



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

APPLICATION NO. E011 OF 2023

-BETWEEN-

GEORGE PETER KALUMA.....APPLICANT

-AND-

NGO CO-ORDINATION BOARD.....1ST RESPONDENT

ERIC GITARI.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AUDREY MBUGUA ITHIBU.....4TH RESPONDENT

DANIEL KANDIE.....5TH RESPONDENT

KENYA CHRISTIAN

PROFESSIONAL FORUM.....6TH RESPONDENT

KATIBA INSTITUTE.....AMICUS CURIAE

*(Being an application for review of the Judgment and Orders of the Court
(Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko SCJJ) delivered on 24th
February 2023 in SC Petition No. 16 of 2019)*

Representation:

George Peter Kaluma Advocate for the Applicant

Muma & Kanjama Advocates for the 1st Respondent

Ligunya Sande & Associates for the 2nd Respondent

RULING OF THE COURT

A. INTRODUCTION

[1] The Applicant, George Peter Kaluma, filed a Notice of Motion dated 9th March 2023 seeking the review and setting aside of the Judgment of this Court delivered in **NGO Coordination Board vs Eric Gitari & Others**, SC Petition No. 16 of 2019 on 24th February 2023. We hasten to point out at the outset that the applicant was neither a party to the appeal before the Supreme Court nor was he a party when the matter was heard and determined by both the High Court and Court of Appeal.

B. LITIGATION BACKGROUND

(i) Before the High Court

[2] The 2nd respondent filed **Constitutional Petition No. 440 of 2013** before the High Court, seeking *inter alia*, a judicial interpretation of the words ‘every person’ in Article 36 of the Constitution to include all persons living within the Republic of Kenya despite their sexual orientation. He further prayed for a declaration that the 1st respondent had contravened the provisions of Article 36 of the Constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice. Lastly, he sought an order of *mandamus* directing the 1st respondent to comply with its constitutional duties under Articles 27 and 36 of the Constitution and to register his organization as provided for under the Non-Governmental Organizations Co-ordination Act (NGO Act).

[3] The 1st respondent opposed the petition on grounds that the same was premature because internal remedies under the law had not been exhausted; there was no breach of the petitioner’s right to associate with others; and that any infringement of the petitioner’s rights was justifiable. The Board further submitted that under Article 36(3) of the Constitution, a proposed association can be denied registration if reasonable grounds for non-registration are advanced.

[4] The 4th and 5th respondents, Audrey Mbugua Ithibu and Daniel Kandie joined the matter as interested parties before the High Court and submitted that there is

a distinct difference between Lesbian, Gay and Bisexual persons (LGB), and Transgender and Intersex persons (TI). They were concerned that the registration of the NGO would result in a blurring of such issues.

[5] The 6th respondent, Kenya Christian Professional Forum was also an interested party and urged that the petition should be dismissed arguing that there was no violation of Article 36 of the Constitution. They further urged that the rejection of the names proposed by the petitioner was reasonable, as it would otherwise be in violation of Section 162 of Penal code.

[6] The *Amicus Curiae*, Katiba Institute submitted that the Board's decision not to register the proposed NGO violated the 2nd respondent's rights, including the right to freedom of association and fair administrative action. It also submitted that the laws relied on by the Board as justification for rejecting the request for registration were irrelevant to the issue of registration. It also submitted that the denial of registration was not in tandem with the requirements of Article 24 of the Constitution.

[7] The two issues for determination delineated by the High Court for determination, were whether lesbian, gay, bisexual, transgender, intersex and queer groups have a right to form associations in accordance with the law; and whether the decision of the Board not to allow the registration of the proposed NGO because of the choice of name was a violation of the rights of the petitioner under Article 36 and 27 of the Constitution.

[8] A three Judge bench of the High Court (*Lenaola, Ngugi & Odunga JJ.*, as they then were) delivered its judgment on 24th April 2015. The court determined that the refusal to reserve the proposed names was purely administrative and was made pursuant to the NGO Regulations, and not under the NGO Act. The court further held that, even if there was no statutorily prescribed internal remedy that was available to the 2nd respondent, the court could not close its doors on him for failure to exhaust an internal remedy that did not apply to his circumstance. The court thus found that the acts of the 1st respondent constituted an infringement of the 2nd respondent's right to freedom of association.

[9] Furthermore, the court faulted the 1st respondent's reliance on Sections 162 and 163 of the Penal Code to justify its decision and found that the latter does not criminalize homosexuality or the state of being homosexual, but rather refers to certain sexual acts which are "against the order of nature." The court also found that the Penal Code does not criminalise the right to freedom of association of people based on their sexual orientation. On Article 27 of the Constitution, the court held that an interpretation of non-discrimination which excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination.

[10] Accordingly, the trial court allowed the petition and declared that 'every person' in Article 36 of the Constitution includes all persons living within the Republic of Kenya despite their sexual orientation, that the 2nd respondent was entitled to exercise his freedom of association and issued an order of *mandamus* directing the 1st respondent to strictly comply with its constitutional duty under Article 27 and 36 of the Constitution and the relevant provisions of the NGO Co-ordination Act.

(ii) Before the Court of Appeal

[11] The 1st respondent being aggrieved by the decision of the High Court filed an appeal before the Court of Appeal. The issues for determination delineated by the Court were whether the 2nd respondent had an obligation to exhaust the remedies available under the NGO Coordination Act, whether in rejecting the reservation of the name, the 1st respondent violated the provisions of Article 36 and 27 of the Constitution and lastly whether the right under Article 36 is a limited right pursuant to Article 24 of the Constitution.

[12] A five Judge bench at the Court of Appeal having considered all submissions, by Majority decision (*Waki, Koome (as she then was), Makhandia with Nambuye, Musinga JJA dissenting*), arrived at similar findings as the High Court and dismissed the matter being Civil Appeal No. 145 of 2015 in a judgment which was dated and delivered on 22nd March 2019.

(iii) Before the Supreme Court

[13] The 1st respondent being aggrieved with the decision of the Court of Appeal, filed an appeal before this Court seeking to set aside the judgment of the Appellate Court delivered on 22nd March 2019. The issues set out for determination by this Court were whether the 1st respondent was required to exhaust internal remedies under the NGO Act, and whether the decision of the 1st respondent violated Article 36 and 27 of the Constitution.

[14] The appeal was dismissed by a Majority (*Mwilu; DCJ & VP, Wanjala, Njoki with Ibrahim, Ouko SCJJ dissenting*). In determining the matter, the Majority opined that the Petition of appeal was not with the legalization or decriminalization of LGBTIQ activities, or the morality of the same sex marriage but revolved around the question as to whether the refusal to register an organization of persons who fall within the LGBTIQ classification contravened the fundamental rights and freedoms provided for in Article 36 and 27 of the Constitution.

[15] This Court held that Sections 162,163 and 165 of the Penal Code and the provisions of Article 24 of the Constitution do not convey the intention to limit the freedom of association of LGBTIQ persons. On the provisions of Article 36, the Court found that the 1st respondent's limitation of the 2nd respondent's right to freedom of association was not proportionate to the aim sought for registration of the proposed NGO. This Court also held that the word "sex" as used in Article 27 of the Constitution, was to be interpreted as to include the expression "sexual orientation". The Court therefore found that the 2nd respondent's right not to be discriminated against directly or indirectly, based on their sexual orientation was violated by the 1st respondent. Consequently, we did, by a Majority, agree with the findings of the High Court, and the Court of Appeal that LGBTIQ persona have a right to freedom of association, which includes the right to form an association of any kind. The appeal was therefore dismissed in its entirety.

[16] Having set out the litigation background of this matter and the determination by the Court we now turn to consider the present application.

C. THE APPLICATION AND PARTIES' SUBMISSIONS

[17] The Notice of Motion dated 9th March 2023 is supported by an affidavit sworn on even date by the applicant, George Peter Kaluma. The applicant avers that the application is filed pursuant to the inherent jurisdiction of this Court and all enabling provisions of the law. The application seeks the following orders:

- i) *The application be certified urgent.*
- ii) *The implementation of the judgment of the Court in Supreme Court Petition Number 16 of 2019 between NGO Coordination Board and Eric Gitari and others dated and delivered on 24th February 2023 be stayed pending the hearing and determination of the application.*
- iii) *The Court be pleased to review and set aside the judgment of this Court dated 24th February 2023 where at paragraph 79 the Court found and decreed that the use of the word "sex" under Article 27(4) of the Constitution 'refers also to sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise'; and that the word "including" under Article 27 (4) also comprises "freedom from discrimination based on a person's sexual orientation."*
- iv) *The Court be pleased to review and set aside the judgment of this Court dated 24th February 2023 where at paragraph 79 it found and decreed that the appellant's action of refusing to reserve the name of the 1st respondent's intended NGO on the ground that Sections 162, 163 and 165 of the Penal Code criminalises gay and lesbian liaisons was discriminatory in view of Article 27 (4) of the Constitution.*
- v) *The Court be pleased to review and set aside the judgment of this Court dated 24th February 2023 where it decreed that LGBTQ have a right to freedom of association which included the right to form an association of any kind contrary to the provisions of Article 36(3)(a) of the Constitution, Section 14 of the Non-Governmental Organizations Coordination Act, Regulation 8(3)(b) of the Non-Governmental Organizations Regulations as read together with Sections 162, 163 and 165 of the Penal Code.*
- vi) *The Court be pleased to review and set aside its orders on costs in the judgment dated and delivered on 24th February 2023.*

vii) *Parties to bear own costs this being a public interest action.*

viii) *Such other/further orders as the Honourable Court may deem fit, just and appropriate in the circumstances.*

[18] The application is premised *inter alia*, on the following grounds: that the judgment usurped the sovereign power of the people, the legislative role and authority of Parliament and purported to amend Article 27(4) of the Constitution; that the Court disregarded the views of the people of Kenya on ‘sex’ and ‘gender’ contained in the Final Report of the Constitution of Kenya Review Commission; that the Court inadvertently determined **Civil Appeal No. 536 of 2013** between **EG & 7 others vs Attorney General; DKM & 9 Others (interested parties); Katiba Institute & another (amicus curiae)** concerning the constitutionality of Sections 162 (a), (c) and 165 of the Penal Code; that the Court usurped and completely vacated the powers bestowed upon the Director of NGO Co-ordination Board to reserve proposed names of associations; that the decision has opened the door wide to registration of associations, entities, organisations whose naming and or objects are contrary to the law and inconsistent with public interest; and that there is widespread discontent, uproar, dissent and displeasure with the judgment by the general public as reported across all mainstream media and social media platforms. The applicant also contends that the matter is of great public interest and that the exercise by the Court of its inherent review jurisdiction is justified by patent errors of law and the exceptional circumstances in this matter.

[19] The 1st respondent filed a replying affidavit sworn by Lindon Otieno on 14th April 2023 in his capacity as the Legal Affairs Manager of the NGO Co-ordination Board. This affidavit supports the application filed by George Peter Kaluma, as it is deponed that this Court has jurisdiction to review its judgment delivered on 24th February 2023 on the grounds that it was obtained through fraud, deceit and misrepresentation of facts by the 2nd respondent. The 1st respondent refers to its annexures where it has produced some published Articles and a website publication. The 1st respondent contends that the 2nd respondent failed to disclose that he co-founded and illegally operates an unlawful organisation since the year 2012 called ‘the National Gay and Lesbian Human Rights Commission’ and that

he deceived the Court that he together with others, had been denied their right to associate. The 1st respondent also contends that it was not aware of this information prior to the delivery of the judgment.

[20] Additionally, the 1st respondent urges that the judgment delivered on 24th February 2023 has impacted the proceedings pending in Nairobi Court of Appeal (**Civil Appeal No. 536 of 2019 Eric Gitari vs The Honourable Attorney General & Others**).

[21] The 1st respondent prays for a review on the order for costs. It also contends that it has been experiencing challenges with regard to applying the judgment and needs further clarification which will be obtained when it makes oral submissions on the issues raised in the instant application.

[22] The 2nd respondent in his replying affidavit sworn on 22nd March 2023 opposes the application and argues that it is frivolous and without any merit because the applicant lacks legal standing as he is not a party to the proceedings. The 2nd respondent contends that Section 21A of the Supreme Court Act provides that the Supreme Court may review its own judgment or order “upon application by a party.” He further urges that the applicant has not met the grounds for review under Section 21A of the Supreme Court Act and that the application is procedurally irregular as it would fundamentally undermine the authority of the Supreme Court and the finality of its proceedings.

[23] He relied on this Court’s decisions in **Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others** [2017] eKLR; **Wanderi & Others vs Engineering Registration Board and others** [2020] eKLR; **Mohamed Ali Mohamud vs Ahmed Abdullahi Mohamad & 3 Others** [2018] eKLR; and **Senate of Kenya & 3 Others vs Speaker of the National Assembly & 10 Others** [2023] eKLR to buttress his assertion.

[24] The applicant filed submissions in rejoinder dated 11th April 2023. Herein, he submits that the instant application consciously invokes the inherent jurisdiction of the Court and not Section 21(4) of the Supreme Court Act. He states that the application raises grave and novel matters which require further elaboration in open Court.

[25] The applicant also cites the following international instruments to support his case: Universal Declaration of Human Rights, the International Covenant on Civil and Political rights, the African Charter on Human and Peoples Rights, the Yogyakarta principles and Yogyakarta+10.

D. ISSUES FOR DETERMINATION

[26] Taking into account the submissions of the all parties, two issues emerge for determination:

- (i) *Whether the applicant is competent to make the application;*
- (ii) *Whether the applicant has established a basis for the review of this Court's decision.*

On the applicant's competence,

[27] This Court on 24th February 2023 delivered its judgment and order in ***SC Petition No. 16 of 2019 NGOs Co-ordination Board vs Eric Gitari & Others***. As earlier stated, the applicant herein, Peter George Kaluma, was neither a party to the appeal before this Court nor was he a party in the matter before the Court of Appeal nor the High Court. This begs the question whether the applicant is competent to approach this Court in the manner that he has. By extension, it begs the question whether, this Court has jurisdiction to entertain an application seeking a review of its judgment, by a person who was never a party to the proceedings that culminated in the said judgment.

[28] In ***Law Society of Kenya vs Communications Authority of Kenya*** SC Petition No. 8 of 2020 [2023] eKLR, we held as follows on the significance of a party having *locus standi* in a matter:

“Therefore, flowing from the constitutional provisions on the jurisdiction of this Court, the definition of ‘a person’ seeking to file an appeal only extends to a party who is aggrieved by a decision issued against him by the Court of Appeal and wishes to prefer an appeal to the Supreme Court. The definition does not open the door for any passer-by who is disgruntled with a decision delivered by the appellate

Court to approach this Court. This also extends to matters relating to public interest. Furthermore, there is difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the Superior Courts. A person in this context should therefore be a party with locus standi in the matter.

[29] In the instant application, the applicant contends that an application for review can be invoked by any person who would appeal the matter but is yet to do so. We disagree. This Court derives its jurisdiction from Article 163 of the Constitution and subsequently from legislation, to wit, the Supreme Court Act and Rules. It is therefore bound by its rules and procedure. Thus, a party moving the Court under Article 163 must be competent to do so in the first place.

[30] Section 21A of the Supreme Court Act provides for the circumstances pursuant to which this Court may review its own decision on an application filed by “a party”. The Court cannot entertain an application for review of its judgment filed by an applicant who was not a party to the proceedings as this goes to the root of the matter and sanctity of the already determined suit which was contested by the parties. Consequently, we find that the applicant is not competent to seek a review of the judgment under reference.

Whether the applicant has established a basis for the review of this Court’s decision,

[31] This Court has neither jurisdiction to sit on appeal nor to review its decisions other than in the manner provided for by Section 21A of the Supreme Court Act. These principles were also set out in the matter of ***Fredrick Otieno Outa vs Jared Odoyo Okello & 3 others***, SC Petition No. 6 of 2014; [2017] eKLR (***Outa***). Both the Act and stated case law stipulate the circumstances under which this Court may review its decisions, either on its own motion, or upon application by a party as follows:

- a) *The judgment, ruling or order is obtained through 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 the belief that the parties have consented; and*
- d) *The judgment, ruling or order was rendered on the basis of repealed law or as a result of a deliberate concealment of a statutory provision.*

[32] The applicant has not demonstrated how his matter conforms to the specific parameters enumerated under Section 21A of the Supreme Court or in the ***Outa*** case; neither has he demonstrated to our satisfaction that the impugned Judgment was obtained by fraud or deceit, is a nullity, or that the court was misled into giving its judgment under a mistaken belief that the parties had consented thereto. In our view, the application is a disguised appeal from this Court's judgment and does not fall within the confines of the parameters prescribed for review by statute and applicable case law. Therefore, the application stands dismissed. On costs, the applicant is an Advocate of the High Court of Kenya and a Member of Parliament. He ought to have known that his application was misconceived *ab initio*.

He must consequently bear the costs thereof.

E. DISPOSITION

[33] Flowing from our findings above, the final orders to be made are as follows:

(i) The Notice of Motion dated 9th March 2023 is dismissed.

(ii) The applicant shall bear the costs of the appeal.

It is so ordered.

DATED and DELIVERED AT NAIROBI this **12th** day of **September** 2023.

.....
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

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

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

