REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & V-P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 6 OF 2014

—BETWEEN—

FREDRICK OTIENO OUTA..... APPELLANT/RESPONDENT

—AND—

1. JARED ODOYO OKELLO..... 1ST RESPONDENT/APPLICANT

2. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION..... 2ND RESPONDENT

3. RETURNING OFFICER, NYANDO CONSTITUENCY..... 3RD RESPONDENT

4. ODM PARTY..... 4TH RESPONDENT

(Being an application for review of the Judgment and Order of the Supreme Court (Mutunga; CJ & P, Rawal; DCJ & V-P, Ibrahim, Ojwang, Wanjala and Njoki SCJJ) delivered on 3rd July, 2014 in ***Fredrick Otieno Outa v. Jared Odoyo Okello & Three Others;*** *Supreme Court Petition No. 6 of 2014)*

RULING

A. INTRODUCTION

[1] This is an application by way of an amended Notice of Motion dated 27th October, 2014 pursuant to leave of Court granted by *Ibrahim, SCJ* on 25th July,

2014 seeking to set aside and/or review or correct the Judgment, Orders and decree of this Court in ***Fredrick Otieno Outa v. Jared Odoyo Okello & Three Others*** Sup. Ct. Petition No. 6 of 2014 *(Mutunga; CJ, Rawal; DCJ & V-P, Ibrahim, Ojwang, Wanjala, Njoki SCJJ)* delivered on the 3rd of July, 2014.

[2] The application is premised upon Articles 50(1), 159 and 163(7) of the Constitution and Sections 3 and 21 of the Supreme Court Act, No. 7 of 2011 (Supreme Court Act), Rule 20(4) of the Supreme Court Rules, 2012 (Supreme Court Rules) and on the following summarised grounds:

(i) *That the applicant had written to this Court, without success for an Order compelling the respondent to produce in Court the original clear copies of cheques disbursement register annexed at page 386 and 387 marked **SO1** of the record of appeal.*

(ii) *The unclear copies of the requested documents on record conceal vital evidence which affects the applicant's right to a fair hearing.*

(iii) *That the respondent filed an appeal No. 6 of 2014 whose verdict has never been given, and that applicant has never been a party to the Judgment in Petition No. 10 of 2014.*

(iv) *Assuming that the Judgment in Petition No. 10 is the correct Judgment, the same has an error as it makes no reference to the Grounds of Affirmation filed by the applicant on 6th May, 2014.*

(v) *The final Orders in the Judgment do not support the findings in paragraphs 150-161 that CDF officials were involved in the campaigns and disbursement of cheques.*

(vi) *The Court's finding that the respondent was not directly involved in any corrupt practice during elections cannot be supported by the evidence on record, which the Court didn't take into account.*

(vii) *The Court's finding has challenged an uncontroverted evidence that the respondent made a radio communication that he was going to disburse CDF cheques during election period.*

(viii) *There is an error in the interpretation of Section 85A of the Elections Act as appertains to appeals on matters of law only in light of Articles 164(3)(a) and (b) when read together with Articles 81, 87, 105, 159, 162, 165, 169 of the Constitution.*

(ix) *An error exists in the interpretation made by the Court regarding Article 260 of the Constitution on the meaning of a Public Officer.*

(x) *The Judgment of the Court does not take cognizance of the fact that the appellant during campaign rallies signed visitors' books while distributing CDF cheques, a fact never challenged in cross-examination.*

(xi) *The Court committed an error in the evaluation of the evidence and facts.*

(xii) *The Court was wrong at paragraph 119 in its finding that particulars of bribery were not pleaded. The applicant reiterates several factual issues in support of this.*

(xiii) *There is new and important evidence which have since surfaced, to wit: the circulars dated 20th day September, 2012 and 9th October, 2012 from the CDF Fund Board directing officials to complete projects before run up to the election of March 2013; a High Court Order from the High Court restraining disbursement of funds in the period leading to elections and that a new and important evidence has been recovered in the visitors' book from two schools showing that the respondent was present when CDF cheques were disbursed.*

(xiv) *There exists exceptional circumstances of substantial and compelling character making it necessary, for good cause and in the public interest to set aside/review the Court's Judgment which include* ***inter alia*** *too many errors, failure of the Court to consider grounds of affirmation, new evidence of misuse of CDF by the allies of the appellant, that the Judgment of the Court had been changed, the appellant's confidence of winning the case* ***pre*** *and* ***post*** *Judgment needs to be investigated.*

(xv) *The reconsideration or review of the Judgment will foster stability, enhance development of consistent and coherent body of laws, preserve continuity and manifests respect for the past and similar decisions.*

(xvi) *The questions raised for review transcends personal interest of the parties in the impugned Judgment and is of greater benefit and interest to all Kenyans.*

(xvii) *The Supreme Court retains the competence and discretion when it considers it right to do so and for good cause taking into account legal considerations of significant weight.*

[3] The application seeks the following Orders*:*

(i) *That this Court sets aside, or review or correct its decree or Judgment and Orders delivered on 3rd July, 2014.*

(ii) *That the Court review or correct its decree or Judgment and Orders which did not take into account or make a decision on the grounds of affirmation by the 1st respondent/applicant.*

(iii) *The Court be pleased to correct and/or review its Judgment and make an Order nullifying the election of the appellant as a Member of Parliament for Nyando Constituency in view of paragraph 149 to 155 of the Judgment (both inclusive) and from 157 to 161.*

(iv) *That the Court be pleased to admit new and important evidence which were not in possession of the applicant at the time of trial in the alternative and without prejudice to the foregoing, the Court be pleased to set aside the entire Judgment, decree and/or Orders of the Court and Order for a re-hearing/fresh hearing of the Petition No. 6 of 2014.*

(v) *That the Court be pleased to nullify all Orders requiring the applicant to pay costs in the petition filed by applicant in the High Court, and the appeals arising therefrom and the petition/appeal filed by the appellant in this Court.*

(vi) *The costs of this application.*

B. BACKGROUND

[4] The 1st respondent, being aggrieved by the Judgment of this Court in ***Fredrick Otieno Outa v. Jared Odoyo Okello & Three Others*** Sup. Ct. Petition No. 6 of 2014, delivered on the 3rd July, 2014, filed this application seeking to set aside and/or review or correct the Judgment, Orders and decree based on what he perceived to be this Court's jurisdiction as pronounced in the case of ***Jasbir Singh Rai & Three Others v. Tarlochan Singh Rai & Four Others*** Sup. Ct. Petition No. 4 of 2012 [***Rai v. Rai***].

[5] The Judgment sought to be reviewed had reversed the Court of Appeal decision nullifying the election of the appellant as Member of the National Assembly for Nyando Constituency in the following terms at paragraph 211:

"(a) The appeal is allowed, and the determination by the Court of Appeal nullifying the election of Frederick Otieno Outa, is set aside.

(b) The finding by the Court of Appeal that the appellant, Frederick Otieno Outa committed the election offence of bribery, is hereby overturned.

(c) The certificate and report issued by the Court of Appeal, on the basis of its finding pursuant to Sections 86(1) and 87(1) of the Elections Act, is hereby annulled.

(d) The appellant's costs at the High Court, the Court of Appeal and the Supreme Court shall be borne by the 1st respondent.

(e) The 2nd and 3rd respondents shall bear their own costs at the High Court, the Court of Appeal and the Supreme Court.

(f) These Orders shall be forthwith served upon the parties and upon the Speakers of the two Houses of Parliament, for appropriate legislative initiates as recommended herein."

[6] After delivery of this Judgment, this Court on 17th July, 2014, in exercise of its powers under Section 21(4) of the Supreme Court Act, issued an Order correcting errors and/or omissions apparent on the face of the record. Subsequently, on 23rd July, 2014, this Court issued a further Order correcting other errors.

[7] On 22nd July, 2014, the 1st respondent filed an application for review of the Judgment under a Certificate of Urgency.

[8] Thereafter on 15th December, 2015, when the matter came up for hearing, the parties urged the Court to first determine the question as to whether, a five Judge-Bench of this Court, could review a Judgment rendered by a higher number of Judges.

C. PARTIES' SUBMISSIONS

(a) 1st Respondent's Submissions on the Panel for Review

[9] In the written submissions filed on 1st February, 2016, counsel for the 1st respondent argued that it was possible to admit this review application to be heard by a five Judge-Bench.

[10] Counsel acknowledged the fact that there had to be an end to litigation, otherwise the same could continue *ad infinitum*. However, counsel urged, that the window for review of Judgments for the sole purpose of correcting errors could not be completely shut given the fact that Judges were not infallible.

(b) 1st Respondent's Submissions to the Amended Notice of Motion

[11] Mr. Kanjama, counsel for the 1st respondent submitted that this Court's review jurisdiction under Section 21(4) of the Supreme Court Act and Rule 20(4) of the Supreme Court Rules is so wide in scope that it extends beyond correction of clerical errors under the *Slip Rule*. As such, counsel submitted, review jurisdiction extends to both errors of law and errors of fact. Counsel cited the concurring opinion of *Mutunga, CJ* in ***Rai v. Rai*** that '*there is no injustice that the Constitution of Kenya is powerless to redress'*.

[12] Counsel contended that this Court has powers under Articles 10(2)(c), 50(1), 159(2), 163(4)(a) and 259(1) of the Constitution to do justice in each case. He drew examples from the United States Supreme Court's revision powers and asserted that the Court at times reversed itself by modifying its opinion. He also made reference to powers of review vested in the Supreme Courts of India and Ghana, whereby pursuant to constitutional provisions, applications for review before an Apex Court are allowed to correct both errors of law and of fact, in the interests of justice. By the same token, counsel submitted that the same practice obtained in Nigeria and England where such reviews are allowed in exceptional circumstances.

[13] It was counsel's submission that a decision of the Court could be impeached on the basis of default of some kind by the Court or by one of the parties to the dispute especially if the final outcome would be harmful to the public interest. For good measure, counsel embraced the time hallowed maxim to the effect that *"justice should not only be done, but should manifestly and undoubtedly be seen to be done"*.

[14] Counsel drew parallels between Section 21(4) of the Supreme Court Act and Section 22(2) of the Vetting of Judges and Magistrates Act. The two Statutes both employ the language of "review". According to counsel, the Vetting Board had allowed applications for review on grounds similar to those found in Section 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, and Order 45 Civil Procedure Rules, 2010. It was his view that the Board had adopted a less restrictive approach in considering its scope of review. He urged this Court to adopt a similar broad view of review powers.

[15] Mr. Kanjama submitted that the decision of this Court in ***Rai v. Rai,*** could be extended to an application for review of the Court's own Orders. It was counsel's view that the ***Rai*** decision was not limited to this Court's appellate jurisdiction. Counsel argued that the scope of the said review ought to extend to apparent errors of law and fact; grave procedural matters such as bias, perceptions calling into question the integrity of the judicial process, discovery of substantial, new or additional evidence that a party was unable to present earlier due to no fault of their own and which may impact on the key finding of the Court. He urged that the same be applicable to this Court's review powers under Section 21(4) of the Supreme Court Act, because this Court has recognised that, it was possible for a decision to be rendered *per incuriam*.

[16] Counsel further submitted that this Court had inadvertently overlooked or failed to consider matters raised in the Notice of Grounds for Affirmation dated 6th May, 2014 that was filed on behalf of the applicant. The Notice, according to counsel, had raised three pertinent issues that were not addressed, namely:

(i) substantial particulars showing evidence of deliberate electoral malpractice;

(ii) failure of the trial Judge to Order for scrutiny and recount in the specified polling stations; and

(iii) substantial particulars showing evidence of undue influence by the appellant.

[17] It was submitted that there was a key error of fact in the Judgment, particularly in paragraph 119, on whether there was evidence that the respondent distributed CDF cheques. Counsel argued that the true position of fact regarding the presence of the appellant and his active participation in using CDF cheques for campaigns might have led the Supreme Court to a different conclusion. Counsel implored the Court to vacate the Judgment and to rehear the appeal in Order to ascertain the presence of the respondent at various places where cheques were disbursed.

[18] Counsel submitted that there were exceptional circumstances in this case warranting an Order for review. These exceptional circumstances revolved around the acts of electoral corruption by CDF officials who had disbursed cheques within the Constituency during the campaign period with the singular intention of influencing voters in favour of the respondent herein.

[19] It was counsel's submission that the Order awarding costs to the 4th respondent to the prejudice of the appellant was an error which contravened his right to a fair hearing and should thus be reversed upon hearing the application herein. Further, counsel urged the Court to follow the approach of the House of

Lords in ***Cassell v. Broome*** [1972] 2 WLR 645, [1972] AC 1027, [1972] UKHL 3 and vacate, or reverse the Order for costs granted to the 1st respondent.

[20] Counsel made reference to the ***Augusto Pinochet*** case and argued that Mr. Outa, on the 27th June, 2014, had made utterances at a meeting in his Constituency which pointed to the possibility that he had prior information about the Judgment and that this review application was doomed to fail. Such a statement by the Appellant, in the opinion of Counsel, raised serious doubts as to the integrity of the Judgment on the part of this Court.

[21] Counsel urged this Court to allow review and/or revision of its Judgment and either, vacate it to pave way for rehearing afresh, or, correct the Judgment and reverse the final Orders issued therein. In addition, counsel urged the Court to allow the review application herein with costs to the 1st respondent against the appellant and/or the 2nd respondent in this Court and in the other superior Courts.

[22] In support of his contentions, counsel gave a blow by blow account of how various Supreme Courts had addressed the issue of "review". Towards this end, counsel drew this Court's attention to the fact that in India, Article 137 of the Constitution allows for review of a decision of the Supreme Court by way of a Review Petition by one of the parties.

[23] In the United States of America, counsel stated, there is no provision that provides for review by the Supreme Court of its own Judgments. The Supreme Court can only review decisions of lower Courts based on a writ of review by *certiorari*. However, although the decisions of the Supreme Court are final and binding, the Court regularly revisits its own decisions in future cases in the event there is need to do so.

[24] Counsel also made reference to the Nigerian Supreme Court, and stated that the power of the Court *by way of judicial decisions* is limited to correcting Judgments before they are finally delivered. Further, that an overhaul of a Judgment is only limited to instances which fall under the *Slip Rule*.

[25] In Ghana, Article 133 of the Constitution provides that the Supreme Court can review any decision it has made on such grounds as prescribed under the Rules of the Court. These grounds are; exceptional circumstances which have resulted in a miscarriage of justice; discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decision was given. Counsel also made reference to the case of ***Mornah v. Attorney-General*** Writ No. J1/7/2013 in which the Court had declared that aggrieved parties were entitled to invoke the review jurisdiction as a substantial constitutional right.

[26] The attention of this Court was also drawn to the fact that in Pakistan, Article 188 of the Constitution, vests the Supreme Court with power to review its own Orders or Judgments subject to any Act of Parliament or Rules made by it. In the United Kingdom, the Act and the Supreme Court Rules of 2009 do not make express provision for review or revisiting of Judgments or Orders of the Court. However, counsel pointed out that in ***Re Pinochet*** [1998] [1999] HL, five Judges sat *en banc* on review of a Judgment that had been delivered by a different set of five law lords.

(c) Appellant's Submission on Constitution of a Bench

[27] Mr. Wasuna, counsel for the appellant, submitted that while it would be good practice for this Court to review its Judgments, such action, would only be proper, if the Judges sitting in an application for review of Judgment of the

Court, are of equal number, or more than the number of Judges, who rendered the Judgment sought to be reviewed. It was counsel's opinion that the Court would be setting a bad precedent if the Judgment of a full Bench of the Supreme Court were to be reviewed by a lesser Bench of Judges of the Court. Counsel urged the Court to constitute a full Bench to hear and determine the application for review. To support his argument, counsel referred to Article 163(1) and (2), Section 21(4) of the Supreme Court Act together with Rule 20(4) of the Supreme Court Rules. He also cited an extract of decisions from the Supreme Court of India which emphasize that the Constitution of India grants the Supreme Court an exclusive right to review its own Judgment in the rarest of cases under Article 137.

(d) Appellant's Submissions in Response to the 1st Respondent's Amended Notice of Motion Application Dated 27th October, 2014

[28] Mr. Wasuna, counsel for the appellant, opposed the application through a preliminary objection dated 31st October, 2014, supported by a replying affidavit together with submissions dated 1st July, 2015. Counsel for the appellant raised the following grounds of opposition:

(i) Since the application seeks correction of errors on the basis of new evidence that was not before all the Courts, the same should be struck out as being incurably defective.

(ii) There is no jurisdiction to entertain nor hear the application in the matter since the case has been heard on its merits hence the Court has become *functus officio*.

(iii) The application as crafted is an application for review or appeal on the Court's appreciation of the law which jurisdiction is lacking under the Constitution or the Act.

[29] Mr. Wasuna urged the Court to determine:

(i) Whether the jurisdiction of this Court had been properly invoked;

(ii) whether this Court could review its Judgment on the grounds advanced by the 1st respondent;

(iii) whether this Court could admit new evidence after delivering its Judgment; and

(iv) whether the Court could reverse its Order as to costs.

[30] Counsel submitted that the jurisdiction of this Court had not been properly invoked as the application was filed out of time and without leave of the Court contrary to Section 21(4) of the Supreme Court Act. Counsel stated, that the application dated 18th July 2014, was lodged in the Supreme Court registry on the 22nd July, 2014, 19 days after the delivery of the Judgment. As such, the application was filed outside the time allowed by law and without leave of Court. According to counsel, the application ought to have been filed by the 17th of July, 2014 as the Judgment of the Court was delivered on the 3rd of July, 2014.

[31] Counsel submitted that it was not in contention that under Section 21(4) of the Supreme Court Act and Rule 20(4) of the Supreme Court Rules, the Court has jurisdiction to review its Judgment in exceptional circumstances. It was counsel's submission that the applicant ought to demonstrate to the Court that

the circumstances giving rise to the application are exceptional circumstances warranting the Court to exercise its discretion. Counsel referred to the case of ***Rai v. Rai*** in which this Court observed that only in the most exceptional circumstances should there be a departure from the principle of *stare decisis*.

[32] Counsel disputed the contention by Mr. Kanjama to the effect that, grounds for affirmation filed by the applicant in the initial petition were not considered. It was Counsel's submission that this Court had considered the grounds of affirmation by the 1st respondent and rendered an elaborate precedent setting Judgment.

[33] Counsel argued that it was evident from the affidavits filed herein, that there was no new and important matter that had arisen, to warrant this Court, to interfere with its decision. What the 1st respondent had done, counsel contended, was to file another election petition before this Court disguised as an application for review. Counsel stated that it is established precedent that the circumstances in which review would be considered range from discovery of new and important matters or mistakes or errors apparent on the face of the record. Counsel relied upon ***Raniga v. Jivraj*** [Tabs] EA 700k, where the Court stated that it would only apply the *Slip Rule* where it was fully satisfied that it was giving effect to the intention of the Court when Judgment was given.

[34] It was counsel's further submission that, the provision for additional evidence could only be explored during the proceedings of an appeal and not after the conclusion of the appeal when the Court had become *functus officio*.

[35] Counsel urged the Court to expunge from the record the further affidavit of the 1st respondent dated 27th October, 2016, introducing new evidence. He referred to the Orders of *Ibrahim, SCJ* made on the 25th July, 2014 that granted leave to the 1st respondent/applicant to amend his application and declined the request for additional evidence. Counsel further emphasized that the issues

being raised by the 1st respondent were issues well within his knowledge. This being the case, the 1st respondent, was in reality reopening the election petition un-procedurally.

[36] On the issue of costs, counsel submitted that the Court had made the Order following its Judgment and that no compelling reason had been given by the 1st respondent to warrant the vacation of the said Order.

[37] Counsel concluded by urging the Court to dismiss the application for review with costs to the appellants.

(e) 2nd and 3rd Respondents' Grounds of Opposition

[38] Mr. Mukele, counsel for the 2nd and 3rd respondents opposed the applicants' amended Notice of Motion dated 27th October, 2014 by filing grounds of opposition dated 17th November, 2014, together with their submissions dated 6th July, 2015.

[39] Counsel set out the following issues for determination namely:

(i) Whether this Court should entertain the application before it.

(ii) Whether the application sustains the requisite threshold necessary for grant of the Orders sought.

(iii) Whether the Supreme Court in exercising its appellate jurisdiction under Article 163(4) (a) of the Constitution can accept and consider new evidence in light of the provision of Articles 87(1) and 105 of the Constitution and Section 76 of the Elections Act and the jurisprudence of this Court in relation to the strict electoral timelines.

(iv) Whether the application as framed is an appeal with a review label as a passport.

[40] Counsel submitted, that the application, was frivolous and vexatious, as it sought to re-litigate issues upon which Judgment had been rendered and the same should therefore not be entertained by this Court. Counsel placed reliance upon the Supreme Court of India case in ***Sow Chandra Kanta and Another v. Sheikh Habin*** 1975 AIR 1500.

[41] Counsel submitted that the errors/mistakes in the Judgment delivered by this Court on the 3rd July, 2014 were duly corrected, pursuant to the provisions of Section 21(4) of the Supreme Court Act. Therefore, the present application contravenes the provisions of Article 87(1) and 105 of the Constitution, the Elections Act and the Rules thereunder. Counsel argued that this Court lacks jurisdiction to consider any new evidence purported to be adduced by the applicant at this stage. According to counsel, the application had failed to meet the threshold of exceptional circumstances established to enable this Court exercise its review and/or setting aside jurisdiction as set out in the case of ***Jasbir Signh Rai & Tarlochan Singh Rai*** Sup, Ct. Pt. No. 4 of 2012.

[42] Counsel contended that by dint of the Supreme Court decision in ***Rai v. Rai***, the applicant bore the burden to establish that the Judgment rendered in the petition, conflicts with past decisions of the Court or that the decision was given *per incuriam*.

[43] Counsel argued that the application, was inviting the Court to substitute its clearly expressed intention in the Judgment without any justifiable grounds, for it fails to manifest material error in the Judgment of the Court which undermines its soundness or results in miscarriage of justice. He referred to the Supreme Court of India case of ***Kamlesh Verma v. Mayawati and Others***

Review Petition No. 453 of 2012, where the Court observed that the power of review could only be exercised for correction of a mistake but not to substitute the Court's intention.

[44] Counsel submitted that this Court, sitting in its appellate capacity, under the provisions of Article 163(4) (a) of the Constitution, lacks jurisdiction to accept and consider new evidence by dint of the provisions of Articles 87(1) and 105 of the Constitution, the Elections Act and the Election (Parliamentary and County Petition) Rules that set out elaborate and comprehensive mechanisms for resolution of such disputes.

[45] Further, Counsel contended that this Court, had been unequivocal, in safeguarding electoral timelines as established in the ***Ali Hassan Joho and Another v. Suleiman Said Shahbal and Others*** Petition No. 10 of 2013. While also referring to the case of ***Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others*** [2012] eKLR. Counsel argued that an attempt to introduce new evidence, outside the election petition time lines recognized by law, constitutes an arbitrary breach of the Constitution falling outside the scope of the jurisdiction of this Court.

[46] It was Counsel's submission that this Court, being the apex forum, cannot sit on appeal over its own decisions. Counsel concluded by urging the Court to dismiss this application with costs and find that it is bad in law, scandalous, vexatious, frivolous, embarrassing and an abuse of the Court process.

(f) 2nd and 3rd Respondents' Submissions on the Panel for Review

[47] Counsel referred to the provisions of Article 163(2) of the Constitution, and stated that there is no doubt as to the quorum of the Supreme Court for

purposes of its proceedings. Further, counsel referred to Rule 19(3) and (4) of the Supreme Court Rules and stated that the effect of sub-Rule 3 as read with sub-Rule 4 is that a full Bench must be empaneled for this Court to depart from or reverse its previous decision.

[48] Counsel submitted that it would defeat the intention of Section 19(4) of the Supreme Court Act if a Bench of five Judges was constituted to hear and determine the application as it would undermine the elements of predictability and certainty that form the cornerstone of the doctrine of *stare decisis*.

[49] Counsel urged the Chief Justice to empanel a full Bench of the Court for purposes of hearing and determining this application. He cited the case of ***Chief Dominc Ifezue v. Livinus Mbadugha*** Supreme Court of Nigeria SC68/1982 that held that "*the Court has jurisdiction and power, sitting as a full Court of seven Justices to depart from and overrule previous erroneous decisions on points of law given by a full Court on constitutional questions or otherwise*". Also quoted was the case of ***Earl of Selbourne in Bowell v. Cooks*** (1894)86 LT365, where the Court stated that "*[b]ut we are persuaded by the philosophy that allows an aggrieved party who is dissatisfied with a Judgment of the apex Court, the constitutional right of review to a Court with enhanced review jurisdiction and enhanced number of justices*".

D. PRELIMINARY ISSUE FOR DETERMINATION

[50] As directed by the Court, parties to this application submitted on the issue as to whether a five Judge-Bench could review a decision made by a higher number of Judges. It is worth noting that this Court on 26th February, 2016 delivered a Ruling in the case of ***Chris Munga N. Bichage v. Richard Nyagaka Tong'i and Two Others*** Sup. Ct Pt. 17 of 2014, in which it stated at paragraph 78-81:

> ***"[78] What Bench-quorum, in the circumstances, should entertain a cause seeking a departure from the*** *Joho* ***precedent?***
>
> ***"[79] As already noted, several factors are relevant, including the clear implications to be drawn from the written Constitution; the relevant perceptions of justice and fairness; the limitations and realities attending the functioning of the Constitution; and the like. Were it not for such practical, contextual and nuanced elements, which must confer upon the Court some discretionary remit, a plain solution would have been to subject a precedent emanating from a five-Judge Bench to a larger Bench, for reconsideration. However, in the present circumstances, we would draw a lesson from the practice elsewhere: and as already noted, the Supreme Court of the United States of America generally sits in the same numerical strength, when setting a precedent, and when reconsidering a precedent. We also take into account the reality that the Kenyan Supreme Court has the limited-size Bench of seven, which on occasions may not sit as such, but as a five-Judge or six-Judge Bench. Given the challenge of Bench-size, in a new Supreme Court that is in quest of greater stability, and in the light of the latitude allowed by the Constitution, we would take the position, in these times, that*** *the prescribed minimum Bench-quorum, with the essential research and scholarly assistance, and with the back-up of professionally-competent advocacy from the Bar, will be properly constituted to hear and determine all matters coming up before it.* ***Such a Bench is duly empowered to hear and determine matters as prescribed in Article 163(3),(4),(5),(6) and (7) of the Constitution, and in the relevant legislation and regulations."***

[51] We would affirm the decision of this Court in the ***Jasbir Singh Rai*** case, in which we thus stated:

> ***"The Supreme Court Act has no specific provision requiring that on reviewing [the Court's] decision, a greater number of Judges should sit."***

[52] Applying these principles to the instant matter, we hold that this Court may sit, whether with its minimum quorum of five Judges or more, in reconsidering the precedent set in the ***Joho*** case.

[53] The question of quorum in matters of review or departure from earlier decisions by this Court has thus been authoritatively settled in the foregoing case. It is to the issues for determination in the substantive cause that we must now turn.

E. ISSUES FOR DETERMINATION

[54] Taking into account the nature of the application before us, and the submissions by counsel for the parties, we have isolated the main issue for determination as being:

> ***"Whether this Court has jurisdiction to review its own Judgments, Rulings or Orders, and if so, what is the scope of such jurisdiction?"***

F. ANALYSIS

[55] This is the first time, that this Court, is being confronted by the question as to whether, it has jurisdiction to review its own decisions. We are aware that Mr. Wasuna has urged us, to dismiss this application on grounds that, the same was filed out of time. It is our view that, this being an application for review, coming long after the Court has delivered a substantive Judgment in an electoral dispute, the dictates of time within which to file such an application are critical. Indeed, we would not have hesitated to dismiss it on the basis of Mr. Wasuna's argument, were it not for the fact that, the question before us, is not only novel, but weighty.

It is a question that calls for prompt and comprehensive consideration by this Court, so as to clear the terrain to be trodden, by those who may seek in future, to invoke such review jurisdiction, if any.

[56] Apex Courts in Africa, and other parts of the Commonwealth and beyond, have had to confront the issue regarding the nature, and extent of their review jurisdiction. Useful insights are deducible from the various decisions regarding this question. We hereby proceed to consider some of these decisions in an endeavour to determine the scope of this Court's review jurisdiction.

(i) The Position in Nigeria

[57] In Nigeria, there is no constitutional provision which expressly vests the Supreme Court, with powers to review its own decisions. In this regard, Article 235 of the Constitution of the Federal Republic of Nigeria has been the center of construction regarding this question. It reads:

> *"Without prejudice to the powers of the President or of the Governor of a State with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court."*

[58] From its wording, it is not clear whether the phrase "any other body" includes or excludes the Supreme Court itself. However, the Rules of that Court, are clear as to the extent of its powers to review its own decisions. In that regard, Order 8, Rule 16 of the Supreme Court Rules provides:

> *"The Court shall not review any Judgment once given and delivered by it save to correct any clerical mistake or some error arising from an accidental slip or omission, or to vary the Judgment or Order so as to give effect to its meaning or intention. A Judgment or Order*

shall not be varied when it correctly represents what the Court decided nor shall the operative and substantive part of it be varied and a different form substituted."

[59] The Court's approach in most cases has been that it does not have the power to review its own decisions except for the minor reasons specified in the Rules. The rationale behind this approach is that there is no constitutional provision which expressly donates to the Court, powers to review its own decisions. This approach was adopted in ***Adigun v. Attorney-General of Oyo State*** (1987) 2 NWLR (PI.56) 197 at 212 where the Court observed thus:

"The powers or inherent powers of the Court of law are powers which enable it to effectively exercise the jurisdiction conferred upon it. The jurisdiction given to the Supreme Court by the Constitution is to hear and determine the matters set out and specified in Section 212(1) and (2) and Section 213(1) and (2)(a,b,c,d,e and f) of the Constitution. In the course of the discharge of its main duty of adjudication, the Court takes and expresses its decision which it intends to give in the matter in writing and delivers it. (See Section 258(1) of the Constitution). If the decision is what the Court intends to give in the matter, that is the end of the adjudication process. If the expression used does not accurately convey the Court's intention both Order 8 Rule 16 of the Supreme Court Rules 1985 and Section 6(6)(a) of the Constitution enable the Court to make the necessary correction but if the terms of the Judgment correctly convey the intention of the Court, neither the inherent powers of the Court nor Order 8, Rule 16 of the Supreme Court Rules 1985 allows an alteration in the Judgment to convey a different intention."

[60] The same approach was followed in ***Alhaji Taofeek Alao v. African Continental Bank Ltd.*** Suit No: SC.14/1995(2), where the Court quoted with approval the passage in *Adigun*. There the Court interpreted Article 235 in the following terms:

> *"This provision gives a stamp of finality to the determination by the Supreme Court. There is no constitutional provision for the review of the Judgments of the Supreme Court by itself. Indeed, if there were, it would constitute an appeal into which category the present application falls. But as the Constitution and the law now stand, there cannot be no appeal questioning the decision of the Supreme Court to itself or to anybody. This is good for the integrity of the Court as there must be finality to litigation when a matter has undergone two, three or four appeals".*

[61] However, in ***Amalgamated Trustees Ltd. v. Associated Discount House Ltd.*** (2007) LPELR-454 (SC); while reaffirming the general principle embodied in Order 8, Rule 16 of that Court's Rules, and the *ratio decidendi* in ***Adigun*** and ***Alhaji Taofeek;*** the Court made the following pronouncement:

> "*That apart, the Supreme Court as is the practice in other superior Courts of record possesses inherent power to set aside its Judgment in appropriate cases. Such cases are as follows:*
>
> *(i) When a Judgment is obtained by fraud or deceit.*
>
> *(ii) When the Judgment is a nullity such as when the Court itself was not competent ; or*

(iii) When the Court was misled into giving Judgment under a mistaken belief that the parties had consented to it; or

(iv) When Judgment was given in the absence of jurisdiction; or where the procedure adopted was such as to deprive the decision or Judgment of the character of a legitimate adjudication."

[62] In ***Alhaji Muhammadu Maigari Dingyadi & Another v. Independent National Electoral Commission & Others*** Suit No: SC.32/2010, the Court explicated further on the nature of its inherent powers in the pronouncement which we hereby quote:

> *"...Any other error outside this saving clause would not be permitted by the Slip Rule since the Judgment would then have represented what the Court decided and any alteration or variation would be a variation of the substantive part of the Judgment.* ***The inherent power of the Court can only be invoked if there is a missing link in the main body of the Judgment and steps must be taken to fill the gaps or clear the ambiguity in the interest of justice. The exercise of this power should not be used to review or rehear the case or alter the rights and obligations of the parties under the Ruling or Order made"*** [Emphasis added].

[63] Again in ***Citec International Estate Ltd. & Others v. Francis & Others*** (2014) LPELR-22314 (SC); the Nigerian Supreme Court reaffirmed the general principle to the effect that it cannot sit on appeal over its own Judgment save in circumstances permitted by the Slip Rule.

The Court also revisited the extent of its inherent powers beyond the Slip Rule and rendered itself thus:

> *"However, it has been held by this Court that the Supreme Court possesses inherent power to set aside its Judgment in appropriate cases but that such inherent jurisdiction cannot be converted into an appellate jurisdiction as though the matter before it is another appeal, intended to afford the losing litigants yet another opportunity to restate or re-argue their appeal....where a Judgment of this Court or an Order thereof is adjudged a nullity, a party affected thereby is entitled to have it set aside* ***ex debitio justitiae.*** *The Court has inherent jurisdiction or power to set aside its own Order or decision made without jurisdiction if such Order or decision is in fact a nullity or was obtained by fraud or if the Court was misled into granting the same by concealing some vital information or facts".*

(ii) The South African Position

[64] In South Africa, the position is that, as a general rule, once the Constitutional Court renders itself in a Judgment, it becomes *functus officio* regarding the same, and may not review it except, on grounds enumerated in Rule 42 of the Uniform Rules of Court, read with Rule 29 of the Rules of the Constitutional Court. Rule 29 provides that some Rules of the Uniform Rules of Court are applicable to the Constitutional Court and Rule 42 is included on the list of the included Rules. It reads in part:

> *"(1) The Court may, in addition to any other powers it may have,* ***mero motu*** *or upon the application of any party affected, rescind or vary:*

(a) *An Order or Judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*

(b) *an Order or Judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*

(c) *an Order or Judgment granted as the result of a mistake common to the parties."*

[65] In ***Daniel v. President of the Republic of South Africa and Another*** [2013] ZACC 24; 2013 (11) BCLR 1241 (CC) at para 5, the applicant urged the Court to set aside its earlier Order. In that Order, the Court had dismissed the applicant's application to have the President's failure to appoint an independent commission of inquiry declared unconstitutional. The Court had this to say regarding its powers to revisit its decisions:

> *"The general principle is that once a Court has duly pronounced a final Order, it becomes* ***functus officio*** *and has no power to alter the Order. However, Rule 42 of the Uniform Rules creates exceptions to this principle. The Rule empowers Courts to rescind or vary Orders in certain defined circumstances."*

(iii) The Approach in England

[66] In England, the approach was that once an appeal is concluded, the same could not be reopened (***Regina v. Pinfold*** [1988] QB 462). However, regarding the appealability of the decisions of the House of Lords, the case of ***In re***

Pinochet [1999] UKHL 1 is instructive as encapsulated in the pronouncement quoted below:

> *"In principle it must be that your Lordships, as the ultimate Court of appeal, have power to correct any injustice caused by an earlier Order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In* ***Cassell & Co. Ltd. v. Broome*** *(No. 2) [1972] A.C. 1136, your Lordships varied an Order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.*
>
> *However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an Order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later Order made in the same case just because it is thought that the first Order is wrong."*

[67] In ***Taylor and Another v. Lawrence and Another*** [2002] 3 WLR 640; at issue was the question whether the English Court of Appeal could reopen an appeal on the ground that its earlier decision could have been tainted by bias. In reopening the appeal, the Court pointed out at (paragraph 54) that at law, it had the power to reopen a concluded appeal where it was necessary to avoid real injustice in certain exceptional circumstances. It further pointed out that, as a Court of justice, it had the power to reopen concluded appeals in Order to ensure that justice is done between the parties and to maintain public confidence in the

administration of justice by correcting wrong decisions and clarifying and developing the law (at paragraph 26 and 50).

[68] Following ***Taylor*****,** the powers of the English Court of Appeal to reopen concluded appeals were codified in Rules. Rule 52.17 of the Civil Procedure Rules 1998 (SI 1998 No 3132) was introduced and it provided specific circumstances under which the English High Court and the Court of Appeal may reopen concluded appeals. The Court of Appeal could reconsider its decisions where:

(a) it was necessary to do so in Order to avoid real injustice;

(b) the circumstances were exceptional and made it appropriate to reopen the appeal; and

(c) there was no alternative effective remedy.

(iv) The Position in India

[69] In India, the power of the Supreme Court to review its own decisions and or Orders is expressly granted by Article 137 of the Constitution which provides as follows:

> *"Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any Judgment pronounced or Order made by it."*

[70] In the case of ***Rupa Ashok Hurra v. Ashok Hurra & Anr*** **,**Writ Petition (civil) 509 of 1997**,** the Court stated:

> *"In view of the specific provision of Article 137 of the Constitution read with Order XL, Rule 1 of the Supreme Court Rules, conferring power of review on this Court, the problem in entertaining a review*

petition against its final Judgment which its precursor - the Federal Court - had to face, did not arise before this Court."

[71] Notwithstanding this express constitutional provision, the Supreme Court of India, has defined its powers of review, so as to maintain the delicate balance between, the need for finality in litigation and the overarching duty of the Court to do justice where circumstances so demand in specific cases.

[72] In ***Girdhari Lal Gupta v. D. H. Mehta And Another;*** AIR 1971 SC 2162, (1971) 3 SCC 189, the Petitioner had urged the Court to review its Order, pursuant to which it had dismissed an appeal against his conviction. The application for review was based on the ground that the petitioner's counsel had omitted to bring to the Court's attention, the provisions of Section 23 (c) (2) of the Foreign Exchange Regulation Act. Counsel for the respondent argued that the Court could not review its own decision (*functus officio* Rule). The Court however allowed the petition to review on the basis that had this provision been brought to its attention, it would have significantly influenced its interpretation of Section 23 (c) (1) of the Act.

[73] In ***Sow Chandra Kanta And Another v. Sheik Habib*** 1975 AIR 1500, 1975 SCC (4) 457, the petitioner had been denied special leave to appeal by the Supreme Court and urged the Court to review that decision. In dismissing the review application, the Court stated thus:

"A review of a Judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over-ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

[74] In ***Northern India Caterers (India) v. Lt. Governor Of Delhi*** 1980 AIR 674, the Court had to decide whether it could review its own decision based on the ground that the decision was based on an erroneous appreciation of facts. In dismissing the review application, the Court remarked:

> *"It is well settled that a party is not entitled to seek a review of a Judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a Judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so."*

[75] The Court in ***Northern India Caterers*** identified the circumstances that would justify the exercise of review jurisdiction as follows:

(a) Where the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its Judgment. (***Gupta*** case above).

(b) Where a manifest wrong has been done and it is necessary to pass an Order to do full and effective justice. (***O. N. Mahindroo v. Distt. Judge Delhi & Anr*)**

(c) Where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. (***Chandra Kanta v. Sheikh Habib*).**

In ***Rupak Ashok,*** the Court made this instructive observation:

> *"[137] We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final Judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of Judgment as though it is essentially in public interest that a final Judgment of the final Court in the country should not be open to challenge yet there may be circumstances, as mentioned above, wherein declining to reconsider the Judgment would be oppressive to judicial conscience and cause perpetuation of irremediable injustice."*

(v) Kenyan Perspective: Whether the Supreme Court has Jurisdiction to Review its own Judgments, Decisions/Orders

[76] The genesis of this application is a Judgment delivered by this Court in the case of ***Fredrick Otieno Outa v. Jared Odoyo Okello & Three Others;*** Sup. Ct. Petition No. 6 of 2014. The 1st respondent was dissatisfied with the finding and Orders in that case and now seeks a 'review' of the Court's decision. He approaches the Court by invoking Article 163(7) of the Constitution, Section

21 of the Supreme Court Act, 2011 and Rule 20(4) of the Supreme Court Rules, 2012. He further relies on the case of ***Jasbir Singh Rai & Three Others v. Tarlochan Singh Rai & Four Others*** SC. Pt. No. 4 of 2012, where this Court affirmed that it could indeed, *depart from its previous decision*, for good cause, and after taking into account legal considerations of significant weight.

[77] For purposes of the application before us, the relevant provisions of the law are firstly, Article 163 (4) of the Constitution, which provides:

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court –***
>
> ***(a) as of right in any case involving the interpretation or application of this Constitution; and***
>
> ***(b) in any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved..."***

[78] The foregoing Article is what can be said to provide "the threshold constitutional basis" for the appellate jurisdiction of this Court. In a long line of authorities, this Court, has authoritatively pronounced itself on the nature, extent, and scope of its appellate jurisdiction under the said Article. In none of these authorities has this Court, declared, or even contemplated, that Article 163(4) of the Constitution, confers upon it, jurisdiction to entertain a second appeal to itself in the same cause. Not even the most nuanced of interpretations of this Article can permit a party to reopen or re-litigate a matter that has been heard and determined with finality by this Court. Such jurisdiction, simply doesn't exist.

[79] This then leads us to Article 163 (7) of the Constitution, pursuant to which the present application for review has been brought. It provides:

> ***"All Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court"***

[80] The 1st respondent/applicant herein, appears to be arguing that Article 163(7) of the Constitution allows this Court to depart from its previous decisions. According to Mr. Kanjama, this provision would cover applications such as the one before us. But what is the real scope of Article 163 (7)?

[81] It is to be noted that this provision is not exclusively addressed to the Supreme Court. Rather, it is an edict, firmly addressed to all Courts in Kenya that in making their Judgments, Rulings, or Orders; they shall be bound by the authoritative pronouncements of the Supreme Court. Such an edict derives from the common law doctrine of *Stare Decisis;* a doctrine, that requires that lower Courts are to be bound by the decisions of higher Courts. So while all the other Courts are bound by the decisions of this Court, the Supreme Court itself is not bound by its decisions. This allows the Supreme Court to depart from its previous decisions where circumstances so demand.

[82] In ***Jasbir Singh Rai & Three Others v. Tarlochan Singh Rai and Four Others,*** SC. Pt. No. 4 of 2012; this Court went to great lengths in giving directions as to when it would depart from its previous decisions if moved so to do pursuant to Article 163 (7) of the Constitution. In that case, the petitioner had moved the Court to depart from its previous decision in ***S. K. Macharia & Another v. Kenya Commercial Bank & Two Others.***

[83] It is clear to us that Article 163(7) of the Constitution can only be invoked by a litigant who is seeking to convince this Court, to depart from its previous decision, on grounds for example, that such decision was made *per incuriam,* or that, the decision is no longer good law, and so on. This provision cannot be invoked by a losing party as a basis for the Court to review its own Judgment, decision, or Order. Nor, can it confer upon the Supreme Court, jurisdiction to sit on appeal over its own Judgment. In our view, reviewing a Judgment or decision, is not the same as departing from a previous decision by a Court. We therefore hold that the application before us cannot be anchored on Article 163(7) of the Constitution.

[84] Having discounted the applicability of Articles 163(4) and 163(7) of the Constitution for purposes of moving this Court to review its own Judgment; the next logical cause of inquiry is to consider any other statutory provisions or the Rules of this Court. Towards this end, our attention must turn to Section 21 (4) of the Supreme Court Act which provides as follows:

> ***"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."***

[85] This Section as quoted, embodies what is ordinarily referred to as the *"Slip Rule"*. By its nature, the *Slip Rule* permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy,

regarding the Judgment or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the *Slip Rule* does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior Courts demonstrates, this is the true import of the *Slip Rule*.

[86] We therefore hold that, Section 21(4) of the Supreme Court Act, does not confer upon this Court, jurisdiction, or powers, to sit on appeal over its own Judgments. Neither, does it confer upon the Court, powers to review any of its Judgments once delivered, save to correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the Judgment or Order so as to give effect to its meaning or intention. Indeed, any corrections made pursuant to this section become part of the Judgment or Order as initially rendered. The main purpose therefore, of Section 21(4) of the Supreme Court Act, is to steer a Judgment, decision, or Order of this Court, towards logical, or clerical, perfection.

[87] The other provision that we must interrogate, is Rule 20(4) of the Supreme Court Rules; which provides that:

> ***"The Court may, in circumstances it considers exceptional, on an application by any party or on its motion, review any of its decisions."***

[88] Unlike Section 21(4) of the Supreme Court Act, Rule 20(4) of the Supreme Court Rules would on its face, appear to confer upon this Court, jurisdiction or

powers, to review its own Judgments, or decisions beyond the confines of the Slip Rule.

[89] Yet, the issue is not as simple or direct as it appears, given the fact that, here, we are dealing with subsidiary legislation. Such legislation must flow from either the Constitution or a parent Act of Parliament. Neither the Constitution, nor the Supreme Court Act, explicitly, or in general terms, confers upon the Supreme Court, powers, to sit on appeal over its own decisions or to review such decisions. This being the case, no rule of the Court, not even Rule 20(4), as worded, can confer upon this Court, jurisdiction to review its own decisions. If this were the intent of Rule 20(4), then the said Rule, would be of doubtful constitutional validity. We must therefore hold, that Rule 20(4) is not capable of conferring upon this Court, powers to review its decisions, beyond the confines of the Slip Rule, as embodied in Section 21(4) of the Supreme Court Act. At best, this Rule can only be understood to be echoing Section 21(4) of the Supreme Court Act.

[90] Flowing from the above analysis, and taking into account the elaborate submissions by counsel, and the practice in the Commonwealth and beyond, the inescapable conclusion to which we must arrive, is that this Court, being the final Court in the land, has no jurisdiction to sit on appeal over, or to review its own Judgments, Rulings, or Orders, save in the manner contemplated by Section 21(4) of the Supreme Court Act. The Court becomes *functus officio* once it has delivered Judgment or made a final decision. The stamp of finality with which this Court is clothed should not be degraded except in exceptional circumstances as determined by the Court itself. Were we to hold otherwise, there would be no end to litigation, thus, severely compromising the integrity of the judicial process, and the integrity of this Court.

[91] Having reached this Conclusion, based largely on the fact that, neither the Constitution, nor the law, explicitly confers upon the Court, powers to review its decisions, does this render this Court entirely helpless? Aren't there situations, so grave, and exceptional, that may arise, that without this Court's intervention, could seriously distort its ability to do justice? Of course, litigation must come to an end. But should litigation come to an end, even in the face of an absurdity? The Supreme Court is the final Court in the land. But most importantly, it is a final Court of justice. This being the case, the Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all.

[92] Taking into account the edicts and values embodied in Chapter 10 of our Constitution, we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations 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.

These principles are no doubt informed by various judicial authorities, in other jurisdictions, such as the ones we have cited from Nigeria, United Kingdom, India and South Africa.

[93] We have now clearly answered the question, as to whether, this Court has jurisdiction, to review its own Judgments, Rulings, or Orders. We have also, determined the nature, scope, and extent, of such review jurisdiction. Applying these principles as set out above, we now proceed to consider, whether the application before us, satisfies the criteria set forth to warrant a review of this Court's Judgment, and consequential Orders, in ***Fredrick Otieno Outa v. Jared Odoyo Okello & Three Others;*** SC Petition No.6 of 2014.

[94] The 1st respondent/applicant herein, is asking the Court to set aside, review or correct its Judgment delivered in that case. The application is premised on seventeen (17) grounds, which we have reproduced verbatim, elsewhere in this Ruling. Our consideration of the grounds in support of this application, leaves us in no doubt whatsoever, as to the real intention of the applicant. The application questions this Court's interpretation of the Constitution and the law. The applicant seeks to introduce new and additional evidence that was never part of the record. The applicant is asking this Court, to reverse or overturn its own Judgment.

[95] We have unambiguously held, that an application for review, is not meant to afford the losing party, an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome. The Applicant is asking this Court to sit on appeal over its own Judgment. We have unequivocally stated that the Supreme Court lacks jurisdiction to entertain a second appeal to itself. Once the Court has heard and determined an appeal from the Court of Appeal, it becomes *functus officio*. The Judgment stands until such time, if at all, that it is

departed from in a future case or, reviewed, within the confines that we have clearly outlined.

[96] We find no reason to review the Judgment in any way, as the criteria established for such a review have not been satisfied by the Applicant. In one of the grounds, the applicant suggests, without supporting evidence, that the "Judgment in question was changed". We have difficulty with this allegation, in view of the fact that, a Judgment, once delivered in open Court, as happened in this case, can only be "changed" through the *Slip Rule*. There can only be one Judgment; the Judgment that is read and delivered in open Court.

G. ORDERS

[97] On the basis of our findings and conclusions regarding the main issue for determination; we make the following Orders***:***

(i) The Preliminary Objection dated 31st October, 2014 is hereby allowed.

(ii) The Application for Review dated 22nd July, 2014 (as amended by the Notice of Motion dated 27th October, 2014), is hereby dismissed.

(iii) The costs of this application shall be borne by the 1st respondent/applicant herein.

DATED and **DELIVERED** at **NAIROBI** this **24th Day** of **February, 2017.**

.....	.....
P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT OF** **THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
J. B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. N. NDUNGU **JUSTICE OF THE SUPREME COURT**	**I. LENAOLA** **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA