REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Mwilu, Ag. CJ & Ag. P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

APPLICATION NO. 33 OF 2020

KENYA BUREAU OF STANDARDS..... APPLICANT

–AND–

GEO CHEM MIDDLE EAST .....RESPONDENT

(Being an application for review and stay of the Judgment and Orders of the Supreme Court ***(Mwilu Ag. CJ & Ag. P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ.)*** *delivered at Nairobi on 18th December 2020, in SC Petition No. 47 of 2019.)*

RULING OF THE COURT

A. INTRODUCTION

[1] The application before the Court is dated 23rd December 2020, and lodged on 28th December, 2020. It seeks to review and stay this Court's Judgment and Orders issued on 18th December 2020, in SC Petition No. 47 of 2019. It is brought under Sections 3, and 21 (2) & (4) of the Supreme Court Act and Rules 3 (1) & (5), 28 (5) and 32 of the Supreme Court Rules, 2020.

[2] In the impugned Decision, this Court overturned the Court of Appeal Judgment *(Karanja, Sichale & Mohammed, JJ,A.)* delivered on 22nd November, 2019 in Civil Appeal No 259 of 2018, and affirmed the High Court Judgment (*Ochieng, J.)* delivered on 30th May, 2017 in HCCC Miscellaneous Cause Nos. 455 and 501 of 2016, where in, the trial Court adopted an arbitral award and directed the applicant to pay the sum of USD 15, 401,504.70 and costs of the arbitration.

B. THE APPLICATION

[3] The application is supported by the Supporting and Supplementary Affidavits sworn by *Luise Rasanga* on 23rd December, 2020 and 6th January, 2021 respectively. It is opposed by the Replying and Supplementary Affidavits sworn by *Pradeep Gopal* and *Fredrick Ngatia, S.C*, on 7th and 13th January, 2021 respectively.

C. THE PARTIES' RESPECTIVE CASES

(a) Applicant's Case

[4] In its written submissions dated 6th January 2021, and filed on 8th January 2021, the applicant submits that, this Court has review jurisdiction under Rule 28 (5) of the Supreme Court Rules, 2020, as read together with Article 163 (8) of the Constitution. In support of this position, it relies on the Court's decision in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 others;*** SC Application No. 2 of 2011, [2012] eKLR.

[5] It is the applicant's case that, the scope of this Court's jurisdiction under Rule 28 (5) of the Court's Rules, 2020 is expansive, compared to the preceding position under Rule 20 (4) of the Supreme Court Rules, 2012 (now repealed). It adds that the Court has a wider latitude, outside the confines of the *slip rule* under Section 21 (4) of the Supreme Court Act. The jurisdiction under Rule 28 (5), urges the applicant, is a stand-alone right, subject to its own *sui generis* test, and goes beyond the general rule in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others***; SC Petition No. 6 of 2014, [2017] eKLR. In conclusion on this issue, it is submitted that, the *slip rule* provision under Section 21 (4) of the Supreme Court Act is now independently governed by Rule 28 (6) of the Supreme Court Rules 2020.

[6] Regarding the merits of the application, the applicant restates its grounds in support, and urges that the motion is meritorious and raises exceptional circumstances for review. It faults this Court's finding by urging that, the Court found it lacked jurisdiction to entertain the appeal, but nonetheless granted the Orders sought. It is the applicant's case that this raises a jurisprudential conflict and error, as it is settled law, when a Court finds it lacks jurisdiction, it must down its tools. In support of this argument, it relies on this Court's jurisprudence in ***Republic v. Karisa Chengo & 2 others***; SC Petition No 5 of 2015, [2017] eKLR: ***Benson Ambuli Adega & 2 others v. Kibos Distillers Limited & 5 Others***; SC Petition No. 3 of 2020, [2020] eKLR, and ***Samuel Kamau Macharia [Supra].***

[7] It is the applicant's further case that, the impugned Judgment is predicated on a jurisdictional error apparent on the face of the record. To this end, it urges that this Court mistakenly set aside the Court of Appeal substantive Judgment by applying the wrong considerations. It argues that this Court failed to appreciate the Ruling for leave to appeal, granted in C.A Civil Application No. 132 of 2017, was unchallenged before it, and delivered by a different Appellate Bench. It therefore urges that, the Court pleaded for itself and subsequently determined an appeal not before it. To support this assertion, the applicant relies on the finding in ***Cordisons International (K) Limited v. Chairman National Land Commission & 43 Others***; SC Petition No. 14 of 2019, [2019] eKLR; and ***Mbogo & another v. Shah*** [1968] 1 EA 93.

[8] It similarly faults this Court for assuming supervisory jurisdiction over the Court of Appeal in clear violation of the Constitution. It is submitted that this Court, incorrectly arrogated itself power to determine the legality or otherwise of the leave to appeal to the Court of Appeal. The applicant relies on this Court's Decision ***In the Matter of Re Interim Independent Electoral Commission***; Constitutional Application No. 2 of 2011, [2011] eKLR, to buttress this argument.

[9] The applicant submits that the Court's Judgment is in violation of its rights to fair hearing under Article 50 of the Constitution. It states that the parties in the appeal, were not invited to address the Court on, whether the Appellate Court's Ruling on leave ought to have been set aside, or the applicability of the decisions in ***Nyutu Agrovet Limited v. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)***; Petition 12 of 2016, [2019] eKLR and ***Synergy Industrial Credit Limited v. Cape Holdings Limited***, Petition 2 of 2017; [2019] eKLR. To this end, it submits that the two judicial precedents do not apply retrospectively and cannot overturn a decision delivered before their pronouncement. To support this submission, it relies on this Court's Decision in ***Suleiman Said Shahbal v. Independent Electoral & Boundaries Commission & 3 others***; SC Petition No. 21 of 2014, [2014] eKLR.

[10] The applicant argues that this Court misinterpreted the Appellate Court's determination on the question, whether the Arbitral Tribunal had jurisdiction to entertain the matter, to mean delving into the merits of the award. It adds this is an error apparent on the record, as the Court wrongly equated a legal issue to a factual issue.

[11] On the issue of stay, the applicant invokes this Court's jurisdiction under Section 21 (2) of the Supreme Court Act. It submits that the application is brought in public interest. It is urged that, payment of the decretal amount involve expenditure of public funds, occasioning excessive burden on the taxpayer. It is additionally submitted that the arbitral ward ordered payment of Value Added Tax and interest to the Kenya Revenue Authority. Consequently, the applicant urges, it would be contrary to public interest to permit payment of a sum of USD 2,237,944.803, to a foreign company that is not registered as a tax payer in Kenya. To support this submission, the applicant relies on ***Anami Silverse Lisamula v. Independent Electoral & Boundaries Commission & 2 others***; SC Petition No. 9 of 2014, [2014] eKLR.

(b) Respondent's Case

[12] The respondent filed its submissions dated 13th January, 2021 on even date. It is the respondent's case that this Court's review jurisdiction, can only be exercised within the limits of Section 21 (4) of the Supreme Court Act, which equates to correction of clerical errors or the *slip rule*. The respondent contends that, Rule 28 (5) of the Supreme Court Rules, 2020, is inconsistent with Section 21 (4) of the Supreme Court Act, as it appears to extend this Court's review jurisdiction outside the *slip rule*.

[13] Whereas Article 163 (8) of the Constitution confers upon this Court powers to make rules for the exercise of its jurisdiction, urges the respondent, such rules are subsidiary legislation, and cannot, by dint of Section 31 (b) of the Interpretation and General Provisions Act, be inconsistent to the Parent Act. To support this submission, it reiterates this Court's finding in the ***Fredrick Otieno Outa Case [Supra],*** and ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 others*** [2014] eKLR. The respondent concludes that Rule 28 (5) of the Supreme Court Rules, 2020, must be taken to echo the provisions of Section 21 (4) of the Supreme Court Act, otherwise the Rule would be of doubtful Constitutional validity.

[14] On the merits of the application, the respondent restates its grounds in reply and submits that the application discloses no ground for review. It urges that the applicant's purported review grounds, fall outside the purview of Section 21 (4) of the Supreme Court Act. It adds that the same fails to satisfy the exceptional circumstances set in the ***Fredrick Otieno Outa Case***, and is an invitation to the Court to, without jurisdiction, sit on appeal of its own decision. To support this argument, it relies on this Court's Decision in the ***Fredrick Otieno Outa Case*** *[supra], and* ***Parliamentary Service Commission v. Martin Nyaga Wambora & others;*** SC Application No. 8 of 2017, [2018] eKLR. It is the respondent's further case that, the applicant has, to justify its case.

[15] The respondent submits that, the appellate court's jurisdiction to hear and determine the appeal before it, had properly arisen for determination by the Supreme Court. It is submitted that, any assertion the Court retrospectively applied its decisions in ***Nyutu and Synergy Cases*** is distorted, as the Court clarified that these decisions are the yardstick for granting or refusing leave to appeal in similar matters.

[16] The respondent further submits that a party, cannot by way of submission, purport to change its case. It urges the Court to disregard such allegations, introduced in the applicant's supplementary affidavit and written submissions. To persuade this Court, it relies on the High Court decision in ***Forum for the Restoration of Democracy in Kenya v. Office of the Registrar of Political Parties, Ann Nderitu & another; David Eseli Simiyu & Another (Interested Parties)***; Constitutional Petition No. 197 of 2020, [2020] eKLR.

[17] In conclusion, the respondent asserts that a contest whether a decree issued by the High Court is in accordance with the Arbitral Award, is not an issue ripe for determination by this Court. It urges that the application is founded on falsehoods, is an abuse of the Court process, and is one for dismissal.

D. ISSUES FOR DETERMINATION

[18] On the basis of the pleadings and submissions by the Parties herein, we consider that two issues merit our determination; these are:

(i) *Whether the application meets the threshold for grant of review orders; and*

(ii) *If the answer to (i) above is in the affirmative, what remedies are available.*

E. ANALYSIS

(i) Review

[19] It is the applicant's contention that, the Motion is meritorious and raises exceptional circumstances for review. To support this argument, the applicant faults this Court's Judgment on various grounds that, the Court found it lacked jurisdiction to entertain the appeal, but granted the Orders sought. It also faults the Court's decision, for being predicated on a jurisdictional error apparent on the face of the record, for retrospectively relying on its decision in ***Nyutu and Synergy Cases***, for requiring a bench of the Court of Appeal to overturn orders granted by a different appellate bench, for assuming supervisory jurisdiction over the Court of Appeal, for violating its rights to fair hearing under Article 50 of the Constitution, and for erroneously equating a legal issue on jurisdiction to a factual issue on merits of the arbitral award.

[20] The respondent on the other hand, contends that the application fails to disclose any ground for review. It is the respondent's further submission that, the applicant's grounds for review fall outside the purview of Section 21 (4) of the Supreme Court Act, and were an invitation to the Court, to without jurisdiction sit on appeal of its own decision.

[21] In addition, the respondent agrees with this Court's decision and urges that the Court, had jurisdiction to determine the appeal before it, correctly found that the appeal window to the Court of Appeal, in relation to a contest on an arbitral award is severely restricted, correctly applied its decision in the ***Nyutu and Synergy Cases*** as the yardstick for determining leave to appeal under Section 35 of the Arbitration Act, and correctly declined to delve into the merits of the arbitral award.

[22] The legal position as regards this Court's power to review its own decision was settled in the ***Fredrick Otieno Outa Case***, *[supra]*, wherein this Court found that, as a general rule, the Supreme Court has neither jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in

the manner contemplated by Section 21(4) of the Supreme Court Act. It was however stated that, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice.

[23] Subsequently, the Court set out the exceptional circumstances in which it can vary any of its Judgments, Rulings or Orders, limiting them to instances where;

> ***(i) The Judgment, Ruling, or Order, is obtained, by fraud or deceit;***
>
> ***(ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;***
>
> ***(iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;***
>
> ***(iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision****. [Emphasis added].*

[24] After considering the applicant's submissions, we do not see how the Motion meets the conditions precedent set out in ***Fredrick Otieno Outa*** *[supra]*. The applicant has failed to demonstrate, how, if at all, the Judgment it seeks to review can be impugned on any of the four grounds set out above.

[25] It is clear to us that the application before us is a disguised appeal which seeks to reopen Matters already determined with finality by this Court. In ***Fredrick Otieno Outa*** *[supra],* we emphasized the principle that an application for review, was not intended to give a party an opportunity to appeal, or relitigate its case. Where such a review is sought, an applicant must lay a basis, to the satisfaction of the Court, that the application for review satisfies the set criteria. This position is restated in ***Mohamed Fugicha v. Methodist***

Church in Kenya (through its registered trustees) & 3 others, SC Application No 4 of 2019, [2020] eKLR and ***Parliamentary Service Commission v. Martin Nyaga Wambora & others;*** SC Application No 8 of 2017, [2018] eKLR.

[26] Having found that the application for review is unmeritorious, we have no hesitation in dismissing it. We consequently make the following Orders:

F. ORDERS

(i) The Notice of Motion dated 23rd December, 2020 and filed on 28th December 2020, is hereby dismissed;

(ii) The applicant shall bear the costs of this application.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **17th Day** of **March, 2021.**

.....
P. M. MWILU
Ag. CHIEF JUSTICE & Ag. PRESIDENT OF THE SUPREME COURT

.....
M. K IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

18/3/2021

REGISTRAR

SUPREME COURT OF KENYA