IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, OKWENGU & MUSINGA JJ.A)

CIVIL APPEAL NO. 419 OF 2018

BETWEEN

THE ASSETS RECOVERY AGENCY .....APPELLANT

AND

CHARITY WANGUI GETHI .....1ST RESPONDENT

JEDIDAH WANGARI WANGUI ..... 2ND RESPONDENT

JOHN KAGO NDUNG'U ..... 3RD RESPONDENT

PATRICK ONYANGO OGOLA T/A

OGOLA & MUJERA ADVOCATES ..... 4TH RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court at Nairobi (J.N Onyiego, J.) dated 31st October 2018

In

ACEC Misc. Appl. No. 17 of 2016)

****

JUDGMENT OF THE COURT

1. This is an appeal from the ruling and order of the High Court (Onyiego,

J. dismissing the appellant's application seeking to review the Court's orders issued on 4th July, 2018 declining leave for the filing and serving of the appellant's supplementary affidavit out of time.

2. The genesis of this appeal is that vide originating summons dated 14th March, 2016 the appellant herein sought orders of forfeiture of various properties belonging to the respondents herein. Such forfeiture was premised on diverse criminal cases instituted by the Directorate of Criminal Investigations founded on allegations of fraud and embezzlement of public funds perpetuated by public officials and private persons amounting to Kshs. 791, 385, 000.00 from the State Department of Planning in the Ministry of Devolution.

3. The application came up for directions on the 27th February, 2017 where all the respondents sought leave to file their respective responses. The court gave directions allowing the respondents to file their responses within 30 days. The appellant was equally granted leave to file a further affidavit in response thereto if need be, within 21 days from the date of service. The matter was listed for further directions on the 24th April, 2017.

4. On the 24th April, 2017, it transpired that none of the respondents had filed responses as directed citing various reasons. The respondents were allowed 21 days to file and serve their responses to the application. The matter was then fixed for mention to confirm compliance and for further directions on the 6thJune, 2017.

5. Once again on the 6th June, 2017, when the matter was mentioned, there was no compliance from any of the respondents for various reasons and the court indulged them yet again and granted them one last chance to file their responses. The matter was slated for further

directions on the 13th June, 2017.

6. The 1st and 2nd respondents filed their joint replying affidavit on 13th June 2017, while the 3rd and 4th respondents filed their replying affidavits on 12th June, 2017 and 13th June, 2017 respectively. On 13th June, 2017 when the matter came up for directions to confirm compliance, it was agreed by all the parties, and it was so ordered, that the appellant shall file and serve their written submissions within 30 days and the respondents shall equally file and serve their submissions in response within 30 days upon service. The matter was then allocated a mention date for the 11th September, 2017.

7. On the 11thSeptember, 2017 when the matter came up for directions the court directed that all the parties file their respective submissions as earlier directed and the matter was again fixed for mention on the 21st November, 2017. On this day, the applicant was yet to comply with directions on filing of submissions. Yet again on the 21st of November 2017, there was no compliance with the orders made on filing of submissions. The court directed that there be compliance of its earlier orders on filing of submissions.

8. The record shows that on this day, the appellant had not filed its submissions for reasons that Mr. Mohamed Adow, learned counsel for the appellant was unwell, the appellant requested for 21 more days to file their submissions which request was not opposed by the respondents. The court directed the parties to comply with the orders of filing submissions and the matter was again set for mention on the 4th April, 2018.The court did not sit on this day and the matter was allocated a mention date for 16th May, 2018.

9. Come 16th May, 2018 and the same story was repeated. This time round, the appellant indicated to the court that owing to the complexity of the matter they were not able to file the submissions as earlier ordered and they needed a few more days to comply. The court once again acceded to the said request and ordered that by consent of the parties the appellant to file and serve their submissions by 18th May, 2018 and the respondents were allowed to file their response within 30 days from the date of service. The matter was then set for further mention on 4th of July, 2018 to confirm compliance.

10. On 4th July, 2018 the appellant confirmed having filed their written submissions and additionally sought leave to file a supplementary affidavit. The 1st, 2nd and 4th respondents confirmed that they had been served the same morning while the 3rd respondent had not been served at all. All the respondents had therefore not filed their respective submissions citing delays on the part of the appellants to file and serve its submissions within reasonable time as directed by the court.

11. Upon considering submissions made by the appellant and the respondent on the issue of leave to file supplementary affidavit, the court observed that the appellant had failed to file the said affidavit for a period of over a year despite the court's directions given on 27th February, 2017, notwithstanding that the respondents had filed their replying affidavits sometime in June 2017. The learned Judge ultimately exercised his discretion against the appellant and rejected the application and directed that the respondents file their submissions within 14 days. The matter was then fixed for mention on the 25th July, 2018 to confirm compliance and to take a date for judgment.

12. In total disregard of the directions given by the court on the filing of any further affidavits, and without leave, the appellant proceeded to file a supplementary affidavit the same day (4th July, 2017).

13. Subsequently, vide an application filed under certificate of urgency dated 19th July, 2018, the appellant sought a review of the court orders issued on the 4th of July, 2018. The application was brought pursuant to **Article 159(2)(d)** of the Constitution under **Order 45** and **50(5)** of the Civil Procedure Rules on grounds as appear on the face of the application and supported by an affidavit sworn by Mohammed Adow, the appellant's counsel.

14. The pertinent paragraphs of the affidavit were as follows:-

> ***"….***
>
> ***2. THAT there is an apparent error on the face of the record in declining filing and service of the Supplementary Affidavit since the Applicant was earlier granted leave by the same Court presided over by Hon. Lady Achode.***
>
> ***3. THAT the Supplementary Affidavit is based on further investigations into the funds stolen from the National Youth Service.***
>
> ***4. THAT the delay in filing the Supplementary Affidavit was occasioned by the complexity of the case and the interwoven nature of the crimes investigated.***
>
> ***….***
>
> ***8. THAT the declining of the Applicant's Supplementary Affidavit shall greatly prejudice the applicant's forfeiture dated 14th March 2016….***
>
> ***9. THAT the nature of the applicant's case is not like the ordinary civil case rather an application to recover proceeds of crime stolen from the coffers of the National Youth Service, a public entity, hence declining the filing of the Affidavit shall greatly prejudice public interest.***
>
> ***10. THAT the admission of the Supplementary Affidavit shall not prejudice the Respondents since they will be allowed to respond to the same."***

15. The 1st, 2nd and 3rd respondents opposed the application vide replying affidavits filed on diverse dates. The 1st and 2nd respondents

filed a replying affidavit dated 8th August, 2018, the 3rd respondent filed a replying affidavit dated 10th August, 2018 while the 4th respondent filed a replying affidavit dated 15th of August, 2018. All respondents maintained that the appellant's application did not meet the requisite threshold to allow a review of the aforementioned orders and lamented that the appellant's delay in filing the further affidavit was inordinate. It was also contended that at all times when the matter had come up to confirm filing of submissions there was no mention of filing of a supplementary or further affidavit.

16. Upon consideration of the application, replying affidavits and rival submissions, the learned Judge found that the issue that fell for the determination of the court was whether the application met the threshold for grant of orders for review. Ultimately, the learned Judge held as follows:-

> ***"13. Unfortunately, the applicant went ahead and filed a further affidavit without seeking leave to extend time. I do not find sufficient reason for the delay in filing a further affidavit for more than a year. The applicant has not demonstrated due diligence in doing what they were required to do. I have not been persuaded enough to review my orders of 4th July 2018. Accordingly, application for review dated 19th September 2018 be and is hereby dismissed and the supplementary affidavit filed on 4th July 2018 without leave of the court expunged from the court record."***

It is the above decision that culminated in the instant appeal.

17. The appellant raises 7 grounds of appeal being that the learned Judge erred in law and facts in: dismissing the appellant's application without appreciating that it disclosed material evidence hence an unfair hearing contrary to **Article 50** of the Constitution; holding that the appellant could not find redress under **Article 159(2)(d)** of the Constitution to oust mandatory rules of procedure; misapprehending and misapplying the principles and law by dismissing the application; by failing to appreciate the nature of the primary matter; by finding that the supplementary affidavit had been filed without leave of court; failing to consider the prayer seeking enlargement of time to file the supplementary affidavit; failing to appreciate that the primary suit involved an issue of public interest.

18. During the plenary hearing of the appeal learned Counsel Mr. Mohammed Adow and Ms. Faith Irari appeared for the appellant, Mr. Edwin M. Muriungi appeared for the 1st and 2nd respondents, Ms. Rebecca Mogire appeared for the 3rd respondent while Mr. Chacha Odera appeared for the 4th respondent.

19. Urging the Court to allow the appeal, Mr. Adow, submitted that the main issue for determination was whether the learned Judge erred in fact and law in disallowing the appellant's application dated 19th July, 2018. Counsel further submitted that the learned Judge dismissed the application without justifiable reasons. He maintained that the power of a court to disallow pleadings is draconian hence in disallowing the application, the learned Judge was in violation of the appellant's rights as envisaged under **Article 50** of the Constitution without any justifiable reasons, thus denying it the opportunity to present its case in a favourable manner.

20. Mr. Adow argued that the learned Judge erred by failing to appreciate that the appellant's case was a complex one requiring cumbersome process of investigations and gathering of information; a process which led to the delay in filing the supplementary affidavit within time. He contended that the process of investigations is what led to the delay in filing the supplementary affidavit in issue and that the learned Judge disregarded the said fact when he disallowed the appellant's application.

21. Citing the case of **Nicholas Kiptoo Salat v. Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR,** counsel submitted that the learned Judge erred in holding that the appellant could not invoke **Article 159(2)(d)** of the Constitution to oust mandatory rules of procedure. He maintained that the learned Judge dwelt on technicalities and ignored the substantive issues before him thus occasioning grave injustice to the appellant and in turn acted against public interest.

22. Mr. Adow faulted the learned Judge for restricting his decision to the prayer of review of the previous orders ignoring the prayer seeking an enlargement of time, as envisaged under **Order 50(6)** of the Civil Procedure Rules, which stood unopposed by the parties. He summed up his submissions by positing that the learned Judge overlooked substantive justice and put premium on technicalities contrary to the clear provisions of the law on which the application was anchored.

23. The appeal was opposed by all the respondents. On behalf of the 1st and 2nd respondents, learned counsel Mr. Muriungi, submitted that the appellant sought to file the supplementary affidavit over a year after leave to file the same had been granted and constituted new facts. He maintained that such delay was unreasonable and no justification for the same was demonstrated; that the appellant simply stated that the primary matter was complex and that such delay was caused by the need for further investigations. Further, counsel submitted that when a party files a case before a court, it is presumed that they have all the material needed to prosecute it hence there is no room for carrying out further investigations once the case is ongoing.

24. Placing reliance on the case of **Astute Africa Investments & Holding v. Spire Bank Kenya Limited & Another (2018) eKLR,** Mr. Muriungi contended that the purpose of the supplementary affidavit ought to have been to respond to issues raised in the replying affidavit and not an avenue to introduce new facts or raise new issues. He submitted that such inclusion of new facts and evidence would greatly prejudice the respondents in the suit.

25. Counsel submitted that the learned Judge properly exercised his discretion to disallow the application and was properly guided in his application of **Article 159(2)(d)** of the Constitution and the decision in **Nicholas Salat***(supra)* cited by the appellant. He maintained that whereas courts are required to do justice without undue regard to technicalities, that is not to say rules of procedure are to be done away with.

26. Counsel maintained that the Court ought also to consider prejudice suffered by another party if procedures were to be ousted; that the learned Judge properly exercised his discretion in finding that the respondents would be prejudiced as they would be denied an opportunity to respond to the new issues and facts that would have been introduced by the supplementary affidavit at the submissions stage.

27. Mr. Muriungi submitted that as was rightly held by the learned Judge the appellant had filed the supplementary affidavit without leave and had not sought an extension of time to file the supplementary affidavit after time lapsed after the initial leave was granted. Further, that the application before the High Court was to review a decision and not to enlarge time as purported by the appellant. On the issue of public interest, he submitted that the appellant could not invoke public interest to trample on the respondents' right to a fair trial.

