IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & KOOME JJ.A.)

CIVIL APPLICATION NO. 65 OF 2019

BETWEEN

CENTURION ENGINEERS AND BUILDERS LTD.....RESPONDENT/APPLICANT

AND

KENYA BUREAU OF STANDARDS.....APPLICANT/RESPONDENT

(Being an application for review/Rescission of the Orders

of the Court (Ouko (P), Nambuye & Koome JJ.A.) dated

20th December 2019 in Nairobi Civil Application No. 65 of 2019)

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RULING OF THE COURT

Before us is a Notice of Motion dated 31st December, 2019 substantively under **sections 3, 3A** and **3B** of the **Appellate Jurisdiction Act**, **Rule 57(2)** of the **Court of Appeal Rules, 2010**, **Article 159(2)** of the Constitution of Kenya and all other enabling provisions of the law, seeking orders that: the Court be pleased to recall and/or re-open Civil Application No. Nai 65 of 2019; upon recalling and/or reopening the said Civil Application No. Nai 65 of 2019, the Court be pleased to review, vary and/or set aside its ruling and orders made on 20th December, 2019 (**Ouko (P), Nambuye & Koome, JJ.A.**) in Civil Application No. Nai 65 of 2019; upon reviewing, varying and/or setting aside its said decision made on 20th December, 2019, the Court be pleased to order that Civil Application No. Nai 65 of 2019 be heard afresh together with Civil Application No. Nai 71 of 2019; costs of this application be provided for.

It is supported by grounds on its body and a supporting affidavit of **Bryan Khaemba** together with annextures thereto. It has been opposed by a replying affidavit of **Jotham Okioma Arwa** sworn on 8th June, 2020. The application was canvassed virtually through rival pleadings, written submissions and legal authorities relied upon by the respective parties in support of their opposing positions without oral highlighting.

The background to the application is that there are two interrelated applications whose mode of disposal is what has triggered the filing of the application under consideration. The earlier in time is the application filed in Civil Application No. 65 of 2019 **Kenya Bureau of Standards vs. Centurion Engineers and Builders Ltd**, being a notice of motion under **Rule 83** of the **Court of Appeal Rules, 2010** dated 27th February, 2019 seeking orders as follows:

> **"1) That the Honourable Court be pleased to issue a declaratory order that leave to appeal earlier granted by this Court to the respondent in the ruling dated 23rd November, 2018 in Civil Application No. Nai 282 of 2016 Centurion Engineers and Builders Ltd vs. Kenya Bureau of Standards has lapsed and or expired upon default to file a record of appeal within appointed time.**
>
> **2) That this Honourable Court be pleased to order that the respondent's Notice of Appeal dated 22nd December, 2016 be deemed as withdrawn under Rule 83 of the Court of Appeal Rules for default to lodge the record of appeal within the stipulated 30 days leave period.**
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> **3) That the applicant be awarded the costs of this application and costs in Civil Application No. Nai 289 of 2016 Centurion Engineers and Builders Ltd vs. Kenya Bureau of Standards.**

The application was supported by grounds on its body and a supporting affidavit of **Jotham Okioma Arwa** together with annextures thereto. The application was opposed by a replying affidavit sworn by **Alfred Nyandieka** on 16th September, 2019 together with annextures thereto.

Next in time of filing is the Notice of Motion filed in Civil Application No. 71 of 2015, **Centurion Engineers and Builders Ltd vs. Kenya Bureau of Standards** dated 4th March, 2019, under **Rule 4** of the **Court of Appeal Rules**, **2010,** substantively seeking orders that:

> **"2) This Honourable Court be pleased to extend time for filing and service of the record of appeal from the decision of the judgment of the High Court (F. Tuiyot, J.) dated 9th December, 2016 in HCCC No. 506 of 2012.**
>
> **3) Costs of this application be provided for."**

It was supported by grounds on its body and a supporting affidavit sworn by **Alfred Nyandieka** together with annextures thereto. The application was opposed first by respondent's preliminary objection and replying affidavit sworn by **Evans Ochieng** on 2nd May, 2019. In the preliminary, the respondent objects to the application dated 4th March, 2019 on the grounds:

> **"1) That the application is incurably and fatally defective for seeking extension of a conditional order for leave to appeal that already expired and lapsed.**
>
> **2) The application is an abuse of Court process and an afterthought having been filed with the sole intent of defeating the respondent's application earlier filed seeking striking out of the notice of appeal being Civil Application No. 65 of 2019 Kenya Bureau of Standards vs. Centurion Engineers and Builders Limited.**
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> **3) That the application is tainted with deliberate indolence and in action undeserving of the discretionary jurisdiction of this honourable court under Rule 4 of the Rules hence should be dismissed with costs.**

On 19th September, 2019 the notice of motion dated 27th February, 2019 filed in Civil Application No. 65 of 2019 came before us for hearing and disposal, in the course of which our attention was drawn to the existence of an interrelated notice of motion dated 4th March, 2019 in Civil Application No. 71 of 2019. After due deliberations with learned counsel for the respective parties herein on the mode of disposal of both applications, orders were made herein as follows:

> **"By consent of both learned counsel present;**
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> **1) Both applications be and are hereby directed to be canvassed by way of written submissions with no oral highlighting.**
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> **2) The appellant's written submissions filed and served on 18th September, 2019 herein are already on the record.**
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> **3) The respondent has 14 days of today to respond to those submissions.**
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> **4) The applicant has 14 days from the date of service upon him of the respondent's submissions to file a response if any.**
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> **5) The applicant in CA 71 of 2019 to file and serve written submissions within 14 days of today.**
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> **6) The respondent therein has a corresponding right of reply within 14 days of service.**
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> **7) The applicant therein also has a corresponding right of reply to the respondent's submissions if any.**
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> **8) Both applications are deemed to have been consolidated and heard together today.**
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> **9) Ruling on 6th December, 2019"**

The ruling initially slated for delivery on 6th December, 2019, was delivered on 20th December, 2019 prompting the filing of the application under consideration.

Supporting the application, the applicant contends that the ruling delivered on 20th December, 2019 contains errors apparent on the face of the ruling and therefore warrants review and setting aside along parameters suggested by them. The errors pointed out by the applicant are as follows: the Court's failure to adhere to its own directions given on 19th September, 2019 that both applications be consolidated and heard together through rival pleadings and written submissions; failure to appreciate and take into consideration the applicant's replying affidavit filed and served on the respondent on 18th September, 2019 in opposition to the respondent's application dated 27th February, 2019 and thereby wrongly and/or inadvertently held that the respondent's notice of motion No. Nai 65 of 2019 was served prior to the filing of the applicant's notice of motion dated 4th March, 2019; and, lastly, erroneously vacating the substratum in the applicant's application No. Nai 71 of 2019 without either considering or determining the said application (No. Nai 71 of 2019).

In light of the totality of the above submissions, the applicant contends that the jurisdiction of the Court is properly invoked as the court has residual powers to review its decisions especially in circumstances demonstrated wherein it is not disputed that the orders issued by the Court on 20th December, 2019 are not appealable to the Supreme Court. Second, the said orders not only went contrary to the directions given by

the Court on 19th September, 2019, but also deprived the applicant of its fundamental right to be heard on its application in No. Nai 71 of 2019 in breach of **Article 50** as read with **Article 24** of the Constitution. Noncompliance with those directions also breached applicant's right to natural justice by taking away the notice of appeal dated 22nd December, 2016 without hearing the applicant on its application dated 4th March, 2019 seeking to validate the appellate process initiated by the said notice of appeal.

To buttress the above submissions, the applicant cited the case of **Nguruman Limited vs. Shompole Group Ranch & Another** [**2014**] **eKLR** entrenching the jurisdiction of the Court to recall, review and rescind its own decision.

In rebuttal, the respondent raised a preliminary point of law arguing that the applicant's application as laid does not lie in law as **Rule 57(2)** of the **Court of Appeal Rules** invoked as the core provision of law for accessing the relief sought only applies to recalling, reviewing and rescinding or otherwise by a full Court of decisions made by a single Judge which is not the position herein and should therefore be struck out.

The above preliminary objection notwithstanding, the respondent appreciates that there is limited discretionary residual jurisdiction vested in the Court to recall, review and rescind or otherwise its own decisions, but adds that the exercise of this residual power is exercised cautiously and exceptionally in instances which are not the case herein; because, the slip rule under **rule 35(2)** of the **Rules** of the Court that specifically empowers the Court to correct clerical or arithmetic mistakes in any judgment arising from an accidental slip or omission; it is a thinly veiled appeal challenging the merits of this Court's ruling delivered on 20th December, 2019, a process the Court lacks jurisdiction to entertain.

The Court also took into consideration all relevant factual factors in relation to grievances addressed in Civil Application No. Nai 71 of 2019, applicant's replying affidavit to respondent's application, issue of the certificate of delay, delay on approving the draft order, sickness on the part of the applicant's counsel, plea for application of overriding objective principle, access to substantive justice without elevating to procedural technicalities, fact of **Rule 83** of the Courts Rules being couched in mandatory terms, the sequence of service of the two consolidated applications, the fact of conditional leave of thirty (30) days granted to the applicant on 22nd November, 2018 having lapsed on 23rd December, 2018; fact of no record of appeal having been filed by the time settlement of the leave days order was done and the period of days that had lapsed since the date leave to appeal was granted on 23rd November, 2018; and, lastly, the fact that the applicant did not apply for a certified copy of the proceedings immediately after the delivery of the High Court ruling on 9th December, 2016 but did so only on 23rd November, 2018 after delivery of the ruling granting them leave to appeal.

It is also the respondent's contention that in light of the factual circumstances demonstrated above, the applicant was not entitled to rely on the proviso to **Rule 82(1)** on computation of time, and on that account allowed respondent's application in **Nai No. 65 of 2019**. No newly discovered matters were raised in the application to merit review of the impugned ruling. Neither has any misdirection or improper exercise of the Courts discretionary mandate was demonstrated to exist on the record. There was also no complaint of consideration of extraneous factors, nor omission of necessary consideration of relevant matters to warrant review and setting aside of the impugned ruling dated 20th December, 2019 and, therefore, prayed for the review application to be dismissed.

We have considered the record in light of the above rival position and principles of law that guide the Court in the exercise of its exceptional, sparring and cautious mandate under the core provisions of law for the relief sought, namely, **section 3** of the **Appellate Jurisdiction Act** donating the general mandate of the Court which we find no need to interrogate and **Rule 57(2)** of the Courts' **Rules** donating the residual but sparingly exercised mandate to recall, review and rescind or otherwise of its decisions. **Section 3A** and its twin sister **Section 3B** of the **Appellate Jurisdiction Act** and **Article 159(1)(d**) of the Constitution of Kenya though ancillary also fall for consideration as in our view these impact generally on the Court in the exercise of its discretionary mandate to dispense justice.

Rule 57(2) of the **Court of Appeal Rules** provides as follows:

> **"An order made on an application to the Court may similarly be varied or rescinded by the Court."**

We shall revert shortly to the parameters for the invocation of this provision as it is central in the determination of the application.

Sections 3A of the **Appellate Jurisdiction Act, Cap 9 Laws of Kenya** and **3B** enshrines the overriding objective principle of the Court, while **Article 159(2)** of the Constitution of Kenya, 2010 enshrines the non-technicality constitutional procedural principle. Circumstances under which the above provisions may be invoked and applied by the Court in the dispensation of justice have been crystallized by case law. For the overriding objective principle, we take it from the cases of **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008);** and **Kariuki Network Limited & Another vs. Daly & Figgis Advocates Civil Application No. Nai 293 of 2009**, which all support the proposition that the purpose of the overriding objective principle is first, to enable the court achieve fair, just, speedy, proportional, time and cost-saving disposal of cases before it. Secondly, to embolden the court to be guided by a broad sense of justice and fairness. Thirdly, to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

While those for the non-technicality principle we take it from the cases of **Jaldesa Tuke Dabelo vs. IEBC & Another [2015] eKLR; Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR; Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014]eKLR; Patricia Cherotich Sawe vs. IEBC & 4 Others [2015]eKLR** for principles/propositions *inter alia* that: the exercise of the jurisdiction under **Article 159** of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice save that **Article 159(2)(d)** of the Constitution is not a panacea for all procedural ills.

We should also not overlook the inherent power of the Court enshrined in **Rule 1(2)** of the Court's **Rules**. It provides:

> **"1(2) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."**

See **Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR;** and **Board of Governors, Moi High School, Kabarak & Another vs. Malcolm Bell [2013] eKLR** wherein this Court and the Supreme Court of Kenya variously stated *inter alia* that: inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute; and second, that inherent power is an endowment to the Court such as to enable it regulate its internal conduct, and ensure that its mode or discharge of duty is conscionable, fair and just.

When similarly confronted with a request to exercise its sparring, cautious and exceptional mandate under **rule 57(2)** of the **Rules** of the Court, the Court in the case of **Moi University of Eldoret & Another vs. Prof. Ezekiel Kiprop & Another Civil Application No. Nyeri. 1 of 2019 (UR. 1/2019)** and which we fully adopt as stating the now crystallized position in law with regard to the exercise of the Court's cautious and sparing mandate under **Rule 57(2)** of the Court's **Rules** expressed itself as follows:

> **"It is now settled, and it is common ground between the parties in this application, that this Court has residual jurisdiction to review its judgments ..... In Benjoh Amalgamated & Another vs. Kenya Commercial Bank Ltd (supra) this Court undertook an exhaustive review of previous decisions as well as decisions from several foreign jurisdictions on its power to review its judgments and concluded that it has residual jurisdiction, in limited cases, to reopen a decided matter. That power, the Court added, must be exercised with circumspection. This is how the Court expressed itself:**
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> ***"The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court)."***
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> **(See also Standard Chartered Financial Services Ltd & 2 Others vs. Manchester Outfitters (Suiting Division) Ltd & 2 Others (supra) and Beth Muthoni Njau & Eddie Njau (supra)).**

In Mukuru Munge vs. Florence Shingi Mwawana, & 2 Others [2016] eKLR, this Court, in declining an invitation to review its judgment stated as follows:

> **"The residual power of the Court to reopen its decisions is therefore a circumscribed power to be exercised in exceptional cases. That power is not intended to circumvent the principle that, save in those cases where the Constitution allows an appeal to the Supreme Court, decisions of this Court are otherwise final."**

And in Niels Bruel vs. Moses Wachira & 2 Others [2018] eKLR, the Court reiterated as follows:

> **"Starting with the first prayer to re-open the appeal and review the judgment of this Court, it is axiomatic that this Court has jurisdiction to do so. But that jurisdiction is exceptional and has to be exercised sparingly and with circumspection to thwart disaffected parties who merely seek a second bite of the cherry or who invite the Court to sit on appeal from its own judgment."**

Applying the above threshold to the rival positions herein, it is our finding that it is indeed correct as contended by the applicant that directions were given by the Court on 19th September, 2019 regarding the mode of disposal of the above two mentioned interrelated applications. It is not disputed that in law the respondent's application filed on 1st March, 2019 fell for consideration by a full court (a three Judge bench) while the applicant's application dated 4th March, 2019 fell for consideration by a single Judge. The above being the correct procedural position in the disposal of the above consolidated application, it is our finding that Item 8 of the order of the Court made on 19th September, 2019 overlooked this jurisdictional issue.

This Court has time and again expressed itself explicitly that in law, jurisdiction is everything. Without it, a Court of law has no business proceeding further with a matter. It has to down tools. See **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989]eKLR**, wherein **Nyarangi J.A** (as he then was) expressed himself on the issue as follows:

> ***"Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. .....:***
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> ***By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these***

characteristics. .....

Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

In light of the above exposition, it is our finding that there is no way the apparently erroneously consolidated applications could have been heard jointly. It was erroneously consolidated by the Court especially when neither party has cited before us any provision of law either under the **Act** or the **Rules** that makes provision for the exercise of such a mixed grill type of mandate. The above being the uncontroverted position on the record, it therefore, follows that this was an oversight on the part of the Court. The error occasioned is not one that can be termed as an accidental slip curable under the Court's **Rule 35(2)** Procedures. It is a fundamental jurisdictional issue touching on the mode of procedure the Court ought to have employed in the disposal of the two applications erroneously consolidated as provided for within the **Rules** of the Court.

In light of the conclusion reached above, we find no need to delve into a thorough interrogation of other issues raised herein in the rival submissions of the rival parties that touch on the merits of the pending applications, as doing so would in our view highly prejudice the outcome of the anticipated merit disposal of those applications in view of the orders we are about to make in the disposal of the application. It is, therefore, sufficient for us to state that sufficient basis has been laid to warrant us to allow the application, revisit, recall and rescind the ruling of 20th December, 2019 which we hereby do. We proceed to make orders there on as follows:

1) Both applications be and are herein restored *"ante"* to their respective status in the litigation as at 19th September, 2019 when directions on the disposal of both applications were made.

2) Item 8 of the said directions is recalled, reviewed, set aside and substituted with an order as follows:

i) The two applications namely, No. Nai 65 of 2019, Kenya Bureau of Standards vs. Centurion Engineers and Builders Ltd and Nai 71 of 2019, Centurion Engineers and Builders Ltd vs. Kenya Bureau of Standards are ordered to be heard separately.

3) The hearing of the application No. Nai 65 of 2019, Kenya Bureau of Standards vs. Centurion Engineers and Builders Ltd to await the outcome of the determination by a single Judge in chambers of application No. Nai 71 of 2019, Centurion Engineers and Builders Ltd vs. Kenya Bureau of Standards.

4) In view of what has transpired herein since the 19th September, 2019 when the said directions were given, we direct that both applications be listed for hearing and determination expeditiously on priority basis starting with No. 71 of 2019, Centurion Engineers and Builders Ltd vs. Kenya Bureau of Standards.

5) Each party to bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR