



IN THE COURT OF APPEAL

AT ELDORET

CORAM: (NAMBUYE, JA ( IN CHAMBERS))

CIVIL APPLICATION NO. 82 OF 2018

BETWEEN

RAIPLY WOODS (K) LIMITED.....PLAINTIFF/APPLICANT

AND

ERICK KIRONGET NGEYWO.....1<sup>ST</sup> RESPONDENT

BEATRICE JUMA UTA.....2<sup>ND</sup> RESPONDENT

AUGUSTINE MAKOKHA NAMUCADA.....3<sup>RD</sup> RESPONDENT

COUNCILLOR JUMA.....4<sup>TH</sup> RESPONDENT

ENOCK OLUOCH.....5<sup>TH</sup> RESPONDENT

FRANCIS KAMONDIA.....6<sup>TH</sup> RESPONDENT

PETER WAITHAKA.....7<sup>TH</sup> RESPONDENT

OYULA JOSEPH.....8<sup>TH</sup> RESPONDENT

KIBIEGO SAMMY.....9<sup>TH</sup> RESPONDENT

HOLY REEMED CHURCH (sued through its official

CHARLES M. BARASA).....10<sup>TH</sup> RESPONDENT

SINGH ENGINEERING.....11<sup>TH</sup> RESPONDENT

SPRING OF HOPE CHURCH

(sued through its officials CHARLES, GITONGA, JESTUS OYOMBA

and CHALO LITIEMA).....12<sup>TH</sup> RESPONDENT

RAMJI D. VEKARIA.....13<sup>TH</sup> RESPONDENT

(An Application for leave to file an appeal out of time against the Orders and ruling of the High Court of Kenya at Eldoret (J. Odeny, J.)

Dated 16<sup>th</sup> October, 2017

in

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**RULING**

Before me is a Notice of motion dated 27<sup>th</sup> August, 2018 and filed on 28<sup>th</sup> August, 2018, expressed to be brought under **Rules 4, 39, 42 and 43** of the Court of Appeal Rules (CAR), and all other enabling provisions of the law, substantively seeking leave to file an appeal out of time against the Ruling of **Hon. J. Odeny** delivered on 16<sup>th</sup> October, 2017 in ELC 415 of 2012 and its consequential orders; that the notice attached herein be deemed as duly filed, together with an attendant order for provision for costs. It has been supported by grounds in its body, a supporting affidavit of **Andama Amos** and a further affidavit of **Makau Mutiso** deposed on 1<sup>st</sup> April, 2019 and filed on 2<sup>nd</sup> April, 2019. It has been opposed by replying affidavits deposed by: **James Njuguna** on 15<sup>th</sup> October, 2018 and filed on 17<sup>th</sup> October, 2018 on behalf of the 1<sup>st</sup> -7<sup>th</sup> and 9<sup>th</sup>-12<sup>th</sup> respondents; **Soita N. Sheila**, on 29<sup>th</sup> August, 2018 and filed on 8<sup>th</sup> September, 2018 for the eighth respondent, and lastly **Omollo H. Aseso** on 4<sup>th</sup> October, 2018 and filed on 6<sup>th</sup> October, 2018 for the 13<sup>th</sup> respondent.

The application was canvassed by way of written submissions filed and fully adopted and highlighted by learned counsel, **Mr. Makau Mutiso** for the applicant; **Emmanuel Kipkurui** for the 1<sup>st</sup> -7<sup>th</sup> and 9<sup>th</sup>-12<sup>th</sup> respondents; **Sheila Soita** for the 8<sup>th</sup> respondent and **Andrew O. Okongo** for the 13<sup>th</sup> respondent.

Supporting the application, **Mr. Makau Mutiso** submitted that the applicant who has title to the suit property filed the suit dismissed for want of prosecution on 16<sup>th</sup> October, 2017 against the respondents seeking various reliefs; that the dismissal order robbed the applicant of an opportunity to prosecute its suit on merit; that efforts to have the dismissal order reviewed and set aside through applications dated 19<sup>th</sup> October, 2017; 7<sup>th</sup> December 2017 and 19<sup>th</sup> June, 2018 bore no fruits; that the dismissal of the suit was occasioned by a genuine mistake on the part of the applicant's counsel, which mistake should not be visited on the applicant which is an innocent litigant as it is now trite law that mistakes of counsel should never be visited upon an innocent litigant; that the Court has a wide discretion to extend time within which an appeal may be filed; that the delay involved is not inordinate. Neither has it occasioned any miscarriage of justice or prejudice to the respondents. Sufficient reason and basis have also been demonstrated to warrant the granting of the orders sought.

Relying on **Article 159 (2) (d)** of the Kenya Constitution 2010, counsel submitted that the court should not pay undue regard to procedural technicalities at the expense of substantive justice considering that the issue in controversy herein involves land which is highly emotive. Ends of justice to all parties herein would therefore best be served if the suit were to be revived and heard on its merits. The application is not an abuse of the due process of the Court as erroneously contended by the respondents as all that the applicant is seeking is to exercise its right of access to justice under **Articles 48 & 50** of the Kenya Constitution 2010. The applicant also has no intention of either vexing or causing any hardship, in convenience or injustice to the respondents.

To buttress the above submissions, counsel cited among others on the case of **Nicholas Kiptoo Korir Arap Salat versus Independent Electoral & Boundaries Commission and 7 others [2014] eKLR** for the restatement of the principles that guide the Court in the exercise of its jurisdiction under the **Rule 4** of the CAR procedures; the case of **Belinda Murai & others versus Amos Wainaina [1978] KLR 278** for the propositions that, the door to justice is not closed just because a mistake has been made by a lawyer; and secondly, that the role of the Court is to do all it takes to rectify any mistake (s) that may have arisen in the course of litigation before it if the interests of justice so demand. The case of **Philip Chemwolo & another versus Augustine Kubende [1986] eKLR** for the holding *inter alia* that, the role of the court is to adjudicate over the rights of litigants before it and not for imposing discipline. Secondly, that unless there is evidence of intention to over reach, there is no error or default that cannot be put right by payment of costs. Thirdly, that a party should not suffer penalty of not having his/her case heard on merit just because a mistake has been made either by counsel or by the party himself/herself.

Also cited is the case of **D.T. Dobie and Company (Kenya) Limited versus Joseph Mbaria Muchina & Another [1980] eKLR** for the proposition that, a court of justice should aim at sustaining a suit rather than terminating it by way of summary dismissal; **Richard Nchapi Leiyagu versus Independent Electoral & Boundaries Commission & 2 others [2013] eKLR** for the holding *inter alia* that, the right to a hearing has always been a well-protected right in the constitution as it is the cornerstone of the rule of law.

Learned counsel **Mr. Emmanuel Kipkurui** opposed the application on the grounds that it is an abuse of the process of the court as on 19<sup>th</sup> October, 2017 the applicant timeously filed an application seeking to set aside the order of 16<sup>th</sup> October, 2017 which was also dismissed with costs for want of prosecution. That undeterred, the applicant filed an application dated 19<sup>th</sup> November, 2017, seeking to reinstate the dismissed application of 19<sup>th</sup> October, 2017; which was heard *inter partes* and dismissed for lack of merit, prompting the applicant to file another application dated 27<sup>th</sup> March, 2018 seeking review of the order dismissing the application dated 19<sup>th</sup> November, 2017 and filed on 7<sup>th</sup> December, 2017 which was also canvassed on merit and dismissed on 20<sup>th</sup> June, 2018. Also filed was an application dated 19<sup>th</sup> June, 2018 seeking to arrest the ruling delivered on 20<sup>th</sup> June, 2018 which was also dismissed as it had been overtaken by events.

In light of the totality of the above undisputed facts, counsel submitted that the applicant is undeserving of the exercise of the court's discretion for the grant of the relief sought as it is them who abused the opportunity accorded to them to agitate both the suit and the application to reinstate the suit but failed to do so; that the applicant is therefore guilty of laches and or indolence both of which should not be condoned by this Court; that no direct appellate right lies as of right as at now in favour of the applicant after unsuccessfully pursuing the process for review and setting aside of the orders of 16<sup>th</sup> October, 2017 to its logical conclusion.

Learned counsel **Sheila Soita**, also opposed the application, submitting that there is no right to fall back on the intended direct appellate process upon losing out on the review and setting aside procedures; that there has been inordinate delay in seeking the court's intervention which in counsel's view has not been sufficiently explained to the required threshold. The applicant is therefore undeserving of the exercise of the Court's discretion considering their acknowledgement that they made a mistake by adopting a wrong mode of procedure when seeking

reversal of the intended impugned orders of 16<sup>th</sup> October, 2017 and, that their conduct of unsuccessfully filing numerous applications is a clear demonstration in counsel's view that they were simply bent on abusing the due process of the court.

To buttress the above submissions, counsel cited the case of **County Executive of Kisumu versus County Government of Kisumu & 8 others [2017] eKLR** for the holding *inter alia* that extension of time being a discretionary relief is not a right of a party but a relief accorded only to a deserving party. The case of **Fahim Yasin Twaha versus Timmamy Issa Abdala & 2 others [2015] eKLR** in support of the submission that the applicant's conduct of unsuccessfully filing numerous applications does not amount to a reasonable explanation for the delay. Lastly the case of **Annah Mwihaki Wairimu versus Hannah Wanja Wairuro [2017] eKLR** in support of the submission that the 8<sup>th</sup> respondent will suffer great prejudice if the application were to be granted as it would unnecessarily prolong the litigation he was involuntarily dragged into.

Learned counsel **Mr. Andrew O. Okongo** also opposed the application re-echoing the stand taken by the other opposing learned counsel ahead of him; that the application is an abuse of the due process of the Court as the applicant is guilty of laches and has also come to court with unclean hands occasioned by its own in excusable self-inflicted conduct of electing to unsuccessfully pursue the review and setting aside procedures, and should not therefore be allowed to hide under the veil of mistake of counsel as they were also obligated to ensure that the correct mode of procedure was employed to redress their grievances.

To buttress the above submissions, counsel relied on the case of **Benjoh Amalgamated Limited & another versus Kenya Commercial Bank Limited [2014] eKLR** in support of the submission that the applicant is guilty of laches. The case of **Tana and Athi Rivers Development Authority versus Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** & **Maina Karanja versus Maina Karanja [2014] eKLR** in support of the submission that granting the application under consideration would not in the circumstances of this application promote expeditious, justiciable and holistic disposal of the matter.

My invitation to intervene on behalf of the applicant has been invoked under **Rules 4, 39, 42 and 43** of the CAR as well as any other enabling provision of the law. **Rules 39, 42 and 43** are merely procedural in nature and need no further interrogation. **Article 159 (2) (d)** of the Constitution has been relied upon by counsel for the applicant in his submissions. It provides *inter alia* that Justice shall be administered without undue regard to procedural technicalities. The principles that guide its invocation have been set out in numerous case law. I will highlight a few for purposes of the record. In the case of **Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR**, the Court held *inter alia* that:

***“Rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was not aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action”.***

In **Raila Odinga and 5 others versus IEBC & 3 Others [2013] eKLR**, the Supreme Court stated that:

***“The essence of Article 159 of the Constitution is that, a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case”.***

In **Lemaken Arata versus Harum Meita Lempaka & 2 others eKLR**, it was stated 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”.***

Lastly in **Patricia Cherotich Sawe versus IEBC & 4 others [2015] eKLR**, it was stated that:

***“Article 159 (2) (d) of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it.”***

**Rule 1(2)** of the CAR which enshrines the inherent power of the Court falls under the general prayer of any other enabling provisions of the law. In the case of **Equity Bank Limited versus West Link Mbo Limited [2013] eKLR**, Musinga, JA *inter alia* stated as follows. With regard to inherent powers of the court.

***“Inherent power is the authority possessed by a court implicitly without its being derived from the constitution or statute.....”***

In **Kenya power & Highlighting Company Limited versus Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, the Court had this to say about its inherent jurisdiction:

***The jurisdiction of the court which is comprised within the term inherent” is that which enables it to fulfill itself, properly and effectively, as a court of law. The overriding features of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over the process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process....In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary***

*whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.*

.....

*This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.”*

The Supreme Court of Kenya in the case of **Board of Governors Moi High School Kabarak & another versus Malcolm Bell [2013] eKLR** added the following:

*“inherent powers are endowments to the court such as will enable it to remain standing, as a constitutional authority, and to ensure its internal mechanisms are functional. It includes such powers as enable the court to regulate its internal conduct, to safeguard itself against contemptuous or discipline intrusion from elsewhere, and to ensure that, its mode of challenge or duty is considerate, fair and just.”*

**Rule 4** of the CAR, which is the major Rule for accessing the relief sought provides as follows:

*“4. The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”*

The principles guiding the exercise of jurisdiction under the Rule 4 of the CAR procedures are now well settled. I will highlight a few by way of illustration. In **Edith Gichugu Koine versus Stephen Njagi Thoithi [2014] eKLR, Odek, J.A.** stated that the mandate under Rule 4 is discretionary, unfettered and does not require establishment of “*sufficient reasons*”. Neither is it limited to the period for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public importance.

In **Nyaigwa Farmers’ Co-operative Society Limited versus Ibrahim Nyambare & 3 Others [2016] eKLR, Musinga, J.A.** stated that the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and the degree of prejudice to the respondent if the application is allowed are all relevant factors for consideration. In **Hon. John Njoroge Michuki & Another versus Kentazuga Hardware Limited [1998] eKLR, G.S. Pall JA** (as he then was) added *inter alia* that an applicant has a right to apply for extension of time to file the notice and record of appeal under rule 4 of the CAR; and which order should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond *para adventure*, that the intended appeal is not an arguable.

In **Cargil Kenya Limited Nawal Versus National Agricultural Export Development Board [2015] eKLR, K. M’Inoti J.A** stated that it is a discretion which must be exercised judicially considering that it is wide and unfettered. In **Fakir Mohamed versus Joseph Mugambi & 2 Others CA Nai. 332 of 2004** it was stated that the factors to be considered are not limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the responses of the parties and also whether the matter raises issues of public importance.

There is also **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR** in which **Odek, J.A.** stated that failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by the particular applicant that the intended appeal is arguable. In **Joseph Wanjohi Njau versus Benson Maina Kabau- Civil Application No.97 of 2012**, it was observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; and lastly, in **Richard Nchapi Leiyagu versus IEBC & 2 Others Civil Appeal No.18 of 2013**; it was stated that the right to a hearing is not only constitutionally entrenched but it is also the cornerstone of the rule of law.

The Supreme Court of Kenya (M.K. Ibrahim S.C.J. & S. Wanjala S.C.J) in **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others** (supra) as restated the applicable principles as follows:-

*“(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.*

*(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.*

*(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.*

*(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.*

*(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.*

*(6) Whether the application has been brought without undue delay; and*

*((7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”*

I have considered the record in light of the rival pleadings, submissions, provisions of law under which the applicant seeks the relief sought as well as principles of law that guide the invocation and application of both **Article 159 (2) (d)** of the Kenya Constitution 2010, and the inherent power of the Court as enshrined under **Rule 1(2)** of the CAR. It is not disputed that the intended impugned orders were made on 16<sup>th</sup> October, 2017 which is a period of ten (10) months and twelve days to the date the application under consideration was filed. **Rule 75 (2)** of the CAR obligated the applicant to lodge a notice of appeal within fourteen (14) days of 16<sup>th</sup> October, 2017, which lapsed on 30<sup>th</sup> October, 2017. It provides as follows:-

***“Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.”***

**Rule 77 (1)** on the other hand, obligated the applicant to serve such a notice of appeal onto the opposite parties within seven (7) days of the lodging of such a notice. It provides as follows:

***“An intended appellant shall, before or within seven (7) days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.”***

While the proviso to **Rule 82(1) & (2)** of the CAR obligated the applicant to apply for a certified copy of the proceedings and serve a copy of the letter bespeaking such proceedings onto the opposite parties within thirty (30) days of 16<sup>th</sup> October, 2017. None of the above prerequisites were complied with by the applicant. Instead, the applicant elected to pursue and fully exhausted the unsuccessful review and setting aside procedures. They have cited mistakes of counsel which they plead should not be visited on them, an innocent litigant.

In **Owino Gor versus Marmanet, Forest Co-Operative Credit Society Ltd [1987] eKLR** the Court stated *inter alia* that, mistakes of advocates and clerks where demonstrated to exist may be sufficient basis for the exercise of discretion in favour of a deserving party. In **CFC Stanbic Limited versus John Maina Githaiga & another [2013] eKLR**, the Court declined to visit mistakes of counsel on a litigant who had demonstrated clearly that he had given instructions to his advocate to take a procedural step in the matter. In **Lee G. Muthoga versus Habib Zurich Finance (K) Ltd & another** Civil Application No. NAI 236 of 2009, the Court restated the principle that a litigant should not suffer because of his advocate's oversight. Lastly in **Catherine Njuguini Kanya & 2 others versus Commercial Bank of Africa Ltd Civil Application No. Nai 366 of 2009**, observation was made that: litigants place a lot of trust on the good workmanship of their advocates and in an instance where an advocate is blamed for poor workmanship.

***“the role of a court of law is to balance the interests of the parties before it without visiting the sins of an advocate on an innocent litigant.”***

As to whether the undoubtedly admitted mistake of counsel in unsuccessfully pursuing the review and setting aside procedure will surfeit to warrant the exercise of discretion in favour of the applicant will depend on the determination of the issue as to whether the applicant who undisputably elected, pursued and unsuccessfully exhausted the review and setting aside procedures can in law revert back to pursue the intended direct appellate process arising from the very orders that they unsuccessfully sought to reverse through the review and setting aside procedures.

In Misc. Application No. 66 of 2016 (UR. 52/2016), **The Hon Attorney General, Chief of Defence Forces and Army Commander Kenya Army versus David Wanyonyi** observations were made therein as follows:

***“Order 45 rule 1(1) of the Civil Procedure Rules permits a party to seek review from an order in respect of which no appeal has been preferred.***

***Order 45(2) on the other hand permits a party who is not appealing to seek review of the judgment. The same sub rule does not permit the pendency of two parallel processes namely that of an appeal and for review. The only instance when such a parallel process can be permitted to co-exist is where the pendency of an appeal arising from the same judgment has been initiated by a party other than the party applying for review. It is however silent as to whether a party losing on review can revert back to pursue the abandoned appellate process.”***

Further that:

***“Where an appeal is lodged earlier in time, an aggrieved party has leave to seek review during the pendency of the appeal but once the review application has been fully determined he/she cannot revert back to the appellate process.***

.....

***..... once the review application is determined the position of the parties as regards the original appeal process is altered. ....a party can only appeal against the refusal to review or otherwise.”***

In the case of **African Airlines International Limited versus Eastern & Southern African Trade & Development Bank (PTA Bank) [2003] KLR 140**, following observations were made:

***“The courts’ jurisdiction to hear a review is not taken away if after the review petition an appeal is filed by any other party.***

***An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with”***

From the above observations, it is evident that the right of review is in competition with the right of direct appeal; that the right of review has primacy over the right of appeal where it is pursued earlier in time and it can even be determined notwithstanding the pendency of an appeal filed later in time over the same *substratum*. The converse is however also true that there is no jurisdiction to entertain an application for review during the pendency of an appeal which was filed earlier in time.

See also the case of **Origo & Another versus Mungala [2005] 2KLR 307**, in which the court held *inter alia* that a person who files a Notice of Appeal which is struck out cannot thereafter proceed by way of review.

In **Harris Horn Senior, Harris Horn Junior versus Vijay Morjaria Nyeri Civil Appeal No. 223 of 2007** when confronted with similar arguments, the Court made observation *inter alia* as follows:

***[32] As for the need to do justice to the party before it, we have no doubt that this is the core business of the court. However a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”***

Applying the above threshold to the rival arguments herein, it is my finding that the applicant having elected and exhaustively pursued the review and setting aside procedure cannot in law revert back to pursue the direct appellate process as of right. They have to unwind the review and setting aside process, restore themselves *ante* to the position they were in as at the time the intended impugned orders of 16<sup>th</sup> October, 2017 were made before they can be permitted in law to pursue the intended direct appellate process.

As already highlighted above, the applicant has blamed its advocate for the predicament they now find themselves in and have pleaded that the sins of their advocate in resorting to a wrong process to redress their grievances should not be visited against them. Case law reviewed above on instances where sins of an advocate were excused from being visited upon innocent litigants all related to the failure of the affected advocates to take a procedural step to progress the litigation resulting in the matter either being struck out and or dismissed for want of prosecution. They had nothing to do with mistakes of advocates who unsuccessfully followed one of the legally provided for procedures for redressing a client’s grievance to their logical conclusion and upon hitting a dead end reverted back to an alternative mode of redress earlier abandoned. The applicant’s plea on this ground therefore fails.

As to whether substantive justice enshrined in **Article 159 (2) (d)** of the Constitution can be applied to salvage the applicant’s intended direct appellate process, case law reviewed above inclusive of pronouncements from the Supreme Court of Kenya is explicit that, this provision is not a *panacea* for all procedural lapses. Secondly, that rules of procedure were not made in vain. There is therefore need for them to be adhered to. Having ruled that the applicant upon being aggrieved by the orders of 16<sup>th</sup> October, 2017 had an option either to pursue the now intended direct appellate process or the review and setting aside procedure that was unsuccessfully pursued, there is no jurisdiction for me to grant leave to the applicant to fall back on to the now intended direct appellate process earlier abandoned as of right without first of all parties herein being restored *ante* to the position they were in as at the date of 16<sup>th</sup> October, 2017, when the intended impugned orders were made before embarking on the current intended direct appellate procedure.

Turning to the inherent power of the court also as an alternative fall back on for the relief sought, the case law reviewed above indicates clearly that this is a residual power, sparingly, invoked only in instances where there is no provision of a rule or law to cater for the particular situation sought to be remedied. Herein, we have the order 45 CPR procedures which stipulates clearly that, a party pursuing either of the two above mentioned processes namely review and setting aside on the one hand and direct appellate right processes to their logical conclusion cannot fall back on to the abandoned process unless the process pursued to its logical conclusion is reversed and parties restored *ante* to the position they were in as at the point in time when the intended grievance was occasioned. The applicant’s plea therefore also fails on this ground.

Lastly, on the right of access to justice which undoubtedly is a constitutionally entrenched right, in **Richard Nchapi Leiyagu versus EBC & 2 others** (supra), it was stated that the right to a hearing is not only constitutionally entrenched but also the corner stone of the Rule of law. In **Mbaki & others versus Macharia & Another [2005] 2EA 206** the Court of Appeal stated *inter alia* that:

***“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”***

In **National Enterprises Corporation versus Mukisa Food Ltd CA. Civil Appeal No. 42 of 1997**, it was stated *inter alia* that:

***“Unless and until the Court has pronounced a judgment upon the merits of the case or by consent of the parties, it has power to revoke the expression of its coercive power where that has only been obtained by failure to follow any of the rules of procedure.”***

In the Tanzanian case of **Abbas Sherally and Another versus Abdul Fazaiboy, Civil Application No. 33 of 2003**, the importance of the right to be heard was emphasized as follows:

***“The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.”***

Applying the above threshold to the applicant’s arguments that its right of access to justice supercedes procedural technicalities, it is my

finding that there is nothing in the case law reviewed above to suggest that enjoyment of the right of access to justice has primacy over observance of legally provided for procedural requirements for accessing the said right. In essence, all that I make of the principles of law distilled from the case law reviewed above is that the right of access to justice has to be exercised within the law. Herein, the applicant exercised and fully exhausted that right through the unsuccessful review and setting aside procedures. Refusal to accord them the intended direct appellate right does not in the circumstances amount to a denial of the right of access to justice, but a reminder that that right was fully exhausted through the review and setting aside procedures and unless and until that process is reversed *ante* to the date of 16<sup>th</sup> October, 2017 when the intended impugned orders were made, there is no further right of access to justice capable of being exercised by the applicant as of right with regard of any grievance arising from the intended impugned orders of 16<sup>th</sup> October, 2017.

The upshot of the above assessment and reasoning is that the applicant stands non suited. There is therefore no need for me to interrogate the applicability or otherwise of the **Rule 4** CAR prerequisites to his request for extension of time within which to appeal. The application is therefore dismissed with costs to the respondents.

**Dated and delivered at Eldoret this 17<sup>th</sup> day of October, 2019.**

**R.N. NAMBUYE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**