28. On behalf of the 3rd Respondent, learned counsel Ms. Mogire, associated herself with the submissions of the 1st and 2nd respondents save for adding that there must be strict proof of any allegation of the discovery of a new matter or evidence for one to succeed in an application such as the one that was for consideration before the court. See: **Francis Origo & Another v. Jacob Mungala (2005) 2 K.L.R. 307**

29. Counsel maintained that there was clearly no discovery of new and important matter or evidence that was not within the appellant's knowledge or could not be produced after the exercise of due diligence, to warrant review of the High Court's decision.

30. Citing *inter alia* this Court's decision in the case of **Stephen Gatua Kimani v. Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) eKLR,** Ms. Mogire argued that the appellant did not demonstrate any sufficient reason to warrant a grant of the orders sought. Further, that it was trite that an application for review based on "a sufficient reason" can only be allowed where the reason is analogous or *ejusdem generis* with the other grounds for review. Counsel submitted that the appellant did not meet the threshold for review of the orders made by the court. She submitted that the court correctly apprehended and applied the principles and the holding espoused in the **Nick Salat** case (*supra*).

31. On behalf of the 4th respondent, learned counsel Mr. Odera, equally opposed the application. He also reiterated the 1st and 2nd respondent's submissions save for adding that contrary to the appellant's claims, there was no error on the face of the record as alleged in the application that would serve as ground for review of the High Court's orders.

32. Counsel urged that the application did not disclose any other ground for review of the said orders or directions, and that even in the appeal, the appellant has failed to demonstrate that indeed there was any error on the face of the record that was overlooked by the learned Judge of the High court or any other sufficient reasons for the grant of the orders sought.

33. Citing the case of **Mbogo and Another v Shah [1968] EA 93,** counsel submitted that the question for determination before the Court is whether this Court has been shown sufficient reasons to invite it to interfere with the discretion of learned Judge of the High Court in dismissing the application for review.

Counsel also placed reliance on this Court's decision in **United India Insurance Co. Ltd -Versus- East African Underwrited (Kenya) Limited (1985) eKLR.**

34. In response to the appellant's prayer that the appeal be allowed and an order be made that the matter be heard by a different Judge of the Anti-corruption and Economic crimes division of the High Court, counsel urged that such prayer had no basis whatsoever as there were no allegations of bias or impropriety made against the learned Judge of the High Court and that there was nothing that has been raised which impugn the propriety of the Judge's continued conduct of the matter before the court.

35. Mr. Odera contended that the appellant's allegations that the primary suit was not in the nature of ordinary civil proceedings was unfounded as the appellant's application for review was brought under the provision of **section 81**, **90**, **92** and **100**, of **Part VIII** of the Civil Procedure Act; that section **81(1)** of the said Act expressly provides that proceedings under **Part VIII** shall be civil proceedings.

36. In a nutshell, all the respondents urged the Court to dismiss the appeal as it lacked merit.

37. This being a first appeal, the duty of this Court is circumscribed by **Rule 29 (1**) **a** of the Rules of this Court and rehashed in a plethora of decisions from this Court among them the case of **Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where it was held in part that:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

38. Having considered the record of appeal in entirety, rival submissions and the law particularly as espoused in the cited legal authorities, we discern only one issue for determination as hereunder:

> *i. Whether the learned Judge properly exercised his discretion in dismissing the appellant's application for review thus giving orders as it did.*

39. It is trite that an order to allow or reject a review of a decision is discretionary. In the locus classicus case of **Mbogo and Another v Shah (supra)** at p 95 the predecessor of this Court said:-

> ***"…I think it is well settled that this Court will not interfere with the discretion of a judge with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

And Sir Charles Newbold, P, put it thus:

"… a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice ….

40. Guided by the principles set out in the above case, which this Court has religiously applied over the years, in order to determine whether or not the learned Judge properly exercised his discretion, it is paramount that we interrogate the learned Judge's decision *vis-a-vis* the applicable laws and the circumstances surrounding the case, which inevitably includes the history and conduct of the parties prior to the issuance of the impugned order.

41. We have, in detail above, revisited the history of the matter showing the many times the learned Judge indulged the parties, particularly the appellant, after set timelines for filing documents were not met leading eventually to the filing of the application for Review. We shall revert to this issue later.

42. On the application that was dismissed, what was before the learned Judge was essentially an application seeking to review the High Court's orders declining leave for the filing and serving of the appellant's supplementary affidavit out of time. The applicable law for the review of a High Court decision is **Order 45** of the Civil Procedure Rules. The pertinent provisions state as follows:-

"1. Application for review of decree or order [Order 45, rule 1.] (1) Any person considering himself aggrieved—

a. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

…

3. When court may grant or reject application [Order 45, rule 3.]

1. Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

2. Where the court is of opinion that the application for review should be granted, it shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation." (Emphasis supplied)

43. In his decision, the learned Judge expressed himself as follows:-

"9. The law governing issuance of review orders is order 45 rule 2 (1) (b) of the Civil Procedure Rules. Under this provision, a party can seek review of a decree or order from which an appeal is allowed but from which no appeal has been filed or a decree or order from which no appeal is allowed. It is incumbent upon the applicant to prove that there is discovery of new or important matter or evidence which after due diligence was not within his knowledge or on account of mistake or apparent error on the face of the record or any other sufficient reason".

44. From the above findings, it is clear that the learned Judge was properly guided on the applicable law and the principles involved in determining an application for review such as the one before him. and that the learned Judge considered the application in light of the applicable law and the guiding principles

45. In an application for review, as envisaged under **Order 45** of the Civil Procedure Rules, the grounds which ought to be established are conclusive. An applicant must establish: that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or made; that there has been a mistake or error apparent on the face of the record or: any "other sufficient reason". The ground "other sufficient reason" has been held to be consonant with the first two grounds: See **Kuria v Shah [1990] KLR 316**. Additionally, the applicant must exhibit that he acted expeditiously.

46. We find it necessary to quote the learned Judge's Ruling *in extenso* so that his ultimate decision can be appreciated. At the end of the day, what the appellant seems to be saying is that the learned Judge dismissed its application whimsically, unfairly and without regard to the law. This is what the learned Judge pronounced:-

"10. In the instant case, the only ground cited for delay was the complexity of the matter necessitating further investigations. There is no dispute that leave to file further affidavit was granted way back 27th February 2017. Even after

the replying affidavits were filed on 13th June 2017, the applicant did not do anything one year down the line.

11. When a party files a suit in court the same should be ripe for prosecution and not for further investigation. The applicant has not alleged discovery of any new evidence or material facts after 4th July 2018 when the court refused to enlarge time. There is no apparent mistake or error on the part of the court. These grounds are therefore not available for review to succeed.

12. I am therefore left with the ground of whether there is any other reasonable cause persuasive enough to warrant review of the orders of 4th July 2018 declining filing and service of the further affidavit outside time. Grant of orders to extend time is an issue that falls squarely within the discretion of the court. It is a creature of equity which can be enjoyed only if one seeking to enjoy it acts equitably. Extension of time is not an automatic right to a litigant. It is subject to proof that the applicant acted reasonably in the circumstances in complying with the orders. In the case of Nicholas Kiptoo Salat vs IEBC and 6 Others (2013) eKLR the court of appeal held that courts must never provide comfort and cover to parties to exhibit scant respect for rules and time lines hence, the applicant cannot invoke Article 159 (2) (d) of the Constitution to oust mandatory rules of procedure.

Unfortunately, the applicant went ahead and filed a further affidavit without seeking leave to extend time. I do not find sufficient reason for the delay in filing a further affidavit for more than a year. The applicant has not demonstrated due diligence in doing what they were required to do. I have not been persuaded enough to review my orders of 4th July 2018. Accordingly, application for review dated 19th September 2018 be and is hereby dismissed and the supplementary affidavit filed on 4th July 2018 without leave of the court expunged from the court record."

47. A careful perusal of the appellant's affidavit in support of its application for review as filed before the High Court reveals that the appellant's main grounds for review was that the delay in filing the further affidavit was due to the complexity of the matter necessitating the need for conducting further investigations. The learned Judge found that this excuse could not fall under the category of discovery of new and important material that could not be discovered with due diligence. The learned Judge therefore went on to find that the only ground the appellant was advancing was "***any other sufficient reason***" which the learned Judge addressed in his decision as shown above.

48. As correctly stated by the learned Judge, exercise of discretion lies in equity. Whoever seeks equitable relief must come to equity with clean hands, and must also eschew indolence. As can be seen from the narration of the events leading to the rejection of leave to file a supplementary affidavit, the appellant sought leave to file the supplementary affidavit in the first instance and the same was granted on 27th February, 2017. Any supplementary affidavit was to be filed within 21 days of service affidavits by the respondents. It was not an open-ended leave. The appellant did not file any, nor did it seek extension of time upon expiry of the 21 days. Instead, it made the application over one year later after several mentions which we have enumerated above.

49. Even when directions were given on filing of submissions, the appellant did not indicate that it was yet to file its supplementary affidavit or seek extension of time to file the same. Submissions were later filed and served again after several mentions and the only plausible assumption would be that the appellant had decided to abandon the intention to file any further or supplementary affidavits. In absence of any plausible explanation for the delay, the learned Judge cannot be faulted for not exercising his discretion in favour of the appellant.

50. The appellant further faults the learned Judge's decision on grounds that the learned Judge: failed to appreciate that the appellant's further affidavit disclosed material evidence; failed to appreciate that the nature of the primary matter was one that required extensive and cumbersome investigation and cumbersome gathering of evidence; erred in finding that the supplementary affidavit had been filed without leave of Court; failed to consider the prayer seeking enlargement of time to file the supplementary affidavit and; failed to appreciate that the primary suit involved an issue of public interest.

51. It is not in doubt that the primary matter before the trial court was a complex one but whether or not the matter was complex or not was not a material issue for determination. It is also noteworthy that the evidential facts of the primary matter as averred in the supplementary affidavit were also not issues for determination by the trial court in determining the application before it. It was not upon the court to consider the merits of the contents of the said affidavit but rather the time and circumstances leading to the delay in filing of the said affidavit. We may also add that exercise of favourable discretion is not pegged on the gravity of the matter, or public interest alone and compliance with the law and the attendant rules and regulations cuts across the board and applies equally to all matters before the court.

52. The appellant further argued that the dismissal of the application interfered with its constitutional rights to a fair hearing under the Constitution without any justifiable reasons hence denying it the chance to present its case in a favourable manner. As already pointed out, it is common ground as is evident from the record that the appellant was granted an opportunity to file and serve a further affidavit within 21days upon service of the respondent's responses which it failed to do and did not seek any extension until over one year later. The ground that the dismissal of the application violated the appellant's constitutional rights under **Article 50** of the Constitution does not therefore lie.

53. Lastly, the appellant faulted the Court for elevating procedural technicalities as opposed to substantive justice in violation of **Article 159 (2)(d)** of the Constitution. The courts have stated time and again that the enactment of **Article 159(2)(d)** of the Constitution was not intended to supplant the laid down rules of procedure. Further, **Article 159(2)(d)** of the Constitution was not intended to provide refuge to all cases where there has been blatant or flagrant breach of procedural guidelines set by the Rules.

54. In conclusion, following the guiding principles set out in **Mbogo - V- Shah**,(supra), the appellant has failed to demonstrate that the learned Judge failed to properly exercise his discretion in dismissing the application that was before him in order to warrant this Court's interference. The appellant has not demonstrated that the learned Judge misdirected himself in law, misapprehended any facts or took into account considerations which he ought not to have considered or failed to take into consideration any facts which he should have taken into account, hence arriving at the wrong conclusion.

55. We think we have said enough to demonstrate that this appeal is totally devoid of merit. Consequently, we dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 8th day of May, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

…….

JUDGE OF APPEAL

D. K. MUSINGA

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR