



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

**PETITION NO. E031 OF 2024 AS CONSOLIDATED WITH PETITIONS
NOS. E032 & E033 OF 2024**

— BETWEEN —

**THE CABINET SECRETARY FOR THE NATIONAL
TREASURY AND PLANNING1ST APPELLANT/RESPONDENT**
THE ATTORNEY GENERAL2ND APPELLANT/RESPONDENT
THE NATIONAL ASSEMBLY 3RD APPELLANT/RESPONDENT
**THE SPEAKER OF THE
NATIONAL ASSEMBLY4TH APPELLANT /RESPONDENT**
KENYA REVENUE AUTHORITY5TH APPELLANT /RESPONDENT

— AND —

OKIYA OMTATAH OKOITI 1ST RESPONDENT/APPLICANT
ELIUD KARANJA MATINDI 2ND RESPONDENT/APPLICANT
MICHAEL KOJO OTIENO3RD RESPONDENT
BENSON ODIWOUR OTIENO4TH RESPONDENT/APPLICANT
BLAIR ANGIMA OIGORO5TH RESPONDENT/APPLICANT
VICTOR OKUNA 6TH RESPONDENT
FLORENCE KANYUA LICHORO 7TH RESPONDENT
DANIEL OTIENO ILA 8TH RESPONDENT
RONE ACHOKI HUSSEIN 9TH RESPONDENT

HON. SENATOR EDDY GICHERU OKETCH	10TH RESPONDENT
CLEMENT EDWARD ONYANGO	11TH RESPONDENT
PAUL SAOKE	12TH RESPONDENT
LAW SOCIETY OF KENYA	13TH RESPONDENT
AZIMIO LA UMOJA ONE	
KENYA COALITION PARTY	14TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION	15TH RESPONDENT
KATIBA INSTITUTE	16TH RESPONDENT
THE INSTITUTE FOR SOCIAL	
ACCOUNTABILITY (TISA)	17TH RESPONDENT
TRANSPARENCY INTERNATIONAL KENYA	18TH RESPONDENT
INTERNATIONAL COMMISSION OF	
JURISTS-KENYA (ICJ KENYA)	19TH RESPONDENT
SIASA PLACE	20TH RESPONDENT
TRIBELESS YOUTH	21ST RESPONDENT
AFRICA CENTER FOR OPEN GOVERNANCE	22ND RESPONDENT
ROBERT GATHOGO KAMWARA	23RD RESPONDENT
TRADE UNIONS CONGRESS OF KENYA	24TH RESPONDENT
KENYA MEDICAL PRACTITIONERS'	
PHARMACISTS AND DENTIST UNION	25TH RESPONDENT
KENYA NATIONAL UNION OF NURSES	26TH RESPONDENT
KENYA UNION OF CLINICAL OFFICERS	27TH RESPONDENT
FREDRICK ONYANGO OGOLA	28TH RESPONDENT
NICHOLAS KOMBE	29TH RESPONDENT
WHITNEY GACHERI MICHENI	30TH RESPONDENT
STANSLOUS ALUSIOLA	31ST RESPONDENT
HERIMA CHAO MWASHIGADI	32ND RESPONDENT
DENNIS WENDO	33RD RESPONDENT
MERCY NABWIRE	34TH RESPONDENT
BENARD OKELO	35TH RESPONDENT

NANCY OTIENO	36 TH RESPONDENT
MOHAMED B. DUB	37 TH RESPONDENT
UNIVERSAL CORPORATION LIMITED	38 TH RESPONDENT
COSMOS LIMITED	39 TH RESPONDENT
ELYS CHEMICAL INDUSTRIES	40 TH RESPONDENT
REGAL PHARMACEUTICALS	41 ST RESPONDENT
BETA HEALTHCARE LIMITED	42 ND RESPONDENT
DAWA LIMITED	43 RD RESPONDENT
MEDISEL KENYA LIMITED	44 TH RESPONDENT
MEDIVET PRODUCTS LIMITED	45 TH RESPONDENT
LAB AND ALLIED LIMITED	46 TH RESPONDENT
BIOPPHARM LIMITED	47 TH RESPONDENT
BIODEAL LABORATORIES LIMITED	48 TH RESPONDENT
ZAIN PHARMA LIMITED	49 TH RESPONDENT
THE SPEAKER OF THE SENATE	50 TH RESPONDENT
CONSUMERS FEDERATION OF KENYA (COFEK)	51 ST RESPONDENT
KENYA EXPORT FLORICULTURE HORTICULTURE, AND ALLIED WORKERS UNION	52 ND RESPONDENT
DR. MAURICE JUMAH OKUMU	53 RD RESPONDENT

*(Being an application for review of the Ruling and Orders of the Supreme Court
(Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)
delivered on 20th August 2024)*

RULING OF THE COURT

[1] UPON READING the Notice of Motion dated 29th August 2024 and lodged before this Court on 30th August 2024, by 1st, 2nd 4th & 5th Respondents/Applicants seeking, orders *inter alia* that-

- a. *The directions and orders issued by this Honourable Court in the ruling dated and delivered 20th August 2024, specifically Order No. (iii) be and are hereby varied and set aside.*
- b. *An Order be and is hereby issued that the 1st, 2nd, 4th, and 5th Respondents herein having filed and transmitted to the Registrar of this Court, and served on all parties, their Notice of Appeal dated 12th August 2024, have up to 24th September 2024 to institute their intended Petition of Appeal.*
- c. *This Honourable Court do issue fresh directions in line with the Supreme Court Rules, 2020 taking into consideration the timelines and statutory requirements, allowing all parties sufficient time to file and serve their respective pleadings, responses, and any necessary cross-appeals.*
- d. *The consolidated appeals be rescheduled for hearing on a date that allows all parties adequate time to comply with the procedural requirements as provided under the Supreme Court Rules, 2020.*
- e. *Any other or further directions that this Honourable Court deems fit and just to grant in the circumstances; and*

[2] TAKING INTO ACCOUNT the affidavit in support of the Motion sworn by **Benson Odiwuor Otieno**, the 4th Respondent/Applicant herein, and their written submissions both dated 29th August 2024 wherein the applicants submit that; their case before the High Court i.e. **Petition No. E181 of 2024** and **Petition E021 of 2024** and in the Court of Appeal i.e. **Civil Appeal No. E021 of 2024** had sought broader declarations on the unconstitutionality of the Finance Act 2023 than are now before the Court; the appeals were distinct in scope and raised unique issues not found in the three consolidated appeals; this Court ordered the consolidation of the petitions of appeal herein, while the timeline for filing responses to the consolidated appeal, particularly **S.C. Petition No. E033 of 2024**, had not lapsed thus prejudicing their right to adequately prepare their responses and any necessary cross- appeals; the consolidation order did not address or provide any guidance regarding the responses to the Petition of Appeal as consolidated; the deadline for

filing a response to ***S.C. Petition No. E033 of 2024*** would lapse on 30th August 2024 but, when the matter was mentioned before the Deputy Registrar of the Court, only 9 days had lapsed out of the 14 days allowed for an affected party to respond to an appeal; the Deputy Registrar's directions, stating that the time for filing a response had lapsed, were in clear violation of Rule 42 of the Supreme Court Rules and blatantly disregarded the statutory timelines; the Court, having already granted conservatory orders, should not have had any legitimate reason, under the guise of urgency of the appeal, to curtail the parties' right to fully prepare for the hearing of the appeal.

[3] They urge further that, based on the rules of computation of time as provided under Section 57 of the Interpretation and General Provisions Act (Cap.2) as read with Section 15 of the Supreme Court Rules, having filed and transmitted to the Registrar and served on all parties their Notice of Appeal, the deadline for the applicants to institute their appeal will lapse on 24th September 2024, and therefore, it would be contrary to the Rules of the Court to lock them out while they are still within the timeline set for institution of appeals. That the issues raised in their Notice of Appeal are also unique in scope and have not been raised by the petitions already filed in this matter and they are apprehensive that should they later institute their petition of appeal, the Court will most likely want to consolidate it with the already consolidated ones, or should the Court proceed to determine the three petitions already filed, it may later decline to entertain their appeal. It would, in the circumstances, be just and expedient to hear all the appeals relating to the challenge of the Court of Appeal judgment, at once, rather than in instalments; and

[4] UPON READING the Replying Affidavit by the 1st and 2nd Appellant's dated 3rd September 2024 and sworn by **Charles Hinga** the Principal Secretary for the Ministry of Public works, Housing and Urban Development wherein he avers that they have complied with the directions issued by the Court on 20th August 2024; and that they understand the need to expedite the matters and the overbearing public

interest as well as the need for this Court to fully settle the issues raised in appeal as they are matters of national concern affecting revenue collection in the country. The 1st and 2nd Appellants also urge this Court to balance the rights of the applicants and respondents to a fair hearing *vis-a-vis* the need to expedite hearing of the consolidated Petitions; and

[5] UPON READING the submissions by **Eliud Karanja Matindi**, the 2nd Respondent herein, in support of the application and wherein he submits that allowing the application will ensure that the applicants have an opportunity to have their intended Petition of Appeal heard and determined on its merits. Conversely, a failure to grant the application will mean the intended appeal will be fatally compromised and the Applicants will have been condemned unheard. He anchors his submission on this Court's decision in ***Deynes Muriithi & 4 Others v Law Society of Kenya & another*** [2016] eKLR where it was held that this Court has inherent jurisdiction to forestall an injustice, and in this context, the requirement that all parties are heard freely and fairly before a matter is concluded. The persuasive authority of the Court of Appeal in ***Judicial Service Commission v Mbalu Mutava & another*** [2015] eKLR is also cited in support of this submission, where the Court reaffirmed the position that the right to fair hearing under Article 50 (1) of the Constitution as read with Article 25 cannot be limited; and

[6] BEARING IN MIND that this Court on 20th August 2024 issued orders which were to the effect that;

“a. conservatory order is hereby issued suspending and staying the declarations in Orders iii, iv, vi, vii & ix (i) issued in the Court of Appeal Judgement dated 31st July, 2024 in Civil Appeals No. E003, E016, E021, E049, E064 & E080 of 2024 (Consolidated) pending the hearing and determination of the consolidated appeal;

ii. the consolidated appeal be set down for mention before the Deputy Registrar of the Court for purposes of ensuring compliance with earlier directions on filings.

iii. The consolidated appeals shall be set for hearing- virtually- on 10th and 11th September 2024 at 9 a.m. each day”.

[7] Subsequent to the above orders, the Deputy Registrar of this Court, on 23rd August 2024, issued orders directing the parties to file their responses and cross-appeals in line with **Order iii** above and in the aforesaid directions, the Deputy Registrar declined to offer any advice to the applicants herein in relation to their notice of appeal upon considering the fact that the consolidated appeal had already been fixed for hearing on 10th and 11th September 2024. The said directions triggered the filing of the present Motion and with the above background in mind;

[8] WE NOW OPINE AND DETERMINE as follows;

- i. Under Section 21 A of the Supreme Court Act as read with Rule 28 (5) of the Supreme Court Rules, and the guiding principles in ***Fredrick Otieno Outa vs Jared Odooyo Okello & 3 Others*** S.C. Petition No. 6 of 2014 [2017] eKLR this Court, may, upon application by a party, or on its own motion, review its own decision where: (a) the judgment, ruling, or order, was obtained, by fraud, deceit or misrepresentation of facts; (b) the judgment, ruling, or order, is a nullity by virtue of being made by a court which was not competent; (c) the Court was misled into giving judgment, ruling or order, under a belief that the parties had consented to the same; or (d) the judgment, ruling or order was rendered, on the basis of a repealed law, or as a result of a deliberate concealment of a statutory provision; and
- ii. Rule 3 of the Supreme Court Rules provides for the scope and objectives of the Supreme Court Rules and Rule 3 (5) specifically provides that;

“(5) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.

This Rule is pertinent and applicable to the present Motion for reasons to be detailed out below.

- iii. In the above context, this Court, in issuing its directions dated 20th August 2024, was cognisant of the time of filing of respective pleadings as anchored in Part IV of the Supreme Court Rules. Amongst the considerations made by the Court in fast tracking the matter is the public interest involved in the consolidated appeal and the fact that the Finance Act is a time bound statute. Indeed, in paragraph 20 of its decision the Court stated;

“...Furthermore, balancing the loss and uncertainty which would be occasioned to the applicants as against the loss by the respondents and public, we find that public interest tilts in favour of granting conservatory and stay orders to preserve the substratum of the consolidated appeal and maintain stability in the budget and appropriation process pending the determination of this appeal. In addition, in view of the public interest in the matter, we direct that the consolidated appeal herein be set down for hearing within the shortest time possible after the delivery of this ruling.” [Emphasis added]

- iv. The subsequent directions by the Deputy Registrar dated 23rd August 2024 are therefore in conformity with the Ruling dated 20th August 2024 and we note that all parties including the applicants have partly complied with the said directions.
- v. Noting the **Fredrick Outa** decision and Rules 21A and 28(5) aforesaid, the applicants have not shown how the impugned directions were a nullity,

or were obtained, by fraud, deceit or misrepresentation of facts. We also find that the applicants had, from the date of the Court of Appeal judgement i.e. 31st July 2024, sufficient time to file their appeal especially because of the public interest, sensitivity and urgency of the matters in dispute. The fact that the appellants filed their appeals with the said urgency and have complied with all the directions issued by this Court as have the applicants, means that the applicants could have similarly done so but for their own indolence.

- vi. The applicants' plea that they are within the time for filing their appeal is negated by the fact that this Court has inherent jurisdiction to make such orders as would meet the ends of justice, the timelines set out in the Rules notwithstanding. We have also not been shown how our directions are capricious or injudicious.
- vii. It will be prejudicial to the appellants herein and all the close to fifty (50) other affected parties to allow the filing of a subsequent appeal in this matter at this stage as none has raised any issue with the fast tracking of the hearing of the consolidated appeal save the 2nd Respondent and for reasons set out above.
- viii. We further note that the issues raised by the applicants in their Notice of Appeal have already been canvassed by other parties in the consolidated appeal; for example, the 15th, 16th, 17th, 18th and 19th respondents' cross appeal advances the argument that the Court of Appeal erred in law when it failed to hold that the Act is a Bill concerning county governments and that the lack of concurrence between the Speaker of the Senate and the Speaker of the National Assembly before the introduction of the Finance Bill vitiated the constitutionality of the Act. We also note that the *pith and substance* test alongside all other related issues raised in the Notice of

Appeal filed by the applicants on 20th August 2024 can be addressed in submissions as a matter of law without the filing of a fresh appeal. The only other issue that we see in the said Notice relevant to this Ruling is the question whether the Court of Appeal failed to grant appropriate reliefs pursuant to Articles 2(4) and 23(3) of the Constitution. Again, that issue is already germane to the determination of the consolidated appeal and we said so in our Ruling under attack. In effect, none of the five (5) issues in the applicants' Notice of Appeal fall outside the existing appeal to warrant the filing of a separate appeal and in any event they all arise from the same judgment of the Court of Appeal that the appellants have challenged and can be raised in the context of submissions already filed by the parties.

- ix. In view of the foregoing we, find that the application does not fall within the parameters for review in the ***Fredrick Otieno Outa Case*** as set out above and must be therefore be dismissed.
- x. On costs, award of the same is discretionary and follows the principle set out by this Court in ***Jasbir Singh Rai & 3 other v. Tarlochan Singh Rai & 4 others*** SC Petition No 4 of 2012; [2014] eKLR that costs follow the event and that the Court may in appropriate cases exercise discretion and decide otherwise. We find that the application was not superfluous and that the applicants were endeavoring to exhaust every remedy to ventilate their case. In the circumstance, it will not serve the ends of justice to condemn the applicants to pay costs of the application.

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

- i. ***The Notice of Motion dated 29th August 2024 and filed on 30th August 2024 is hereby dismissed; and***

ii. *There shall be no order as to costs.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 5th day of September, 2024.

.....
M. K. KOOME
CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT

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

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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

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

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

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W. OUKO
JUSTICE OF THE SUPREME COURT