



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP; Wanjala, Njoki, Ouko, Warsame, SCJJ)

PETITION (APPLICATION) NO. E012 OF 2023

— BETWEEN —

DARI LIMITED.....1ST APPLICANT
RAPHAEL TUJU.....2ND APPLICANT
MANO TUJU.....3RD APPLICANT
ALMA TUJU.....4TH APPLICANT
YMA TUJU.....5TH APPLICANT
S.A.M COMPANY LIMITED.....6TH APPLICANT
-AND-
EAST AFRICAN DEVELOPMENT BANK.....RESPONDENT

(Being an application for review of this Court's Order of 11th October 2024)

Representation:

Okatch & Partners for the Applicants

Mohammed Muigai, LLP for the Respondent

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 13th May 2026 and filed on 3rd June 2026, pursuant to Sections 3A, 21(2), 23A, 24(1) of the Supreme Court Act, Rules 28(5), 31 and 32 of the Supreme Court Rules 2020 and Articles 2, 3(1), 10, 19, 20(1), (2) & (3), 25, 47, 48, 50, 163(1) & (4), 159(2)(d) and (e) of the Constitution, in which the applicants are seeking that the order of recusal made by this Court on 11th October 2024 be reviewed, varied, vacated and/set aside; and

[2] UPON CONSIDERING the applicants' grounds on the face of the application and affidavit in support sworn by *Raphael Tuju* on 13th May 2026 together with their Supplementary Affidavit sworn on 1st July 2026, wherein it is contended that Mr. David Odongo, the respondent's witness, was suborned into making false affidavits and witness statements that misled the Court and the superior courts below; that the respondent thereby procured judicial outcomes through material falsehoods; that this Court has a duty to safeguard the integrity of its process and prevent outcomes obtained through dishonesty and misrepresentation; that the circumstances disclosed constitute an exceptional case warranting the Court's intervention by invoking its jurisdiction under Section 21A of the Supreme Court Act and Rule 28(5) of the Supreme Court Rules 2020, as read with Articles 25, 27, 47, 48 and 50 of the Constitution; that the Court retains a limited post-decisional jurisdiction to review its decisions in exceptional circumstances so as to meet the ends of justice, as affirmed in its ruling of 23rd January 2026 in ***Attorney General on behalf of the Cabinet Secretary, Ministry of Interior and Coordination of National Government Vs Nguruman Ltd***, SC PT (App) No. E015 of 2025 [unreported] which was in reference to the case of ***Janmohammed (SC) (Suing as the Executrix of the Estate of the Late HE Daniel Toroitich Arap Moi) & another Vs District Land Registrar Uasin Gishu & 4 others*** [2024] KESC 39 (KLR); that the complaint to the JSC that precipitated the order of recusal has since been withdrawn, thereby tilting the scales of justice in favour of the applicants in light of the new evidence; and that, absent conservatory orders, the respondent is likely to proceed with the attachment and sale of the property forming the subject matter of the dispute; and

[3] UPON CONSIDERING the applicants' submissions dated 13th May 2026 2025 and filed on 3rd June 2026, restating the grounds set out above in addition to urging this Court to be persuaded by its authoritative pronouncement on the question of its review jurisdiction in the case of ***Outa Vs Okello & 3 others*** [2017] KESC 25 (KLR); that the present application falls within the exceptional

circumstances contemplated in the said decision; and that, therefore this Court is properly seized of jurisdiction to review, vary, vacate and/or set aside its recusal decision of 11th October 2024; that the threshold for the exercise of this Court's residual jurisdiction has clearly been met by the applicants; that no prejudice will be occasioned to the respondent should the orders sought be granted, but instead the applicants stand to suffer irreparable harm if the orders sought are not granted; and

[4] HAVING CONSIDERED the respondent's replying affidavit sworn by *Carol Luwaga* on 29th June 2026 together with its submissions dated 10th July 2026, wherein it is contended that the applicants' previous application dated 16th May 2024 seeking a stay of the proceedings pending determination of a complaint before the Judicial Service Commission (JSC), was dismissed by this Court on 11th October 2024, resulting in the recusal of the Judges on the bench; that no further proceedings ensued thereafter and the matter has now been reinitiated through the present application; that the applicants have failed to meet the statutory and procedural thresholds under Section 21A of the Supreme Court Act and Rule 28(5) of the Supreme Court Rules, 2020; that the allegations concerning the respondent's former employee, Mr. David Odongo, are without merit, having been employed as the respondent's Head of Business, Rwanda Country Office, when he swore the impugned affidavit in HCCC No. 1 of 2020 (O.S), and having subsequently been cross-examined and re-examined in open court on 11th and 24th July 2024; that the applicants have not demonstrated how his evidence misled this Court or the superior courts below, nor has he sworn any affidavit before this Court so as to confer jurisdiction upon it to interrogate proceedings in the High Court; furthermore, there is no evidence of the alleged withdrawal of the complaint before the JSC neither was it communicated to the respondent; that the circumstances relied upon are distinguishable from those in the ***Janmohammed, SC case*** (*supra*); that none of the grounds for review under Section 21A, Rule 28(5) and in ***Outa*** (*supra*) has been presented; and that, in any event, this is not the first instance in which the applicants have alleged factual misrepresentation or false evidence on the part of the respondent in these proceedings; and

[5] COGNISANT OF THE FACT that this Court has already established the guiding principles upon which it will review its decision in ***Outa*** (*supra*), namely that:

- 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.*

[6] WE NOW OPINE as follows:

- i. We note that the applicants have placed considerable reliance on the affidavit sworn by *David Odongo* in the matter pending determination before the High Court in support of the present application. However, in our view, issues that are live before that court are not available for this Court's consideration; hence our decision to confine our consideration of the application to the prayer:

“2. THAT the recusal decision made by this Honourable Court on the 11th day of October 2024 be reviewed, varied, vacated and/or set aside.”

- ii. The ruling of this Court dated 11th October 2024 was precipitated by a complaint lodged by the applicants before the JSC against all the Judges constituted to hear the appeal, namely, Lady Justice Philomena Mwilu (DCJ & VP), the late Mr. Justice Mohammed Khadar Ibrahim, Justice (Dr.) Smokin Wanjala, Lady Justice Njoki Ndungu and Mr. Justice William Ouko, SCJJ. In their petition before the JSC, the applicants made allegations of

bias against the Bench, stating that the five Judges were determined to render a predetermined outcome.

- iii. They argued that they had completely lost faith in the Court's administration of justice and would ideally call for the recusal of the Judges concerned, but for the doctrines of necessity and statutory authority as espoused by the Court in ***Shollei Vs Judicial Service Commission & another*** [2022] KESC 5 (KLR); that having petitioned the JSC, it was only fair for the Court to allow the JSC to hear and determine the pending complaint before proceeding to hear the main appeal. In other words, the applicants were not seeking a stay of the Judgment of the Court of Appeal or proceedings before that court. Instead, they were seeking to stay their own appeal before this Court pending the determination of their complaint before JSC.
- iv. The Court, however, was of the view that in the circumstances, it was untenable to participate further in the proceedings, for doing so would not serve the ends of justice, *“at least in the eyes and perception of the appellants/applicants”*. The Court went further to explain that;

“[28] In taking this decision, we are keenly aware of its consequences on the appeal before us, given the constitutional provisions as to quorum of this Court. Indeed, such a decision is one that ought only to be taken very sparingly, on a case by case basis, and in the most compelling circumstances”.

- v. Following these events, the applicants, by their letter dated 11th May 2026 to the Hon. Registrar of the Court and copied to the Hon. Chief Justice and to each of the five Judges, stated that they have unreservedly withdrawn the complaint against the Justices of the Supreme Court from the JSC.
- vi. The applicants have cited Section 21A of the Supreme Court Act, among many other provisions of the Constitution and the Court's Rules, praying that the Court reviews its ruling of 11th October 2024 in which the five judges recused themselves. Section 21A aforesaid permits the Court to review its

own decision where the decision was obtained through fraud, deceit or misrepresentation of facts; or where the decision is a nullity for having been made by a court which was not competent; or where the court was misled into making the decision under the belief that the parties have consented; or where the decision was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision.

- vii. We do not, respectfully, think Section 21A or the strictures established in ***Outa*** are applicable here in their strict sense. The applicants have not shown how the ruling was procured by fraud, or made without jurisdiction, or based on mistaken consent, or rendered upon repealed or deliberately concealed law. Nor do the applicants contend that the ruling was erroneous when it was made. Similarly, Rule 28 (5) of the Court's Rules, which permits the Court to review its decisions in any circumstance which it considers meritorious, exceptional, and in the public interest, does not apply.
- viii. What we know is that there has been a material supervening shift in the factual circumstances upon which the order of recusal rested. It was the complaint by the applicants to the JSC that led to the recusal by the Judges. At paragraph 14 of the Ruling of 11th October 2024, the Court was clear in its pronouncement that it was "*only fair to first allow the complaint before the JSC to run its course, and as such, it is just and equitable that the instant application be determined on a priority basis*".
- ix. That the complaints have subsequently and unequivocally been withdrawn, and in exercise of the Court's inherent powers, we find no justification to perpetuate the recusal beyond this point. We emphasize, however, that this cessation of circumstances that gave rise to the recusal of Judges *per se* does not alter the validity of the ruling of 11th October 2024. It was the correct and proper decision to make in the circumstances at the time. As a matter of fact, and to buttress this fact, the applicants have not invited us to hold that the ruling was erroneously made. Instead, they have based their prayers on the withdrawal of the complaints. Indeed, the basis of our recusal having ceased

to exist, we reiterate that there is no factual and objective basis for the continued recusal.

- x. Consequently, in exercise of Section 3A of the Supreme Court Act, and without interfering with the validity of our ruling of 11th October 2024 when it was made, the Court declares that the order of recusal is vacated going forward, and the four Judges (Hon. Mr. Justice Mohammed Khadar Ibrahim having passed away and substituted by Hon. Mr. Justice Mohammed Abdulahi Warsame in these proceedings) shall be at liberty to participate in the further proceedings in the pending appeal, which may now be listed in the normal manner for hearing.
- xi. We affirm that this is not the first time this Court has resorted to its inherent discretionary authority to make such orders as may be necessary for the ends of justice, for it is a court of justice. Inherent power is, however, not substantive jurisdiction capable of creating a new cause of action. It is not a jurisdiction to reopen and reconsider the merits of our earlier ruling under consideration. It is purely a power ancillary to jurisdiction already properly seized. See ***Board of Governors, Moi High School, Kabarak & another Vs Bell & 2 others*** [2013] KESC 12 (KLR), ***Republic Vs Mohammed & another*** [2018] KESC 59 (KLR) and ***Janmohammed (SC)*** (*supra*).
- xii. Before we conclude, we consider it necessary to address a matter of considerable institutional concern. While it is not questionable that every person has the right under the Constitution to lodge a *bona fide* complaint concerning the conduct of a judge or judicial officer before the JSC, nothing in this ruling should be understood to be limiting the proper exercise of that right. There is a corresponding responsibility on a litigant not to casually make allegations sufficiently grave to occasion the recusal of five of the seven Justices of the Supreme Court.
- xiii. An apology cannot be compelled, nor do we insist it must be tendered first for this Court to exercise its inherent jurisdiction. We cannot, however, be indifferent to the fact that the complaints against the Judges have been

withdrawn without explanation, retraction or expression of regret. We say no more.

[7] **CONSEQUENTLY**, and for reasons we have given, the following are the Court's final **ORDERS**:

- a) The Notice of Motion dated 13th May 2026 and filed on 3rd June 2026 is hereby allowed to the extent that we vacate the orders of recusal in the ruling dated and delivered on 11th October 2024.*
- b) Each party shall bear its own costs.*

It is so Ordered.

DATED and DELIVERED at NAIROBI this 25th Day of September 2026.

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

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

.....
M. WARSAME
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA