REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

SC APPLICATION NO. E007 OF 2026

–BETWEEN–

JOHN KIARIE KUNGU.....APPLICANT

-AND-

DYER & BLAIR INVESTIMENT BANK LIMITED.....1ST RESPONDENT

CFC STANBIC BANK LIMITED ..... 2ND RESPONDENT

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*(Being an application for review of the Ruling of the Supreme Court (Mwilu; DCJ & VP, Ibrahim, Wanjala, Lenaola & Ouko, SCJJ) delivered on 6th October, 2023 in **SC Application No. E023 of 2023**)*

Representation:

Ms. Wangui for the Applicant
(Paul Mwangi & Company advocates)

Mr. Ajak Jok for the 1st Respondent
(*Oraro & Company Advocates*)

Mr. Ogunde for the 2nd Respondent
(*Walker Kontos Advocates*)

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion application dated 10th February 2026, and filed on 11th February 2026, by the Applicant, under Articles 21(4), 48, 50(1), 159(2)(d), 163(4)(b), 163(5), and 163(7) of the Constitution of Kenya, Section 21A(b) of the Supreme Court Act, and Rules 28(5) and 33(2) of the Supreme Court Rules seeking orders that: -

a) *That this Honourable Court be pleased to review, vary, vacate and/or set aside its ruling delivered on 6th October 2023 in Supreme Court Application No. E023 of 2023 between himself and the respondents, under section 21A(b) of the Supreme Court Act read with rule 28(5).*
b) *That upon setting aside its decision in SC Application No. E023 of 2023, this Honourable Court reviews the ruling of the Court of Appeal on certification in Civil Application No. Sup. 7 of 2017 between the same parties, under Article 163(5) of the Constitution and rule 33(2) of the Supreme Court Rules.*
c) *That this Honourable Court do issue a reasoned certification by applying all the principles set out in* ***Malcolm Bell v Moi & another [2013] KESC 23 (KLR)*** *paragraph 53 (i–xi) to the seven questions raised by the applicant in SC Application No. E023 of 2023.*
d) *That in the event this Honourable Court certifies that this matter is one of general public importance, it be pleased to grant leave to the applicant to file an appeal against the judgment delivered by the Court of Appeal in Civil Appeal No. 78 of 2016 and Civil Appeal No. 62 of 2016, consolidated.*
e) *That this Honourable Court be pleased to issue any further orders as it may deem fit in the circumstances, as shall meet the ends of justice.*
f) *That costs of this application be provided for.*

[2] UPON CONSIDERING the applicant's grounds on the face of the application, his averments in his affidavit sworn on 10th February 2026, and filed on 11th February 2026, together with his written submissions dated 10th February 2026, and filed on 11th February 2026, wherein he states that, he instituted ***Civil Suit No. 47 of 2008*** in the High Court at Nairobi, against the respondents, to enforce an agreement dated 28th April 2003; that under the agreement he deposited Kshs. 100,000,000/- with the 1st respondent for investment in shares, fixed deposits, treasury bonds or bills for a commission; that he deposited Kshs. 91.5 million which the 1st respondent invested with the 2nd respondent; that the High Court entered judgment in his favour against the respondents jointly and severally for Kshs. 310,333,333.30 with interest at 16% per annum from 21st October 2007, until payment in full, together with costs; that the respondents appealed, and on 28th July 2017, the Court of Appeal held that the 1st respondent was in breach of contract, but that damages were to be assessed for one year only, and not four years; that the Court of Appeal further held that, there was no privity of contract between the applicant and the 2nd respondent, and assessed interest at 10% based on treasury bond rates in 2003; that aggrieved, he sought certification to appeal to this Court under Article 163(4)(b); that the Court of Appeal dismissed his application on 9th June, 2023, holding that the issues raised did not transcend his personal interests; that he then moved this Court by Originating Motion dated 21st June 2023, seeking review under Article 163(5); that on 6th October 2023, this Court dismissed the motion, affirmed the Court of Appeal's refusal of certification, and ordered him to bear costs; and

[3] UPON CONSIDERING the Applicant's further contentions that this Court did not conduct a proper review under Article 163(5); that the Court merely "noted" the decision of the Court of Appeal rather than reviewing it, and proceeded to assess the merits without first establishing jurisdiction through certification review; that the Court reframed his grievances, conducted its own independent assessment, and retroactively affirmed the Court of Appeal's decision, thereby acting without

constitutional competence; that certification review is a mandatory jurisdictional gateway, and that both the Court of Appeal and the Supreme Court failed to apply the full *Hermanus/Malcolm Bell principles* to his seven questions; that this omission violated Articles 50(1), 48, and 25(c) of the Constitution, rendering the decisions nullities for want of jurisdiction; that the Court of Appeal breached the doctrine of stare decisis, by relying on the truncated ***Hermanus*** test in ***KEFHAU*** instead of the expanded ***Malcolm Bell*** matrix, contrary to Article 163(7); that as held in ***Macfoy Vs United Africa Co. Ltd*** (1961) 3 All ER 1169; (1962)AC 152 and ***Anisminic Ltd Vs Foreign Compensation Commission*** (1969) 2 AC 147 jurisdictional errors render decisions void; and that according to ***Fredrick Otieno Outa Vs Jared Odoyo Okello*** (Petition 6 of 2014) [2017] KESC 25 (KLR), even Supreme Court decisions, may be declared nullities in exceptional circumstances, where the Court lacked competence; and that the circumstances herein are meritorious, exceptional, and in the public interest under Rule 28(5) of the Supreme Court Rules, and therefore warrant the intervention of this Court; and

[4] HAVING CONSIDERED the 1st respondent's replying affidavit sworn by Jimnah Mwangi Mbaru, its director, on 20th February 2026, and filed on 23rd February 2026, together with its written submissions dated 24th February 2026, and filed on 25th February 2026, wherein the 1st respondent contends that this Court had already, in Application No. E023 of 2023, dismissed a similar certification application for lack of merit, having correctly applied its jurisprudence, and found no matter of general public importance; that the present application having been lodged after an inordinate delay of two years and four months, amounts to an impermissible attempt to re-litigate settled issues, and fault the Court's reasoning; that the applicant has failed to demonstrate exceptional circumstances required for the Court's limited review jurisdiction under section 21(4) of the Supreme Court Act, and Rule 28(5) of the Supreme Court Rules; no new material or grounds have been presented that were unavailable with due diligence, and that the issues raised remain confined to the parties' dispute rather than transcending into matters of

public importance; that the principle of finality in litigation must be upheld; that the application is procedurally defective for want of an extracted order, and for lack of a proper change of advocates on record; that the applicant's reliance on semantics in the Court's ruling—such as the use of the words "noted" versus "reviewed" amounts to pedantic objections that do not establish nullity or exceptional circumstances; that according to the decision in ***Fredrick Otieno Outa Vs Jared Odoyo Okello,*** (Petition 6 of 2014) [2017] KESC 25 (KLR), which affirmed that this Court cannot sit on appeal over its own decisions save in the most exceptional cases, such as fraud, deceit, or lack of jurisdiction; that the applicant's attempt to invoke Article 163(7) of the Constitution as a basis for review is misguided, as the same cannot be used by a losing party to reopen a final decision; and that the review jurisdiction of the Supreme Court is narrow and circumscribed, that the applicant has failed to meet the threshold of exceptional circumstances; and that the application is fatally defective, devoid of merit, and should be dismissed with costs to the respondents; and

[5] CONSIDERING the 2nd respondents submissions dated 4th March 2026, and filed on 5th March 2026, wherein it argues that, under Section 21A(b) of the Supreme Court Act, review is only available where a decision is a nullity or where exceptional circumstances in public interest exist; that the applicant has not demonstrated that the order was a nullity, nor is it suggested that the Court lacked jurisdiction to issue it; that the allegation of misconstrued jurisdiction amounts merely to dissatisfaction with the merits of the decision, which does not meet the threshold for nullity; and

[6] BEARING IN MIND that the primary issue before us for determination is whether, the applicant has laid a sufficient basis to warrant a review of this Court's Ruling delivered on 6th October 2023, pursuant to Section 21(4) of the Supreme Court Act, and noting the pleadings filed, submissions made and the authorities submitted;

[7] WE NOW OPINE AND DETERMINE as follows:

i. Section 21(4) of the Supreme Court Act, under which this application has been brought, 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."***

ii. The ruling sought to be reviewed was delivered on 6th October 2023, while the present application was filed on 17th February 2026, two years and four months later. It is therefore manifestly outside the fourteen-days timeline prescribed under Section 21(4) of the Supreme Court Act. The applicant has not sought leave of the court to mount the application out of time, and therefore his application is unmeritorious on that account.

iii. Even if one were to overlook the strict timelines, the question remains whether, the applicant has satisfied the threshold for review of this Court's ruling. In ***Fred Otieno Outa Vs Jared Odoyo Okello (Supra)*** faced with a similar application, this Court elaborately discussed its review jurisdiction under Section 21(4) of the Act and set out the limited circumstances to be considered in determining a review application as follows: -

> ***"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."

iv. The applicant anchors his plea on the ground that the ruling was a nullity, advancing the following reasons: -

a) That the Court did not conduct a proper review under Article 163(5), since it merely "noted" the decision of the Court of Appeal rather than reviewing it, and proceeded to assess the merits without first establishing jurisdiction through certification review;

b) The Court reframed his grievances, undertook its own independent assessment, and retroactively affirmed the Court of Appeal's decision, thereby acting without constitutional competence;

c) The Court failed to apply the full Hermanus/Malcolm Bell principles to his seven questions, thereby violating Articles 50(1), 48, and 25(c) of the Constitution

v. It is evident that the Court of Appeal, in dismissing the applicant's motion for certification, found that he had failed to demonstrate that the issues in his intended appeal, transcended his personal grievances into matters of general public importance, a finding that this Court upheld. The applicant has made no attempt to show, by way of new evidence unavailable at the time of the ruling, that his dispute rises above personal grievances in the dispute.

vi. His assertion that this Court reframed his grievance is wholly unsubstantiated, as he has not identified what his grievance was, prior to the

ruling, nor how the Court allegedly reframed it. Equally, his contention that the Court failed to apply the full ***Hermanus/Malcolm Bell*** principles is without foundation. Article 163(4)(b) of the Constitution confers jurisdiction upon this Court to entertain matters certified by the Court of Appeal as matters of general public importance. In ***Hermanus Phillipus Vs Giovanni Gnecchi -Roscone,*** SC. Application No. 4 of 2012 [2013] eKLR, this Court defined a matter of general public importance as one that, *inter alia,* transcends the circumstances of the particular case, and bears significant impact on the public interest. Having established that the issues raised in the intended appeal did not transcend the personal dispute between the parties, this Court was under no obligation to consider whether the other principles outlined in ***Hermanus*** and ***Malcolm Bell cases*** had been satisfied. In any event, the applicant has not identified any principle from those authorities that the Court disregarded.

vii. As submitted by the 2nd respondent, and which we agree with, the applicant's claims amount merely to dissatisfaction with the merits of the decision of this Court. Such dissatisfaction does not meet the threshold for nullity and, by extension, cannot sustain a review under Section 21(4) of the Supreme Court Act. This Court has, in a number of decisions, held unambiguously that an application for review is not intended to afford a losing party an opportunity to re-litigate or reopen a matter merely because such party is unhappy with the outcome. The applicant herein is, in effect, asking this Court to sit on appeal over its own ruling. For these reasons, the applicant's application, which we have also found to have been filed outside the statutory period of time, and without leave of this Court, lacks merit and amounts to an abuse of the court process.

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

i. The applicant's Notice of Motion dated* 10th February, 2026 *and filed on 11th February, 2026 is hereby dismissed with costs to respondents.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **19th** day of **June**, 2026.

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M.K. KOOME

CHIEF JUSTICE & PRESIDENT OF

THE SUPREME COURT OF KENYA

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P.M. MWILU	**S.C. WANJALA**
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF KENYA	**JUSTICE OF THE SUPREME COURT**
.....	**.....**
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**