th respondent who filed submissions on even date. The 13th respondents filed their grounds of opposition and submissions both dated 24th January 2024. The 14th, 15th and 18th respondents filed joint grounds of opposition and submissions all dated 16th January 2024. Equally, the 21st respondent filed an affidavit sworn by its head of legal services, Mr. Lawrence Karanja, on 29th January 2024 and submissions of even date. The afore-stated respondents echoed the same sentiments, namely that the application for review did not meet the parameters set out in Section 21A of the Supreme Court Act.

D. PRELIMINARY ISSUE FOR DETERMINATION

[13] We note that on 31st January 2024, whilst before the Deputy Registrar of this Court, the applicant's counsel made an oral submission in which he objected to the responses filed by the 2nd respondent/ appellant, 5th - 9th respondents, 13th and 21st respondents on the ground that time started running on 28th December 2023 and the responses ought to have been filed by 10th January 2024 or thereabouts. He urged the Court to either expunge all the documents filed after 30th January 2024 or grant the applicant leave to respond.

[14] In response, the 2nd respondent's/appellant counsel similarly made oral submissions before the Deputy Registrar to the effect that they filed their replying affidavit on 15th January 2024, submissions and a list of authorities on 30th January 2024. Relying on Order 50 Rules 4 of the Civil Procedure Rules, he submitted that the time between 21st December 2023 and 13th January 2024 is excluded from computation of time. He urged that time began to run on 13th January 2024 and so, their documents were filed within the timelines given by the Court. He further urged that upon service of the supplementary affidavit on 22nd January 2024, time started running pursuant to which they filed their submission

and list of authorities on 30th January 2024. The Deputy Registrar referred the resolution of this issue to the Court.

[15] The Supreme Court Act and the Supreme Court Rules, 2020 provide the substantive and procedural law for this Court. There is no basis therefore to rely on other laws unless expressly provided for, and unless there is a lacuna. See ***Daniel Kimani Njihia v Francis Mwangi Kimani & another*****, [2015] eKLR**, and ***Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others (Application 12 (E021) of 2021) [2022] KESC 3 (KLR) (10 February 2022) (Ruling)*** where it was reiterated that the only regime of law that govern proceedings before the Court are, the Constitution, Supreme Court Act, the Supreme Court Rules and any Practice Directions. Further, it was held that the Appellate Jurisdiction Act and the Civil Procedure Rules are not applicable when moving this court; and that the court has to be moved under the correct provisions of the law. **Rule 15 of the Supreme Court Rules, 2020** provides that time computation shall be in accordance with the Constitution, Section 57 of the Interpretations and General Provisions Act [Cap 2] and any directions of the Court. Subsection 2 provides that the Court may extend any time limited by the Rules or by any decision of the Court. These provisions are the ones that constitute the applicable law and not Order 50 Rule 4 of the Civil Procedure Rules, which clearly do not apply to this Court in the circumstances.

[16] Applying the provisions of Section 57 of the Interpretation and General Provisions Act to the instant case, 14 days from 28th December 2023 would take us to 18th January 2024 or thereabouts. Therefore, all the respondents were required to have filed and served their responses and submissions by 18th January 2024. Going by that, it follows that indeed the 2nd respondent/2nd appellant, 5th- 9th respondents, 13th and 21st respondents filed their responses out of time. We reject the 2nd respondent's/2nd appellant's argument that time re-opened after the applicant filed a supplementary affidavit on 22nd January 2024.

[17] That said, this Court has in the past underscored the importance of complying with timelines issued. For instance, in the case of ***Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others,*** SC Petition No. 5 of 2016; [2018] eKLR, we held as follows:

> ***"[24] We however acknowledge that the petitioner's submissions were filed out of time.... We underscore the importance of complying with Court Orders and directions given especially with regard to filing and service of documents within the requisite time. That notwithstanding, we take cognizance of Rule 53 of the Supreme Court Rules, 2012 which gives us power to extend the time limited by the Rules, or by any decision of the Court. To this extent therefore, the late filing of submissions is not patently incurable."***

[18] In the ***Jane Cheperenger Case***, we allowed the submissions that had been filed 30 days out of time and found that the same was not patently incurable. In the case of ***Kenya Railways Corporation & 2 Others v Okoiti & 3 Others***, Petition (Application) 13 (E019) of 2020 & Petition 18 of 2020 (Consolidated); [2022] KESC 68 (KLR), we cited the decision in ***Jane Cheperenger Case***. We, however, expunged the 1st respondent's replying affidavit as it was filed almost 2 years after the petition was filed.

[19] Considering the circumstances of the present case, we note that despite the late filing, the applicant still exercised his right of rejoinder to all but one respondent, the 13th respondent. The 13th respondents' grounds of opposition and submissions relay a similar argument to that of the other respondents. Further, the applicant has essentially responded to these submissions elsewhere. We are, therefore, of the considered opinion that it would be in the interests of justice to consider the averments by the 2nd respondent/2nd appellant, 13th and 21st respondents, late filing notwithstanding.

E. ISSUES FOR DETERMINATION

[20] Taking into account the submissions of all parties, one singular issue emerges for determination: ***Whether the applicant has established a basis for the review of this Court's decision.***

[21] The applicant is asking this Court to review its judgment delivered on 15th December 2023. It is a well-established principle that this Court cannot sit on appeal or review its decision(s) save for the manner prescribed under Section 21A of the Supreme Court Act, which provides as follows:

> "***The Supreme Court may review its own decisions, either on its own motion, or upon application by a party in any of the following circumstances-***
>
> ***a) where the judgment, ruling or order was obtained through fraud, deceit or misrepresentation of facts;***
>
> ***b) where the judgment, ruling or order is a nullity by virtue of being made by a court which was not competent;***
>
> ***c) where the court was misled into giving a judgment, ruling or order under the belief that the parties have consented; or***
>
> **d)** ***where 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.***"

[22] Rule 28(5) of the Supreme Court Rules, 2020 provides as follows:

> ***"(5) The Court may review any of its decisions in any circumstance which the Court considers meritorious,***

exceptional, and in the public interest, either on the Court's own motion, or upon application by a party."

[23] The applicant argued that this Court considered matters that went beyond its constitutional and statutory jurisdictional mandate as it had no jurisdiction to hear the appeal in the first place. It further argues that the Court went beyond its constitutional mandate as set out in Article 163(4) (a). Secondly, it argues that the Court had no competence to try facts and evidence of the case, in particular, interrogating the applicant's squatter status; considering whether fraud was adequately proved against the Estate of Mark Too; considering the allegation that Retired President Daniel Moi allocated the suit properties to the applicant and assessing the intent of the surrender of the titles to the suit properties.

[24] On the ***question of this Court's jurisdiction*** to hear the appeal, we are in agreement with the 1st respondent's/ appellant submissions that this Court rendered itself on the same in the judgment.

[25] As to the ***question of the alleged allotment*** of the suit properties to the applicant, the propriety thereof and to the finding that the applicants' members were not squatters; we find that in order to resolve the dispute, it invariably followed that the Court could and would descend into the factual contestations. This was our holding in the case of ***Dina Management Limited v County Government of Mombasa & 5 Others,*** SC Petition 8 (E010) of 2021; [2023] KESC 30 (KLR) on the question of considering facts of a case. ***See Pars. 49 and 50.***

[26] On the ***question of fraud***, the applicant alleged that considering the affidavit of R.J. Simiyu was fraudulent since it contained an annexure titled "*Surrenders dated 1st November 2000'* that was not produced before the superior courts below. A perusal of the Court record will show that the affidavit of R.J. Simiyu was indeed presented before the Environment and Land Court and the Court of Appeal but it would appear that the depositions therein were not

considered by the superior courts below. We find that the applicant has therefore failed to establish that the judgment was obtained through fraud, deceit or misrepresentation of facts.

[27] The applicant also raised other grounds to support his case for review for instance that the Late Retired President Daniel Moi was condemned unheard and the Court's finding that the dispute ought to have been resolved through *viva voce* evidence. It is patently obvious that these are purely grounds for appeal, and not review.

[28] Looking at the issues raised by the applicant, we are unable to see how any of the grounds and allegations fall within the parameters of our jurisdiction of review. At best, the notice of motion is an appeal, disguised as an application for review. The applicant is clearly looking to have the Court reconsider and relook the entire judgment and overturn it, which this Court has no jurisdiction to do. In ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others***, SC Petition No. 6 of 2014; [2017] eKLR, this Court held that it does not have the jurisdiction to sit on appeal over its own decisions. Further, that an application for review is not an appeal and it is not meant to give a litigant another bite at the cherry.

[29] In the circumstances, we find this application is for dismissal. The applicant having failed in the prayer for review, it does not suffice to consider the other prayers for reinstatement of the judgment of the Environment and Land Court and for injunctive reliefs as sought. In line with our decision in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others,*** SC Petition Application No. 4 of 2012; [2014] eKLR, we are inclined to award costs to the 1st - 4th respondents/appellants, the 12th, 13th, 14th, 15th, 18th and 21st respondents. Having expunged the 5th - 9th respondents documents, we shall not award them costs.

ORDERS

[30] Consequently**,** and for the reasons aforesaid, we make the following Orders:

i. ***The application dated 20th December 2023 is hereby dismissed.***

ii. ***The applicant shall bear the costs of the application which shall be payable to the 1st-4th respondents/appellants, the 12th, 13th, 14th, 15th, 18th and 21st respondents.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **31st** day of **May, 2024.**

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT

.....

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

.....

M. K. IBRAHIM
JUSTICE 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