



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E005 OF 2023

– BETWEEN –

STANBIC BANK KENYA LIMITED APPELLANT/APPLICANT

– AND –

SANTOWELS LIMITED RESPONDENT

(Being an application to review and/or clarify the Judgment of the Court (Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala & Njoki, SCJJ) dated 28th June 2024 in SC Petition No. E005 of 2023)

Representation:

Mr. Allen Gichuhi, SC for the appellant
(Wamae & Allen Advocates)

Mr. Kevin Mogeni for the respondent
(Mogeni & Co. Advocates)

RULING OF THE COURT

[1] **WHEREAS** this Court by a Judgment dated 28th June 2024 in **SC Petition No. E005 of 2023** dismissed the appeal and settled the substantive issue arising in the following terms:

“[70] In conclusion on this issue, we find that interest rates on loans and facilities advanced by banks/financial institutions are subject to

the regulatory process under Section 44 of the Banking Act. In addition, that such banks/financial institutions are required to seek the Cabinet Secretary's approval under Section 44 of the Banking Act prior to increasing interest rates on loans and/or facilities advanced to its customers.”; and

[2] UPON CONSIDERING the Notice of Motion brought by the applicant dated 4th September 2024 after the dismissal of the appeal, expressed to be brought under Sections 3A and 21A of the Supreme Court Act, Cap 9B and erroneously invoking Rules 3, 24, 25(2) and 28 instead of Rule 28(5) of the Supreme Court Rules 2020, for orders:

i) Spent....;

ii) That this Court be pleased to review and amend that portion of its Judgment and the Order therein dated 28th June 2024, to wit, - “In addition, that such banks/financial institutions are required to seek the Cabinet Secretary's approval under Section 44 of the Banking Act prior to increasing interest rates on loans and/or facilities advanced....”;

In the alternative,

*iii) That Court in exercise of its inherent jurisdiction be pleased to clarify that portion of its Judgment and the Order therein dated 28th June 2024, to wit, “**In addition, that such banks/financial institutions are required to seek the Cabinet Secretary's approval under Section 44 of the Banking Act prior to increasing interest rates on loans and/or facilities advanced....”**,*

iv) That the Court be pleased to grant such further or other orders as it deems just in the interests of this case;

v) There be no orders as to costs.”; and

[3] UPON READING the affidavit in support of the Motion sworn by the applicant's Head of Legal, Janet Wanjohi Kabiru, on 4th September, 2024 and its submissions of even date to the effect that; this Court pursuant to Section 21A as well as its inherent jurisdiction under Section 3A of the Supreme Court Act and the principles enunciated in *Outa vs. Okello & 3 others* [2017] KESC 25 (KLR) (*Outa Case*) has powers to review its own decision; whereas Section 44 of the Banking Act (the Act) states that no bank or financial institution shall increase its rate of banking or other charges without the prior approval of the Cabinet Secretary (for National Treasury and Economic Planning), in implementation of this provision, various legislative developments have taken place since the year 2003; that following these developments, the powers granted to the Cabinet Secretary under Section 44 of the Act have been delegated to the Governor Central Bank of Kenya (CBK); and

[4] ON THE BASIS of these legislative developments, the applicant explains as follows: that, on 17th June 2003, CBK issued Banking Circular No. 03 of 2003 directing all institutions under the Act to submit to the Minister, through CBK, the list of all current and other banking charges; that by Banking Circular No. 5 of 2003, CBK provided further guidance to licensed institutions under Section 44 of the Act requiring them to communicate all changes in the rate of banking and other charges to their customers at least 30 calendar days before such changes become effective; further, that the Minister shall continue to be informed of such changes in a timely manner through the CBK; that by Legal Notice No. 34 of 2006 issued pursuant to the Act, the Minister of Finance promulgated the Banking (Increase of Rate of Banking and Other Charges) Regulations **requiring that every application for approval of an increase in the rate of banking under Section 44 be submitted to the Minister through the Governor CBK**; that by Legal Notice No. 35 of 2006 dated 20th April 2006 (Legal Notice No. 35) the then **Minister for Finance (Mr. Amos Kimunya) in exercise of the powers conferred by Section 38 of the Interpretation and General Provisions Act, formally delegated the powers conferred upon the**

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Minister by Section 44 of the Act to the holder of office of the Governor of CBK; and

[5] FURTHER NOTING the submissions by the applicant that: through Legal Notice No. 35, CBK became the primary authority through which the rate of banking, other charges, or tariffs are regulated, with the Governor of CBK exercising delegated powers and authority of the Minister of Finance; Legal Notice No.35 and the Regulations are in conformity with Article 231(2) of the Constitution which provides that CBK is responsible for *inter alia*, formulating monetary policy, promoting price stability and issuing currency; by Article 231(3) of the Constitution, CBK shall not be under the direction or control of any person or authority in the exercise of its powers or in the performance of its functions, thereby entrenching independence; the Governor of CBK's authority under Section 44 of the Act cannot be exercised jointly by the Cabinet Secretary, nor can they be exercised by the Cabinet Secretary alone; that the declaration by the Court that approvals on the increase of interest rates by banks and financial institutions ought to be sought from the Cabinet Secretary, nullifies the prevailing legal regime under which the power of the Cabinet Secretary has been delegated to the Governor of CBK; and that applied retrospectively, the declaration of the Court would nullify all the approvals made by the Governor of CBK which approvals were within the purview of the law as it currently exists. For these reasons, the applicant urges that it is a matter of grave public interest that the judgment be reviewed for as the applicant and other banks and financial institutions will be subjected to a litany of litigation from borrowers on the basis that the rates were varied without appropriate Ministerial authority; and

[6] UPON REVIEWING the respondent's Replying Affidavit sworn by Rajiv Raja, the respondent's director, sworn on 20th September 2024 and its submissions of even date in opposition to the Motion to the effect: that the Motion discloses no grounds for review as the issues it raises regarding application of Section 44 have been canvassed and determined from the High Court through to

this Court; that the Motion is clearly an appeal disguised as an application for review; that in the present matter, the Act expressly granted the powers to the Cabinet Secretary and irrespective of any delegation, the functions remain those of the Cabinet Secretary; that circulars No. 3 and 5 were made *ultra vires* the provisions of Section 44 for the reason that at the time the said circulars were being issued, the Governor of CBK did not have authority to issue those circulars; that pursuant to Legal Notice No. 35, for the first time, the Cabinet Secretary delegated the functions under Section 44 to the holder of the office of the Governor CBK and not to the CBK as provided for under Article 232 of the Constitution; that by the said legal notice, the Cabinet Secretary issued such conditions, exceptions and qualifications that the Governor of CBK was to exercise in undertaking the duties on his behalf; consequently, the primary function of issuing approvals remained that of the Minister but exercised on his behalf by the Governor of CBK; and

[7] FURTHERMORE, the respondent contends that Section 44 of the Act is not a function specifically donated by the Constitution to the CBK neither has Parliament conferred it, and therefore does not come under the provisions of Article 231(3) of the Constitution; that the Court of Appeal in ***Attorney General & 2 others vs. Independent Policing Oversight Authority & another*** [2015] KECA 734 (KLR) when faced with a situation of delegated power, held that the person delegating must remain fully accountable for the outcome of the delegated work and that one can delegate authority but not responsibility; that any action by the delegate which is contrary to the instrument of delegation is *ultra vires* and illegal as one will be acting without jurisdiction and contrary to the provisions of law or its principles; and that based on the foregoing, the Court's original decision was correct and the applicant therefore has no valid grounds for review; and

[8] CONSIDERING the applicant's further affidavit by Janet Wanjohi Kabiru sworn on 27th September 2024 and further submissions of even date in response to the respondent's submissions where she argues that: this Court held in ***Odinga***

& another vs. Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) [2017] KESC 52 (KLR) that it has inherent jurisdiction to determine whether there is any matter to be clarified even where such a matter does not fall within the four corners of an application for review provided that the said matter is one of public interest and the application will clarify the real intention of the Court; that the respondent has not produced any evidence to support the contention that the Governor of CBK has conferred upon himself duties beyond those specified under Legal Notice No.35; and that Section 44 aforesaid applies as found by this Court save that the powers donated by the said provision have been delegated to the Governor of CBK by law; and

[9] BEARING IN MIND the jurisdiction of this Court under 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 our pronouncement in the **Outa Case**, it is now firmly established that, as a general rule, the Supreme Court cannot sit on appeal over its own decisions, or review its decisions, save to correct obvious errors apparent on the face of the decision. However, in exercise of its inherent powers, the Court may, review its decision in exceptional circumstances, so as to meet the ends of justice. It will only do so in 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.” See **Outa**; and

[10] IN ADDITION, Rule 28(5) of the Supreme Court Rules stipulates that;
“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”.

[11] UPON EVALUATION of the Motion and rival arguments by the parties, **WE OPINE** as follows:

i. We note from the onset that the applicant's Motion does not squarely fall within the parameters of Section 21A of the Supreme Court Act or Rule 28(5) of the Supreme Court Rules, 2020 or even the principles enunciated in the ***Outa Case***. The applicant is instead suggesting that there was an oversight or omission by the Court in its Judgment by finding that banks or other financial institutions are required to seek the Cabinet Secretary’s approval under Section 44 of the Banking Act while in their view such approval ought to be sought from the Governor of CBK in terms of the prevailing law. There is therefore no suggestion that our judgment under review was obtained through fraud, deceit or misrepresentation of facts; or that the Court was misled into giving it; or that it was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision.

ii. Based on the view presented in this Motion by the applicant, Section 21A has been invoked in error for the reasons we have alluded to in the previous paragraph; that review of the judgment has been sought on the basis of fraud, deceit or misrepresentation or a deliberate concealment. From the applicant’s own averment, the correct provision should have been Section 21(4) of the Supreme Court Act which provides that:

“Within fourteen days of delivery of its judgment, ruling or order, the Court may, on its own motion or on application by any party with notice to the other or others, correct any oversight or clerical error of

computation or other error apparent on such judgment, ruling or order and such correction shall constitute part of the judgment, ruling or order of the Court.” [our emphasis]

- iii. This section reflects the principles of the “Slip Rule”, which permits the Court to rectify errors that are evident on the face of a judgment, ruling, or order. Such errors must be clear and indisputable, and their correction does not grant the Court the authority to reconsider its own judgment, ruling, or order, nor does it allow for a review that would substantially alter the decision. It follows that this Court can correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the judgment, ruling or order so as to give effect to its intention in terms of its decision and to steer a judgment, ruling, or order “*towards logical, or clerical, perfection*”. See the ***Outa Case***.
- iv. Therefore, to be successful in an application under the Slip Rule, the following strictures must be satisfied: the application must be made within 14 days of the Judgment, Ruling or Order; the applicant must give notice to the other parties; the error must relate to an oversight or clerical slip of computation or other error; and the error must be apparent on the face of the judgment, ruling or order in question. Based on the foregoing, it is clear that the applicant has not only moved the Court under the wrong provision but also failed to bring its application within the statutory required period of 14 days.
- v. The invitation to review the Judgment on the basis of Legal Notice No. 35 in which the Cabinet Secretary has delegated his powers under Section 44 of the Act to the Governor of CBK cannot prevail against an express statutory provision which assigns the responsibility or authority of restricting the increase in banking rates to the Cabinet Secretary.
- vi. As a result, the Cabinet Secretary as the delegating authority remains accountable for the outcome of the delegated power and the Cabinet

Secretary can only donate his authority but not responsibility. He retains the residual authority to vary or cancel a delegation as explained in Section 38(4) of the Interpretation and General Provisions Act as follows:

“No delegation under subsection (1) of a power or duty shall exclude the exercise of the power or the performance of the duty by the person by whom the delegation was made.”

- vii.** In the result and for the aforesaid reasons, we are not persuaded that there is justification for us to review the Judgment of 28th June, 2024.
- viii.** On costs, we underscore the fact that an award of costs is an exercise of judicial discretion and follows the principle set out by this Court in ***Rai & 3 others vs. Rai & 4 others*** [2014] KESC 31 (KLR), that costs follow the event. In exercise of our discretion, we direct each party to bear its own costs.

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

- i. The Notice of Motion dated 4th September 2024 and filed on 6th September 2024 be and is hereby dismissed.***
- ii. Each party shall bear its own costs.***

It is accordingly ordered.

DATED and DELIVERED at NAIROBI this 14th day of March, 2025.

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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

.....
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

