



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. 11 (E008) OF 2022

– BETWEEN –

HON. MIKE MBUVI SONKO APPELLANT/APPLICANT

– AND –

**THE CLERK, COUNTY ASSEMBLY
OF NAIROBI CITY 1ST RESPONDENT**
**THE SPEAKER OF NAIROBI CITY
COUNTY ASSEMBLY 2ND RESPONDENT**
NAIROBI CITY COUNTY ASSEMBLY 3RD RESPONDENT
THE CLERK OF THE SENATE 4TH RESPONDENT
THE SPEAKER OF THE SENATE 5TH RESPONDENT
THE SENATE 6TH RESPONDENT
HON. ATTORNEY GENERAL 7TH RESPONDENT
**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (IEBC) 8TH RESPONDENT**
**THE ASSUMPTION OF THE OFFICE
OF THE COUNTY GOVERNOR
COMMITTEE, NAIROBI CITY COUNTY 9TH RESPONDENT**
**HON. BENSON MUTURA,
THE ACTING GOVERNOR NAIROBI COUNTY 10TH RESPONDENT**
**ANNE KANANU MWENDA,
THE DEPUTY GOVERNOR 11TH RESPONDENT**
OKIYA OKOITI OMTATAH 12TH RESPONDENT

(Being an application for leave to adduce additional evidence, and review of the Judgment of the Supreme Court and the reasons thereof (Koome: CJ & P, Mwilu: DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) dated 15th July, 2022 and 5th December, 2022 respectively)

Representation:

Mr, Ochieng Oginga, Ms. Phiney Opiata & Mr. Kennedy Wanyanga for the applicant
(*Wanyanga & Co. Advocates*)

Mr. Kevin Kokebe & Mr. Felix Mulaku for the 1st respondent
(*Diro Advocates LLP*)

Mr. Stephen Shikanda for the 2nd respondent
(*Osundwa & Co Advocates*)

Mr. Eugene Mukele h/b for Mr. Brian Ashioya for the 3rd respondent
(*Ashioya Mogire & Nkatha Advocates*)

Mr. Eugene Mukele for the 4th, 5th and 6th respondents
(*The Senate*)

Mr. Thande Kuria for the 7th respondent
(*Attorney General Chambers*)

Mr. Joseph Kiarie for the 11th respondent
(*Joseph Kiarie & Company Advocates*)

Okiya Okiiti Omtatah the 12th respondent
(*appearing in person*)

No appearance for the 8th, 9th and 10th respondents

RULING OF THE COURT

[1] **COGNISANT** that following the resolution of the Nairobi City County Assembly and the Senate, the applicant was impeached from the office of the Governor of Nairobi County on 17th December, 2020; the applicant and other litigants filed petitions in the High Court, HC Constitutional Petition No. E425 of 2020 (consolidated with Petition No. E014 of 2021) - ***Mike Sonko Mbuvi Gideon Kioko & Another vs. Clerk, Nairobi City County Assembly & 9 Others***, and HC Constitutional Petition No. E005 of 2021 (consolidated with Petition No. E433 of 2020, E007 of 2020, E009 of 2020, E011 of 2021, E012 of 2021, E013 of 2021, E015 of 2021, E019 of 2021 and E021 of 2021), ***Okiya Omtatah Okiiti & 9 Others vs. Anne Kananu Mwenda & 6 Others; Mike Mbuvi Sonko Kioko Gideon & 9 Others*** (the High Court petitions), challenging the impeachment; the High Court (*Chitembwe, J.* (as he then was),

Korir & Okwany, JJ.) by a judgment dated 24th June, 2021 dismissed the petitions, and the said decision was upheld by the Court Appeal vide a judgment dated 4th March, 2022 in **Civil Appeal No. E425 of 2021**; and equally, this Court by a judgment dated 15th July, 2022 with the detailed reasons thereof delivered on 5th December, 2022 dismissed the second appeal herein principally on the ground that its jurisdiction had not been properly invoked; and

[2] UPON CONSIDERING the Notice of Motion dated 18th March, 2024 and lodged on 20th March, 2024 by the applicant under Articles 23, 47, 48, 50, 163(1) & (4), and 159 of the Constitution, Sections 22 and 24 of the Supreme Court Act (Cap 9B, Laws of Kenya) and Rules 23, 29 and 31 of the Supreme Court Rules, 2020 seeking the following Orders:

“

- i. ...
- ii. *The Honourable Court be pleased to review, vary, vacate and/or set aside its judgment of 15th July, 2022 together with the reasons as contained in its reasoned judgment dated 5th December, 2022.*
- iii. *The Honourable Court be pleased to declare that the proceedings and subsequent orders emanating from the High Court petitions that gave rise to the appeal before this Court were a nullity and a mistrial.*
- iv. *In the alternative to prayer (iii) above, the Honourable Court be pleased to order a re-opening and fresh hearing of the High Court petitions before a new bench of the High Court. (sic)*
- v. *The Honourable Court be pleased to admit new and important evidence in the form of –*

- a) *A letter by the Hon. Justice Martha, K. Koome, the Chairperson of the Judicial Service Commission dated 27th April, 2022 addressed to the President of the Republic of Kenya, H.E Uhuru Kenyatta, recommending for the appointment of a Tribunal to consider the removal from office of Hon. Mr. Justice Said Juma Chitembwe, Judge of the High Court.*
- b) *The Gazette Notice No. 5540 dated 18th May, 2022 appointing a Tribunal to inquire into the conduct of Hon. Mr. Justice Said Juma Chitembwe, Judge of the High Court.*
- c) *The report and recommendations of the Tribunal appointed to inquire into the conduct of Hon. Mr. Justice Said Juma Chitembwe, Judge of the High Court.*
- d) *Proceedings and Hansard of the Senate and Videos in regard to the impeachment proceedings before the Senate in regard to the applicant.*
- e) *The rulings in Nairobi CMCC Anti-Corruption Case No. 1 of 2020 dated 21st December, 2022; Nairobi HC Criminal Revision Applic. No. E002 of 2023 dated 10th July, 2023; Nairobi CMCC Anti-Corruption Case No. 32 of 2019 dated 22nd November, 2023; and Kiambu CMCR Case No. E078 of 2021 dated 11th March, 2024.*
- vi. *The Honourable Court be pleased to issue any further orders as it may deem fit in the circumstances as shall meet the ends of justice.*
- vii. *Costs of the application be provided for.” and*

[3] UPON REVIEWING the affidavits in support of the Motion sworn by the applicant, on 18th March 2024, 26th April 2024 and 9th May 2024, and the applicant's submissions dated 18th March, 2024; all of which are to the effect that, the then Acting Chief Justice empanelled a 3-Judge Bench of the High Court (*Chitembwe, J. (as he then was), Korir & Okwany, JJ.*) to determine the High Court petitions; while the appeal herein was pending before this Court, the Judicial Service Commission (JSC) commenced proceedings for removal of *Chitembwe, J. (as he then was)* from office under Article 168 of the Constitution based on his alleged misconduct; pursuant to JSC's recommendation, the President appointed a Tribunal to investigate the Judge's conduct; some of the allegations against the Judge before the Tribunal touched on his conduct in handling the High Court petitions, wherein he was the Presiding Judge in the 3-Judge Bench; the import of such allegations was that the Judge acted contrary to the principles of natural justice, and unduly influenced the outcome of the High Court petitions rendering the entire proceedings a nullity; and

[4] NOTING the applicant's deposition that, the Tribunal observed that the Judge should have not only disclosed his relationship with the applicant (on account of marital relations and land transactions) to the Hon. Chief Justice, his colleague Judges in the 3-Judge Bench, and the parties in the High Court petitions but should have also recused himself from the matter. Ultimately, that the Tribunal found the Judge guilty of gross misconduct and recommended his removal from office. Further, that this Court affirmed the Tribunal's decision by its judgment dated 28th December, 2023 in ***Chitembwe vs. The Tribunal Appointed to Investigate into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court***, SC Petition No. E001 of 2023; [2023] KESC 114 (KLR). Accordingly, the applicant contended that the Tribunal's decision has a bearing on the High Court judgment which culminated in the appeal before this Court; in that, the High Court Judgment is tainted with breach of the principles of natural justice enshrined under Articles 47 and 50 of the Constitution

and the applicant's fundamental rights; and moreover, the said Judge having been removed from office due to his misconduct in the High Court petitions meant that the joint judgment of the 3-Judge Bench of the High Court could not stand; and

[5] FURTHER NOTING the affidavit sworn by Benson Mutura, the former Speaker of Nairobi City County Assembly and the 10th respondent herein, on 3rd May, 2024 in support of the Motion, the tenor of which is that, he was present when the motion to impeach the applicant was raised and considered before the County Assembly; there was no lawful impeachment and the whole process was tainted with illegality as firstly, the proceedings were initiated as a result of political influence wherein members of the County Assembly were intimidated and coerced through state machinery; secondly, the impeachment proceedings proceeded despite conservatory orders issued by the Employment and Labour Relations Court halting the same being in force; thirdly, there was no requisite quorum when the resolution to impeach the applicant was passed by the County Assembly; and fourthly, the votes were cast by clerks as opposed to members of the County Assembly. Likewise, Abdi Ibrahim Hassan, the former majority leader of the Nairobi County Assembly, and Michael Ogada, a former member of the Nairobi County Assembly, by their affidavits sworn on 15th December, 2023 and 24th November, 2023 respectively reiterated the averments made by Benson Mutura; and

[6] UPON COGITATING on the applicant's assertion that, some of the grounds of his impeachment were subject of criminal proceedings, which have been subsequently determined in his favour; he has been acquitted of all the charges therein and absolved of wrong doing; if the said decisions/rulings, which he seeks to adduce as additional evidence, had been available during his impeachment proceedings both the County Assembly and Senate would have arrived at a different decision; the decisions in the criminal proceedings go to the heart of the appeal herein and more so, with regard to this Court's findings on the grounds of his impeachment. Further, that the additional evidence sought to be adduced is

credible and necessary to ensure that the issues before this Court are conclusively determined; this Court is not *functus officio* and has unfettered discretion under Sections 21A of the Supreme Court Act and Rule 28 of the Supreme Court Rules to grant the orders sought to cure the injustice caused as appreciated in ***Deynes Muriithi & 4 Others vs. Law Society of Kenya & Another***, SC Applic. No. 12 of 2015; [2016] eKLR; and unless the orders sought are granted, there is a risk that he would be permanently barred from holding office on account of the illegal and unethical conduct of *Chitembwe, J.* (as he then was); and

[7] TAKING INTO ACCOUNT the fact that the 7th respondent's response dated 25th April, 2024 and submissions of even date, as well as the 11th respondent's response and submissions dated 29th April, 2024 support the Motion on more or less similar grounds as the applicant. Further, that the 7th respondent posited that the import of the finding of misconduct on the part of *Chitembwe, J.* has a bearing on the propriety and legality of the High Court judgment; this Court must as a matter of necessity and in the interest of justice expand the scope of review of its decisions based on fraud to include when the judicial machinery itself is tainted such as the matter at hand; and this Court should review its judgment and order the High Court petitions to be heard a fresh by another bench of the High Court; and

[8] CONSIDERING that in opposing the Motion, the 1st respondent lodged submissions dated 7th April, 2024 and an affidavit sworn by Edward Gichana, the Clerk of the Nairobi City County Assembly, on 8th April, 2024. On their part, the 4th 5th and 6th respondents jointly filed an affidavit sworn by Jeremiah Nyegenye, the Clerk of the Senate, on 9th April, 2024 as well as joint submissions dated 11th April, 2024. The combined effect of the foregoing is that this Court had previously, by a ruling dated 8th August 2022, determined an earlier Motion for review of its judgment by the applicant with finality; the instant Motion is a feeble and unwarranted attempt to reopen the matters that have already been determined by

this Court contrary to the decision in ***Kenya Bureau of Standards vs. Geo Chem Middle East***, SC Applic. No. 33 of 2020; [2021] KESC 60 (KLR); and

[9] FURTHER NOTING the said respondents’ contention that the applicant had not met the test for review as delineated in ***Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 Others***; SC Petition No. 6 of 2014, [2017] eKLR; none of the parties herein including the applicant made any application for the said Judge to recuse himself from the High Court petitions; the High Court judgment was unanimously made by the 3-Judge Bench, and the conduct of the other two Judges was not in question; in any event, the unanimous decision of the 3-Judge Bench of the High Court was confirmed by the Court of Appeal and this Court; the applicant was impeached on account of his own conduct as opposed to the Judge’s conduct; and this Court having found that its jurisdiction with respect to the appeal herein was not properly invoked, the Motion at hand could not confer jurisdiction on it. It is instructive to point out that while the 4th, 5th and 6th respondents vide a letter dated 25th April 2024, under the hand of Ms. M. Wangechi, wrote to the Deputy Registrar of this Court that they wished to withdraw their pleadings related to this Motion, they have not filed a formal application in line with Rule 27 of the Supreme Court Rules and therefore, their pleadings are still on record. In addition, the 3rd respondent filed grounds of opposition dated 24th April, 2024 wherein it maintained that the impeachment process before it was above board; and

[10] BEARING IN MIND the following parameters within which this Court can review its judgment, as settled in ***Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 Others (supra)*** and now codified under Section 21A of the Supreme Court Act:

“21A. The Supreme Court may review its own decision, either on its own motion, or upon application by a party in any of the following circumstances—

- a) where the judgement, ruling or order was obtained through fraud, deceit or misrepresentation of facts;*
- b) where the judgement, 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 judgement, ruling or order under the belief that the parties have consented; or*
- d) where the judgement, ruling or order was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision.”*

(See also Rule 28(5) of the Supreme Court Rules.) Further noting that the test for allowing additional evidence as set out under Section 20(2) of the Supreme Court Act is –

“20 (2) The Court, in admitting additional evidence, shall consider whether the additional evidence –

- (a) is directly relevant to the matter before the Court;**
- (b) is capable of influencing or impacting on the decision of the Court;**
- (c) could not have been obtained with reasonable diligence for use at the trial;**
- (d) was not within the knowledge of the party seeking to adduce the additional evidence;**
- (e) removes any vagueness or doubt over the case;**
- (f) is credible and bears merit;**
- (g) would not make it difficult or impossible for the other party to respond effectively; and**
- (h) discloses a case of wilful deception to the Court.; and**

[11] UPON DELIBERATIONS ON THE MOTION AND THE RIVAL SUBMISSIONS, WE OPINE as follows:

- i. It is instructive to note that the applicant did not invoke any legal provisions for adducing additional evidence in his Motion. Be that as it may, the applicant previously filed a Notice of Motion dated 20th July, 2022 in this appeal seeking *inter alia* leave to adduce additional evidence. Some of the evidence he sought to adduce therein included the JSC letter under the hand of the Hon. Chief Justice to the President recommending the appointment of a Tribunal to investigate the conduct of *Chitembwe, J.* (as he then was), and the Gazette Notice appointing the Tribunal. This Court vide a ruling dated 8th August, 2022 dismissed the said Motion and pronounced in part as follows:

“But of great significance is the fact that the applicant has all along been aware of the material he is now seeking to introduce. At the time he lodged the appeal in the Court of Appeal and even in this Court, he was well aware of the gazette notice of 18th May, 2022 in which a tribunal was appointed to investigate the conduct of Chitembwe, J. He has so averred himself in his submissions.”

- ii. We also wish to point out that some of the evidence sought to be adduced in the Motion at hand, such as proceedings, Hansard and videos of the impeachment proceedings before the Senate, were available at the time the High Court petitions were being heard. No explanation had been offered by the applicant as to why he did not adduce that evidence at the High Court. Besides, we are not convinced of the relevance of the additional evidence sought to be adduced by the applicant as pertains to the misconduct of *Chitembwe, J.* (as he then was) to this matter which relates to the

impeachment of the applicant as a Governor. Likewise, with respect to the rulings in the criminal cases in which the applicant was the accused person, it is important to point out that impeachment proceedings of a Governor are not dependent or tied to criminal convictions. In the end, we find that the applicant has not satisfied all the elements under Section 20(2) of the Supreme Court Act to warrant the leave sought to adduce additional evidence. See ***Garama vs. Karisa & 3 Others***, SC Petition No. E020 of 2023; [2024] KESC 1 (KLR)

- iii. The general rule is that once this Court delivers a judgment, it becomes *functus officio* save that, based on exceptional circumstances as delineated under Section 21A the Supreme Court Act and Rule 28 (5) of the Supreme Court Rules, the Court can review its decision. Equally, the applicant did not invoke any of the said provisions in his Motion save for mentioning them in his submissions. Nonetheless, we will address the issue of whether the Motion meets the threshold for the review sought.
- iv. As correctly pointed out by the 1st, 4th, 5th and 6th respondents, the applicant previously filed a Notice of Motion dated 18th July, 2022 in this appeal seeking review of this Court's judgment. One of the grounds upon which the applicant sought review was that by then, a Tribunal had been formed to consider the conduct of *Chitembwe, J.'s* (as he then was) who was the Presiding Judge of the 3-Judge Bench of the High Court which dismissed the High Court petitions. This Court by another ruling dated 8th August, 2022 dismissed the Motion for review and held in part as herein under-

“Applying these conditions to this application, 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 judgment. A review as envisaged by Section 21A and Rule 28(5)

aforesaid, concerns the decision of this Court and not any other court below it. The applicant cannot demonstrate that the judgment of this Court of 15th July, 2022 was obtained by fraud and or deceit or in what way it is a nullity.

...

But more fundamentally, the Court having found as a main reason that its jurisdiction was not properly invoked, a review application cannot confer on it jurisdiction.” [Emphasis added]

We find that the aforementioned pronouncement still holds true for the Motion at hand.

- v. Taking into account the totality of the applicant’s Motion, we are convinced that it is an attempt to relitigate issues already conclusively determined by this Court. We have on numeral occasions expressed that review was not intended to give a party an opportunity to appeal, or relitigate its case. See ***Mohamed Fugicha vs. Methodist Church in Kenya (through its registered trustees) & 3 Others***, SC Application No 4 of 2019, [2020] eKLR and ***Parliamentary Service Commission vs. Martin Nyaga Wambora & Others***; SC Application No 8 of 2017; [2018] eKLR. Therefore and for the above reasons, the applicant’s omnibus Motion cannot be allowed to stand as it lacks merit.
- vi. Taking into account the foregoing and this Court’s decision in ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others***, SC Petition No. 4 of 2012; [2014] eKLR, we deem it just to order that costs to follow the event, and the applicant meets the 1st, 3, 4th, 5th and 6th respondents’ costs for the Motion.

[12] CONSEQUENTLY and for the reasons afore-stated, we make the following Orders:

- i. The Notice of Motion dated 18th March, 2024 and filed on 20th March, 2024 is hereby dismissed.***
- ii. The appellant/applicant shall meet the 1st, 3rd, 4th, 5th and 6th respondents' costs of the Motion.***

It is so ordered.

DATED and DELIVERED at NAIROBI this **26th** day of **July, 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

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

REGISTRAR
SUPREME COURT OF KENYA

