WHEN THE APEX COURT'S DECISION IS NOT FINAL: THE POWER OF APEX COURTS TO REVIEW(RESCIND) THEIR DECISIONS IN SOME AFRICAN COUNTRIES

Jamil Ddamulira Mujuzi[*]

Abstract

Generally, the decision of the highest/apex court in a country is final. However, courts are staffed by human beings, and it is natural to err. It is not uncommon for apex courts to make mistakes. Legislation and case law from African countries show that courts can 'escape' the consequences of their mistake in one of the three ways. First, by departing from a previous erroneous/outdated decision (in a subsequent case). Second, by invoking the 'slip rule' to correct clerical or arithmetical errors. Three, which is the focus of this article, by reviewing/rescinding their decisions. In this case, one of the parties to a judgment asks a court to re-open the case he/she has lost and set aside its decision. As the discussion below shows, this remedy is available to, among other things, protect the right of access to justice (courts) to prevent an injustice, or. to protect the integrity of the court. This ultimately contributes to the entrenchment of the rule of law. This article shows that African countries have adopted five different approaches in dealing with the apex courts' powers to review their decisions. First, the constitutions of some African countries such as Ghana, Eswatini, the Gambia and Namibia expressly allow courts to review their decisions. Second, in some countries such as Uganda, South Africa, Tanzania and Zimbabwe the apex courts' power/jurisdiction to review their decisions is provided for in their respective rules. Third, in some countries such as Lesotho, Seychelles, Zambia, and Sierra Leone neither the constitutions nor the rules empower apex courts to review their decisions. However, courts have invoked their inherent powers as the basis to review their decisions. Fourth, in Kenya, the Supreme Court's powers to review its decisions are provided for in legislation and rules of the court. Finally, in Nigeria, the Supreme Court rules prohibit it from reviewing its decisions. However, the Supreme Court held that it has inherent powers to review its decisions. This article shows that, irrespective of the source(s) of the power, case law from all the courts show that there is consensus that apex courts will review their decision(s), whether criminal or civil, if it is in the interests of justice to do so. Different grounds/reasons are invoked to explain why it is in the interests of justice to review a court's decision. In some countries the list of the grounds of review is closed whereas in others it is open. In some countries, judges often disagree on the issue of whether the apex court's power to review its decisions is categorised as 'inherent jurisdiction' or 'inherent power.' In this article, it is argued that in countries where legislation empowers courts to review their decisions, they have jurisdiction. Inherent powers exist in countries where legislation is silent

[*] Professor of Law, Faculty of Law, University of the Western Cape, South Africa. Email: djmujuzi@gmail.com

https://doi.org/10.47348/JCLA/v12/i1a2

on court's powers to review their decisions. Although finality of litigation is a very important principle, achieving the ends of justice is more important. Thus, apex courts should not be very conservative when developing principles on reviewing their decisions.

Keywords: apex courts, African countries, review powers, final decision, inherent powers, inherent jurisdiction, interests of justice

Résumé

En règle générale, la décision de la plus haute juridiction d'un pays est définitive. Toutefois, les tribunaux sont composés d'êtres humains et il est naturel de commettre des erreurs. Il n'est pas rare que les cours suprêmes commettent des erreurs. La législation et la jurisprudence des pays africains montrent que les tribunaux peuvent « échapper » aux conséquences de leur erreur de l'une des trois manières suivantes. Premièrement, en s'écartant d'une décision antérieure erronée ou dépassée (dans une affaire ultérieure). Deuxièmement, en invoquant la « règle du lapsus » pour corriger des erreurs d'écriture ou d'arithmétique. Troisièmement, ce qui est l'objet du présent document, en révisant ou en annulant leurs décisions. Dans ce cas, l'une des parties à un jugement demande à un tribunal de rouvrir l'affaire qu'elle a perdue et d'annuler sa décision. Comme le montre la discussion ci-dessous, ce recours est possible, entre autres, pour protéger le droit d'accès à la justice (tribunaux), pour prévenir une injustice ou pour protéger l'intégrité du tribunal. Cela contribue en fin de compte à l'enracinement de l'État de droit. Cet article montre que les pays africains ont adopté cinq approches différentes en ce qui concerne le pouvoir des cours suprêmes de réexaminer leurs décisions. Premièrement, les constitutions de certains pays africains comme le Ghana, l'Eswatini, la Gambie et la Namibie autorisent expressément les tribunaux à réexaminer leurs décisions. Deuxièmement, dans certains pays comme l'Ouganda, l'Afrique du Sud, la Tanzanie et le Zimbabwe, le pouvoir/la compétence des cours suprêmes à réexaminer leurs décisions est prévue dans leurs règles respectives. Troisièmement, dans certains pays comme le Lesotho, les Seychelles, la Zambie et la Sierra Leone, ni la constitution ni les règles n'autorisent les cours suprêmes à réviser leurs décisions. Cependant, les tribunaux ont invoqué leurs pouvoirs inhérents comme base de révision de leurs décisions. Quatrièmement, au Kenya, les pouvoirs de la Cour suprême en matière de réexamen de ses décisions sont prévus par la législation et les règles de la Cour. Enfin, au Nigeria, les règles de la Cour suprême lui interdisent de réexaminer ses décisions. Toutefois, la Cour suprême a estimé qu'elle disposait de pouvoirs inhérents pour réexaminer ses décisions. Cet article montre qu'indépendamment de la (des) source(s) du pouvoir, la jurisprudence de toutes les cours montre qu'il existe un consensus sur le fait que les cours suprêmes réexaminent leurs décisions, qu'elles soient pénales ou civiles, s'il est dans l'intérêt de la justice de le faire. Différents motifs sont invoqués pour expliquer pourquoi il est dans l'intérêt de la justice de réexaminer la décision d'un tribunal. Dans certains pays, la liste des motifs de révision est fermée, tandis que dans d'autres, elle

est ouverte. Dans certains pays, les juges sont souvent en désaccord sur la question de savoir si le pouvoir de la cour suprême de réexaminer ses décisions relève de la « compétence inhérente » ou du « pouvoir inhérent ». Dans cet article, il est soutenu que dans les pays où la législation habilite les tribunaux à réexaminer leurs décisions, les tribunaux sont compétents. Les pouvoirs inhérents existent dans les pays où la législation est muette sur les pouvoirs des tribunaux de réviser leurs décisions. Bien que la finalité du litige soit un principe très important, il est plus important d'atteindre les objectifs de la justice. Par conséquent, les juridictions suprêmes ne devraient pas être très conservatrices lorsqu'elles élaborent des principes sur le contrôle de leurs décisions.

Mots clés: cours suprêmes, pays africains, pouvoirs de révision, décision finale, pouvoirs inhérents, compétence inhérente, intérêts de la justice.

Introduction

As a general rule, the decision of the highest/apex court in a country is final.[1] However, courts are staffed by human beings and it is natural to err. Apex courts also make mistakes in their decisions. This raises the question of how such mistakes can be corrected. These mistakes can be corrected by these courts themselves. There are two categories of mistakes that can be made by an apex court: minor mistakes and fundamental mistakes. Minor clerical or arithmetical errors are corrected through the 'slip rule'. This is provided for in the relevant court rules and does not raise difficulties.[2] However, it is a different question altogether when there are reasonable grounds to believe that the apex court's decision is wrong or was tainted with fraud. This raises the question of whether such courts can depart from or review their judgments (decisions) to prevent an injustice to the affected party or protect the integrity of the court specifically and the judiciary generally. This ultimately contributes to the entrenchment of the rule of law. The power of an apex court to depart from its previous decision is different from that of reviewing its decision.[3]

[1] The apex court is the final court of appeal. However, in some countries, it is the first court of instance and also the final court in some matters. See for example, art 104 of the Constitution of Uganda (1995) (challenging presidential elections); art 140 of the Constitution of Kenya (2010) (challenging presidential elections).

[2] See for example, r 35 of the Judicature (Supreme Court Rules) Directions, Legal Notice 13 of 1996 (Uganda); s 147 of the Seychelles Code of Civil Procedure Code. For the circumstances in which the Supreme Court of Uganda can invoke the slip rule, see, for example, *China Road and Bridge Corporation v Welt Machinen Engineering Ltd and Others* [2023] UGSC 43. For the position in Zambia, see, for example, *Southern African Trade Ltd v Zambia Revenue Authority* [2017] ZMSC 288.

[3] For the distinction between the court's power to depart from its decision and its power to review its decisions, see Jabbi, B.B. '"Autonomic judicial review": powers in search of identity and assertion' (1999) 43(1) *Journal of African Law* 99; Mujuzi, D.J. 'The Supreme Court of Uganda's powers to depart from or reopen (review) its decisions under art 132(4) of the Constitution' (2024) 16(4) *African Journal of Legal Studies* 405. In *Nur and Sam (Pty) Ltd T/a Big Tree Filling Station and Others v Galp Swaziland (Pty) Ltd* [2015] SZSC 204 para 48 the Supreme Court of Swaziland held

https://doi.org/10.47348/JCLA/v12/i1a2

In this article, I analyse the constitutions, legislation, rules and case law from 14 African countries to demonstrate the circumstances in which apex courts can review their decisions.[4] African countries have followed different approaches on this issue. First, the constitutions of some countries such as Ghana, Eswatini, the Gambia and Namibia expressly allow courts to review their decisions. However, they do not stipulate the grounds on which to exercise that power. They either empower the apex courts to stipulate those grounds in their rules (Ghana, Eswatini and Gambia) or they are silent on this issue (Namibia). Second, the rules of the apex courts in some African countries such as Uganda, South Africa, Tanzania and Zimbabwe empower them to review their decisions. These rules also provide for the grounds of review. Third, in some African countries, neither the constitutions nor the rules empower apex courts to review their decisions. However, apex courts have invoked their inherent powers as the basis to review their decisions. They have also stipulated the grounds for review. This is the case in countries such as Lesotho, Seychelles, Zambia and Sierra Leone. Forth, in Kenya, the rules initially provided for the Supreme Court's power to review its decisions. However, the Kenyan Supreme Court held that those rules were potentially unconstitutional and that it had inherent powers to review its decisions. Subsequently, legislation was amended to expressly empower the Supreme Court to review its decisions. Five, in Nigeria, the Rules prohibit the Supreme Court from reviewing its decisions but the Court, without declaring the rules unconstitutional, held that it has inherent powers to review its decisions.

Irrespective of which approach is followed (whether the review power/jurisdiction is provided for in the constitution, the rules or as inherent powers), courts in all these countries will review a decision, whether criminal or civil, when it is in the interests of justice to do so. The approaches taken by different African countries show that there is a difference between inherent jurisdiction and inherent powers. The former is found in countries where legislation/rules empower courts to review their decisions. The latter exists in countries where legislation is silent on the court's powers to review its decisions. Irrespective of which approach is followed, the review powers are meant to serve more or less the same objectives. Before illustrating how courts in different African countries have invoked their powers to review their decisions, it is important to discuss the distinction between inherent jurisdiction and inherent powers.

that 'The power to depart from its previous decisions is different from review power because it appears that it may be exercised only in a subsequent case, not the same one being reviewed'.

[4] These countries were chosen because they all follow or partly follow English common-law principles. Their case law and legislation were also readily available online.

https://doi.org/10.47348/JCLA/v12/i1a2

Inherent review jurisdiction or inherent powers?

Inherent jurisdiction and inherent powers are some of the most contested terms in legal jurisprudence in cases where apex courts are called upon to review their decisions.[5] As mentioned above, in some countries legislation expressly empowers courts to review their decisions. Some judges in these countries refer to this as their inherent power.[6] Others refer to it as review jurisdiction[7] or inherent jurisdiction.[8] There are also those who use the terms interchangeably.[9] In other words, they create the impression that jurisdiction is the same thing as inherent power. Likewise, in countries where legislation is silent on the courts' powers to review their decisions, judges have referred to this either as inherent power[10] or inherent jurisdiction.[11] Others have used the terms interchangeably.[12] In both categories of countries, courts have held that jurisdiction is a 'creature of statute'.[13] This means that a court can only

[5] In *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd and Vijay Construction (Pty) Ltd v Eastern European Engineering* [2022] SCCA 5 para 75, the Seychelles Court of Appeal referred to case law from different common law countries and to several academic publications and observed that 'the distinction between what is jurisdiction and what constitutes power is not always straight forward as one would have anticipated. Courts have grappled with the reach of inherent jurisdiction and inherent power'.

[6] *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in Public Sector Including Organs of State and Others* [2021] ZACC 28 para 165 (the Constitutional Court of South Africa). In the case of South Africa, s 173 of the Constitution expressly refers to 'inherent powers' of the court to regulate its own procedure. *China Road Bridge Corporation v Welt Machinen Engineering and Others* [2023] UGSC 42, 34 (Supreme Court of Uganda). The relevant rule, as will be discussed below, specifically mentions the court's review power. *Jackson Godwin v Republic* [2018] TZCA 186 (Court of Appeal of Tanzania).

[7] *Nur and Sam (Pty) Ltd T/a Big Tree Filling Station and Others v Galp Swaziland (Pty) Ltd* [2015] SZSC 204 para 60 (Supreme Court of Eswatini).

[8] *Likanyi v S* [2017] NASC 10 para 96 (Supreme Court of Namibia); *Lweza Clays Ltd & Another v Tropical Bank Ltd & Another* [2021] UGSC 76; *Insingoma v Rubinga* [2015] UGSC 18; and *Nakibuka v Sematimba & 2 Others* [2014] UGSC 17 (Supreme Court of Uganda); *AMI Tanzania Ltd v OTTU on Behalf of P.L. Assenga & Others* [2013] TZCA 499 (Court of Appeal of Tanzania).

[9] *Principal Secretary, Ministry of Public Service and Others v Xolile Sukati* [2015] SZSC 38 paras 17–19 (Supreme Court of Eswatini); *Ofori v Ecobank Ghana Ltd & 2 Others* [2021] GHASC 134, 35–36 (Supreme Court of Ghana); *De Wet v Klein* [2023] NASC 45 para 12 (Supreme Court of Namibia); *S v Gumbura* [2021] ZWSC 25 (Supreme Court of Zimbabwe); *Kennedy Elias Shayo v Republic* [2023] TZCA 17841; *Shekha Nasser Hamud v Mary Agnes Mpelumbe* [2023] TZCA 18018 (Court of Appeal of Tanzania).

[10] See for example, *Mwambeja Ranching Co Ltd & another v Kenya National Capital Corporation* [2024] KESC 28 (KLR) (Supreme Court of Kenya); *Dari Ltd & 5 others v East African Development Bank* [2023] KESC 93 (KLR).

[11] See for example, *Basotho Patriotic Party & 3 Others v Lejone Puseletso & 6 others* [2024] LSCA 17 para 41 (Lesotho Court of Appeal).

[12] For example, *Belmont & Anor v Belmont* [2020] SCCA 44 (Seychelles Court of Appeal); *Maphathe v I Kuper Lesotho* [2019] LSCA 30 para 18; *Hippo Transport v Commissioner of Customs & Excise* [2018] LSCA 5 para 19 (Lesotho Court of Appeal); *Access Bank (Zambia) Ltd v Group Five/ ZCON Business Park Joint Venture* [2016] ZMSC 24 at 31; *Rosalia Mwamfuli v Ntimba & Another* [2018] ZMSC 318 (Supreme Court of Zambia).

[13] See for example, *National Bank of Commerce Ltd v National Chicks Corporation Ltd & Others*

https://doi.org/10.47348/JCLA/v12/i1a2

exercise jurisdiction over a person or a subject matter or legal issue where legislation empowers it to do so. Since jurisdiction is a creature of statute, in countries where legislation empowers courts to review their decisions courts exercise their review jurisdiction. This is the case even where the relevant legislation expressly refers to such mandate as inherent powers. However, in countries where legislation does not expressly empower courts to review their decisions they do so on the basis of their inherent powers. The purpose of that power is to ensure a court does not fold its hands in the face of an injustice. The apex courts in all countries discussed in this article have held that the purpose of their review jurisdiction or inherent power is to ensure that justice is done – that is, to serve the interest or ends of justice. It is against that background that they have held that the jurisdiction or power to review their decisions is an exception to legal principles such as *res judicata* and *functus officio*. Since this is the case, courts should not develop principles that will make it almost impossible for parties to have apex courts' decisions reviewed. However, a balance has to be struck between the need for finality of litigation and the review powers to serve the ends of justice. Thus, review powers are exercised in exceptional circumstances. What follows is an illustration of how apex courts in fourteen African countries have invoked their powers/jurisdiction to review their decisions.

Constitutions empowering apex courts to review their decisions

The constitutions of some African countries expressly empower apex courts to review their decisions. For example, art 133 of the Constitution of Ghana (1992) provides that

> (1) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court.
> (2) The Supreme Court, when reviewing its decisions under this article, shall be constituted by not less than seven Justices of the Supreme Court.

Since the Constitution does not stipulate the grounds of which the Supreme Court can review its decision, the Rules of Procedure of the Supreme Court provide for those grounds. Rule 54 provides that:

[2019] TZCA 345 at 27 (Tanzanian Court of Appeal); *Kasolo v Delahaije* [2023] UGSC 2 (Supreme Court of Uganda); *Republic v High Court, (commercial Div) Accra: Exparte Brobbey* [2023] GHASC 11 at 7 (Supreme Court of Ghana); *National Land Commission v Tom Ojienda & Associates & 2 others* [2024] KESC 16 (KLR) para 33 (Supreme Court of Kenya); *Bristol v Rosenbauer* [2022] SCCA 23 (Seychelles Court of Appeal); *Mwenye and Another v Minister of Justice, Legal and Parliamentary Affairs and Another* [2023] ZWCC 9 para 71 (Constitutional Court of Zimbabwe).

https://doi.org/10.47348/JCLA/v12/i1a2

> The Court may review any decision made or given by it on the following grounds–
> *(a)* exceptional circumstances which have resulted in miscarriage of justice;
> *(b)* discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given.[14]

Under r 55, the application for review has to be filed at court 'not later than one month from the date of the decision sought to be reviewed'. Rules 56–59 deal with the procedure that the parties to the review application have to follow. There are several instances in which litigants have invoked r 54 to ask the Supreme Court to review its decisions.[15] For example, in *Tamakloe v Republic*[16] the Supreme Court referred to a list of its decisions between 1987 and 2002 on r 54 and held that:

> The principles established by these cases and others are that the review jurisdiction of the Supreme Court is a special jurisdiction and is not intended to provide an opportunity for a further appeal. It is a jurisdiction which is to be exercised where the applicant succeeds in persuading the Court that there has been some fundamental or basic error which the Court inadvertently committed in the course of delivering its judgment and which error has resulted in a miscarriage of justice.[17]

The court added that proving exceptional circumstances under r 54*(a)* 'is a high hurdle to surmount'.[18] For r 54*(a)* to be invoked, it is not enough for a litigant to prove exceptional circumstances. He/she must prove that those exceptional circumstances resulted in a miscarriage of justice.[19] The court added that 'the categories of exceptional circumstances cannot be exhaustively stated'.[20] However, since the Supreme Court is the final court, it does not have the power to review its decision under r 54*(a)* simply because it is erroneous. A decision can only be reviewed in exceptional

[14] For the history of the court's power to review its decisions in Ghana prior to the promulgation of the 1992 Constitution, see *Korboe v Amosa* [2016] GHASC 45 at 14–17.

[15] For a list of some of these cases between 1987 and 2002, see *Tamakloe v Republic* [2011] GHASC 2 at 3.

[16] *Tamakloe v Republic* [2011] GHASC 2.

[17] Ibid at 3.

[18] Ibid at 3.

[19] Ibid at 13.

[20] Ibid at 4.

https://doi.org/10.47348/JCLA/v12/i1a2

circumstances that resulted in[21] or 'perpetuate' a miscarriage of justice.[22] The court is prepared to invoke its review powers under r 54*(a)* in cases where, for example, it overlooked an important matter or evidence that was adduced by the parties;[23] the applicant was wrongfully convicted because the prosecution failed to prove its case beyond reasonable doubt;[24] it overlooked important or mandatory statutory provision (*per incuriam* decisions);[25] and the decision is wrong, absurd or perverse.[26] As the court explained in *Republic v High Court, Accra Ex Parte: Tsatsu Tsikata and Others*:[27]

> The review jurisdiction of this court has always been treated as extra-ordinary or unique and requires exceptional reasons accompanied by evidence of some detriment loss, or injustice on an Applicant or that a substantial question of law has been glossed over in delivering the ruling or judgment sought to be reviewed which will otherwise result in a substantial miscarriage of justice to an Applicant.[28]

In *Republic v Edmund Addo*,[29] the court held that '[t]o succeed on review, the Appellant must show that the court committed a fundamental error, which error was so crucial, that if same were not committed, the decision would have concluded differently'.[30] However, although the court has explained cases in which it has to exercise its power to review its decisions, there are instances in which judges disagree whether or not r 54*(a)* is applicable. As a result, sometimes there are majority and minority opinions.[31] This shows that the line between when r 54*(a)* is

[21] *Bonney and Others v Ghana Ports and Harbours Authority* [2014] GHASC 170 at 12.

[22] *Quist v Danawi* [2015] GHASC 105 at 11. See also *Kuranchie v The Attorney General & Another* [2024] GHASC 64.

[23] *Tamakloe v Republic* [2011] GHASC 2 at 10. See also *Tsuru III v Attorney-General* [2011] GHASC 20 at 2–3.

[24] *Tamakloe v Republic* [2011] GHASC 2 at 15–17 (per Justice Baffoe-Bonnie).

[25] *Tsuru III v Attorney-General* [2011] GHASC 20 at 2 referring to the case of *Republic v Tetteh* [2003–2004] SCGLR 140 where the court 'unanimously reversed its earlier decision because it had overlooked certain mandatory statutory provisions relating to the rendition of Court-Martial decisions'. See also *Saviour Church of Ghana v Adusei & Others* [2022] GHASC 38 (failure by the court to recognise the applicant as a separate legal entity).

[26] *Tsuru III v Attorney-General* [2011] GHASC 20 at 4 (for example, as in this case, the court had misinterpreted the relevant constitutional provision).

[27] *Republic v High Court, Accra ex parte: Tsatsu Tsikata and Others* [2020] GHASC 38.

[28] Ibid para 16.

[29] *Republic v Edmund Addo* [2024] GHASC 13.

[30] Ibid para 6.

[31] *Tsuru III v Attorney-General* [2011] GHASC 20 (the majority held that the decision was reviewed because the court had misinterpreted the applicable constitutional provision which led to the discrimination against the applicant); *Tamakloe v Republic* [2011] GHASC 2 (the majority held that although the court had not adequately considered the evidence leading to the applicant's conviction, the threshold under r 54*(a)* was not met); *Asare II and Others v Addai and Others* [2015]

https://doi.org/10.47348/JCLA/v12/i1a2

invoked for review purpose and as a disguised appeal is not as clear as one would expect. It depends on the judge's understanding/interpretation of the facts before them. Unlike in the case of review under r 54*(b)*, which is straightforward, a review under r 54*(a)* depends on the court's (or the majority's) understanding on what amounts to a miscarriage of justice. However, in some cases the court's decision is unanimous that either the application for review under r 54*(a)* should be dismissed[32] or allowed.[33]

Under r 54*(b)*, the court will review its decision if the circumstances in which the evidence was discovered meet the stipulated criteria. Most of the applications for review have been brought on the basis of r 54*(a)*. However, in *Ofori v Ecobank Ghana and Others*[34] the court dealt with an application for review under r 54*(b)*. The applicant, relying on English case law, asked the court to invoke 'its inherent jurisdiction to re-open the appeal', grant him leave to adduce further evidence and rehear the appeal.[35] He argued that case law from England shows that the apex court in that country held that it has inherent power to re-open the appeal and admit new evidence should it be convinced that one of the parties failed to disclose relevant evidence that subjected the other party to an unfair procedure resulting into a significant injustice with no alternative remedy.[36] The court held that the applicant's application should have been based on r 54*(b)* as opposed to its inherent jurisdiction.[37] It held further that for an applicant to succeed under r 54*(b)*, he/she has to convince it that 'during the hearing of the case and the appeals' the applicant 'made diligent effort to get this new evidence and could not get it or that the evidence is of such nature that it could not have been obtained at the time the appeal was being heard'.[38] In this case, the court, by majority, dismissed the application because it found that the evidence on which the applicant wanted to rely under r 54*(b)* was known to the applicant before the case

GHASC 147 (the majority dismissed the application for review on the basis that the court had misinterpreted a customary practice); *Korboe v Amosa* [2016] GHASC 45 (whether a lawyer without a valid practicing certificate can file court documents); *Republic v High Court, General Jurisdiction, Accra* [2020] GHASC 9 (whether the court erred by failing to rely on its previous case law); *The Republic v Court of Appeal, Cape Coast ex parte: Gyakye Quayson* [2022] GHASC 55 (failure by the Court to have a constitutional provision interpreted). See also *Lomotey & Anor v Richardson & 3 Others* [2023] GHASC 101.

[32] *Bonney and Others v Ghana Ports and Harbours Authority* [2014] GHASC 170; *Ablakwa and Another v Attorney General and Another* [2013] GHASC; *Quist v Danawi* [2015] GHASC 105; *Republic v High Court, Accra ex parte: Tsatsu Tsikata and Others* [2020] GHASC 38; *Mensah and Others v Boakye* [2021] GHASC 75; *Republic v High Court, (Criminal Div) Accra: ex parte Opuni* [2023] GHASC 10; *Standard Bank Offshore Trust Co Ltd v National Investment Bank Ltd and Others* [2018] GHASC 18; *Ankomah-Nimfah v Quayson and Others* [2022] GHASC 19 (5 April 2022).

[33] *Republic v Tetteh* [2003–2004] SCGLR 140.

[34] *Ofori v Ecobank Ghana and Others* [2021] GHASC 84.

[35] Ibid at 2.

[36] Ibid at 2.

[37] Ibid at 3–4 and 10.

[38] Ibid at 10.

https://doi.org/10.47348/JCLA/v12/i1a2

was filed in the High Court.[39] In his dissenting opinion, Justice Dotse held that the respondent had won the case through fraud and deception (by relying on forged documents) and that the court should have invoked its inherent power to re-open the case and rehear the appeal.[40] A person who would like the court to depart from its previous decision on the basis of art 129(3) of the Constitution has the burden of convincing it why it should do so especially when it has followed it in previous decisions.[41]

Likewise, the Constitution of Swaziland (Eswatini) (2005) empowers the Supreme Court to review its decisions. Section 148 provides:

> (2) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by an Act of Parliament or rules of court.
> (3) In the exercise of its review jurisdiction, the Supreme Court shall sit as a full bench.

Unlike in Ghana where the conditions for review can only be provided for in the Rules, in Eswatini those conditions can be stipulated by parliament (in an Act) or the court itself (in the rules). The Supreme Court has observed that neither parliament nor the chief justice has enacted or promulgated the relevant Act or rules respectively to provide the grounds on which it can exercise its review jurisdiction.[42] However, the absence of these grounds has not prevented the court from exercising its review jurisdiction. The challenge is that the court has given different standards on which it can review its decisions. For example, in one case, it held that it can only review its decision when 'it committed a gross irregularity as opposed to an error of law'; this is because 'a review court is not concerned with the merits of the decision under review' and that 'an error of law is not a review ground but one of appeal'.[43] In another case, it held that '[t]he statutory power to review must be exercised when there is a patent and obvious error of fact or law'.[44] In another case, it held that it 'should allow the review only in exceptional circumstances "where it appears that its previous decision was wrongly decided"'.[45] In *Kukhanya (Pty) Ltd v Maputo Plant Hire (Pty) Ltd and Another*,[46] the Court held that, for it to review its decision, the applicant must 'show the existence of

[39] Ibid at 10.

[40] Ibid at 13–43. See also *Daniel Ofori v Ecobank Ghana & 2 Others* [2023] GHASC 18.

[41] *Ablakwa and Another v Attorney General and Another* [2013] GHASC 143.

[42] *Nur And Sam (Pty) Ltd T/a Big Tree Filling Station and Others v Galp Swaziland (Pty) Ltd* [2015] SZSC 204 para 49; *Dlamini And another v The National Commissioner of Police and Another* [2016] SZSC 35 para 8.

[43] *Ginindza v Msibi and Others* [2013] SZSC 45 para 19.

[44] *Commissioner of Police and Another v Dlamini* [2015] SZSC 39, para 10.

[45] *Dlamini No v Ndzinisa and Others* [2015] SZSC 208 para 6.

[46] *Kukhanya (Pty) Ltd v Maputo Plant Hire (Pty) Ltd and Another* [2022] SZSC 5.

https://doi.org/10.47348/JCLA/v12/i1a2

any exceptional circumstances or any gross and manifest injustice'.[47] The court set the same criteria in a subsequent case.[48] This implies that the court will review its decision on one of the two grounds: in exceptional circumstances or where there is gross and manifest injustice. It is not sufficient for the injustice to be 'gross'. It must be 'gross and manifest'. However, it appears that the most important factor for the court to review its decision is that it is in the interests of justice to do so. For example, it held that the exceptional circumstances in which it will exercise its review powers include 'fraud, patent error, bias, new facts, significant injustice or the absence of an alternative remedy'.[49] This means that an injustice is one of the examples of exceptional circumstances.

Section 148(2) does not allow a litigant to disguise his/her appeal against the decision of the court as a review.[50] In *Prime Minister of Swaziland v Christopher Vilakati and Others*[51] the court referred to s 148 of the Constitution and held that it 'reaffirms the inherent common law power of' the apex court in the country 'to review and correct any manifest injustice caused by an earlier order improperly made'.[52] Section 148(2) is an exception to the principle of *functus officio*.[53] In *Commissioner of Police and Another v Dlamini*[54] the Supreme Court reiterated the fact that s 148(2) strengths 'the court's already existing inherent jurisdiction' to 'revisit its own decision with the object of either confirming or setting aside the same'.[55] The court added that courts follow the principle of *res judicata*[56] but that s 148 'constitutes a vital statutory departure from the doctrine of *res judicata*'.[57] The court explained that the doctrine of *res judicata* should not be applied rigidly and that exceptions should be permitted if by upholding the doctrine 'there is a very real likelihood that a litigant will be denied access to the courts and the net result will be an injustice to that litigant'.[58] It referred to case law from South Africa explaining the exceptions to the doctrine of *res judicata*.[59] It emphasised that:

[47] Ibid para 48.

[48] *Dlamini v Rex* [2023] SZSC 12 para 37.

[49] *Dlamini And another v The National Commissioner of Police and Another* [2016] SZSC 35 para 11.

[50] *Mamba and Others v Madlenya Irrigation Scheme* [2015] SZSC 222; *Nxumalo v Rex* [2018] SZSC 24; *Sihlongonyane v Sihlongonyane and Others* [2018] SZSC 52; *Gama v Foot the Bill Investment (Pty) Ltd and Others* [2019] SZSC 35.

[51] *Prime Minister of Swaziland v Christopher Vilakati and Others* [2014] SZSC 47.

[52] Ibid para 3. See also *Bennet Tembe v Rex* [2017] SZSC 20 para 28.

[53] *Siboniso Clement Dlamini v Walter P. Bennet, Thabiso G. Hlanze No, Registrar of The High Court, First National Bank Swaziland Ltd* [2017] SZSC 21 para 34.

[54] *Commissioner of Police and Another v Dlamini* [2015] SZSC 39.

[55] Ibid para 3.

[56] Ibid paras 4–5.

[57] Ibid para 6.

[58] Ibid para 7.

[59] Ibid para 8.

https://doi.org/10.47348/JCLA/v12/i1a2

> The statutory jurisdiction to revisit its own decisions under the Constitution is merely an extension of the court's inherent jurisdiction. It is thus clear that in order for the court to exercise the statutory jurisdiction it must exercise similar caution so as not to open the gates to a flood of proceedings which are by their nature appeals disguised as reviews. The constitutional provision certainly was not promulgated to allow litigants to have limitless opportunities of re-opening cases which have been adjudicated to a finality.[60]

Before the court invokes its powers under s 148(2), the burden is on the applicant to establish, on a balance of probabilities, 'the existence of a gross and manifest injustice which requires to be prevented, ameliorated or corrected by' the court.[61] These are 'stringent requirements' that show that a court can only review a decision in exceptional circumstances.[62] The court has reviewed its decisions, for example, where it misinterpreted the law to confer powers on an official that was contrary to the applicable legislation,[63] it imposed a cost order on a litigant without giving him a chance to be heard,[64] and where it failed to assess the evidence on the record properly.[65] The court's review powers under s 148(2) extend to consent judgments as well.[66]

The Supreme Court is divided on the issue of whether s 148(2) empowers it to review its decision more than once. Literally interpreted, s 148(2) entitles a litigant to a single review. In other words, it does not empower the court to review the already reviewed decision. However, there are cases in which the court has held that it has power to review its decision more than once.[67] For example, in *Attorney General v The Master of the High Court*,[68] the Court held that as a general rule, s 148(2) 'envisages one review application' but that the Supreme Court can conduct another review if 'the existing judgement on review is substantively and legally incompetent and unenforceable and does not constitute an effective remedy which accords with justice and fairness'.[69] The court explained the rationale behind the doctrine of *res judicata* and held that:

[60] Ibid para 9.

[61] *Siboniso Clement Dlamini v Walter P. Bennet, Thabiso G. Hlanze No, Registrar of The High Court, First National Bank Swaziland Ltd* [2017] SZSC 21 para 37.

[62] *Nzuza And Others v Nzuza And Others* [2017] SZSC 30 para 38.

[63] *Commissioner of Police and Another v Dlamini* [2015] SZSC 39 paras 19–27 (the court, contrary to the relevant legislation, held that the Minister and the not the commissioner of police had the power to dismiss a police officer).

[64] *Dlamini No v Ndzinisa and Others* [2015] SZSC 208.

[65] *Sikhondze v Rex* [2021] SZSC 49.

[66] *MP Simelane Attorneys v Beauty Build Construction (Pty) Ltd and Two Others* [2017] SZSC 14.

[67] *Dlamini and Another v The National Commissioner of Police and Another* [2016] SZSC 35.

[68] *Attorney General v The Master of The High Court* [2016] SZSC 10.

[69] Ibid para 56.

https://doi.org/10.47348/JCLA/v12/i1a2

> [I]n the subsequent review proceedings, the aggrieved litigant should … show that he is liable to suffer substantial hardship and injustice if the existing judgment on review is allowed to stand, and, that there is no effective alternative remedy.[70]

In other words, the errors made by the court should be 'grave' and have 'caused gross injustice which constitutes a very high degree of extremely exceptional circumstances required by' the court to review its decision once again.[71] There are instances where litigants have met the above test and succeeded in subsequent review proceedings.[72] However, in *Henwood v Henwood and Another*,[73] the court, in departing from the case law in which it held that it can review the same decision more than once, held that:

> [A] correction under section 148(2) only relates to a judgment in the appellant jurisdiction of this Court and not a judgment in its review jurisdiction. Put in the simplest of terms, the Constitution does not provide for a review of a review or 'a correction of a correction'. Accordingly, to allow more than one review is constitutionally incorrect.[74]

The court also held that s 148(2) does not apply to interlocutory orders. It is only applicable to the court's judgments where the applicant does not have any other legal recourse.[75] Strictly speaking, s 148(2) does not contemplate a second review. However, as the court explained, if its reviewed judgment will cause a miscarriage of justice, nothing bars it from reviewing it again. The threshold in the second review application is higher than the one in the first review.

Section 148(2) does not stipulate the time within which an application for the review of the Supreme Court's decision should be brought. As a result, the Supreme Court has relied on common law to hold that the application must be brought within a reasonable time.[76] The Supreme Court held that what amounts to unreasonable delay depends on the circumstances of each case but that 'a delay of over one year before instituting review proceedings is unreasonable given the need to bring matters of litigation

[70] Ibid para 57.

[71] *Vilakati v Prime Minister of Swaziland and Others* [2016] SZSC 15 para 33. See also *Siboniso Clement Dlamini v Walter P. Bennet, Thabiso G. Hlanze No., Registrar of The High Court, First National Bank Swaziland Ltd* [2017] SZSC 21 para 35.

[72] See for example, *Attorney General v The Master of The High Court* [2016] SZSC 10; *Vilakati v Prime Minister of Swaziland and Others* [2016] SZSC 15.

[73] *Henwood v Henwood and Another* [2019] SZSC 59.

[74] Ibid para 23.

[75] Ibid paras 25–27.

[76] *African Echo T/a Times of Swaziland and Others v Zwane* [2016] SZSC 202 paras 38–39.

https://doi.org/10.47348/JCLA/v12/i1a2

to finality and closure so that the parties can reorganize their lives'.[77] The test of whether or not the delay was reasonable is objective.[78] Should the applicant fail to bring the review application within reasonable time, he/she is required to file an application for condonation.[79]

This discussion shows that although in Ghana and Eswatini the constitutions allow apex courts to review their decisions, they do not stipulate the grounds upon which courts can exercise that power. As a result, these grounds are laid down in the rules (in the case of Ghana) and in case law (in Eswatini). This raises the question of whether the Supreme Court's review powers in Eswatini are constitutional or derived from common law. As mentioned above, art 133(1) of the Constitution of Ghana provides for the court's power to review its decisions according to the circumstances laid down in the rules. The grounds have been established. This means that any review application must be determined on the basis of one or more of the grounds stipulated in the rules. However, although s 148(2) of the Constitution of Eswatini provides that the Supreme Court may review any of decisions based on the 'conditions as may be prescribed by an Act of Parliament or rules of court', neither the Act or the rules have been enacted or adopted to provide for these grounds. In *African Echo T/a Times of Swaziland and Others v Zwane*,[80] the respondent opposed the review application on among other grounds that 'the application for review of the Supreme Court decision is impermissible in the absence of an Act of Parliament or Rules of Court permitting such'.[81] However, the respondent did not pursue this objection.[82] The court held that 'it is common ground that the Supreme Court has held that it can exercise its review powers even in the absence of law or rules prescribing the conditions or grounds for review'.[83] Since the respondent did not pursue this ground of objection, he did not make submissions on why the Supreme Court did not have jurisdiction to exercise its review powers in the absence of the Act or rules stipulating the grounds of review. However, in the author's view, the use of the phrase 'as may be prescribed by …' as opposed 'as shall be prescribed …' or 'as prescribed' implies that the existence of the relevant Act of parliament or rules is not a prerequisite for the court to exercise its review jurisdiction. In other words, as the court has held, its constitutional power to review its decisions can be exercised on the basis of common law grounds. However, the court has observed that there is an urgent need for the grounds of

[77] Ibid para 41.
[78] *Attorney General v The Master of The High Court* [2016] SZSC 10 para 56.
[79] *Dlamini v Rex* [2023] SZSC 12 para 36.
[80] *African Echo T/a Times of Swaziland And Others v Zwane* [2016] SZSC 202.
[81] Ibid para 29.
[82] Ibid para 53.
[83] Ibid para 53.

https://doi.org/10.47348/JCLA/v12/i1a2

review to be provided for to prevent people from approaching it with meritless applications[84] and to guide it on the criteria that should be used to assess the applications.[85] The draft Constitution of Gambia (2020)[86] also empowers the Supreme Court to review its decision. However, since the Constitution is yet to be adopted, there is no need to discuss it.

Article 81 of the Constitution of Namibia provides that '[a] decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted'.[87] Neither the Supreme Court Act[88] nor the Rules of the Supreme Court[89] provide for the circumstances in which the court can reverse its decision. Section 17 of the Supreme Court Act expressly forbids the appeal against or review of the decision or order of the Supreme Court. Since the Constitution, the Act and the rules are silent on the grounds on which the court may reverse its decisions, the court has had to explain such circumstances. The Supreme Court held that it can only reverse its decision when it is convinced that it was wrong.[90] In *Kamwi v Law Society of Namibia*,[91] the applicant's appeal before the Supreme Court was dismissed. He asked the Supreme Court to 'review' its decision on, among other grounds, that it was *per incuriam* and misinterpreted the relevant constitutional provisions.[92] In his application, he later substituted the word 'review' with 'reverse'.[93] The issue for the court to determine was whether art 81 granted it 'jurisdiction to reverse one of its earlier decisions, in proceedings between the same parties, on the same facts and same issues'.[94] The applicant argued that although s 17

[84] In *Vilakati v Rex* [2018] SZSC 32 para 36 the court, after dismissing a review application, held that '[i]t would be remiss of me not to place on record that the disturbing trend of bringing baseless review Applications before this Court continues unabated and as such it has now become imperative that Rules are urgently promulgated to give itemised guidelines relating to such review Applications'.

[85] *Sikhondze v Rex* [2021] SZSC 49 para 66, it was observed that because of the lack of the Act and rules giving effect to s 148(2), 'there has been a lot of teething problems resulting in, inter alia, lack of clarity and consistency in some of the Judgments of this Court as to the operationalization and the requirements to be met by a litigant who seeks to exercise his or her rights under s 148(2)'.

[86] Article 181 of the draft Constitution provides that '(1) The Supreme Court may, on application made to it, review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court. (2) The Supreme Court shall, when reviewing its decision under subsection (1), be constituted by not less than seven judges of the Court.'

[87] For a detailed discussion of the circumstances in which parliament can reverse a court's judgment, see Mujuzi, D.J. 'Equality before the law and the recognition of same-sex foreign marriages in Namibia: *Digashu and another v GRN and others; Seiler-Lilles and another v GRN and others* [2023] NASC 14' (2023) 23(4) *International Journal of Discrimination and the Law* 321.

[88] Supreme Court Act, No 15 of 1990.

[89] Rules of the Supreme Court of Namibia, No 249 of 2017.

[90] *Schroeder and Another v Solomon and Others* [2010] NASC 11 paras 18–19.

[91] *Kamwi v Law Society of Namibia (1)* [2010] NASC 16.

[92] Ibid para 3.

[93] Ibid para 4.

[94] Ibid para 5.

https://doi.org/10.47348/JCLA/v12/i1a2

of the Supreme Court Act provides that the decision of the court is final, such a decision can be reversed if it is a nullity. He referred to English case law in support of his argument.[95] The respondent argued that the court did not have power under art 81 to review its decision.[96] The court held that art 81 cannot be relied on by the applicant to appeal against its decision.[97] It held that it was 'not necessary to decide whether Article 81 can permit' it to 'reverse a judgment that is a nullity because the applicant has not established [that the court's impugned decision was] a nullity'.[98] The court concluded by explaining why the impugned decision was not a nullity.[99] It did not explain whether it can reverse its decision if it is a nullity.

However, seven years after that decision, the court was confronted with facts requiring it to interpret art 81. In *Likanyi v S*,[100] the Botswana and Namibia authorities colluded to abduct the applicant and his colleagues from Botswana and took them to Namibia where they were prosecuted for treason. The applicant argued before the High Court that, as a result of the abduction, Namibian courts did not have jurisdiction over him. The High Court upheld his argument. However, on appeal to the Supreme Court by the state, the Supreme Court agreed with the state that the High Court had jurisdiction. He was prosecuted, convicted and sentenced.[101] However, in a subsequent case filed shortly after by the appellant's accomplices, who were also abducted from Botswana under similar circumstances, the Supreme Court held that the High Court had no jurisdiction over them.[102] Against that background, the applicant approached the Supreme Court and asked it to reverse the decision in his case and find that the High Court also lacked jurisdiction to try him. He argued, inter alia, that the court's decision to the effect that the High Court had jurisdiction over him violated his right of equality before the law.[103] The state argued that the court did not have the power to reverse its decision in the applicant's case and that 'any injustice that might have occurred is incurable'.[104] The court held that, as a general rule, it has no power to review its decisions.[105] It held further that the purpose of art 81 (on the binding nature of the court's decisions) is to entrench the

[95] Ibid paras 7–9.
[96] Ibid para 10.
[97] Ibid paras 11–16.
[98] Ibid para 18.
[99] Ibid paras 19–22.
[100] *Likanyi v S* [2017] NASC 10.
[101] Ibid paras 61–67.
[102] Ibid paras 17–19.
[103] Ibid para 20.
[104] Ibid para 22.
[105] Ibid paras 23–29.

https://doi.org/10.47348/JCLA/v12/i1a2

principles of *res judicata* and *stare decisis*.[106] It added that jurisprudence from other countries such as the United Kingdom, India, Canada and South Africa shows that although apex courts emphasise the importance of the principle of *res judicata*, they have explained exceptional circumstances in which they can re-open, review and set aside their decisions.[107] It added that '[t]here is no justification in a constitutional state for a rigid rule which admits of no exception at all to the principle of criminal *res judicata* in relation to decisions of the Supreme Court'.[108] It held further that '[i]t is indefensible to argue that the need for finality must, at whatever cost, take precedence however manifest and grave an injustice done to a subject during a criminal process involving the apex court'.[109] Against that background, the court held that:

> [I]n an exceptional case, the Supreme Court has the competence under Art. 81 of the Constitution to correct an injustice caused to a party by its own decision. The exception will apply in matters involving the liberty of subjects, primarily in criminal matters, where this court is satisfied that its earlier decision was demonstrably a wrong application of the law to the facts which resulted in an indefensible and manifest injustice.[110]

The court held that it has inherent power to determine its procedure and explained the temporary steps that a person who intends to invoke art 81 should follow until the chief justice issues the relevant directives.[111] It observed that in its judgment in which it held that the High Court had jurisdiction over the appellant, it did not give full legal effect to the applicable international and Namibian law relevant to extradition and deportation.[112] It explained the exceptional circumstances that justified its decision to reverse the earlier judgment.[113] It also explained the injustice that the applicant was bound to suffer if it had not reversed its earlier judgment.[114] In his partly dissenting decision, one of the judges held, inter alia, that there was no need for the majority to rely on exceptions to *res judicata* as art 81 expressly empowers the court to reverse its decisions when it is fit to do so.[115]

A few observations should be made about the court's decision in this case. The court suggests that, as a general rule, it should only reverse its

[106] Ibid para 30.
[107] Ibid paras 31–50.
[108] Ibid para 51.
[109] Ibid para 52.
[110] Ibid para 53.
[111] Ibid paras 54–59.
[112] Ibid paras 68–74.
[113] Ibid paras 74–75.
[114] Ibid paras 76–77.
[115] Ibid para 95 (Justice Frank).

https://doi.org/10.47348/JCLA/v12/i1a2

decision in exceptional circumstances and primarily in criminal matters. However, the mere fact that the decision of the court is wrong does not mean that the court will reverse it. In addition to showing that the decision was wrong, the applicant must also prove that it 'resulted in an indefensible and manifest injustice'. The use of 'and' instead of 'or' between 'indefensible' and 'manifest' suggests that the words must be read conjunctively and not disjunctively. Thus, the injustice has to be both 'indefensible and manifest'. It is not enough that the injustice is either indefensible or manifest. Both elements must be present. Although the court held that the power to reverse its decision should 'primarily' be involved in criminal matters, nothing bars it from invoking its powers in civil matters where the judgment is demonstrably wrong and resulted in an indefensible and manifest injustice.[116] Likewise, nothing prevents it from invoking its power in criminal matters that do not involve the liberty of the subject. In simple terms, the court will invoke its powers under art 81 in all cases where the decision was 'demonstrably a wrong application of the law to the facts which resulted in an indefensible and manifest injustice.' Since art 81 expressly allows the court to reverse its decision, there was no need, as Justice Frank correctly held, for the court in *Likanyi* to create the impression that the powers to reverse its incorrect decision are derived from the need to relax *res judicata* principles.[117] Article 81 confers on the court the constitutional 'greenlight' to reverse its decisions. All that it is required to do is to explain the factors that should be in place before it can reverse its decision. It could rely on factors developed by courts in common-law jurisdictions. The court stipulated limited circumstances in which it can review its decisions. However, practice from other countries shows that these are not the only situations in which the apex court may review its decisions.

Review powers provided for in the apex courts' rules

In some African countries, the constitutions do not empower apex courts to review their decisions. However, this power is provided for in the respective courts' rules. For example, art 134(4) of the Constitution of Uganda (1995) provides that '[t]he Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so …'. The Constitution does not

[116] Indeed, in *Nakuumba v Ipinge and Others* [2021] NASC 22 the court indicated that it was prepared to invoke art 81 when it wrongly classified a marriage as being 'in community of property, when it was out of community of property'. This had serious implication for the distribution of property at dissolution of the marriage.

[117] *Likanyi v S* [2017] NASC 10 para 95. For a recent discussion of the concept of *res judicata*, see *Beukes and Another v President of the Republic of Namibia and Others* [2024] NASC 28 paras 86–95. See also *Hellens and Another v Minister of Home Afffairs and Others* [2024] NASC 21 paras 4–5 where the court relies on case of Likanyi v S to explain the circumstances in which it can reverse its decision.

https://doi.org/10.47348/JCLA/v12/i1a2

provide the circumstances in which the court can depart from its decisions. However, case law shows that the court has departed from its decisions in cases where, for example, it found that it was no longer good law.[118] There are instances in which the court has also declined applications from litigants to depart from its previous decisions.[119] This raises the question of whether the Supreme Court has the power to review its decision. The drafting history of art 134(4) shows that it was not meant to be relied on by the court to review its decisions. The drafters of the Constitution were of the view that the Supreme Court should only 'revisit' its decision under two circumstances: under the slip rule and when departing from its previous decision.[120] Since art 134(4) did not expressly prohibit the court from reviewing its decision, its rules empower it to review its decisions. Rule 2(1) of the Judicature (Supreme Court) Rules[121] provides that the rules shall govern the practice and procedure of appeal before the court. Rule (2) states that:

> Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.

Under r 2(2), the court has the inherent power to set 'aside judgments which have been proved null and void after they have been passed'. This means that the court can only review its decision on one ground: when it is null and void. There are cases in which the court has dealt with its powers under r 2(2). For example, in *Orient Bank Ltd v Zaabwe and Another*[122] the applicant asked the court to review its 'erroneous' previous order to compensate a third party for the loss occasioned to him by the applicant's fraudulent activity. The applicant argued that the order was null and void because the respondent had obtained it 'by fraud' as

[118] In *Re: Application for leave to intervene as Amicus Curiae by Prof Oloka Onyango & 8 Others* [2016] UGSC 2 (court departing from its previous decision on amicus curiae); *Abelle v Uganda* [2018] UGSC 10; *Uganda Post Ltd v Mukadisi* [2023] UGSC 58. In *2nd Lt Ogwang Ambrose v Uganda* [2024] UGSC 45, the Supreme Court observed that the Court of Appeal had also departed from its judgment.

[119] *Amama Mbabazi v Kaguta Museveni & 2 Others* [2016] UGSC 4 (in this case, the court refused to depart from its position it two earlier presidential to the effect that in such petitions, 'the burden of proof lies on the petitioner to prove what he asserts to the satisfaction of the Court').

[120] Uganda Constituent Assembly, *Proceedings of the Constituent Assembly* (1994/1995) at 5463 (explanation of rationale behind draft art 134(4) by Mr Abu Mayanja).

[121] Judicature (Supreme Court) Rules, Legal Notice 13 of 1996.

[122] *Orient Bank Ltd v Zaabwe and Anor* [2008] UGSC 54.

https://doi.org/10.47348/JCLA/v12/i1a2

it was based on his 'false testimony'.[123] It added that the order was also 'invalid because at the time of its delivery the court was not competently constituted'.[124] The court first highlighted the circumstances in which it can invoke the slip rule.[125] It observed that the applicant's submissions practically amounted to an appeal against its decision, which was contrary to r 2(2).[126] It emphasised that its inherent power 'must not be invoked to circumvent the principle of finality of the court's decisions'.[127] It held that the applicant's argument that the court was not properly constituted at the time it made the impugned order had no merit.[128] The court held that it was prepared to invoke its inherent power to set aside its judgment based on fraud if the applicant met three requirements: 'that the fraud is proved strictly, that the judgment is based on that fraud and that the order is necessary either for achieving the ends of justice or to prevent abuse of court process'.[129] It concluded that there was no evidence that its order was obtained by fraud.[130] In *Nsereko & Others v Bank of Uganda*,[131] the applicants asked the court to re-open and review its previous judgment because they had discovered 'new and important evidence which after the exercise of due diligence had not been within the knowledge and/or could not have been produced at the time of the suit and/or the appeals'.[132] The court dismissed the application because the applicants failed to demonstrate how re-opening a case that had been decided six years ago would have served the 'ends of justice'.[133]

In *Ibrahim Ruhweza v Uganda*,[134] the High Court convicted the appellant of aggravated robbery and imposed the mandatory death penalty. His appeals to the Court of Appeal and Supreme Court were dismissed. In confirming the death sentence, the Supreme Court overlooked its earlier judgment to the effect that the mandatory death sentence was unconstitutional and that offenders sentenced to mandatory death penalties had to have their cases remitted to the High Court to hear evidence in mitigation of these sentences.[135] He asked the court to invoke r 2(2) and set aside its decision. The court agreed with him and held that its decision was 'null and void and should be set aside and the appellant should go back to the High

[123] Ibid at 5.
[124] Ibid at 5.
[125] Ibid at 6.
[126] Ibid at 7.
[127] Ibid at 10.
[128] Ibid at 17–21.
[129] Ibid at 21.
[130] Ibid at 22–23.
[131] *Nsereko & Others v Bank of Uganda* [2011] UGSC 17.
[132] Ibid at 3.
[133] Ibid at 8. See also *Eseza Byakika v National Social Security Fund* [2025] UGSC 11 at 7.
[134] *Ibrahim Ruhweza v Uganda* (Criminal Application No 1 of 2014) (27 November 2014).
[135] *Attorney General v Susan Kigula & Others* [2009] UGSC 6.

https://doi.org/10.47348/JCLA/v12/i1a2

Court for mitigation of sentence'.[136] An application under r 2(2) must be brought within a reasonable time.[137] However, the court has not explained what amounts to reasonable time. As mentioned above, under r 2(2) the court can only review its decision when it is 'null and void'. Although this is an objective test, the court has the discretion to determine what amounts to a 'null and void' judgment depending on the circumstances of the case. Unlike in some countries such as Ghana, where a court can only set aside a wrong judgment if the failure to do so will occasion a miscarriage of justice to the applicant, this is not a requirement under r 2(2).

In South Africa, the Constitutional Court's power to rescind its decisions is provided for in r 42(1) of the Uniform Rules[138] which states that:

> 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.

Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others[139] is the leading case on the power of the court under r 42. The applicant was sentenced to 15 months' imprisonment for contempt of the court's order.[140] He argued that the contempt order should be rescinded because it contained material errors as the court failed to properly analyse the applicable constitutional provisions, his conviction was based on hearsay evidence and violated his right to equality before the law.[141] He added that his submission constituted 'grounds for a rescission in terms of rule 42(1)*(a)* … but in the event that he has not met those requirements … he has established good cause for a rescission under the common law'.[142] The respondent and amicus curiae argued that the application did not meet the requirements for rescission under r 42(1)*(a)* because, inter

[136] Ibid at 2.

[137] *Sanyu Katuramu & Others v Attorney General* [2017] UGSC 9 (in this case the application was brought eight years after the judgment and the court dismissed it).

[138] As amended by GoN R1157, G. 43856 (cio 1 December 2020).

[139] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC).

[140] Ibid paras 6–7.

[141] Ibid paras 14–20.

[142] Ibid para 21.

https://doi.org/10.47348/JCLA/v12/i1a2

alia, the court had not committed any patent error.[143] The court referred to r 42(1) and held that:

> It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court 'may', not 'must', rescind or vary its order – the rule is merely an 'empowering section and does not compel the court' to set aside or rescind anything. This discretion must be exercised judicially.[144]

The court analysed the applicant's submissions and held that it had not committed any error within the meaning of r 42(1)*(a)*.[145] It held that under r 42(1), and at common law, 'the law of rescission is clear: one cannot seek to invoke the process of rescission to obtain a re-hearing on the merits'.[146] The court added that r 42 is to a limited extent an exception to the doctrine of *functus officio*.[147] It held further that, at common law, an application for rescission can only be successful if the applicant meets the following two requirements: 'First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success.'[148] After assessing the evidence, the court held that the applicant did not meet those requirements.[149] The court also held that it was not in the interests of justice of rescind its decision.[150] It added that the interests of justice do not 'compel' it 'to expand the grounds of rescission or reconsider the application'.[151] Against that background, it held that:

> There is a reason that rule 42, in consolidating what the common law has long permitted, operates only in specific and limited circumstances. Lest chaos be invited into the processes of administering justice, the interests of justice requires the grounds available for rescission to remain carefully defined.[152]

[143] Ibid paras 23–45.
[144] Ibid para 53.
[145] Ibid paras 54–67.
[146] Ibid para 68.
[147] Ibid para 68.
[148] Ibid para 71.
[149] Ibid paras 72–85.
[150] Ibid paras 86–95.
[151] Ibid para 96.
[152] Ibid para 98.

https://doi.org/10.47348/JCLA/v12/i1a2

The court concluded that its refusal to rescind the decision did not violate South Africa's constitutional and international law obligations.[153] It is thus evident that in South Africa the apex court can only rescind its decision under r 42 because it consolidates what common law 'has long permitted'. For an applicant to succeed in his/her application, they must prove one of the grounds under r 42(1). The court's reasoning creates room for the argument that even proving that ground alone is not a guarantee that the court will rescind its decision. However, the court does not explain the circumstances in which it can refuse to rescind its order or judgment in case one of the conditions under r 42(1) is met. It has emphasised that its powers under r 42(1) should be exercised in exceptional circumstances.[154] I argue that the word 'may' under r 42(1) should be interpreted as 'shall'. Thus, if the court finds that any of the grounds under r 42(1) exists, it has no choice but to rescind the order or judgment. This is because it can hardly be argued that it is in the interests of justice, within the meaning of s 173 of the Constitution, for the court not to rescind or vary an order or judgment 'stained' by one of the grounds under r 42(1).[155] Those grounds were singled-out because the existence of one of them goes to the root of the order or judgment. As the Constitutional Court held in *Mokone v Tassos Properties CC and Another*,[156] whenever a court invokes s 173, it has only one constitutional test 'and it has everything to do with the interests of justice'.[157] Thus, a court can only exercise 'its inherent power … after being satisfied that it was [is] in the interests of justice to do so'[158].

The Constitution of Tanzania (1977) is silent on the Court of Appeal's power to either depart from or review its decisions. Before 2009, the Rules of the Court of Appeal were silent on the court's power to review its decisions. The court held that it had inherent power to review its decisions on one of the four grounds.[159] However, the list was not

[153] Ibid paras 99–123.

[154] *R v R* 2023 (9) BCLR 1126 (CC) para 51. See also *Mothulwe v Labour Court, Johannesburg and Others* [2025] ZACC 10 paras 39 – 40 in which the court declined an application to rescind its decision under r 42(1)*(a)*.

[155] Section 173 of the Constitution provides: 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.' For the interpretation of s 173, see, for example, *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC).

[156] *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC).

[157] Ibid para 67.

[158] *Rissik Street One Stop CC t/a Rissik Street Engen and Another v Engen Petroleum Ltd* 2024 (4) SA 447 (CC) para 57.

[159] These were: (1) manifest error on the face of the record; (2) the decision was obtained by fraud of one of the parties (in this case it had to be shown that the successful litigant was a party to the fraud); (3) the applicant was denied a hearing which resulted in the miscarriage of justice; and (4) where the court did not have jurisdiction. The court also had the power, on the basis of the slip rule,

https://doi.org/10.47348/JCLA/v12/i1a2

exhaustive.[160] It did not have the power to review its decision on merits.[161] In 2009, the Rules of the Court expressly provided for the powers of the court to review its decisions. As the discussion below shows, before 2016, the court's power to review its decisions was exclusively regulated by r 66. Rule 66(1) of the Court of Appeal Rules (2009)[162] provides that:

> The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds— *(a)* the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;[163] or *(b)* a party was wrongly deprived of an opportunity to be heard; *(c)* the court's decision is a nullity;[164] or (d) the court had no jurisdiction to entertain the case; or *(e)* the judgment was procured illegally, or by fraud or perjury.[165]

to correct accidental errors or omissions. The slip rule is generally not considered as a ground for review. In these cases, the court dismissed applications to review its judgments because the applicant failed to prove one of the above grounds: *Dar-es-Salaam Education and Office Stationery v National Bank of Commerce* [1996] TZCA 25; *Timothy M. Kaare v Mara Cooperative Union* (1984) Ltd [1996] TZCA 12; *Chandrakant Joshubhai Patel v Republic* [2003] TZCA 37; *Peter Ng'homango v Gerson M.K Mwangwa and another* [2007] TZCA 162.

[160] *Sdv Transmi (Tanzania) Ltd v M/s Ste Datco* [2005] TZCA 9 at 5.

[161] *Mohamed Hassan v Mayasa Mzee and another* [1998] TZCA 4.

[162] The Tanzania Court of Appeal Rules, 2009. For the drafting history of the rules, see *Thomas Mgiro v Republic* [2013] TZCA 441.

[163] For a detailed discussion of what amounts of a manifest error, see, for example, *Halmashauri Kijiji cha Vilima Vitatu & Another v Udaghwenga Bayay & Others* [2016] TZCA 567. In *Huang Quin and Another v Republic* [2023] TZCA 199 at 9, the court held that 'no judgment will attain perfection and … not every error is amenable to review'. In *Emmanuel Malahya v Republic* [2021] TZCA 172 at 7, the court held that 'for an error to warrant review, it must be apparent on the face of the record not requiring long-drawn arguments from the opposing parties'. In other words, as the court held in *Chacha Jeremiah Murimi & Others v Republic* [2019] TZCA 466 p 6, 'such an error must be obvious not involving a process of reasoning'. See also *Registered Trustees of St. Anita's & Others v Azania Bank Limited* [2025] TZCA 568; *TANCOAL Energy Limited v National Bank of Commerce Limited & Another* [2025] TZCA 479.

[164] For a discussion of what amounts to a null decision, see *Sanlam General Insurance (T) Limited vs AMC Trade Finance Limited* [2025] TZCA 348; *Victor Robert Mkwavi v John Mathias Mangana (as administrator of the estate of the late Juma Omary)* [2025] TZCA 337.

[165] In *Sabato Thabiti & Another v Republic* [2021] TZCA 429 p 4, the court held that 'the Court Rules do not define the phrase «procured illegally» but plainly speaking, it simply means, obtained in a way or manner that is contrary to, or forbidden by law'. In *Said Shabani v Republic* [2013] TZCA 423 p 6, the court held that 'the basic principle underlying review is that: «The Court would not have acted as it had if all the circumstances had been known»'. However, in *SYMBION Power Tanzania Ltd v CRDB Bank PLC* [2024] TZCA 661 p 10, the court held that 'this Court cannot review its own decision except to correct any clerical mistake or some error arising from any accidental slip or omission in a judgment or order. The enabling law does not clothe the Court with the jurisdiction to act as an appellate court and sit to reconsider the correctness or otherwise of its own decisions'. This approach erroneously limits the court's power under r 66*(a)* to the 'slip rule'. Thus, the court ignores the distinction between r 66*(a)* and r 42 (which deals with the slip rule). For the circumstances in which the court has invoked r 42, see, for example, *Metwii Pusindawa Lasilasi v Republic* [2024] TZCA 139; *Director Moshi Municipal Council v Stanlenard Mnesi & Another* [2019] TZCA 85.

https://doi.org/10.47348/JCLA/v12/i1a2

Rule 66(2) provides the format for the application for review. Rule 66(3) provides that '[t]he notice of motion for review shall be filed within sixty days from the date of the judgment or order sought to be reviewed'.[166] As a general rule, the court will dismiss an application filed outside the 60-day deadline.[167] However, the court can extend the time to file an application for review after considering factors such as the length of delay, the reason(s) for the delay, whether the applicant has an arguable case and whether or not the respondent will be prejudiced if the court condones the late application.[168] In other words, the applicant has to account for the period of delay.[169] For example, in *Samweli Gitau Saitoti alias Saimoo alias Jose & Others v Director of Public Prosecutions*,[170] the court allowed the applicant to file the review application four years after the impugned decision because the applicants had strong reasons.[171] Case law suggests that one of most important factors that the court considers in deciding whether or not to condone a late application is whether the applicant has an 'arguable case'.[172] The 'arguable case' has to be demonstrated on a balance of probabilities.[173] In other words, whether his/her application shows that he is likely to convince the court to review the application on one of the grounds under r 66(1). It is argued that whether or not a person has an arguable case should not be considered as one of the factors in deciding whether to condone the late application for review. The only relevant factor should be the reason(s) for the delay. Requiring proof of an arguable case is tantamount to deciding the application on merits before it is even filed. Rule 66(4) provides for the duration within which the notice of review must be served on the other parties. However, if the party is served and does not appear, the review hearing will proceed *ex*

[166] The 60-day deadline was first imposed by the court before the promulgation of the 2009 Rules. For this history, see *Benjamin Mpilimi & Others v Republic* [2013] TZCA 244.

[167] *Peter Mabimbi v The Minister for Labour & Youth Development & Others* [2009] TZCA 58 (application filed 89 days after the judgment); *Eliya Anderson v Republic* [2013] TZCA 195 (13 June 2013) (filed after four years).

[168] *Thomas Mgiro v Republic* [2013] TZCA 441 at 4–5. See also *Kombo Omary v Republic* [2010] TZCA 38 (the applicant was serving a prison sentence, but the court declined to condone the late application because his application had no prospect of success); *Bakir Israel v Republic* [2012] TZCA 146 (application was not successful). See also *Hamza K. Sungura v The Registered Trustees of Joy in the Harvest* [2023] TZCA 17324.

[169] *Charles Karamji alias Charles Masangwa v Republic* [2020] TZCA 336 at 7 (in this case the applicant failed to account for the six-year delay).

[170] *Samweli Gitau Saitoti alias Saimoo alias Jose & Others v Director of Public Prosecutions* [2020] TZCA 363.

[171] The reasons were that the applicants were illiterate, they were waiting for the outcome of the appeal the DPP had filed against one of the High Court orders and they had an arguable case.

[172] *Tanzania Fish Processors Ltd v Eusto K. Ntagalinda* [2020] TZCA 237 p 13.

[173] *Gibson Madege v Republic TZCA* 199 (application brought six years after the judgment and dismissed). See also *Jamal Msitiri alias Chaijaba v Republic* [2020] TZCA 1774; *Tanzania Fish Processors Ltd v Eusto K. Ntagalinda* [2019] TZCA 67.

https://doi.org/10.47348/JCLA/v12/i1a2

parte.[174] Rule 66(5) provides that '[a]n application for review shall as far as practicable be heard by the same Justice or Bench of Justices that delivered the judgment or order sought to be reviewed'. There are instances in which an application for review can be heard by judges who did not hand down the judgment.[175] Under r 66(6), if the court grants the application for review, it 'may rehear the matter, reverse or modify its former decision … or make such other order as it thinks fit'. Rule 66(7) provides that:

> Where an application for review of any judgment and order has been made and disposed of, a decision made by the court on the review shall be final and no further application for review shall be entertained in the same matter.

Rule 66 is the exception to 'the public policy principle that there must be an end to litigation'.[176] The following issues should be noted about the above rules. First, the use of the word 'may' suggests that, even if one of the grounds in r 66(1) is proved, the court still has the discretion whether or not to review its decision. I argue that in the context of r 66 the word 'may' should be interpreted to mean 'shall.' This is because allowing a decision that is tainted by one of the errors mentioned in r 66 to stand is against the interests of justice.[177] Second, the list of grounds on which a court may review its decisions is closed. This means that a review can only take place on any of the five grounds enumerated in r 66(1).[178] No other ground is admissible. Thus, in *Eliya Anderson v Republic*,[179] the court held that r 66 'restricts the court's inherent jurisdiction of review to only five distinct grounds'.[180] In other words, '[t]he Court … is strictly barred from entertaining an application for review save on the basis of the … grounds' in r 66(1).[181] The grounds mentioned in r 66(1) are

[174] *Christina Mrimi v Coca Cola Kwanza Bottlers Ltd* [2012] TZCA 1 (the applicant had named a wrong respondent, and the court found, ex parte, that this was a manifest error on the record which caused the respondent irreparable damage, and the review application was successful).

[175] See, for example, *Equador Ltd v National Development Corporation* [2023] TZCA 4 (and the cases discussed therein).

[176] *Eusebio Nyenzi v Republic* [2013] TZCA 286 p 3.

[177] In *Karim Ramadhani v Republic* [2015] TZCA 66 p 4, the court held under r 66(1), the phrase 'no application for review shall be entertained' is 'couched in mandatory terms'.

[178] In *OTTU on behalf of P.L. Asenga & Others v AMI Tanzania Ltd* [2013] TZCA 474 p 5, the court held that 'paragraphs *(a)* to *(e)* of sub-rule 1 of r 66 of the Rules have no cumulative effect. This is because of the use of the word «or»; it is in the alternative. So, the Court can exercise its powers of review if it is satisfied that any one of the grounds enumerated therein has been violated.'

[179] *Eliya Anderson v Republic* [2013] TZCA 195.

[180] Ibid at 5.

[181] *Joel Silomba v Republic* [2013] TZCA 332 p 7. See also *Chalamanda Kauteme v Republic* [2013] TZCA 249 p 3; *Patrick Sanga v Republic* [2013] TZCA 473 p 5; *Mychel Andriand Takahindangeng v Republic* [2024] TZCA 1100 p 12.

https://doi.org/10.47348/JCLA/v12/i1a2

the 'rarest of situations'.[182] Because of the rare nature of those grounds, '[o]btaining an order of a review from the Court is not easy'.[183] However, in *Epson s/o Michael v Republic*,[184] the court referred to r 66(1) and the relevant case law and held that '[t]he law is settled. The court will not readily extend the list of circumstances for review'.[185] The use of the word 'readily' implies that the court is open to extending the grounds of review in exceptional circumstances. However, there is no known case in which the court has ever added another ground for review on those provided for in r 66. Much as an aggrieved party has 'the right to seek a review jurisdiction of the Court',[186] he/she has to meet one of the grounds under r 66(1) because 'review is not an automatic right'.[187] Third, once the court has reviewed a judgment, its decision is final. It cannot be reviewed again irrespective of the circumstances.[188] This was the case even before r 66 was promulgated.[189] This position should be distinguished from the one in Eswatini where the Court of Appeal has held that it has jurisdiction to review its decision more than once. Unlike in other countries where courts have distinguished between departing from their decisions and review, in Tanzania the Court of Appeal held that '[t]he means by which the court can depart from or overrule its own decision is by way of review'.[190] Instances in which the court has reviewed its decisions under r 66(1) include where the applicant's right to be heard was violated,[191] the court lacked jurisdiction,[192] where the Court of Appeal's order 'staying the execution in the High Court was issued while there was no execution proceedings in the High Court',[193] and the presence

[182] *AMI Tanzania Ltd v OTTU on Behalf of P.L. Assenga & Others* [2013] TZCA 229 p 16; *Andrew Ambrose v Republic* [2015] TZCA 60, p 5.

[183] *Kileo Bakari Kileo & Others v Republic* [2022] TZCA 333, p 10.

[184] *Epson s/o Michael v Republic* [2013] TZCA 290.

[185] Ibid p 3.

[186] *Kileo Bakari Kileo & Others v Republic* [2022] TZCA 333 p 8.

[187] *Omary Makunja v Republic* [2016] TZCA 211 p. 4. In *Majid Goa alias Vedastus v Republic* [2017] TZCA 184 the court summarised most of the principles relevant to review proceedings.

[188] See generally, *OTTU on behalf of P. L. Asenga & Others v Ami T. Ltd* [2019] TZCA 138.

[189] In *George M. Shambwe v National Printing Co. Ltd* [1997] TZCA 62 at 4, the court held that, although it had the inherent power to review its decisions, it has 'never ever reviewed a previous review' and added that 'that would be an abuse of the process of the court and should be totally discouraged'.

[190] *Peter Mabimbi v The Minister for Labour & Youth Development & Others* [2009] TZCA 58 p 5.

[191] *OTTU on behalf of P.L. Asenga & Others v AMI Tanzania Ltd* [2013] TZCA 474; *Vicent Damian v Republic* [2016] TZCA 934. In *Mehar Singh t/a Thaker Singh v Highland Estates Ltd & Others* [2016] TZCA 825 the court held that 'a party' under r 66(1)*(b)* means 'a person who was involved in the proceedings desired to be reviewed'.

[192] P 9219 *Abdon Edward Rwegasira v The Judge Advocate General* [2016] TZCA 969 (the Court of Appeal lacked jurisdiction to revise the proceedings of the Court Martial Appeal Court). In *Jacqueline Ntuyabaliwe Mengi & Others v Abdiel Reginald Mengi & Others* [2024] TZCA 681, it was held that the jurisdiction in question has to relate to proceedings. It should not be general jurisdiction.

[193] *D. B. Shapriya & Co. Limited & Others v Kamaka Company Limited & Others* [2025] TZCA 400 at 15.

https://doi.org/10.47348/JCLA/v12/i1a2

of a manifest error on the record occasioning a miscarriage of justice.[194] The court does not have power to review its decisions on merits.[195] This is because 'the primary purpose of review is not to challenge the merits of a decision but rather to address irregularities of a decision which has caused injustice to a party'.[196]

Although r 66 provides for the court's power to review its decisions, this power was 'only inherent and not statutory'.[197] However, this position changed in 2016 when the Appellate Jurisdiction Act[198] was amended to include therein s 4(4), which provides that '[t]he Court of Appeal shall have the power to review its own decisions'. Unlike the 2009 Rules, the Act does not stipulate the grounds for review. The court is divided on whether the applicant's failure to cite s 4(4) of the Act renders the application defective. In *Commissioner General (TRA) v Pan African Energy T. Ltd*,[199] the applicant relied on r 66 and asked the court to review its earlier decision. The respondent argued that the application was 'fatally defective' for failing to mention s 4(4) of the Act.[200] The applicant argued, inter alia, that he only became aware of s 4(4) after filing the application.[201] One of the issues before court was whether it should 'overlook the non-citation of the provisions of s 4 (4) of the Act because the application was filed just five days after the provision came into force'.[202] The court explained how s 4(4) was included in the Act and added that, before its enactment, applications for review were filed on the basis of r 66.[203] Against that background, the court held that:

> It is our well-considered view that it was not legally appropriate for the Rules to empower the Court to entertain and hear applications for review instead of the same being promulgated in the Act. In this token, we think and highly recommend that the maker of the Rules should amend the

[194] *Chavda & Co Advocates v Arunaben Chaggan Chhita Mistry & Others* [2017] TZCA 154; *Elia Kasalile & Others v Institute of Social Work* [2019] TZCA 73 (relied on wrong piece of legislation); *Costantine Victor John v Muhimbili National Hospital* [2022] TZCA 646; *Samwel Gitau Saitoti alias Saimoo alias Jose & Others v The Director of Public Prosecutions* [2021] TZCA 554 (the court nullified the trial but did not quash the conviction and sentence. In this case, the court also allowed the applicant to file the application outside of time). See also *National Microfinance Bank v Leila Mringo & Others* [2021] TZCA 233 (the court relied on wrong legislation to make orders against the applicant which affected his employment status); *Hassan Ng'anzi Khalfan v Njama Juma Mbega & Another* [2021] TZCA 3185 (the court ordered a wrong person to be appointed administrator of a deceased's estate).

[195] *Efficient International Freight Ltd & Another v Office Du The Du Burundi* [2011] TZCA 60.

[196] *James Ashirafu v Republic* [2017] TZCA 248, pp 8–9.

[197] *Thomas Mgiro v Republic* [2013] TZCA 441, p 6.

[198] Appellate Jurisdiction Act, Chapter 141.

[199] *Commissioner General (TRA) v Pan African Energy T. Ltd* [2017] TZCA 157.

[200] Ibid p 3.

[201] Ibid p 4.

[202] Ibid p 21.

[203] Ibid p 22.

https://doi.org/10.47348/JCLA/v12/i1a2

> provisions of rule 66 which purport to bestow upon the Court with substantive powers over review. Those powers should be moved to the provisions of the already in place section 4 (4) of the Act and rule 66 should be left to deal with only procedural aspects.[204]

The court concluded that the applicant's failure to cite s 4(4) was fatal to the application and struck it out.[205] However, in *Christopher Ryoba v Republic*,[206] the applicant relied on r 66 exclusively and the respondent argued that the application was defective.[207] The court held that r 48 of its rules 'enjoins' it 'to order the insertion of a correct provision where there is an omission to do so if the court has jurisdiction to entertain a matter before it'.[208] The court added that failure by the applicant to cite s 4(4) was not fatal to the application but advised that 'it is desirable that litigants cite s 4 (4) of the AJA in all applications for review as the correct provision conferring power on the court to review its decisions'.[209] In some of the cases decided after the commencement of s 4(4), the applicants relied exclusively on r 66 but the court decided the applications on merits.[210] This could be explained by the fact that these applications were filed before the commencement of s 4(4).[211] There are cases in which s 4(4) is not mentioned at all and the application is assessed exclusively on the basis of r 66.[212] In some of these cases, the court highlighted that, although the applications were filed on the basis of r 66, the court derives its power from s 4(4).[213] However, this does not render such applications defective. Although the court's power to review its decisions is included in s 4(4) of the Act, it still relies on the same grounds and procedure under r 66.[214] This is because s 4(4) only provides for the jurisdiction to review and is silent on the grounds that a court should consider. As a result, all the cases that were decided before the enactment of s 4(4) are still relevant. It

[204] Ibid pp 22–23.

[205] Ibid pp 24–28.

[206] *Christopher Ryoba v Republic* [2020] TZCA 1752.

[207] Ibid p 8.

[208] Ibid p 10.

[209] Ibid p 10.

[210] See for example, *Abdi Adam Chakuu v Republic* [2017] TZCA 138.

[211] *Israel Solomon Kivuyo v Wayani Langoi & Another* [2017] TZCA 176 (application filed in November 2007); *Chavda & Co Advocates v Arunaben Chaggan Chhita Mistry & Others* [2017] TZCA 154.

[212] *Juma Mathew Malyango v Republic* [2023] TZCA 231.

[213] *Mathias Rweyemamu v General Manager (KCU) Ltd* [2017] TZCA 219.

[214] *D.N. Bahram Logistics Ltd & Another v National Bank of Commerce Ltd & Another* [2023] TZCA 17377; *Hassan Kapera Mtumba v Salim Suleiman Hamdu* [2023] TZCA 17362; *Fabrice Ezaovi v Kobil Tanzania Ltd* [2023] TZCA 176; *Equador Ltd v National Development Corporation* [2023] TZCA 4; *Habyalimana Augustino & Another v Republic* [2017] TZCA 173; *Aloyce Maridadi v Republic* [2019] TZCA 526; *Sharaf Shipping Agency T. Ltd v Bacilia Constantine & Others* [2024] TZCA 750; *Yohana Maiko Sengasu v Mirambo Mabula & Another* [2024] TZCA 658; *NCBA Bank Tanzania Ltd v Hirji Abdallah Kapikulila* [2024] TZCA 655.

https://doi.org/10.47348/JCLA/v12/i1a2

should also be remembered that '[t]he principles governing review have been developed through case law and codified in Rule 66 …'.[215]

In Zimbabwe, r 73 of the Supreme Court Rules[216] provides that the High Court Rules apply to the Supreme Court in cases of the lacuna in the rules of the latter. It is on that basis that r 29 of the High Court Rules[217] applies to the Supreme Court. Rule 29(1) of the High Court Rules provides that:

> The court or a judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary– *(a)* an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or *(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; or *(c)* an order or judgment granted as a result of a mistake common to the parties.

Rule 29(2) provides that the application for a remedy under r 29(1) has to be made 'within one month after becoming aware of the existence of the order or judgment'. This does not necessarily mean one month after the order or judgment was handed down. Under r 29(3), the court is barred from making 'any order correcting, rescinding or varying an order of judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed'. In *Bonde v National Foods Ltd*,[218] the court held that:

> The purpose of r 449 [now r 29] is to enable the court to revisit its orders and judgments, to correct or set aside its orders and judgments where, to allow such orders to stand on the basis that the court is *functus officio*, would result in an injustice that may destroy the very basis upon which the justice system rests. It is an exception to the general rule and must be resorted to only for the purposes of correcting an injustice that cannot otherwise be corrected in any other way. The rule goes beyond the ambit of mere formal, technical and clerical errors and may include the substance of the order or judgment. It is designed to correct errors made by the court itself and is not a vehicle through which new issues and new parties are brought before the court.[219]

[215] *Austack Alphonce Mushi v Bank of Africa Tanzania Ltd & Another* [2022] TZCA 588 p 4.
[216] Supreme Court Rules, Statutory Instrument 84 of 2018.
[217] High Court Rules, Statutory Instrument 202 of 2021.
[218] *Bonde v National Foods Ltd* [2020] ZWSC 57.
[219] Ibid para 15.

https://doi.org/10.47348/JCLA/v12/i1a2

The court added that for it to invoke its powers under r 29, the applicant has to demonstrate an 'ambiguity or a patent error or omission' in the order or judgement.[220] An applicant who thinks that the court's order or decision could be reviewed should approach the court for a 'remedy' to review its decision under r 29.[221]

Neither constitution nor rules empower courts to depart or review decisions

In some African countries, neither the constitutions nor the rules of the apex courts empower courts to review their decisions. However, apex courts have held that there are circumstances in which they can review their decisions. For example, the Constitution of Lesotho (1993) does not empower the Court of Appeal to depart from or review its decisions. However, in *Hippo Transport v Commissioner of Customs & Excise*,[222] the applicant asked the court to review, correct and set aside an order it had made against it because, after the delivery of the judgement, it discovered 'relevant matters which were never placed before court' and that had those matters been brought to the attention of the court, it would not have reached 'a wrong conclusion'.[223] The issue before the court was whether it had 'jurisdiction to review its own previous decisions or judgments'.[224] The court explained the doctrine of *res judicata* and its importance.[225] It held that it derives its jurisdiction from the Constitution.[226] Against that background, it observed that the Constitution and the relevant legislation make 'no provision, whether expressly or by implication, for the Court of Appeal to sit on appeal or review over its own judgments'.[227] The court emphasised that as the final court in the country,[228] 'it has the inherent jurisdiction or powers to review its own previous decision'.[229] It added that such inherent powers should be invoked 'in order to correct [an] obvious mistake and to do justice'.[230] It added that those inherent powers are derived from the Constitution.[231] It held further that:

> This court can only exercise its review power in exceptional circumstances. This court will view circumstances as exceptional only when gross

[220] Ibid para 29.
[221] *Heuer v Two Flags Trading (Private) Ltd and Others* [2024] ZWSC 45 para 30.
[222] *Hippo Transport v Commissioner of Customs &* Excise [2018] LSCA 5.
[223] Ibid para 2.
[224] Ibid para 4.
[225] Ibid paras 12–14.
[226] Ibid paras 15–16.
[227] Ibid para 17.
[228] Ibid para 18.
[229] Ibid para 19.
[230] Ibid para 19.
[231] Ibid para 21.

https://doi.org/10.47348/JCLA/v12/i1a2

> injustice and or a patent error has occurred in the prior judgment. The power of this court to review its own decisions should therefore not be a disguised rehearing of the prior appeal … It is therefore not done for purposes other than to correct a patent error and or grave injustice, realised only after the judgment had been handed down.[232]

The court also dealt with the issue of whether it has the power to set aside a final judgment on merits.[233] It observed that in Roman-Dutch law, there are circumstances in which a court could rescind its decisions.[234] Against that background, it held that there are circumstances in which it could rescind its decisions.[235] For the court to review its judgement, the applicant has to prove one of the grounds of review mentioned by the court.[236] Since the grounds of review were first laid down in the case of *Hippo Transport v Commissioner of Customs & Excise*, the court has subsequently referred to these grounds as the 'Hippo test'. Thus, the applicant has to pass the 'Hippo test' before the court can review its decision.[237] In *Rex v Phantši*[238] the court reiterated the fact that it has inherent powers and a duty to review its decisions where there is an apparent error but that 'such power is limited to the legality of the administrative action or decision'.[239] This discussion shows that in Lesotho the Court of Appeal has inherent powers to review its decisions. Since those powers are not expressly provided for under the Constitution, the court's view that it derives such powers from the Constitution is debatable. It is more accurate for the court to hold that such powers are conferred upon it by common law. Unlike in other countries where courts can review their decisions *mero motu*, the Lesotho Court of Appeal can only review its decision pursuant to an application by one of the parties. This explains why the court held that '[t]he applicants bear the onus to demonstrate that the impugned judgment was a patent error or caused a gross injustice'.[240] The application for review has to be filed within a reasonable time. Otherwise, the applicant has to provide a satisfactory explanation as to why the court should condone the late application. However, the court does not explain what reasonable time means.[241]

[232] Ibid para 22.
[233] Ibid para 23.
[234] Ibid paras 23–24.
[235] Ibid para 25.
[236] *Maphathe v I Kuper Lesotho* [2019] LSCA 30 paras 18–19.
[237] *Alexis Mphahama v Moosa Holdings (Pty) Ltd* [2024] LSCA 16 para 7.
[238] *Rex v Phantši* [2021] LSCA 6.
[239] Ibid para 19.
[240] *Basotho Patriotic Party & 3 Others v Lejone Puseletso & 6 others* [2024] LSCA 17 para 41.
[241] *Mako Mohale v Minister of Law and Constitutional Affairs* [2024] LSCA 8. In this case, the application for review was made 14 years after the judgment and the court held that the delay was inordinate.

https://doi.org/10.47348/JCLA/v12/i1a2

Likewise, the Constitution of Seychelles is silent on the powers of the court to review its decisions. Unlike in some African countries where judges of the apex courts have been unanimous that such courts have inherent powers or jurisdiction to review their decisions despite the fact that there is no law that expressly empowers them to do so, in Seychelles the Court of Appeal has been divided on this issue. The court held that there is a difference between inherent jurisdiction and inherent powers.[242] In *Belmont & Anor v Belmont*,[243] the court, in a unanimous decision, relied on case law from the United Kingdom on the inherent jurisdiction of the apex court[244] and held that it has 'a residual jurisdiction or inherent power to set aside and rehear an appeal in cases of serious procedural unfairness or irregularities such that the judgment or order ought to be treated as a nullity'.[245] It added that this power is derived from the constitutional provision that confers on it appellate jurisdiction.[246] Likewise, in *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd And Vijay Construction (Pty) Ltd v Eastern European Engineering*,[247] the court, by majority, invoked its inherent powers to set aside its earlier judgment on the ground that it was a nullity because the majority of the judges had violated the appellant's right to be heard.[248] However, in *Bristol v Rosenbauer*[249] the court held that *Vijay Construction*[250] was decided *per incuriam* because the court did not have the power to reopen the case on the basis that the applicant's right to a fair hearing had been infringed. It held that the matter should have been referred to the Constitutional Court, which has jurisdiction to deal with allegations of human rights violations. It also held that the previous cases in which the court held that it had inherent power to set aside its judgement when there is evidence of serious irregularities were wrongly decided because they, inter alia, blurred the distinction between inherent jurisdiction and inherent

[242] *Francis Ernesta & Others v R* [2017] SCCA 24 paras 19–20.

[243] *Belmont & Anor v Belmont* [2020] SCCA 44, Justices Burhan, Fernando and Robinson.

[244] Ibid paras 16–20.

[245] Ibid para 21.

[246] Ibid para 14.

[247] *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd and Vijay Construction (Pty) Ltd v Eastern European Engineering* [2022] SCCA 5, Justices André and Robinson (majority) and Justice Dodin (minority).

[248] After both parties had made their submissions and closed the case, the president of the Court of Appeal sent additional questions to the parties to 'clarify' some important issues. He thereafter convened a hearing for the parties to make oral submissions. However, this procedure was not provided for in the rules. As a result, the two justices refused to participate in the hearing and decided the case against the applicant based on the 'original' submissions. The applicants argued that this was an irregularity which nullified the proceedings and also the judgement.

[249] *Bristol v Rosenbauer* [2022] SCCA 23, Justices Twomey-Woods and Tibatemwa-Ekirikubinza (majority) and Justice Fernando (minority).

[250] *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd and Vijay Construction (Pty) Ltd v Eastern European Engineering* [2022] SCCA 5.

https://doi.org/10.47348/JCLA/v12/i1a2

powers and relied on English case law, which was based on different legal principles.[251] It held further that it does not have the power to review or set aside its decision because neither the Constitution nor the rules of the court confers such jurisdiction on the court. It emphasised that '[i]n Seychelles, the exercise of inherent powers by the Court of Appeal, similarly to the exercise of its jurisdiction, is circumscribed by statutes and rules of court'.[252] The court added that, since legislation does not give it jurisdiction to set aside its decisions, it does not have the power to do so.[253] In *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd)*,[254] one of the issues was whether the court had inherent jurisdiction to set aside its decision in the light of the decision in *Bristol v Rosenbauer.* In other words, the question was whether in *Bristol v Rosenbauer* was correctly decided on this issue.[255] The court held that:

> [W]e are of the considered view that an apex court such as the Seychelles Court of Appeal does have inherent power (we say nothing of inherent jurisdiction) to re-open and reverse its own previous decision as we did in *Attorney-General v Marzorcchi* …, and as we held that we could do in *Belmont & Anor v Belmont* …T his corresponds with the decision of other apex courts such the House of Lords … Even courts established by statute have been said to have a 'residual jurisdiction' to reopen an appeal.[256]

The court added that:

> Two factors, however, warrant emphasis. First, the power to re-open an appeal is an extraordinary one which can only be properly exercised in the most extreme, rare, and exceptional circumstances where the interest of justice clearly demands that this be done. Secondly, the mere fact of the possession of the power is obviously not sufficient to justify a re-opening, otherwise there would be a realistic concern of the 'flood-gates' argument, or to use the metaphor in the pleadings and submissions in this case, of 'Pandora's Box' being opened. There must be finality to litigation and in the interest of this, there must be principles which discipline the circumstances in which an appeal can properly be reopened.[257]

[251] *Bristol v Rosenbauer* [2022] SCCA 23. These cases were: *Karunakaran v Attorney General* [2020] SCCC 5; *Attorney General v Mazorchi and Another* (SCA Civil Appeal 6 of 1996).

[252] *Bristol v Rosenbauer* [2022] SCCA 23 para 33.

[253] Ibid paras 34–42.

[254] *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2022] SCCA 56 (this was an ad hoc panel Anderson, Singh and Young).

[255] Ibid paras 6–8.

[256] Ibid para 59.

[257] Ibid para 60.

https://doi.org/10.47348/JCLA/v12/i1a2

The court added that there are two circumstances in which the Court of Appeal of Seychelles is allowed to re-open a case:

> [W]e are of the view that the exercise of the extreme, rare, and exceptional power to re-open an appeal is limited to the following two circumstances. The first is relatively uncontroversial. Where there is fresh evidence, that satisfies the regime for the admission of fresh evidence, such that an earlier/original decision of the Court of Appeal is likely to be unjust, that decision may be set aside …There are necessarily strict and stringent conditions governing the admission of fresh evidence and these must be scrupulously observed as conditions precedent to the invocation of the exception to review/reverse the previous decision. The second circumstance is more controversial but nonetheless rests on sound legal principles. The right to a fair hearing is a fundamental constitutional principle which permeates, guards, and protects, virtually every other fundamental right in the Constitution. A fair hearing is denied where there is a refusal to listen to what a party has to say regarding his case before the court. Where there is, serious and credible evidence of a substantial contravention of the constitutional right to a fair hearing, such that a party was not heard, the Court may, if it considers the breach to be consequential, review and nullify its previous decision tainted by the lack of fair hearing.[258]

The court also held that *Vijay Construction* was correctly decided. The court also explained clearly why it disagreed with the decision in *Bristol v Rosenbauer*. Since the decision in *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd)*[259] was unanimous on the issue that the Court of Appeal has the power to set aside and rehear an appeal in exceptional circumstances, this position has now been settled. However, the court's view that it can only set aside its decision in two circumstances is very restrictive.[260] The best approach is to leave the grounds of review open as long as there is evidence to prove that it is in the interests of justice to re-open the case. This is so because one of the purposes of inherent powers is to ensure that justice is done. Limiting the court's review powers to those two grounds only has the possibility of forcing the court to 'fold its hands' in the face of an injustice. The rules of the Court of Appeal may have to be amended to expressly provide the grounds on which the court may review its decisions and also the procedure to be followed in filing applications for review.

[258] Ibid paras 61–62.

[259] *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2022] SCCA 56.

[260] In *Adeline v Talma* [2023] SCCA 54 para 20, the court held that it has 'the power to re-open and rehear a matter albeit in very limited circumstances, and that any such power must be exercised judiciously'. It also added that it has the power to rectify its judgement. See also *Dynamics (Pty) Ltd and Another v Vadivello and Another* [2022] SCCA 52 paras 59–60.

https://doi.org/10.47348/JCLA/v12/i1a2

In Zambia, r 78 of the Supreme Court Rules empowers the court to correct clerical errors, accidental slips or omissions (slip rule). In *Match Corporation Ltd v Choolwe*,[261] the court was asked to review its order. Without referring to any law or authority, it held:

> We have given anxious consideration to the facts of this case, cases cited, submissions rendered by both counsel, we are of the opinion that the court may review its own decision where there is mistaken law or fraud. This is not the case here … [The applicant] has not pointed to any provision nor laws which give jurisdiction to the court to review its own decision. Moreover, the order for retrial was made after the consent of both parties. It is our considered view that this court has no jurisdiction to review its decision.[262]

In that case, it is not clear whether or not the court held that it had jurisdiction to review its decisions where there was 'a mistaken law or fraud'. In the first part of the ruling, it appeared to suggest that it had jurisdiction. However, in the last part, it held that it had no jurisdiction. The issue of the court's power or jurisdiction arose again in *Lewanika and Others v Chiluba*[263] when the applicants asked the court to review its two rulings.[264] They argued that, although the Supreme Court Act did not include a provision empowering the court to review its decisions, the 'court has inherent powers' to do so.[265] This submission was opposed by the respondents who argued that the court did not have such power. The court (single justice decision) referred to its earlier case law and held that:

> [T]he legal position seems to be that sitting as an appellate court the Supreme Court does not have any jurisdiction to review its judgment and to alter it in such a way as to give effect to what was not the intention of the court at the time when the judgment or order or ruling was given. To do so would in effect involve the Supreme Court sitting in appeal on its judgment. And to allow such applications for review would be to open doors to all and sundry to challenge the correctness of the decisions of the Supreme Court on the basis of arguments thought of long after the judgment or ruling was delivered. In those circumstances there would be no finality to litigation.[266]

[261] *Match Corporation Ltd v Choolwe* [1996] ZMSC 37.
[262] Ibid p 3.
[263] *Lewanika and Others v Chiluba* [1997] ZMSC 45.
[264] Ibid p 2.
[265] Ibid p.4.
[266] Ibid p.7.

https://doi.org/10.47348/JCLA/v12/i1a2

However, the court held that it has the power to review its decisions when acting as a court of first and final instance in electoral petition matters.[267] The court reiterated this jurisdiction subsequently.[268] In *Martha Ngobola v Attorney General and Others*[269] the court held unanimously (three justices) that r 78 'cannot be used to bless a re-hearing or setting aside of a Judgment, which jurisdiction we do not have'.[270] Between 2004 and 2011, the court emphasised that its rules did not empower it to review its decisions or orders.[271] However, in 2013 in *Finsbury v Ventriglia*,[272] the applicant asked the court to review its earlier order. He relied on the court's rules and its inherent jurisdiction.[273] The respondent argued that, according to previous case law, the court did not have jurisdiction to review its decision.[274] The court held that:

> We have taken time to look at authorities relating to the jurisdiction of an appellate court to review, vary or rescind its final decisions. In our view, it is beyond contest that, as a general rule, this Court's decisions are final. However, this Court has power to reopen and revisit its own decision in exceptional circumstances. We take a leaf from one of the United Kingdom's landmark decisions on this subject, the Pinochet Case ….[275]

The court added that it has 'unfettered inherent jurisdiction and in appropriate cases, it can reopen its final decisions and rescind or vary such decisions' and that its power to reopen a case 'can only be invoked in exceptional circumstances where the interest of justice demands that to be done'.[276] It concluded that, in exercising its jurisdiction to re-open cases, it had to bear in mind the principles of finality of its decisions and *functus officio*.[277] Against that background, the court found that this was an appropriate situation in which to re-open its case. It accordingly re-opened it and discharged the injunction it had issued against the applicants because they had been adversely affected by the injunction.[278] It is evident

[267] Ibid pp 8–9.

[268] *Mulenga and Anor v People* [1997] ZMSC 61.

[269] *Martha Ngobola v Attorney General and Others* [2000] ZMSC 121.

[270] Ibid p 5.

[271] *Development Bank of Zambia and Anor v Jet Cheer Development Co* (Zambia) Ltd [2001] ZMSC 115; *Zambia Consolidated Copper Mines Ltd & Another v Khama* [2004] ZMSC 10; *Joseph Sumbukeni v Chilanga Cement plc* [2007] ZMSC 14; *Dr Arnold Maambo Chooka v Munthali* [2007] ZMSC 130; *Chipasha and Others v Swarp Spinning Mills PLC* [2009] ZMSC 146; *Liuwa v Judicial Complaints Authority* [2011] ZMSC 6.

[272] *Finsbury v Ventriglia* [2013] ZMSC 17.

[273] Ibid paras 3 & 10.

[274] Ibid para 16.

[275] Ibid para 41.

[276] Ibid para 44.

[277] Ibid para 44.

[278] Ibid para 46.

https://doi.org/10.47348/JCLA/v12/i1a2

that the court will only re-open a case when it is in the interests of justice to do so. The court determines what is in the interests of justice. One year later, in *Ngimbu v Kakoma and Electoral Commission of Zambia*,[279] the court emphasised that, as a general rule, it has no jurisdiction to re-open an appeal that it has decided.[280] It referred to its earlier case law to the effect that its case can 'only be reopened where a party, through no fault of its own has been subjected to an unfair procedure and will not be varied or rescinded merely because a decision is subsequently thought to be wrong'.[281] This implies that there is one ground on which the court can re-open its case: where a party has been subjected to an unfair procedure. In other words, if the right to a fair hearing was violated. The court came to the same conclusion in subsequent cases.[282] However, in another case, the court held that 'it is possible to re-open a case before this court if there are compelling reasons for doing so'.[283] The use of the words 'compelling reasons' suggests that there is a possibility for the court to re-open the case on other grounds even if the hearing was not unfair. Hence, in *First Merchant Bank Zambia Ltd (In Liquidation) v Attorney General and Others*,[284] the court held that one of the parties to a case can ask it to re-open a case 'on the grounds of unfair procedure or contesting an injustice'.[285] Unlike in some countries where apex courts can re-open their finalised cases *mero motu*, in Zambia, the Supreme Court can only re-open the case pursuant to an application by one of the parties. This can be inferred from the court's view that for it to re-open its judgment, 'the applicant must bring herself within the parameters justifying the reopening of the decision of the court'.[286] Since the purpose of re-opening the case is to serve the interests of justice, the court should be able to do so *mero motu* if the circumstances justify it to invoke its inherent powers and to also do so on other grounds even if the hearing was fair. An application to file an application to re-open the court's judgment has to be made within a reasonable time. Otherwise, it will be dismissed unless the applicant has compelling reasons justifying the delay.[287] In Malawi, although the rules do not expressly empower the Supreme Court of Appeal to review its decisions, the Supreme Court of Appeal held, based on the practice of

[279] *Ngimbu v Kakoma and Electoral Commission of Zambia* [2014] ZMSC 39.

[280] Ibid p 8.

[281] Ibid p.8.

[282] *Nyimba Investments Ltd v Nico Insurance Zambia Ltd* [2017] ZMSC 290; *Sakala v People* [2020] ZMSC 170; *Attorney General and Others v Ambex Clothing Manufacturer Ltd* [2018] ZMSC 607; *Marlon Peter Elifala Moyo v Attorney General* [2017] ZMSC 212.

[283] *Rosalia Mwamfuli v Ntimba & Another* [2018] ZMSC 318 p 12.

[284] *First Merchant Bank Zambia Ltd (In Liquidation) v Attorney General and Others* [2022] ZMSC 9.

[285] Ibid p 19.

[286] *Mandona v Total Aviation and Export Ltd and Others* [2017] ZMSC 229, 20.

[287] *Nkonde and Others v Attorney General* [2022] ZMSC 49. In this case, the application was made almost two years after the judgment. The Court dismissed it.

https://doi.org/10.47348/JCLA/v12/i1a2

the Court of Appeal of England, that it has the power, in exceptional circumstances, to reverse its decisions.[288]

Section 122(2) of the Constitution of Sierra Leone (1991) empowers the Supreme Court to depart from its decisions.[289] The Supreme Court Rules[290] are silent on the circumstances in which the court can review its decision.[291] The issue of whether the Supreme Court has the power to review its decision arose, albeit indirectly, in the case of *National Insurance Co Ltd v Moiison Tarraf.*[292] The applicant asked the court to clarify its order relating to the interest to be paid to the respondent. The court clarified its decision. However, in his separate concurring judgment, Justice Bash-Taqi observed that:

> It is not competent for three (3) Justices of the Supreme Court to correct or interpret a Judgment made by a panel of five (5) Justices. If the decision is flawed, or if any party is dissatisfied with the decision given by the full panel, he/she can only raise that issue in some other matter before the full Court and that Court in its wisdom may decide not to follow what the previous panel has done.[293]

He added that a full court can deal with such a matter under art 122(2) of the Constitution.[294] This suggest that the court can depart from its previous decision. It does not answer the question of whether a panel of five justices can review its decision. The issue arose directly in *Aiah Momoh v Sahr Samuel Nyandemoh*.[295] In its earlier judgment between the parties, the court ordered the sale of the suit property. Unhappy with the order, the applicant asked the court to, inter alia, set it aside on the basis that it was null and void.[296] The respondent objected to the motion on, among other grounds, that 'the Court cannot review or vary its judgment

[288] *Rolf Patel and Others v Press Corporation and Another* (MSCA Civil Appeal No. 26 of 2012) (20 October 2017) 11. Initially, the Court had held that it did not have such powers and could only review its order before it was final or under the slip rule, see *Dr. G.H. Kayambo v Deriah Kayambo* (MSCA Civil Appeal 8 of 1985)(16 March 1990).

[289] Section 122(2) provides that '[t]he Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears right so to do; and all other Courts shall be bound to follow the decision of the Supreme Court on questions of law'. See for example, *Alhaji Sam Sumana v Attorney-General & Anor* [2015] SLSC 1203; *Patrick John & Another v Mohamed Koneh (Chief Electoral Commissioner) Electoral Commission of Sierra Leone & Others* [2023] SLSC 3.

[290] Supreme Court Rules, 1982.

[291] In *Gabisi v Alharazim* (1964–1966) ALR SL 177, the Supreme Court held that it had no jurisdiction to review its own judgments or orders.

[292] *National Insurance Co Ltd v Moiison Tarraf* [2009] SLSC 3.

[293] Ibid p.2.

[294] Ibid p.2.

[295] *Aiah Momoh v Sahr Samuel Nyandemoh* [2020] SLSC 6.

[296] Ibid p 2.

https://doi.org/10.47348/JCLA/v12/i1a2

delivered by the full bench of five'.[297] He added that since the court's rules were silent on the court's power to review its judgments or orders, the court did not have such powers because 'the power to review or vary the court's judgment must be an expressed provision; and that there is no such expression in the Constitution 1991, and the Supreme Court Rules, 1981'.[298] However, the respondent did not insist on that objection and the court dismissed the application on other grounds.[299] Although legislation is silent on the court's power to review its decisions, the court has that power at common law on the basis of s 170(1) of the Constitution, which provides that common law is one of the sources of law in Sierra Leone.[300] As the Supreme Court held, Sierra Leonean courts follow the 'common law of England'.[301] Case law from other common law jurisdictions such as England and those discussed in this article shows that apex courts have inherent powers or jurisdiction to review their judgments or orders. Since the Supreme Court of Sierra Leone also has inherent power,[302] nothing prevents it from invoking it to review its decisions in exceptional circumstances.[303]

Kenya presents an interesting case study in this category of countries. This is because of the court's previous understanding of the rule that (purportedly) empowered it to review its decisions. Rule 20(4) of the Kenya Supreme Court Rules[304] provided that '[t]he Court may, in exceptional circumstances on application by any party or on its own motion, review any of its decisions'. Section 21(4) of the Supreme Court Act (Kenya) deals with the slip rule.[305] As the discussion below shows, in 2020, r 20(4) was replaced by r 28(5) of the 2020 Supreme Court Rules.[306] Since the discussion on r 20(4) of the 2011 Rules is relevant to the understanding of r 28(8) of the 2020 Rules, it is necessary to discuss the jurisprudence on r 20(4) of the 2011 Rules first. The Supreme Court handed down conflicting decisions on whether it can invoke r 20(4) of its rules to review its decision. In *Mable Muruli v Wycliffe Ambetsa Oparanya*

[297] Ibid p 3.

[298] Ibid p 3.

[299] Ibid p 4.

[300] See generally, Jabbi op cit note 3.

[301] *Kai-Kai & 13 Others v S* [1989] SLSC 7 p 17.

[302] *Basma v The State* [2012] SLSC 10 p 3.

[303] In *Coker v Coker* [1951] SLSC 5, the court held that it has the power to set aside its order if it is a nullity.

[304] Supreme Court Rules, LN 141/2011.

[305] Section 21(4) provides that '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.'

[306] Supreme Court Rules, 2020.

https://doi.org/10.47348/JCLA/v12/i1a2

& 3 others,[307] the applicant invoked, inter alia, r 20(4) and called upon the court to review or depart from its earlier decision. The court held that it could not invoke r 20(4) because the applicant had failed to follow the correct procedure in filing his application for review. It held that 'a party desirous of moving the court to exercise its powers of review, should do so by way of an application, rather than just incidentally, through submissions'.[308] The court also explained the circumstances in which it can depart from its own decision.[309] This implied that had the applicant followed the correct procedure under r 20(4), the court was prepared to rely on r 20(4) as a basis to deal with the review application. However, in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*,[310] the court, for the second time, dealt with the issue of whether it had the power to review its decision under r 20(4).[311] In an election petition, the applicant argued, inter alia, that the court's judgment had not been supported by the evidence on record, the court had misinterpreted the applicable legislation and that new evidence had been discovered after the court's decision was handed down showing that the respondent had committed electoral malpractices.[312] Against that background, the applicant asked the court to set aside or review or correct its judgment and orders.[313] He argued that the Kenyan court should follow the approach of other apex courts in countries such as the USA, Ghana, Nigeria and England where courts correct both errors of law and facts in exceptional circumstances.[314]

In response, the respondents argued that, although it is not in dispute that the court has the power to review its decisions, this had to be done in exceptional circumstances.[315] They argued that those circumstances were absent in this case.[316] On the issue of whether a full bench was required for the court to review its decision, the court followed its earlier case law to the effect that '[t]he Supreme Court Act has no specific provision requiring that on reviewing [the court's] decision, a greater number of Judges should sit'.[317] On the issue of whether the court had the power to review its decisions, it held that neither the Constitution nor the Supreme Court Act conferred that power on it. It referred to jurisprudence from

[307] *Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others* [2016] eKLR.

[308] Ibid para 39.

[309] Ibid paras 41–45.

[310] *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR.

[311] Ibid para 55 (although the court erroneously claimed that it was the first time it was confronted with that issue).

[312] Ibid para 2.

[313] Ibid para 3.

[314] Ibid paras 11–21.

[315] Ibid para 31.

[316] Ibid para 32.

[317] Ibid para 51.

https://doi.org/10.47348/JCLA/v12/i1a2

the countries of Nigeria, India, South Africa and England[318] in which apex courts have explained the circumstances in which they can exercise their power to review their decisions. It referred to art 164(4) of the Constitution (which provides for the jurisdiction of the Supreme Court) and held that '[n]ot 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'.[319] It added that, under art 163(7), it had the power to depart from its decisions 'where circumstances demand'.[320] It explained 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.[321]

The court also explained the circumstances in which it can invoke the slip rule.[322] On the question of whether it has the power to review its decision on the basis of r 20(4), the court held that the rules are subsidiary legislation and that for it to have statutory power to review its decisions, '[s]uch legislation must flow from either the Constitution or a parent Act of Parliament'.[323] Against that background, it held that:

> 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,

[318] Ibid paras 57–68.
[319] Ibid para 78.
[320] Ibid para 81.
[321] Ibid para 83.
[322] Ibid paras 84–86.
[323] Ibid para 89.

https://doi.org/10.47348/JCLA/v12/i1a2

> this Rule can only be understood to be echoing Section 21(4) of the Supreme Court Act.[324]

The court added that once it has handed down a judgment, it 'becomes *functus officio*' and '[t]he stamp of finality with which this Court is clothed should not be degraded except in exceptional circumstances as determined by the court itself'.[325] It does this by invoking its 'inherent powers' to avoid an injustice.[326] The court added that, as a general rule, it only has the powers to correct its decisions under the slip rule.[327] It added that:

> 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.[328]

The court added that those principles were informed by jurisprudence from other countries referred to in its judgment. Against that background, it concluded that the applicants had not proved any of the above-mentioned exceptional circumstances for it to review its decision. The following observations should be made about the court's decision. First, its power to review its judgment is not based on any legislation. It is inherent and only invoked to prevent an injustice. Second, by holding that the exceptional 'circumstances shall be limited to' the situations mentioned above, the court implied that the list of circumstances is closed. In other words, there are no other circumstances in which a court may review its judgment. Third, an application to review the judgment can be made to the court or the court can review the judgement of its volition. Fourth, since this issue is not governed by legislation, the decision does not explain the time within which the application can be brought and the procedure to be followed.

Although in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*[329] the court held that the list of the exceptional circumstances in which it

[324] Ibid para 89.
[325] Ibid para 90.
[326] Ibid para 91.
[327] Ibid para 92.
[328] Ibid para 92.
[329] *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR.

https://doi.org/10.47348/JCLA/v12/i1a2

could review its decision was exhaustive, in *Martin Wanderi & 106 others v Engineers Registration Board & 5 others; Egerton University & 43 others (Interested Parties)*[330] it created the impression that the list of grounds could be expanded. In this case, the court had ordered the applicant, a statutory body of engineers, to register engineers and industrial technologists although the relevant legislation only allowed it to register engineers. This meant that, had the statutory body complied with the court's order, it would have acted contrary to the applicable legislation. This fact was not brought to the attention of the court by counsel of the parties during their oral and written submissions.[331] The applicants asked the court to review its order. The applicants argued that this situation was not mentioned as one of the four exceptions in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* and called upon the court to add a fifth ground on which it could review its order or judgment. The proposed ground was when there existed 'apparent errors of law and of fact [and] inability to implement a Judgment without breaching law and public interest"'.[332] The court followed its decision in *Fredrick Otieno Outa* and emphasised the fact that it did not have jurisdiction, on the basis of r 20(4), to review its judgments.[333] On the facts before it, it agreed to review its decision on the basis of ground (iv) as laid down in *Fredrick Otieno Outa*. Against that background it held that there was 'no reason to depart from any other principle nor create additional principles for review of' judgments.[334] Hence, there was a possibility that the court could create another exceptional ground for review in addition to the four discussed above. This was a good development as it enabled the court to ensure that justice was done. However, in subsequent cases, the court applied the four grounds strictly.[335] Hence, it did not stipulate another ground on which it can review its decisions.

As mentioned above, in 2020 r 28(5) came into effect. It provides that '[t]he Court may review any of its decisions in any circumstance which the Court considers meritorious, exceptional, and in the public interest, either on the Court's own motion, or upon application by a party'. As was the case with r 20(4) of the 2011 Rules, r 28(5) provides that the court's decision can be reviewed on the application of any party or *mero*

[330] *Martin Wanderi & 106 others v Engineers Registration Board & 5 others; Egerton University & 43 others (Interested Parties)* [2020] eKLR.

[331] Ibid para 32.

[332] Ibid para 37.

[333] Ibid paras 15–21.

[334] Ibid para 39. The Supreme Court relied on the same four reasons in *Mwambeja Ranching Co Ltd & another v Kenya National Capital Corporation* [2024] KESC 28 (KLR) para 6 and *Member of Parliament Balambala Constituency v Abdi & 7 others* [2023] KESC 80 (KLR).

[335] See, for example, *Kibisu v Republic* [2018] KESC 34 (KLR). However, the court also dealt with the question of whether it could review its decision on the basis that the presiding judge was biased.

https://doi.org/10.47348/JCLA/v12/i1a2

muto.[336] The difference between r 20(4) of the 2011 Rules and r 28(5) is that, under the former, the court was empowered to review its decisions in 'exceptional circumstances'. However, under the latter, the court may review its decision 'in any circumstance' that it considers 'meritorious, exceptional, and in the public interest'. Strictly interpreted, those three grounds must be interpreted conjunctively. Thus, for any decision to be reviewed, the ground must be meritorious, exceptional and in the public interest. Otherwise, the drafters would have used 'or' as opposed to 'and' before mentioning the last ground. A strict interpretation of r 28(5) would make it almost impossible for the court to review any of its decisions. It is a very high threshold especially in the light of the fact that those terms are not defined or described in the rules. Hence, the grounds should be read disjunctively. As the discussion below illustrates, the jurisprudence of the court shows that the existence of one of these is sufficient for the court to review its decision. This ensures that the interests of justice are served. The court relied on the same grounds it laid down in *Fredrick Otieno Outa*[337] and subsequent cases to review its decisions under r 28(4).[338] It has been illustrated that in *Fredrick Otieno Outa*[339] the court held that its review powers are inherent. They are not conferred by the rules.

However, this position changed in 2022 when the Superior Courts Act was amended to insert s 21A therein. It states that:

> The Supreme Court may review its own decision, either on its own motion, or upon application by a party in any of the following circumstances– *(a)* where the judgement, ruling or order was obtained through fraud, deceit or misrepresentation of facts; *(b)* where the judgement, ruling or order is a nullity by virtue of being made by a court which was not competent; *(c)* where the court was misled into giving a judgement, ruling or order under the belief that the parties have consented; or *(d)* where the judgement, ruling or order was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision.

With the insertion of s 21A into the Act, the Supreme Court has statutory jurisdiction to review its decisions on any of the four grounds enumerated therein. It can no longer invoke its inherent powers as the basis to review its decisions.[340] The court held that 'a party' under s 21A means 'one

[336] However, the grounds that the court follows in review applications are directed to litigants and are silent on the circumstances in which the court can review its decision. See for example, *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR para 31.

[337] *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR.

[338] See, for example, *Mombasa Bricks & Tiles Ltd & 5 others v Shah & 7 others* [2022] KESC 72 (KLR) para 11.

[339] *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR.

[340] Section 3A of the Supreme Court Act provides that 'Nothing in this Act shall be construed

https://doi.org/10.47348/JCLA/v12/i1a2

whose locus standi is not in issue, either as an appellant, respondent, interested party or amicus curiae'.[341] He/she must be a party to the appeal proceedings.[342] The court has held that, for the review application to succeed, the applicant must prove one of the factors under s 21A. It has interpreted the list of review grounds under s 21A as exhaustive.[343] It held that s 21A sets the 'parameters within which this Court can review its judgment'.[344] Thus, any review application must 'point' out 'the specific conditions enumerated under section 21A'.[345] A combined reading of s 21A and r 28(5) suggests that any of the grounds mentioned in s 21A is meritorious, exceptional, or in the public interest. Thus, although r 28(5) is silent on the ground(s) on which the court has reviewed its decision, it should be interpreted as referring to the grounds under s 21A.[346] The court has followed this approach and requires the existence of one of the grounds under s 21A for it to review its decision.[347] Hence, it has reviewed or declined to review its judgments because the applicants had proved or failed to prove exceptional circumstances,[348] meritorious grounds,[349] or

to impair the powers of the Court to make such orders or provide such directions as may be necessary for the administration of justice.'

[341] *Cogno Ventures Ltd & 4 others v Bia Tosha Distributors Ltd & 15 others*; *Kenya Breweries Ltd & 6 others (Interested Parties); Ferran & 24 others (Contemnor)* [2023] KESC 33 (KLR) para 50.

[342] *Kaluma v NGO Co-ordination Board & 5 others* [2023] KESC 72 (KLR) (Civ) para 30.

[343] See, for example, *Trattoria Ltd v Maina & 3 others* [2024] KESC 54 (KLR) para 7; *Mwambeja Ranching Co Ltd & Another v Kenya National Capital Corporation* [2024] KESC 28 (KLR) paras 5–6; *Nairobi Bottlers Ltd v Ndungu & another* [2024] KESC 26 (KLR) para 10. See *also Kenya National Highway Authority v Cycad Properties Ltd & 33 others* [2021] KESC 8 (KLR) para 21.

[344] *Sonko v Clerk, County Assembly of Nairobi City & 11 others* [2024] KESC 43 (KLR) para 10. See also *Sirikwa Squatters Group v Fanikiwa Ltd & 20 others* [2024] KESC 23 (KLR) para 28; *Standard Chartered Financial Services Ltd v Manchester Outfitters (Suiting Division) Ltd Now Called King Woolen Mills Ltd & 2 others* [2023] KESC 110 (KLR) para 8(i).

[345] *Cogno Ventures Ltd & 4 others v Bia Tosha Distributors Ltd & 15 others*; *Kenya Breweries Ltd & 6 others (Interested Parties); Ferran & 24 others (Contemnor)* [2023] KESC 33 (KLR) para 59.

[346] This is the approach the court took before s 21A was enacted. It read r 28(5) in tandem with the factors it laid down in *Fredrick Otieno Outa v Jared Odoyo Okello* (2017). See for example, *Mbugua & another (Suing as the Administrators of the Estate of Joseph Kiarie Mbugua & another) v Timber Manufacturers & Dealers Ltd* [2023] KESC 86 (KLR).

[347] *Dari Ltd & 5 others v East African Development Bank* [2023] KESC 93 (KLR) paras 6–7; *Mwambeja Ranching Co Ltd & another v Kenya National Capital Corporation* [2024] KESC 28 (KLR) para 7; *Sonko v Clerk, County Assembly of Nairobi City & 11 others* [2022] KESC 38 (KLR) para 7; *County Assembly of Migori v Aluochier & 2 others* [2024] KESC 7 (KLR) (Civ) para 15. In those cases, the applications for review were dismissed. However, in *Member of Parliament Balambala Constituency v Abdi & 7 others* [2023] KESC 80 (KLR), the court created the impression that the applicant had to prove more than one ground for it to review its judgment.

[348] See for example, *Musembi & 13 others (Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi) v Moi Educational Centre Co. Ltd & 3 others* [2022] KESC 19 (KLR) (Civ) para 16 (for the court to correct a clerical error and to order the respondent to pay interests on damages awarded).

[349] *Kenya Bureau of Standards v Geo Chem Middle East* (Application 33 of 2020) [2021] KESC 60 (KLR) (application dismissed).

https://doi.org/10.47348/JCLA/v12/i1a2

the public interest.[350] However, sometimes the court does not read s 21A and r 28(5) together. For example, in *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others*,[351] the applicant asked the court to review its previous order and specify that it was entitled to the costs as a successful litigant. The respondent did not oppose the application. The court referred to s 21(4) of the Supreme Court Act, to r 28(5) of the Supreme Court Rules and to case law on the 'slip rule' and held that the application had 'merit'.[352] It held that its previous judgment 'is hereby reviewed' and awarded the applicant costs.[353] Strictly speaking, this was not a review of the judgment. It was rather a slip rule issue to correct an error in the judgment. However, the court's partial reliance on r 28(5) should not go unnoticed. There are other cases in which the court has relied on s 21(4) of the Supreme Court Act (which expressly provides for the slip rule)[354] and r 28(5) as the basis for invoking the slip rule on the application of one of the parties[355] or *mero muto*.[356] This approach blurs the distinction between the slip rule and review of the court's judgment. As the court itself held, '[c]orrection of an apparent error on the face of the record … is distinct from a review'.[357] Section 21(4) deals with the former and r 28(5) with the latter. In some instances, the application for review is based exclusively on s 21A and the court does not mention r 28(5).[358]

[350] In *Senate of the Republic of Kenya & 3 others v Speaker of the National Assembly of the Republic of Kenya & 10 others* [2022] KESC 34 (KLR) para 18. The court relied on r 28(5) to review its order on the ground that its continued enforcement would have 'crippled the running of the government' and resulted into an 'apparent injustice not only to the applicants but Kenyans as a whole'.

[351] *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others* [2024] KESC 67 (KLR).

[352] Ibid para 6.

[353] Ibid para 6(viii)*(b)*.

[354] Section 21(4) provides that '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.'

[355] See for example, *Mombasa Bricks & Tiles Ltd & 5 others v Shah & 7 others* [2022] KESC 72 (KLR); *Githiga & 5 others v Kiru Tea Factory Co Ltd* [2022] KESC 35 (KLR) (Civ).

[356] *MAK v RMAA & 4 others* [2023] KESC 21 (KLR) para 2 where the court stated that '[p]ursuant to section 21 (4) of the Supreme Court Act, rule 28 (5) of the Supreme Court Rules, 2020 and on the Court's own motion, we correct the clerical error by deleting the name of I Lenaola, Justice of the Supreme Court and inserting in his place, PM Mwilu Deputy Chief Justice & Vice President of the Supreme Court'.

[357] *Mbugua & another (Suing as the Administrators of the Estate of Joseph Kiarie Mbugua & another) v Timber Manufacturers & Dealers Ltd* [2023] KESC 86 (KLR) para 5(iv).

[358] See for example, *Kabuito Contractors Ltd v Attorney General* [2023] KESC 89 (KLR); *Gachuhi & another v Evangelical Mission for Africa & another* [2023] KESC 109 (KLR) (Civ); *British American Tobacco Kenya PLC (Formerly British American Tobacco Kenya Ltd) v Ministry of Health & 2 others; Kenya Tobacco Alliance & another (Interested Parties); Mastermind Tobacco Kenya Ltd (Affected Party); Kariuki, Ndegwa & Kubuthu (Applying as Secretary, Chairperson & Treasurer of Kiambu County Welfare Association) & 6 others (Interveners)* [2024] KESC 68 (KLR) (applications for review dismissed).

https://doi.org/10.47348/JCLA/v12/i1a2

It has been mentioned above that the court considers the list of grounds for review under s 21A to be exhaustive. The drafting history of s 21A shows that it was not debated in parliament.[359] It is thus difficult to know the intention of its drafters. However, in *Kaluma v NGO Co-ordination Board & 5 others*,[360] the court created the impression that the list is not exhaustive. In dismissing the applicant's review application, the court held that he had 'not demonstrated how his matter conforms to the specific parameters enumerated under s 21A of the Supreme Court Act or in the *Outa* case'.[361] It has to be remembered that there are some differences between the grounds of review in the *Fredrick Otieno Outa* case and in s 21A. For example, in *Fredrick Otieno Outa* the court held that it can review its decision if there is evidence the 'the judgment is a nullity such as when the court itself was not competent'. This means that the list of factors that can nullify a judgment is open-ended. The competence of the court is one of them. Another factor could be that the court was not independent or impartial. On the other hand, s 21A*(b)* provides that the court will exercise its review jurisdiction 'where the judgement, ruling or order is a nullity by virtue of being made by a court which was not competent'. This implies that the competence of the court is the only factor that can nullify a judgement under s 21A*(b)*. Since the purpose of review is ensure that justice is done, a flexible interpretation of the list of grounds under s 21A is preferable.

The question of whether the court has jurisdiction to review its reviewing order/judgment arose in *Senate of Kenya & 3 others v Speaker of the National Assembly & 10 others*.[362] The applicants asked the court 'to review, vary and/or set aside' its earlier 'ruling and order', which 'allowed an application for review and set aside the orders of stay'.[363] They argued, inter alia, that the impugned order, if not reviewed, had the effect of enabling parliament to pass legislation unconstitutionally and that their opposition to the same was not effective because they 'were extensively limited by time to respond to application whose orders they seek reviewed'.[364] The respondents argued, inter alia, that 'pursuant to rule 28(5) of the Supreme Court Rules, any review by the court is final and not subject to further review'.[365] The court reiterated the principles relevant

[359] See Hansard Reports of Parliament of Kenya (National Assembly), 31 May, 2 June, 7 June and 8 June 2022 available at http://www.parliament.go.ke/the-national-assembly/house-business/hansard [Accessed 27 December 2024].

[360] *Kaluma v NGO Co-ordination Board & 5 others* [2023] KESC 72 (KLR) (Civ).

[361] Ibid para 32. See also *Stanbic Bank Kenya Limited v Santowels Limited* [2025] KESC 3 (KLR) para paras 9 – 10.

[362] *Senate of Kenya & 3 others v Speaker of the National Assembly & 10 others* [2023] KESC 1 (KLR).

[363] Ibid para 1.

[364] Ibid para 3.

[365] Ibid para 4.

https://doi.org/10.47348/JCLA/v12/i1a2

to review of its judgments.[366] It dismissed the application because the applicants failed to demonstrate 'that the impugned ruling was obtained by fraud or deceit, is a nullity, or that the court was misled into giving its ruling on review under a mistaken belief that the parties had consented'.[367] However, it added that:

> The above finding notwithstanding, we note with concern that learned counsel for the applicants seek this court to exercise a jurisdiction it lacks, namely, to review or re-litigate the question of stay, which has been settled by this court with finality.[368]

The court's decision is open to two possible interpretations. First, that it has jurisdiction to review its review order if one of the conditions under s 21A exists. This is supported by the fact that, in this case, the court assessed the application against the grounds under s 21A. Otherwise, it would have dismissed it summarily for lack of jurisdiction. The second argument is that the court does not have jurisdiction in such a case. This is supported by its criticism of the applicants' lawyer for filing the application over which it has no jurisdiction. In the author's view, the first interpretation is the most compelling one. This is so because the purpose of a review application is to serve the end of justice. If there is evidence that the review decision is a nullity, there is no reason why the court should not review it.

Rules prohibit review

In Nigeria, the rules expressly bar the court from reviewing its decisions. Order 8 r 16 of the Supreme Court Rules (as amended in 1999) provides that:

> The court shall not review any judgment once given and delivered by it save to correct any clerical mistake or some 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. 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.

However, in *Amalgamated Trustees Ltd v Associated Discount House Ltd*[369] the Supreme Court held that notwithstanding Ord 8 r 16 and previous case law to the effect that its judgments are final and cannot be reviewed:

[366] Ibid paras 5–6.
[367] Ibid para 7.
[368] Ibid para 8.
[369] *Amalgamated Trustees Ltd v Associated Discount House Ltd* (2007) LPELR-454 (SC).

https://doi.org/10.47348/JCLA/v12/i1a2

> [T]he 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 the 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]. Where judgment was given in the absence of jurisdiction; or [v]. Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.[370]

This means that, although the rules of the court prohibit it from reviewing its decisions, it can rely on its 'inherent power' to review and set aside its decision.[371] By holding that 'such cases are' as opposed to 'such cases' include, the court suggested that the list of the grounds on which it can review its decision is closed. However, in *Jev v Iyortom*,[372] Justice Mohammed referred to the above five conditions and held that they 'are of course not exclusive.'[373] If any of those grounds is available, the court can raise the issue *mero motu* and ask the parties to motivate why its previous order should not be reviewed and set aside.[374]

Conclusion

This discussion shows that in all the countries included in this study, apex courts have the power to review their decisions. This power is derived from the constitutions, rules or common law (inherent powers). Irrespective of the source(s) of the power, case law from all the courts show that there is consensus that apex courts will review their decision(s) if it is in the interests of justice to do so. Different grounds/reasons are invoked to explain why it is in the interests of justice to review a court's decision. The grounds could be attributable to the court (for example when it did not have jurisdiction or misinterpreted the law), to the parties (for example in the case of fraud) or to neither the court nor the parties (for example when new evidence is discovered that was not available at the time the

[370] Ibid p 23.

[371] See also Uwakwe, F. & Amech, W.C. 'The Nigerian Supreme Court judgment in David Lyon & Ors. v. Digi-Eremienyo & Ors: a travesty of justice' (2020/2021) 3(1) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law Journal* 118. For a contrary view, see, for example, Mrabure, O.K. & Idehen, O.S. 'Appraising Nigeria's Supreme Court's powers to review its own judgments' (2021) 4(2) *International Journal of Law and Society* 77.

[372] *Jev v Iyortom* [2015] 15 NWLR 485.

[373] Ibid, p. 509.

[374] Ibid, p. 510. In this case, the court emphasised that it has 'no jurisdiction to grant an application challenging the correctness of its judgment.' However, it has the jurisdiction to vary its consequential order if, for example, it was made *per incuriam*. In this case, it reversed the consequential order because it has been made based on legislation which did not give the court powers to make such order.

https://doi.org/10.47348/JCLA/v12/i1a2

judgment sought to be reviewed was decided). Since apex courts in many countries review their judgments, the African Commission has taken interest in this issue and how it relates to the right to a fair trial. Apart from Morocco, all African countries have ratified the African Charter on Human and Peoples' Rights (the African Charter). Article 7 of the African Charter provides for the right to a fair trial. The African Commission has recognised that, in order to protect the right to a fair trial, in exceptional circumstances apex courts in some African countries are able to review their decisions. In *Spilg and Others v Botswana*,[375] the African Commission on Human and Peoples' Rights held that:

> The modern trend of the law is to invest apex Courts with 'Review Jurisdiction' by which the Court may review a decision made or given by it on certain grounds. These factors may include, but are not limited to grounds such as exceptional circumstances which have resulted in miscarriage of justice; or discovery of new and important matter or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him or her at the time when the decision was made.[376]

Article 28 of the Protocol Establishing the African Court on Human and Peoples' Rights (1998) empowers the court to review its decisions.[377] The discussion above has illustrated that even in countries where the law does not expressly invest apex courts with review jurisdiction, courts have interpreted their powers broadly to hold that they have review jurisdiction. Although it is generally apex courts with the powers to reverse their decisions, in Namibia the Supreme Court's decision can also be reversed by an Act of parliament. However, such a step is prohibited under the Ugandan Constitution.[378] The discussion above shows that in many countries the rules or case law are silent on the time within which a review application has to be brought. There is a need for this issue to be clarified in all countries so that parties know how to proceed. It is also important for the rules or case law to explain the circumstances in which a party can file a late application for review. Apart from Eswatini, Kenya and Tanzania, the issue of whether an apex court can review its reviewed decision has not been addressed in other countries. Courts or rules may have to address this. I am of the view that in exceptional circumstances,

[375] *Spilg and Others v Botswana (Communication 277 of 2003)* [2011] ACHPR 81 (1 December 2011).

[376] Ibid para 185.

[377] For the interpretation of art 28, see, for example, *African Commission on Human and Peoples' Rights v Republic of Kenya* (Application No 006/2012) [2019] AfCHPR 46 (24 October 2019); *Fory v Republic of Cote d'Ivoire* (Application for review 001/2022) [2022] AfCHPR 47 (1 December 2022).

[378] Article 92 of the Constitution (1995).

https://doi.org/10.47348/JCLA/v12/i1a2

determined by courts themselves, apex courts should have the power to review their already reviewed decisions. This is meant to ensure the ends of justice. Practice from Eswatini shows that an apex court can make a mistake in a reviewed decision.

Reference list

Case law

Uganda

2nd Lt Ogwang Ambrose v Uganda [2024] UGSC 45.
Abelle v Uganda [2018] UGSC 10.
Amama Mbabazi v Kaguta Museveni & 2 Others [2016] UGSC 4.
Attorney General v Susan Kigula & Others [2009] UGSC 6.
China Road and Bridge Corporation v Welt Machinen Engineering Ltd and Others [2023] UGSC 43.
China Road Bridge Corporation v Welt Machine Engineering and Others [2023] UGSC 42.
Eseza Byakika v National Social Security Fund [2025] UGSC 11.
Ibrahim Ruhweza v Uganda (Criminal Application No 1 of 2014).
Insingoma v Rubinga [2015] UGSC 18.
Kasolo v Delahaije [2023] UGSC 2.
Lweza Clays Ltd & Another v Tropical Bank Ltd & Another [2021] UGSC 76.
Nakibuka v Sematimba & 2 Others [2014] UGSC 17.
Nsereko & Others v Bank of Uganda [2011] UGSC 17.
Orient Bank Ltd v Zaabwe and Anor [2008] UGSC 54.
Re: Application for leave to intervene as Amicus Curiae by Prof Oloka Onyango & 8 Ors [2016] UGSC 2.
Sanyu Katuramu & Others v Attorney General [2017] UGSC 9.
Uganda Post Ltd v Mukadisi [2023] UGSC 58.

Ghana

Ablakwa and Another v Attorney General and Another [2013] GHASC 143.
Ankomah-Nimfah v QUAYSON and Others [2022] GHASC 19.
Asare II and Others v Addai and Others [2015] GHASC 147.
Bonney and Others v Ghana Ports and Harbours Authority [2014] GHASC 170.
Daniel Ofori v Ecobank Ghana & 2 Others [2023] GHASC 18. *Korboe v Amosa* [2016] GHASC 45.
Kuranchie v The Attorney General & Another [2024] GHASC 64.
Lomotey & Anor v Richardson & 3 Others [2023] GHASC 101.
Mensah and Others v Boakye [2021] GHASC 75.
Ofori v Ecobank Ghana and Others [2021] GHASC 84.
Ofori v Ecobank Ghana Ltd & 2 Others [2021] GHASC 134.
Quist v Danawi [2015] GHASC 105.

https://doi.org/10.47348/JCLA/v12/i1a2

Republic v Edmund Addo [2024] GHASC 13.
Republic v High Court, (Commercial Div) Accra: ex parte Brobbey [2023] GHASC 11.
Republic v High Court, (Criminal Div) Accra: ex parte Opuni [2023] GHASC 10.
Republic v High Court, Accra Ex Parte: Tsatsu Tsikata and Others [2020] GHASC 38.
Republic v High Court, General Jurisdiction, Accra [2020] GHASC 9.
Republic v Tetteh [2003-2004] SCGLR 140.
Saviour Church of Ghana v Adusei & Others [2022] GHASC 38
Standard Bank Offshore Trust Co Ltd v National Investment Bank Ltd and Others [2018] GHASC 18.
Tamakloe v Republic [2011] GHASC 2.
The Republic v Court of Appeal, Cape Coast Ex Parte: Gyakye Quayson [2022] GHASC 55.
Tsuru III v Attorney-General [2011] GHASC 20.

Eswatini (formerly Swaziland)
African Echo T/a Times of Swaziland and Others v Zwane [2016] SZSC 202.
Attorney General v The Master of The High Court [2016] SZSC 10.
Bennet Tembe v Rex [2017] SZSC 20.
Commissioner of Police and Another v Dlamini [2015] SZSC 39.
Dlamini And Another v The National Commissioner of Police and Another [2016] SZSC 35.
Dlamini No v Ndzinisa and Others [2015] SZSC 208.
Dlamini v Rex [2023] SZSC 12.
Gama v Foot the Bill Investment (Pty) Ltd and Others [2019] SZSC 35.
Ginindza v Msibi and Others [2013] SZSC 45
Henwood v Henwood and Another [2019] SZSC 59.
Kukhanya (Pty) Ltd v Maputo Plant Hire (Pty) Ltd and Another [2022] SZSC 5.
Mamba and Others v Madlenya Irrigation Scheme [2015] SZSC 222.
MP Simelane Attorneys v Beauty Build Construction (Pty) Ltd and Two Others [2017] SZSC 14.
Nur And Sam (Pty) Ltd T/a Big Tree Filling Station and Others v Galp Swaziland (Pty) Ltd [2015] SZSC 204.
Nxumalo v Rex [2018] SZSC 24.
Nzuza And Others v Nzuza and Others [2017] SZSC 30.
Prime Minister of Swaziland v Christopher Vilakati and Others [2014] SZSC 47.
Principal Secretary, Ministry of Public Service and Others v Xolile Sukati [2015] SZSC 38.

https://doi.org/10.47348/JCLA/v12/i1a2

Siboniso Clement Dlamini v Walter P. Bennet, Thabiso G. Hlanze No., Registrar of The High Court, First National Bank Swaziland Ltd [2017] SZSC 21.
Sihlongonyane v Sihlongonyane and Others [2018] SZSC 52.
Sikhondze v Rex [2021] SZSC 49.
Vilakati v Prime Minister of Swaziland and Others [2016] SZSC 15.
Vilakati v Rex [2018] SZSC 32.

Malawi
Dr. G.H. Kayambo v Deriah Kayambo (MSCA Civil Appeal 8 of 1985) (16 March 1990)
Rolf Patel and Others v Press Corporation and Another (MSCA Civil Appeal No. 26 of 2012) (20 October 2017)

Namibia
De Wet v Klein [2023] NASC 45.
Hellens and Another v Minister of Home Afffairs and Others [2024] NASC 21.
Kamwi v Law Society of Namibia (1) [2010] NASC 16.
Likanyi v S [2017] NASC 10.
Nakuumba v Ipinge and Others [2021] NASC 22. *Schroeder and Another v Solomon and Others* [2010] NASC 11.

South Africa
Mokone v Tassos Properties CC and Another 2017 (5) SA 456 (CC).
Mothulwe v Labour Court, Johannesburg and Others [2025] ZACC 10.
R v R 2023 (9) BCLR 1126 (CC).
Rissik Street One Stop CC t/a Rissik Street Engen and Another v Engen Petroleum Ltd 2024 (4) SA 447 (CC).
South African Broadcasting Corp Ltd v National Director of Public Prosecutions 2007 (1) SA 523 (CC).
Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others 2021 (11) BCLR 1263 (CC).

Tanzania
Abdi Adam Chakuu v Republic [2017] TZCA 138.
Aloyce Maridadi v Republic [2019] TZCA 526.
AMI Tanzania Ltd v OTTU on Behalf of P.L. Assenga & Others [2013] TZCA 499.
Andrew Ambrose v Republic [2015] TZCA 60.
Austack Alphonce Mushi v Bank of Africa Tanzania Ltd & Another [2022] TZCA 588.
Bakir Israel v Republic [2012] TZCA 146.

Benjamin Mpilimi & Others vs Republic [2013] TZCA 244.
Chacha Jeremiah Murimi & Others v Republic [2019] TZCA 466.
Chalamanda Kauteme v Republic [2013] TZCA 249.
Chandrakant Joshubhai Patel v Republic [2003] TZCA 37.
Charles Karamji alias Charles Masangwa v Republic [2020] TZCA 336.
Chavda & Co Advocates v Arunaben Chaggan Chhita Mistry & Others [2017] TZCA 154.
Christina Mrimi vs Coca Cola Kwanza Bottlers Ltd [2012] TZCA 1.
Christopher Ryoba v Republic [2020] TZCA 1752.
Commissioner General (TRA) v Pan African Energy T. Ltd [2017] TZCA 157.
Costantine Victor John v Muhimbili National Hospital [2022] TZCA 646.
D. B. Shapriya & Co. Limited & Others v Kamaka Company Limited & Others [2025] TZCA 400.
D.N. Bahram Logistics Ltd & Another v National Bank of Commerce Ltd & Another [2023] TZCA 17377.
Dar-es-Salaam Education and Office Stationery vs National Bank of Commerce [1996] TZCA 25.
Director Moshi Municipal Council v Stanlenard Mnesi & Another [2019] TZCA 85.
Efficient International Freight Ltd & Another v Office Du The Du Burundi [2011] TZCA 60.
Elia Kasalile & Others vs Institute of Social Work [2019] TZCA 73.
Eliya Anderson v Republic [2013] TZCA 195.
Emmanuel Malahya v Republic [2021] TZCA 172
Epson s/o Michael v Republic [2013] TZCA 290.
Equador Ltd vs National Development Corporation [2023] TZCA 4.
Eusebio Nyenzi v Republic [2013] TZCA 286
Fabrice Ezaovi v Kobil Tanzania Ltd [2023] TZCA 176.
George M. Shambwe vs National Printing Co Ltd [1997] TZCA 62.
Gibson Madege v Republic TZCA 199.
Habyalimana Augustino & Another v Republic [2017] TZCA 173.
Halmashauri Kijiji cha Vilima Vitatu & Another v Udaghwenga Bayay & Others [2016] TZCA 567.
Hamza K. Sungura v The Registered Trustees of Joy in the Harvest [2023] TZCA 17324.
Hassan Kapera Mtumba v Salim Suleiman Hamdu [2023] TZCA 17362.
Hassan Ng'anzi Khalfan v Njama Juma Mbega & Another [2021] TZCA 3185.
Huang Quin and Another vs Republic [2023] TZCA 199.
Israel Solomon Kivuyo v Wayani Langoi & Another [2017] TZCA 176.
Jackson Godwin vs Republic [2018] TZCA 186.
Jacqueline Ntuyabaliwe Mengi & Others v Abdiel Reginald Mengi & Others [2024] TZCA 681.

https://doi.org/10.47348/JCLA/v12/i1a2

Jamal Msitiri alias Chaijaba v Republic [2020] TZCA 1774.
James Ashirafu vs Republic [2017] TZCA 248.
Joel Silomba vs Republic [2013] TZCA 332.
Juma Mathew Malyango v Republic [2023] TZCA 231.
Karim Ramadhani vs Republic [2015] TZCA 66.
Kennedy Elias Shayo v Republic [2023] TZCA 17841.
Kileo Bakari Kileo & Others v Republic [2022] TZCA 333.
Kombo Omary v Republic [2010] TZCA 38.
Majid Goa alias Vedastus v Republic [2017] TZCA 184.
Mathias Rweyemamu v General Manager (KCU) Ltd [2017] TZCA 219.
Mehar Singh t/a Thaker Singh v Highland Estates Ltd & Others [2016] TZCA 825.
Metwii Pusindawa Lasilasi v Republic [2024] TZCA 139.
Mohamed Hassan vs Mayasa Mzee and another [1998] TZCA 4.
Mychel Andriand Takahindangeng v Republic [2024] TZCA 1100.
National Bank of Commerce Ltd vs National Chicks Corporation Ltd & Others 2019] TZCA 345.
National Microfinance Bank v Leila Mringo & Others [2021] TZCA 233.
NCBA Bank Tanzania Ltd v Hirji Abdallah Kapikulila [2024] TZCA 655.
Omary Makunja v Republic [2016] TZCA 211.
OTTU on behalf of P. L. Asenga & Others vs Ami T. Ltd [2019] TZCA 138.
OTTU on behalf of P.L. Asenga & Others v AMI Tanzania Ltd [2013] TZCA 474.
P.9219 Abdon Edward Rwegasira v The Judge Advocate General [2016] TZCA 969.
Patrick Sanga v Republic [2013] TZCA 473.
Peter Mabimbi v The Minister for Labour & Youth Development & Others [2009] TZCA 58.
Peter Ng'homango v Gerson M.K Mwangwa and another [2007] TZCA 162.
Registered Trustees of St. Anita's & Others v Azania Bank Limited [2025] TZCA 568.
Sabato Thabiti & Another v Republic [2021] TZCA 429.
Said Shabani vs Republic [2013] TZCA 423.
Samwel Gitau Saitoti alias Saimoo alias Jose & Others v The Director of Public Prosecutions [2021] TZCA 554.
Samweli Gitau Saitoti alias Saimoo alias Jose & Others v Director of Public Prosecutions [2020] TZCA 363.
Sanlam General Insurance (T) Limited vs AMC Trade Finance Limited [2025] TZCA 348.
Sdv Transmi (Tanzania) Ltd v M/s Ste Datco [2005] TZCA 9.
Sharaf Shipping Agency T. Ltd v Bacilia Constantine & Others [2024] TZCA 750.
Shekha Nasser Hamud v Mary Agnes Mpelumbe [2023] TZCA 18018.
SYMBION Power Tanzania Ltd v CRDB Bank PLC [2024] TZCA 661.

TANCOAL Energy Limited v National Bank of Commerce Limited & Another [2025] TZCA 479
Tanzania Fish Processors Ltd vs Eusto K. Ntagalinda [2019] TZCA 67.
Tanzania Fish Processors Ltd v Eusto K. Ntagalinda [2020] TZCA 237.
Thomas Mgiro vs Republic [2013] TZCA 441.
Timothy M. Kaare v Mara Cooperative Union (1984) Ltd [1996] TZCA 12.
Vicent Damian v Republic [2016] TZCA 934.
Victor Robert Mkwavi v John Mathias Mangana (as administrator of the estate of the late Juma Omary) [2025] TZCA 337.
Yohana Maiko Sengasu v Mirambo Mabula & Another [2024] TZCA 658.

Zimbabwe
Bonde v National Foods Ltd [2020] ZWSC 57.
Heuer v Two Flags Trading (Private) Ltd and Others [2024] ZWSC 45.
Mwenye and Another v Minister of Justice, Legal and Parliamentary Affairs and Another [2023] ZWCC 9.
S v Gumbura (25 of 2021) [2021] ZWSC 25.

Lesotho
Alexis Mphahama v Moosa Holdings (Pty) Ltd [2024] LSCA 16.
Basotho Patriotic Party & 3 Others v Lejone Puseletso & 6 others [2024] LSCA 17.
Hippo Transport v Commissioner of Customs & Excise [2018] LSCA 5.
Mako Mohale v Minister of Law and Constitutional Affairs [2024] LSCA 8.
Maphathe v I Kuper Lesotho [2019] LSCA 30.
Rex v Phantši [2021] LSCA 6.

Seychelles
Adeline v Talma [2023] SCCA 54.
Attorney General v Mazorchi and Another (SCA Civil Appeal 6 of 1996).
Belmont & Anor v Belmont [2020] SCCA 44.
Bristol v Rosenbauer [2022] SCCA 23.
Dynamics (Pty) Ltd and Another v Vadivello and Another [2022] SCCA 52
Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd) [2022] SCCA 56.
Francis Ernesta and Others v R (2017) SCCA 24.
Karunakaran v Attorney General [2020] SCCC 5.
Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd and Vijay Construction (Pty) Ltd v Eastern European Engineering [2022] SCCA 5.

Zambia
Access Bank (Zambia) Ltd v Group Five/ZCON Business Park Joint Venture [2016] ZMSC 24.
Chipasha and Ors v Swarp Spinning Mills PLC [2009] ZMSC 146.

https://doi.org/10.47348/JCLA/v12/i1a2

Development Bank of Zambia and Anor v Jet Cheer Development Co (Zambia) Ltd [2001] ZMSC 115.
Dr Arnold Maambo Chooka v Munthali [2007] ZMSC 130.
Finsbury v Ventriglia [2013] ZMSC 17.
First Merchant Bank Zambia Ltd (In Liquidation) v Attorney General and Others [2022] ZMSC 9.
Joseph Sumbukeni v Chilanga Cement plc [2007] ZMSC 14.
Lewanika and Others v Chiluba [1997] ZMSC 45.
Liuwa v Judicial Complaints Authority [2011] ZMSC 6.
Mandona v Total Aviation and Export Ltd and Others [2017] ZMSC 229.
Marlon Peter Elifala Moyo v Attorney General [2017] ZMSC 212.
Martha Ngobola v Attorney General and Others [2000] ZMSC 121.
Match Corporation Ltd v Choolwe [1996] ZMSC 37.
Mulenga and Anor v People [1997] ZMSC 61.
Ngimbu v Kakoma and Electoral Commission of Zambia [2014] ZMSC 39.
Nkonde and Others v Attorney General [2022] ZMSC 49.
Nyimba Investments Ltd v Nico Insurance Zambia Ltd [2017] ZMSC 290.
Rosalia Mwamfuli v Ntimba & Another [2018] ZMSC 318.
Sakala v People [2020] ZMSC 170; Attorney General and Others v Ambex Clothing Manufacturer Ltd [2018] ZMSC 607.
Southern African Trade Ltd v Zambia Revenue Authority [2017] ZMSC 288.
Zambia Consolidated Copper Mines Ltd & Another v Khama [2004] ZMSC 10.

Sierra Leone
Aiah Momoh v Sahr Samuel Nyandemoh [2020] SLSC 6.
Alhaji Sam Sumana v Attorney-General & Anor [2015] SLSC 1203.
Basma v The State [2012] SLSC 10.
Coker v Coker [1951] SLSC 5.
Gabisi v Alharazim (1964–66) ALR SL 177.
Kai-Kai & 13 Others v S [1989] SLSC 7.
National Insurance Co Ltd v Moiison Tarraf [2009] SLSC 3.
Patrick John & Another v Mohamed Koneh (Chief Electoral Commissioner) Electoral Commission of Sierra Leone & Others [2023] SLSC 3.

Kenya
British American Tobacco Kenya PLC (Formerly British American Tobacco Kenya Ltd) v Ministry of Health & 2 others; Kenya Tobacco Alliance & another (Interested Parties); Mastermind Tobacco Kenya Ltd (Affected Party); Kariuki, Ndegwa & Kubuthu (Applying as Secretary, Chairperson & Treasurer of Kiambu County Welfare Association) & 6 others (Interveners) [2024] KESC 68 (KLR).

https://doi.org/10.47348/JCLA/v12/i1a2

Cogno Ventures Ltd & 4 others v Bia Tosha Distributors Ltd & 15 others; Kenya Breweries Ltd & 6 others (Interested Parties); Ferran & 24 others (Contemnor) [2023] KESC 33 (KLR).
County Assembly of Migori v Aluochier & 2 others [2024] KESC 7 (KLR) (Civ).
Dari Ltd & 5 others v East African Development Bank [2023] KESC 93 (KLR).
Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2017] eKLr.
Gachuhi & another v Evangelical Mission for Africa & another [2023] KESC 109 (KLR) (Civ).
Githiga & 5 others v Kiru Tea Factory Co Ltd [2022] KESC 35 (KLR) (Civ).
Kabuito Contractors Ltd v Attorney General (Civil Application E025 of 2023) [2023] KESC 89 (KLR).
Kaluma v NGO Co-ordination Board & 5 others [2023] KESC 72 (KLR) (Civ).
Kenya Bureau of Standards v Geo Chem Middle East (Application 33 of 2020) [2021] KESC 60 (KLR).
Kenya National Highway Authority v Cycad Properties Ltd & 33 others [2021] KESC 8 (KLR)
Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others [2024] KESC 67 (KLR).
Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others [2016] eKLR.
MAK v RMAA & 4 others [2023] KESC 21 (KLR).
Martin Wanderi & 106 others v Engineers Registration Board & 5 others; Egerton University & 43 others (Interested Parties) [2020] eKLR.
Mbugua & another (Suing as the Administrators of the Estate of Joseph Kiarie Mbugua & another) v Timber Manufacturers & Dealers Ltd [2023] KESC 86 (KLR).
Member of Parliament Balambala Constituency v Abdi & 7 others [2023] KESC 80 (KLR).
Mombasa Bricks & Tiles Ltd & 5 others v Shah & 7 others [2022] KESC 72 (KLR).
Musembi & 13 others (Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi) v Moi Educational Centre Co Ltd & 3 others [2022] KESC 19 (KLR) (Civ).
Mwambeja Ranching Co Ltd & another v Kenya National Capital Corporation [2024] KESC 28 (KLR).
Nairobi Bottlers Ltd v Ndungu & another [2024] KESC 26 (KLR).
National Land Commission v Tom Ojienda & Associates & 2 others [2024] KESC 16 (KLR).
Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR.

https://doi.org/10.47348/JCLA/v12/i1a2

Senate of Kenya & 3 others v Speaker of the National Assembly & 10 others [2023] KESC 1 (KLR).
Senate of the Republic of Kenya & 3 others v Speaker of the National Assembly of the Republic of Kenya & 10 others [2022] KESC 34 (KLR).
Sirikwa Squatters Group v Fanikiwa Ltd & 20 others [2024] KESC 23 (KLR).
Stanbic Bank Kenya Limited v Santowels Limited [2025] KESC 3 (KLR) para
Standard Chartered Financial Services Ltd v Manchester Outfitters (Suiting Division) Ltd Now Called King Woolen Mills Ltd & 2 others [2023] KESC 110 (KLR).
Sonko v Clerk, County Assembly of Nairobi City & 11 others [2022] KESC 38 (KLR).
Sonko v Clerk, County Assembly of Nairobi City & 11 others [2024] KESC 43 (KLR)
Trattoria Ltd v Maina & 3 others [2024] KESC 54 (KLR).

Nigeria
Amalgamated Trustees Ltd v Associated Discount House Ltd (2007) LPELR-454 (SC).
Jev v Iyortom [2015] 15 NWLR 485.

African Commission on Human and Peoples' Rights
Spilg and Others v Botswana (Communication 277 of 2003) [2011] ACHPR 81 (1 December 2011).

African Court of Human and Peoples' Rights
African Commission on Human and Peoples' Rights v Republic of Kenya (Application No 006/2012) [2019] AfCHPR 46 (24 October 2019).
Fory v Republic of Cote d'Ivoire (Application for review 001/2022) [2022] AfCHPR 47 (1 December 2022).

Rules
High Court Rules, Statutory Instrument 202 of 2021 (Zimbabwe).
Judicature (Supreme Court Rules) Directions, Legal Notice 13 of 1996 (Uganda).
Rules of the Supreme Court of Namibia, No 249 of 2017.
The Supreme Court Rules, 1982 (Sierra Leone).
Supreme Court Rules, L.N. 141/2011 (Kenya).
Supreme Court Rules, Statutory Instrument 84 of 2018 (Zimbabwe).
The Tanzania Court of Appeal Rules, 2009.

Legislation
Appellate Jurisdiction Act, Chapter 141 (Tanzania)

https://doi.org/10.47348/JCLA/v12/i1a2

Code of Civil Procedure (Seychelles)
Supreme Court Act (2011) (Kenya)
Supreme Court Act, No 15 of 1990 (Namibia)

Constitutions
Constitution of Uganda (1995).
Constitution of Kenya (2010).

Journal articles
Jabbi, B.B. '"Autonomic judicial review": powers in search of identity and assertion' (1999) 43(1) *Journal of African Law* 99.
Mrabure, O.K. & Idehen, O.S. 'Appraising Nigeria's Supreme Court's powers to review its own judgments' (2021) 4(2) *International Journal of Law and Society* 77.
Mujuzi, D.J. 'Equality before the law and the recognition of same-sex foreign marriages in Namibia: Digashu and another v GRN and others; Seiler-Lilles and another v GRN and others [2023] NASC 14' (2023) 23(4) *International Journal of Discrimination and the Law* 321.
Mujuzi, D.J. 'The Supreme Court of Uganda's powers to depart from or reopen (review) its decisions under article 132(4) of the Constitution' (2024) 16(4) *African Journal of Legal Studies* 405.
Uwakwe, K. & Amech, W.C. 'The Nigerian Supreme Court judgment in David Lyon & Ors. v. Digi-Eremienyo & Ors: a travesty of justice' (2020/2021) 3(1) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law Journal* 118.

Others
Proceedings of the Constituent Assembly (1994/1995) (Uganda).

https://doi.org/10.47348/JCLA/v12/i1a2