THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: Owiny - Dollo, CJ; Tibatemwa-Ekirikubinza; Tuhaise; Chibita; Mugenyi; JJSC)

CIVIL APPLICATION No. 42 of 2021
[Arising from Civil Appeal No. 06 of 2017 and Civil Application No. 16 of 2019]

HENRY WAMBUGA *(Liquidator of African Textile Mills Limited in Liquidation)* :::APPLICANT

VERSUS

1. **RANCHHODBHAI SHIVABHAI PATEL**
2. **MUKWANO ENTERPRISES LIMITED ::::::::::::::::RESPONDENTS**

10.09.2025
9:26am-

Mr. Tony Arinaitwe for the 2nd Respondent

Mr. Robert Bautu for the Applicant

Ms. Racheal Birungi for the 1st Respondent.

The MD of the 1st Respondent, Mr. Patel present.

Other parties absent.

Birungi: Court Clerk.

Arinaitwe: We are ready to receive the Ruling of court.

Court: Ruling of court delivered in Chambers. Copies availed to the parties.

....
Registrar, Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: OWINY - DOLLO, CJ; TIBATEMWA-EKIRIKUBINZA, TUHAISE; CHIBITA; MUGENYI; JJSC

CIVIL APPLICATION No. 42 OF 2021

[Arising from Supreme Court Civil Appeal No. 6 of 2017 (Mwangusya, Opio-Aweri, Mwondha, Tibatemwa, Mugamba, JJ.SC), & Supreme Court Civil Application No. 16 of 2019 (Mwangusya, Opio-Aweri, Mwondha, Tibatemwa, Mugamba, JJ.SC).]

HENRY WAMBUGA ..... APPLICANT

(Liquidator of African Textile Mills in Liquidation)

VERSUS

1. RANCHHODBHAI SHIVABHAI PATEL LTD}

2. MUKWANO ENTERPRISES LIMITED } :::::::::::::::::::::::::::::::::::: RESPONDENT

RULING OF OWINY - DOLLO, CJ.

Introduction

This Application for review is brought by way of Notice of Motion under Rules 2(2), 35 (1) & (2), 42 (1) & (2) and 43 (1) & (2) of the Judicature (Supreme Court Rules) Direction SI 13-11, and Article 28 of the 1995 Constitution; seeking that this Court:

"*1. Recalls and reviews its judgment dated 6th November 2018 in Civil Appeal No. 6 of 2017, and ruling in Civil Application No. 16 of 2019 as it embodies several findings and holdings by the Court that on the face of the record occasion an injustice to the Applicant and contravene provisions of the Constitution and the law.*

2. Recalls and reviews its decision to remove the Applicant (as liquidator of African Textile Mills Limited in Liquidation) in order to prevent injustice occasioned unto the Applicant.

3. *Reviews the decision in Civil Appeal No. 06 of 2017 and Civil Application No. 16 of 2019 by reason of the errors of law apparent on the face of the record of the judgments.*

4. *Grants costs of and/or incidental to the application."*

Background to the application.

This matter has a long history as is reflected in the Judgment of the Supreme Court under review. I will first summarize what is relevant up to the point of this application. African Textiles Mills Limited (ATM) underwent voluntary liquidation; with the Applicant as its liquidator at the time the cause of action arose. The legality of the actions and/or procedure taken by the Applicant, as the liquidator, in selling ATM's property to the 2nd Respondent Creditor were in question throughout the proceedings in the lower Court and ultimately in this Court in ***Ranchodbhai Shivabhai Patel Ltd & Jayantilal V. Patel vs Henry Wambuga (Liquidator of ATM Ltd) & Mukwano Entreprise Ltd. - Civil Appeal No. 6 of 2017.*** Judgment in the appeal was delivered on 6th November 2018. This Court reviewed that judgment upon the application by the 2nd Respondent vide ***Mukwano Ent Ltd v Ranchodbhai Patel Ltd & Henry Wambuga (Liquidator of ATM Ltd) Civil Application No. 16 of 2019 (No.1).*** Subsequently, and on its own motion, this Court further reviewed that application vide ***Mukwano Ent Ltd v Ranchodbhai Patel Ltd & Henry Wambuga (Liquidator of ATM Ltd) Civil Application No. 16 of 2019 (No.2)***; hence, it maintained its title as Civil Application No. 16 of 2019. This explains the classification here as (No.1) and (No.2). It is the decision of this Court in that latter application (No.2), and the judgment in the appeal that the application arose from, which the Applicant challenges in this application. For its part however, the 2nd Respondent challenges both (No.1) and (No. 2).

I find it prudent to give more detail here on the background to this application, to enable a better appreciation of the issues that arise from the Applicant's grounds for review. Before 1996, the shares of ATM were held in the proportion of 51% by the Government of Uganda, and 49% by the 1st Respondent and its Director Jayantilal V. Patel. Later in 1996, the government

of Uganda transferred its shares in ATM to the 1st Respondent company; thus making it a majority shareholder in the company. In 1998, in order to revamp itself, ATM borrowed UGX Shs. 1,200,000,000/= (Shillings One Billion Two hundred Million only) from Co-operative Bank. Not long thereafter, the Bank went into liquidation with the Bank of Uganda (BoU) taking over its operations, and the loan was recalled; but ATM was unable to pay. In May 2005, by way of special resolution, ATM decided to wind up voluntarily under section 276 (1) of the Companies Act (Cap 110), which has since been repealed, but remains the relevant law applicable in the circumstances of this matter, owing to the presumption against retrospective effect of legislation.

In the resolution, ATM appointed Mr. Clive Mutiso as liquidator. Mr Mutiso was however, vide another special resolution of 22nd July 2005, replaced by the Applicant herein. On 26th July 2005 the Co-operative Bank (in liquidation) discounted the debt owing to it from ATM to UGX Shs. 1,000,000,000/= (Uganda shillings One Billion only) on condition that it was immediately settled; but ATM still failed to raise this money. On 10th April 2006, in typical instance of the proverbial adage of borrowing from Peter to pay Paul, ATM procured a credit facility of US$ 800,000 from Crane Bank Ltd; repayable within 6 months. It was secured by, *inter alia,* personal guarantees of the directors of ATM and the Applicant; and a floating charge over ATM properties, including the suit property, which was the subject of the appeal.

On 18th December, 2006, ATM once again borrowed a further UGX Shs. 1.500.000.000/= (Uganda Shillings One Billion Five Hundred Million only) from Crane Bank Ltd. ATM however failed to pay both loans within the period agreed upon. The Applicant caused the advertisement for sale of the mortgaged suit property on 12th and 13th February 2007; but the sale was halted following a suit filed in the High Court by Crane Bank Ltd. Meetings between the creditor and debtor for payment were fruitless, as ATM and its guarantors still failed to pay. On 3rd August 2007 Court bailiffs, acting on the

instructions of Crane Bank's lawyers, advertised the suit property for sale, stipulating that the property would be sold after 30 days of its publication, unless the debtors or the sureties paid to the mortgagee all monies owed. On 4th September 2007, the Applicant sold the suit property to the 2nd Respondent at US$1,200,000/= (United States Dollars One Million Two Hundred Thousand only) without a special resolution of the members of ATM.

In response thereto, the 1st Respondent and its director filed Civil Suit No. 57 of 2010 in the High Court seeking orders inter alia that the said sale and transfer of the suit land comprised in LRV 786 Folio 12 plot 78-96 Pallisa Road, Mbale, and measuring 9.9 Hectares, with developments thereon, by the 1st Defendant to the 2nd Defendant was '*fraudulent, illegal, irregular, and therefore unlawful*'. They also sought an order for the nullification of the sale; and reversion of the property to ATM. They argued that the Applicant had sold the property without consent of the directors and members of ATM, had received a bribe of US$ 300,000 from the 2nd Respondent, had sold the property below market value, and had inserted a confidentiality clause in the agreement of sale.

Kiryabwiire J., as he then was, found that while there were some procedural irregularities in the sale of the suit property, the alleged fraud had not been proved. The irregularity the learned trial Judge found was the liquidator's treatment of the company by trying to revive it, as if it was in receivership; and yet it was in liquidation. The other irregularity was the failure of the liquidator to hold the annual meeting of creditors in a voluntary liquidation to deal with the company's future. The trial Judge also found that the sale was valid; hence, the 2nd Respondent obtained good title to the suit property. The 1st Respondent and its director further appealed to the Court of Appeal against the Applicant and the 2nd Respondent.

The Court of Appeal held that no fraud, illegality or irregularity on the part of the Applicant had been proved; and that the 1st Respondent and its director

were not entitled to any damages having had their suit dismissed by the trial Judge. They concurred with the trial Judge that there was no need for the Applicant to obtain prior consent before implementing the impugned sale; and found no evidence of fraud or anything indicating that the 1st Respondent was paid the bribe outside the contract of sale. Even then, the Court held that a bribe on its own would not vitiate the contract of sale concluded with a third party. The 1st Respondent and its director further appealed to the Supreme Court vide Civil Appeal No. 6 of 2017. One of the two grounds of the appeal was:

> *"[T]he learned Justices of the Court of Appeal erred in law and fact when they held that the sale of the suit property by the 1st Respondent to the 2nd Respondent was not unlawful and not fraudulent."*

This Court decided in favour of the 1st Respondent, setting aside the concurrent findings of the trial Court, and of the Court of Appeal. In agreement with the lower Courts, the Court found that fraud, as alleged by the Appellants therein had not been proved. The Court however went ahead to raise/and or rephrase another issue, which the Applicant herein challenges; namely:

> *"Whether the sale of the suit property by the 1st Respondent [now Applicant], in exercise of his powers as a liquidator to the 2nd Respondent was lawful and devoid of any other fraudulent conduct."* ***(Emphasis is mine)***

In its judgment, the Court held, *inter alia*, that the Applicant was under duty to obtain the requisite prior consent by way of a special resolution, before executing the sale of the property. His failure to do so meant that he acted unlawfully; which, on the basis of some authorities, was gross negligence and or breach of fiduciary duty amounting to fraud. The Court then issued several orders, as follows:

1. *Since this appeal has partially succeeded, the appellant is entitled to one third of the cost in this Court and the Court of Appeal to be borne by the 1st Respondent. The High Court order on costs remains in force.*
2. *The transfer of the suit property by the 1st Respondent to the 2nd Respondent is hereby nullified and an order hereby issues for cancellation of the 2nd Respondent's name from the certificate of title and restoration of the name of M/s African Textiles Mills Ltd, in Liquidation.*
3. *The High Court order for the 1st Respondent to render an account of the proceeds of the sale is re-affirmed. He should do so by filing it in the High Court and this Court and by providing copies to the appellant's counsel, all within a period not exceeding 30 days from the date of delivery of this judgment.*
4. *The 2nd Respondent shall meet its costs in this Court and the Courts below." (**Emphasis is mine**)*

In 2019, the 2nd Respondent herein filed ***Civil Application No. 16 of 2019 Mukwano Enterprises Ltd v Ranchhobhai Shivabhai Patel Ltd & Henry Wambuga (Liquidator of African Textile Mill Ltd)*** under rule 2 (2) of the Judicature (Supreme Court Rules) Directions S1 13-11 (hereinafter referred to as the Rules of this Court or Supreme Court Rules). The 2nd Respondent moved this Court to, in the interest of justice and to prevent abuse of power, recall its judgment dated 6th November 2018; and review, vary, or amend, the judgment to reflect the intention of the Court. The 2nd Respondent specifically asked the Court to provide in the review that the 2nd Respondent was a *bona fide* purchaser of the suit property, for value, and without any adverse notice from the Applicant herein.

The 2nd Respondent also urged that this Court sets aside its finding in the judgment that the suit property had a value of UGX 22,300,000,000 (Shillings Twenty two Billion Three hundred Million only) as it had no legitimate basis, having been based on an unproven valuation report. It prayed in the

alternative that Court grant orders for a refund to the 2nd Respondent of the monies so paid for the suit property, together with improvements it has made thereon; and also prayed for costs of the application. The 1st Respondent herein opposed this application; and among other things prayed that the 2nd Respondent should not be refunded the money paid because the 2nd Respondent had, upon purchase of the suit property, sold off the plant and machinery of ATM; some of which were brand new. He also contended that if the Court was inclined to order that ATM refunds the US$ 1,200,000, paid as consideration for the suit property, it should be conditioned upon the 2nd Respondent handing back all the machinery found on the suit property as at the time the Applicant took possession thereof as liquidator.

The Court, in its decision titled "*Ruling of the Court*" dismissed the application holding that it did not fall within the parameters of what merits a review, for the reason that the Court would be sitting in appeal over its own judgment, retrying matters already decided upon. The Court however noted that the issue of the status of plant and machinery that were on the suit land when it was sold to the 2nd Respondent had not been clearly captured; and the 1st Respondent had misunderstood the orders of this Court. The Court clarified that the intention of the Court was that the plant and machinery were all part of the suit property affected by the illegality in the transaction of sale. The Court explained that the illegality vitiated the transfer of title with the effect that the sold property remained the property of its owner; and thus, the suit property (land including plant and machinery) could not vest in the owner (ATM) and at the same time in the purchaser, the 2nd Respondent.

Thus, when the Court set aside the sale of the suit property and ordered the return of all the property that constituted part of the suit property, to ATM, this included all the plant and machinery. In order to give effect to the intention of the Court, this Court made the following orders in its ruling dated 23rd December 2020:

"1. The Judgment of this Court in Civil Appeal No. 6 of 2017 is maintained subject to the clarifications.

2. The Applicant immediately returns to M/s African Textile Mills Limited (in liquidation) the plant and machinery that was in the factory as at the time it took over.

3. In the event the return of the plant and machinery as directed in (2) is not immediately practicable, the Applicant shall pay to the 1st Respondent [Rachobhai Shivabhai Patel Ltd] *the equivalent of Uganda Shillings 11,944,127,000/= per Valuation Certificate dated 14th May, 2004, being the replacement value of the plant and machinery.*

4. The Applicant will pay the costs of this Application." ***(My emphasis)***

On its own motion pursuant to rule 35(1) of the Judicature (Supreme Court Rules) Directions, this Court in a ruling dated 9th March 2021 and titled *"Decision of the Court"*, reviewed its ruling of 23rd December 2020, vide *"Civil Application 16 of 2019"*; thus further correcting its *judgment of 6th November 2018.* Although the ruling was stated to be on Courts own motion, it is apparent from the record of appeal that the Applicant had written a letter *'RE1'* dated and delivered to this Court on 23rd December, 2020; requesting Court to move itself to rectify the said order to reflect its intention. The letter read as follows:

"... Going by the order of Court in paragraph 2, we believe the Honorable Court intended to return the property to the Company in liquidation. We also believe that the Court intended that in case it is not possible to return the property, a sum is paid to the Company in liquidation.

The reading of the alternative order in paragraph 3 of the ruling at page 33 however directs the payment should be made to the 1st Respondent who is not African Textile Mills (In Liquidation) of the Liquidator (sic). The said anomaly was brought to the attention of the Learned Registrar of this Honorable Court who advised that the same is brought to your attention.

We therefore pray that the Court moves itself to rectify the minor error in its ruling to provide for the payment to the Company in Liquidation in case the plant and machinery cannot be returned and not the 1st Respondent who for all intents and purposes is not African Textiles Limited (In Liquidation)."
(My emphasis)

This Court varied its orders of 23rd December 2020, thus:

"There was an accidental slip in this order. The Court intended for the recovered properties that had been unlawfully disposed of by Mr. Sylvester Henry Wambuga (the liquidator) to be returned to African Textiles Mills Ltd (in liquidation) on whose behalf the shareholders' derivative suit was brought. Similarly, it was never the intention of the Court to return the same properties recovered herein to the liquidator who perpetrated the fraud herein against African Textile Mills Ltd (in liquidation). This would be a mockery of the justice system.

Accordingly, Order 3 is corrected to read as follows;

"In the event the return of the plant and machinery is not immediately practicable, the Applicant shall pay to African Textile Mills Limited (in liquidation), the equivalent of Uganda shillings 11,944,127,000 per valuation certificate dated 14th May, 2004 being the replacement value of the plant and machinery."

The Court also made further orders under rule 2 (2) of the Judicature (Supreme Court Rules) Directions SI 13-11, thus:

"The Court is permitted under rule 2(2) of the Court's rules to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of court. We therefore, make the following additional orders to give effect to the Court's decision.

5. *The 2nd Respondent, Mr. Sylvester Henry Wambuga, is removed as liquidator of African Textiles Mills Ltd (in liquidation) with immediate effect.* ***(My emphasis)***
6. *We hereby direct that the shareholders take appropriate steps to complete the liquidation process and also recover what has been decreed to African Textile Mills Ltd (in liquidation) in the judgment of this Court."*

The Applicant is aggrieved at the contents of the judgment of 6th December, 2020 and the ruling in Civil Application No. 16 of 2019 (No.2).

Affidavit evidence

Counsel for the Applicant filed an affidavit, which the Applicant deposed in support of this application. The 1st Respondent opposed the application vide an affidavit in reply deponed to by its Managing Director; and raised procedural, as well as substantive, issues. The 2nd Respondent responded vide an affidavit in reply sworn on its behalf by an Advocate who was also its Legal Manager. In essence, he concurred with the Applicant; and added additional grounds for review of the judgment and rulings. The Applicant's rejoinder was specifically in response to the 1st Respondent's affidavit in reply.

Representation

At the hearing of the Application, Counsel Robert Bautu represented the Applicant; Paul Sebunya, the 1st Respondent; and Tony Arinaitwe, the 2nd Respondent. Counsel for the Applicant filed written submissions while Counsel for each Respondent made written submissions in reply. Counsel for the Applicant filed a rejoinder.

Issues

The issues as raised and submitted upon by the parties are:

1. *Whether there is manifest illegality on the face of the record to warrant Court's recall of its judgment in Civil Appeal No. 6 of 2017 and its ruling in Civil Application No. 16 of 2019?*
2. *What other remedies are available to the Applicant?*

Case for the Applicant

Issue 1: ***Whether there is manifest illegality on the face of the record to warrant Court's recall of its judgment in Civil Appeal No. 6 of 2017?***

As regards the challenge of the finding and procedure adopted in arriving at the finding on fraud and removal as a liquidator, Counsel for the Applicant submits that several errors amounting to an illegality occurred as below:

Finding of Fraud

Counsel for the Applicant argues that it was an error of law and fact on the face of the record for the Court to adjudge him fraudulent in Civil Appeal No. 6 of 2017 and the ruling 16 of 2019 (No. 2.) First, Counsel argues that the power of the Supreme Court in a second appeal is only to consider a point of law; and not fact, as they did when they determined that the transaction of sale was tainted with fraud. Second, Counsel submits that when this Court raised the issue of fraud in what was a new and strange sub-issue, he was not granted an opportunity to respond to thereto. This infringed upon his right to a fair hearing under Article 28 of the Constitution.

Removal as a liquidator

According to Counsel for the Applicant, the removal of the Applicant as a liquidator was strange; and a measure generated irregularly by the Court but disguised as a rule 2(2) matter. First, he argues that the Court has no power to remove the Applicant as a liquidator in an appeal because such requires an application or motion envisaged under s. 118(2) of the Insolvency Act 2011. In such an application or motion, cause for removal must be shown, and the application or motion must be served upon the liquidator who must be heard on it; both of which was not done in the Applicant's case. Third, Counsel argued that from a reading of section 2 of the Insolvency Act, 2011, the jurisdiction for this type of application for removal of a liquidator lies with the High Court and not this Court. Fourth, he averred that this power was outside parameters of the rule 35(1) of the Rules of this Court requiring only

clarifications; and this error made the decision in Civil Application No. 16 of 2019 null and void.

Injustice

Counsel submits that the Applicant has suffered an injustice from the above illegal actions flowing from the irreparable negative impact of that finding on the Applicant's character and personality, which had not been in issue in the impugned judgment and ruling. He prayed that the application be allowed.

Case for the 1st Respondent.
Issue 1

Counsel for the 1st Respondent submits that the previous reviews of the impugned judgment were within the law; this application does not fall within the scope of rule 2(2) and 35(1) of the Rules of this Court. Counsel elucidates that the judgment is not null and void to merit review under rule 2(2) and neither does it meet the test of error apparent on the face of the record under rule 35 (1), which error must be patent, manifest and self- evident requiring no elaborate discussion of evidence or argument to establish. In further argument, Counsel reiterates the position in the affidavit in reply as regards the issue of fraud and removal as a liquidator, and argues that the Applicant was granted a fair hearing; and the claims of illegality warranting a recall of the judgment and rulings are unmerited. According to Counsel, the application is a disguised appeal that requires the court to sit in an appeal against itself.

Case for the 2nd Respondent

Counsel for the 2nd Respondent concurs with the Applicant that the application merits recall and review of the judgment and ruling of this Court. He points out in the affidavit sworn on behalf of the 2nd Respondent, that there are credible grounds that show errors and illegality on the face of the record whose correction would also correct the injustice suffered by the 2nd Respondent. Independent of any grounds relied upon by the Applicant, Counsel for the 2nd Respondent also argues that this Court unjustly enriched

ATM (In Liquidation), when it ordered the 2nd Respondent to pay UGX 11,944,127,000 to ATM based on a questionable valuation form; and without ordering a refund of the purchase money of the suit property. Counsel for the 2nd Respondent also argues that the 2nd Respondent was undeservedly condemned of participating in the purchase of the suit property; and yet by his purchase he enabled the redemption of the loan and release of personal guarantees and secured properties by the purchase of the suit property. In the interest of justice, Counsel prays that the application is allowed; so that the Court recalls and reviews its judgment and rulings to rid them of the illegalities in them, and enforce the true intention of the Court.

CONSIDERATION AND DETERMINATION OF THE APPLICATION

Before I delve into the merits of this application, which seeks to have this Court recall and review its own judgment, there is an imperative need to first resolve the preliminary issues raised by the Applicant and the 1st Respondent. Counsel for the Applicant submitted that the affidavit by the 1st Respondent, in reply, should be struck out for being prolix, overly lengthy, argumentative, and containing conjecture and hearsay; in contravention of the provisions of Order 19 rule 3(1) of the Civil Procedure Rules. Specifically, Counsel for the Applicant cited paragraphs 10.0 and 11.0, which have up to 4 layers of subparagraphs; in contravention of Order 19 rule 3(1) of the Civil Procedure Rules. These he argued were prolix and argumentative.

He pointed out that para 10.7 alone is befitting of the title 'submission' moreover on an aspect of a matter not before Court; and assumes knowledge of the thoughts of the Justices of this Court when they made the impugned orders. It is a style that should be discouraged by this Court; and the affidavit should be struck out in keeping with the authority of ***Mabirizi K. Kiwanuka v Attorney General S.C. Misc. Applica. No. 7 of 2018***, where prolixity was defined as the *"unnecessary and superfluous stating of facts and legal arguments in*

pleading or evidence"; and as well, ***Rohini Sidipra v Freny Sidipra & Ors HCSS No. 591 of 1990 [1995] KALR 724.***

For his part, counsel for the 1st Respondent asserted that the affidavit was factual and relevant to the 1st Respondent's defense to the application; and prayed that the preliminary objection should be overruled. He then also raised objections to paragraphs 9, 10, 13, 18, 19, 20, 11,18,19,20,21, 22, 23, 24, 25, 27 and 29 of the affidavit in support of the application as being prolix, argumentative and containing conjecture; and that the affidavit in support of the application should be struck out. Counsel also argued that the omission of the word "limited" from the 1st respondent's name was fatal to the application against the 1st respondent. Meanwhile, counsel for the 1st Respondent challenged the *locus standi* of the Applicant, who is a liquidator no more, to sue in the capacity of a liquidator.

The Applicant made an implicit response to this objection, pointing out in his affidavit in support that the name "Sylvester Henry Wambuga" appearing in the impugned judgment and ruling sought to be reviewed, was at variance with the name "Henry Wambuga" appearing in the special resolution appointing him; which was a '*shocking*' error. He therefore contended that, in reality, he was not removed as liquidator. Counsel for the 1st Respondent also argued that the omission of the word "limited" from the name of the 1st Respondent invalidated the proceedings as against the 1st Respondent; who should then be struck of the proceedings. The 1st Respondent also averred that the application is not tenable in law because it arises distinctively from Civil Appeal No. 6 of 2017 and Civil Application No. 16 of 2019.

I find the contention regarding the difference in name "*Mr. Henry Wambuga*" and "*Mr. Sylvester Henry Wambuga*" baffling because the Applicant has previously filed court documents and given evidence in this matter while alternately using either of the two sets of names. For instance, during trial at the High Court in Civil Suit No. 94 of 2008, the Applicant's document titled

"*1st Defendant's Witness Statement*", deponed by the Applicant himself, bears the name "Sylvester Henry Wambuga' (See pp. 174-181 of the Record of Appeal, Volume 2). Whereas the letter of appointment (as is evidenced by the record of appeal Vol 2 at page 073) is addressed to the Applicant in the name "Mr. Henry Wambuga", the resolution the Applicant attached as an exhibit to his "*1st Defendant's Amended Written Statement of Defence*" (at page 91 of the Record of Appeal Vol 2, and registered at the Uganda Registration Services Bureau) bears the name "Sylvester Henry Wambuga". There was neither any dispute nor denial by the Applicant that the two names "Sylvester Henry Wambuga" and "Henry Wambuga" refer only to himself; hence, logically, I can only construe that both sets of names belong to him. I should also point out that the Applicant could not have suffered any injustice from the variance in the sets of names that are attributed to him. I find no merit in these arguments and the objection would fail.

It is the law that only those with legal capacity can sue or be sued; and that limited liability companies have corporate legal personality. Ordinarily, omitting the word "Ltd" in referring to a limited liability company would change the status of the company. However, within the context of this appeal in issue, I am satisfied that the omission of the word "Ltd" in referring to the 1st Respondent was inadvertent since the ruling from which the review is sought was clearly against the 1st Respondent correctly named with the inclusion of the word "Ltd". All subsequent documents including reply and submissions indicate the 1st Respondent correctly. In the event, the omission was not fatal, as no injustice resulted from it. Hence, this objection must fail.

Both the Applicant and the 1st Respondent challenged each other's affidavits. Affidavits are evidence, which must meet certain standard requirements already laid down in the law and in decided cases. Order 17 r.3 of the Civil Procedure Rules provides thus:

"(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except in interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated-"
(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall unless the court otherwise directs, be paid by the party filing the same."

There is a difference between a defective affidavit, and one that is a nullity. For an affidavit found to be a nullity, the entire deposition is incurable; hence, it is worthless as evidence. An affidavit that is only defective, is curable; as the defective part is severable from the other part that has no defect. Hence, an affidavit that has been cured of the defect therein, through the severance of the defective part, becomes valid; and is therefore admissible in evidence. See: ***Dr. (Rtd) Col Kizza Besigye v T.K Museveni & Anor Election Petition No. 1 of 2001.***

Upon a careful perusal of the affidavit in support of the application, and the one in reply thereto, I find that neither is a nullity. Most of the facts deponed to are within the knowledge of the respective deponents. The facts deponed to in the affidavit of the Director of the 1st Respondent are supported with proof contained in the annexures; even though some, like the facts deponed to in para. 10.4, contain some conjecture. Paragraph 10.4 states thus:

> *"10.4 The intention of the Applicant in writing to court under annexture "RE1" above was in his opinion for court to correct the order in sub-paragraph 10.2.2 above to enable him as a liquidator at the time of African Textile Mill Ltd in liquidation to have control of the stated company's plant and machinery or the value thereof."*

However, the rest of the assertions of facts in the affidavits are valid; and it is the duty of the adversary of either party to controvert them. I do not agree with both counsel that the impugned affidavit in support of application and that of the 1st Respondent in reply are incurably defective; and must therefore

be struck off the Court record. I find no good reason to strike them out in their entirety. This ground of objection must accordingly fail.

I know not, of any law that bars an application for review of a decision of this Court that has affected a person bringing such an application. Whereas both the 1st and 2nd review applications were with regard to the same judgment, with each of the applications in effect altering the judgment in a material particular, there is nonetheless no bar to the review of either ruling, since both rulings ultimately resulted in the altered judgment. However, owing to the imperative need to ensure finality or closure to litigation, there is need to exercise utmost caution in handling the instant applications for review of rulings that resulted from the previous applications, which reviewed the judgment of the Court. This would ensure the avoidance of abuse of the due process through delay tactics, or to pursue an appeal under the guise of an application for review.

The general principle in law is that a party to a suit or an appeal or any person affected by a decision of the Court, has *locus* to file an application for review. Pursuant to this, Rule 35 (1) and (2) of the Rules of this Court provide that *'any interested party'* has locus to file an application for correction of an error. Likewise, rule 2 (2) is equally non-restrictive with regard to who may apply for relief under it. Suffice it to note that an Applicant must have sufficient interest in the matter to qualify to apply. A "party" referred to in both rules means any person who has an interest in the proceedings; hence, it is not limited to persons formally joined as parties to the proceedings. See: the persuasive decision of ***JP Morgan Chase Bank, National Association v Fletcher (2014) 85 NSWLR 644 at [100]-[147], [149] & [162]-[164].***

This rule on *locus standi* is similar to that in the ordinary civil procedure rules applicable in the High Court as can be gathered from section 82 of the Civil Procedure Act Cap 71, and Order 46 Rule 1 of the Civil Procedure Rules S.I 71-1. See; ***Mohamed Alibhai versus W.E Bukenya Mukasa & Anor. Civil Appeal No. 56 of***

1996; and ***Re Nakivubo Chemists (U) Ltd (1979) HCB 12***, where it was noted that the law thus allows *"any person"* affected by the decision of a Court to file for review. In the instant impugned judgment, the Court made orders affecting the Applicant personally and in his capacity as a liquidator; hence it is my finding that he has locus to file an application for review. In fact, he has locus to apply for review to challenge the very fact of his removal as a liquidator. To my mind, the application raises matters that cannot at the outset be dismissed without carefully considering the merits thereof. For instance, it raises issues about the procedure of review on Courts own motion, issues of fair hearing, and the powers of Court to order for removal of a liquidator, the legality of which needs to be considered.

With regard to the contention that the Applicant is guilty of inordinate delay in bringing this application for review, and without any explanation, I should point out that both rules 2 (2) and 35 of the Rules of this Court do not place a limit to the period within which an application for review must be made. Rule 35 expressly provides that the application can be brought "*at any time.*" However, it is already established that a review application must be brought promptly or at least within reasonable time, to avoid prejudice to the other parties or persons. Where an application has not been brought before Court promptly, or within reasonable time, the period taken before filing the application and any prejudice the delay might have caused to the other party by the delay must be given serious consideration. In ***Tibbles v SIG plc (t/a Asphaltic Roofing Supplies) [2012] 4 All ER 259***, where an objection was raised pointing out that there had been a delay in bringing a review application, the Court said:

> *"I emphasise however the word 'prompt' which I have used above. The court would be unlikely to be prepared to assist an Applicant once much time had gone by. With the passing of time is likely to come prejudice for a Respondent who is entitled to go forward in reliance on the order that the*

court has made. Promptness in application is inherent in many of the rules of court: for instance in applying for an appeal, or in seeking relief against sanctions (see CPR 3.9(1)(b)). Indeed, the checklist within CPR 3.9(1) must be of general relevance, mutatis mutandis, as factors going to the exercise of any discretion to vary or revoke an order."

The 1st Respondent relied on ***David Muhenda v Humphrey Mirembe - S.C. Civ. Applica. No. 5 of 2012***, where the Court found that bringing a review application after 12 years was an inordinate delay. In ***John Sanyu Katuramu & 47 Others v A.G - SC Constitutional Application No. 1 of 2016***, with respect to a review application brought after eight years from the date of the judgment of the Court that openned the door for review of cases in that category, the Court noted thus:

"It must be noted that this court handed down its decision in the Kigula case on 21st January, 2008. The instant application to correct the error in the above judgment was filed on 22nd March, 2016. It is not denied that this application was indeed filed 20 years and two months from the date of the decision. It is clear from the record that controversy surrounding the impugned order arose within one year from the decision of the court. One would wonder why it took the Applicants over eight years to file their application under slip rule."

In upholding the objection, this Court observed as follows:

"We think that the reasons the Applicant is advancing to justify his delay are not convincing, considering the long period of his inaction, and so there was inordinate delay in bringing this application in court ... ...

The court will refuse to entertain delayed application brought under rules 2 (2) and 35 of the rules of this court unless sufficient reasons are shown to justify the delay. We agree with the learned counsel for the Respondent that the phrase "at any time" appearing in rules of this court should not be

interpreted to mean that inordinately delayed applications without justification will be permitted by this court.

... ...

In conclusion, we find that the Applicants have failed to give sufficient reasons to justify the filing of the application after eight years and two month for the delay. We accordingly find the conduct of the Applicant latter and dilatory and should suffer the same fate as Muhenda in the Muhenda application."

Regarding the instant matter before this Court, in light of the fact that the impugned ruling was delivered on 9th March 2021, and the application for review was filed on 30th September 2021, which is a period of only six months, I find that the lapse of time in bringing the application did not amount to an inordinate delay. In addition, the objector herein does not claim to have suffered any prejudice or injustice that would tilt the Court's views against hearing the review application on its merits. This ground of objection, too, must fail.

Issue 1. Whether there is manifest illegality on the face of the record to warrant Court's recall of its judgment in Civil Appeal No. 6 of 2017.

The application brought under Rule 2(2) and 35 (1) of the Rules of this Court, seeks the determination of whether, or not, judgment of this Court in Civil Appeal No. 6 of 2017 and Civil Application No. 16 of 2019 should be recalled and reviewed of the on the sole ground that there is a *manifest illegality* on the face of the record thereof. The Applicant contends that the manifest illegality referred to concerns the findings of fraud, and procedure that led thereto, and removal of the Applicant as a liquidator. Under the claim of illegality, the Applicant employs the term '*error apparent on the face of the record'* as well. For the 2nd Respondent, it even goes further to assert that the Court wrongly relied on a valuation report that resulted in its finding that the

2nd Respondent was not a *bonafide* purchaser of the suit assets for value without notice of any adverse claim.

The 1st Respondent disagrees with this assertion. The question that arises, therefore, is whether if there is indeed manifest illegality in the procedure and conclusions arrived at by this Court on this issue, then it is a good ground for review. The application raises issues that tend toward the thin line that demarcates the limits of review. There seems to be a wide area of discretion that can be best described as "*you will know it when you see it*" kind of precedent, especially in the cases that are not clear-cut. While not professing to have the answer to all cases in advance, it is pertinent to clearly delineate, as far as possible the cases that are amenable to review. In ***Sempra Metals Ltd v IRC [2007] 4 ALLER 657***, Lord Nicholls noted thus:

> *"My Lords, legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again. The unsound rule returning once more for consideration by your Lordships' House concerns the [limits of review in the Supreme Court]."*

The Applicant grounded the application not only under both rules 35 and 2 (2) of the Rules of this Court, but also under Article 28 of the Constitution. Several decided cases show that applicants for review proceeded under both rules, especially when citing 'errors of law', in the decision or order under review; perhaps in the hopes that at least either of them would be found to have merit. In that regard, I find it necessary to first examine the scope of review provided for both under r. 35 and rule 2 (2) of the Rules of this Court, before applying it to the case at hand.

At the very outset, I should point out that it is vital to re-state that review is an exception to the rule against re-opening of a case after delivery of judgment therein. Once a competent Court makes an order determining and disposing of a case, then unless it is set aside or reversed on appeal, the

judgment and order of the Court on any issue of fact or law in that matter is conclusive evidence of the finality of the case as between the parties and anyone acting on their behalf. It is also notice to the world of the existence of that judgment and order, and legal consequences ensuing there from. the judgment and order gives finality to the case; and it is beyond recall by that Court. See: ***Bailey v Marinoff (1971) 125 CLR 529 at 530).***

It is trite that in such a circumstance, no one can apply for the reversal of the judgment and orders. See also: ***Halsbury's Laws of England/Civil Procedure: Volume 11 (2020) paras 1 to 496 - Finality of Judgments and of Litigation/; Volume 12 (2020), paras 497 to 1206 (1) - Finality of Judgments and Orders/; Volume 12A (2020), paras 1207 to 1740)/25. (i) Civil Judgments and Orders/A. Conclusiveness and Finality/1557.*** In our jurisdiction, this principle was applied by this Court in ***Orient Bank Ltd v Fredrick Zaabwe & Mars Trading Ltd - Supreme Court Civil Appl. No. 17 of 2007.*** It is a principle in the administration of justice that there must be an end to litigation; and it must be concluded with finality. Article 132 (4) of the Constitution grants the Supreme Court powers to act in disregard of the doctrine of precedent, *stare decisis and functus officio rule*; and thus depart from its own previous decision. However, this power to depart from its own earlier decision does not extend to the power to overturn its own decision in the same matter.

There are however exceptions to this conclusive finality in the determination, in view of the provisions of rules 2(2) and 35 (1) of the Rules of this Court; both of which have been invoked by the Applicant. I must stress here that review under rules 2(2) and 35 are distinct; though rule 2(2) may have an overlap due to its breadth. Second, the resultant error from the decision or order must be specified in the grounds of the application for clarity, to enable the Court effectively deal with the merits of the case, and expeditiously handle the application. In the ***Orient Bank Ltd v Fredrick Zaabwe*** case (supra), the Court stressed this point, thus:

"In ground 1, the Applicant asserts that the "Court made an accidental slip ... that the facts of the case were not contentious"; but does not indicate any error resulting from the alleged slip. Ground 2 lists thirteen erroneous findings of fact that the court made "through accidental slips or omissions" without alluding to, let alone identifying, any of the alleged slips or omissions."

Third, an Applicant needs to be clearly specific whether it is rule 35 or rule 2 (2) of the Rules of this Court that is being invoked regarding a specific ground. Fourth, the error and or the resultant injustice should be the basis of the ground in the application; which would then determine the prayer sought for each ground. Fifth, the review applications have to be made as exceptions under these two rules only; and not under any other law as has been done. To do otherwise would take us out of the realm of review; and instead into an appeal. Indeed, in ***Orient Bank Ltd v Fredrick Zaabwe*** (supra), the Court noted thus:

"It is not clear why the application is stated to be brought under, not only those two rules, but also under the provisions of the Constitution and the Judicature Act cited in the amended notice of motion. From both the said motion and the written submissions, it appears that learned counsel for the Applicant, wittingly or unwittingly, seeks to go beyond the confines of the two rules. We allude to this because notwithstanding the assurances in the Applicant's written submissions that "the Court is not being invited to sit on an appeal against itself"; there are aspects of the application that can hardly be described in any other way. Apart from three out of fifteen grounds on which the application is made, the rest of the grounds listed in the motion are assertions that the Court made erroneous findings of fact or law allegedly because its attention was not drawn to one thing or another."

On the strength of this authority, I examine the types of review under the law. Rule 35 (1) of the Rules of this Court provides:

"***35. Correction of errors***

*(1) A clerical or arithmetical mistake in any judgment of the court, or any error, arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was given." **(Emphasis is added)***

The review under this rule, also sometimes referred to as the slip rule, is codified in Uganda; and it is relatively clear, and has been the subject of wide consideration under the Common law as well. Uganda derived the rule from the Indian Code of Civil Procedure that codified that portion of English law. In ***Vallabhdas Karsandas Raniga v Mansukhlal Jivraj and Others [1965] 1 EA 700 (CAN),*** Spry J.A. found that provision of the law to be equivalent to s. 99 of the Civil Procedure Act, which provides that:

"*Clerical or mathematical mistakes in judgments, decrees or orders, or errors arising in them from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties.*"

He then explained its origin, as well as the relevance of English precedent on the matter, thus:"*S. 99 was derived from the Indian Code of Civil Procedure, 1908, which itself derives from the English rule, and all these provisions are substantially similar. The English cases, although not binding on us, have therefore a high persuasive value.*"

In ***Zaituna Kawuma v George Mwa Lurum Civil Application No. 3/92,*** Manyindo DCJ & Seaton JSC explained:

"These powers are not unique in our Court. In England similar powers exist under O. 20 r 11 of the Rules of the Supreme Court ("the English RSC") and in the inherent jurisdiction of the Court. In Kenya they resided in the former

Court of Appeal by virtue of S.3 (2) of the Appellate Jurisdiction Act, 1962 and r. 13 (2) of the East African Court of Appeal Rules, 1954. Such a rule as R.35 (1) of our RSC and O.20 R 11 of the English RSC is commonly referred to as the "slip rule" and an order made under it is called a "Slip Order."

The relevance of the slip rule in English law has also been elucidated in ***Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia, The Montan [1985] 1 ALL ER 520 pp. 526-527*** where Lord Goff LJ stated thus:

"The slip rule, in the form in which we know it, now embodied in Ord 20, r 11, came from the old Chancery General Orders. It was first introduced, with a number of other orders, on 3 April 1828 (numbered Ord 45): under the Consolidated General Orders of 1859 it became Ord 23, r 21. It provided as follows:

> *'Clerical mistakes in decrees or orders, or errors arising from any accidental slip or omission, may at any time before inrolment be corrected upon motion or petition, without the form and expense of a rehearing.'*

... ...

So there was, in the Court of Chancery, the most ample procedure for correcting errors in judgments and orders. It is understandable that, in that court, concerned as it was with property matters which can generate orders of considerable complexity, there should have developed a more complex procedure for correcting errors in orders than in the courts of common law. But, in the courts of common law, there has existed a power, exercised for hundreds of years before the passing of the Supreme Court of Judicature Acts of 1873 and 1875, under which the court could rectify an order, even when passed and entered, so as to make it carry out the intention and express the meaning of the court at the time when the order was made, provided that the amendment could be made without injustice or on terms which precluded injustice (see: Lawrie v Lees (1881) 7 App Cas 19 at 34-35

per Lord Penzance and Re Swire 30 Ch D 239 at 247 per Bowen LJ). Following the Judicature Acts, the jurisdiction in the Court of Chancery to rehear ceased to exist, being absorbed in the appellate jurisdiction of the Court of Appeal (see Re St Nazaire Co), and enrolment had become obsolete. The slip rule in Consolidated General Ord 23, r 21 was not included among the new Rules of the Supreme Court enacted under the Supreme Court of Judicature Act 1875, Sch 1; but a slip rule in almost exactly its present form, based very closely on the old Ord 23, r 21, was added as Ord 41A in December 1879 (see [1880] WN (Pt II) 16). (It was later to become Ord 28, r 11, and is now Ord 20, r 11.)"

This rule is specific, and where review is to amend a decree or judgment, a Court handling review on the basis of accidental errors or mistakes should first apply rule 35 before resorting to rule 2 (2). In ***Vallabhdas Karsandas*** case (supra) Spry JA stated:

"It appears to us that s. 3(2) of the Appellate Jurisdiction act, (No. 38 of 1962) confers on this court the same jurisdiction to amend judgments, decrees and orders that the High Court has under s. 99 of the Civil Procedure Act, making it unnecessary to look to the inherent powers of the court. This jurisdiction is recognized in r. 13(2) of the East African Court of Appeal Rules, 1954. ***(Emphasis added)***

Review under r. 35 of the Rules of this Court saves parties from the laborious process of going through a rehearing to correct certain errors.

It is apparent that there are two categories of cases that fall under r. 35 (1) known as the slip rule; namely, clerical or arithmetical mistakes, and errors resulting from accidental slips or accidental omissions. These were clearly delineated in ***Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia, The Montan [1985] 1 ALL ER 520***; where the Court was dealing with a rule similar to rule 35, and stated as follows:

"Much of the argument turned on whether Mr. Clark could himself have corrected his error in the exercise of the powers conferred on him by s 17 of the 1950 Act, the slip rule. ...Its predecessor, s 7(c) of the Arbitration Act 1889, was considered by a Divisional Court in Sutherland & Co v Hannevig Bros Ltd [1921] 1 KB 336, [1920] All ER Rep 670. Rowlatt J pointed out that it covers two quite distinct situations, namely (a) a clerical error (a slip of the pen or something of that kind) and (b) an error arising from an accidental slip or omission."

Under the first category, Courts in common law jurisdictions have the power to rectify mistakes in arithmetical computation that are obvious. This includes, *inter alia*, clerical errors of spellings, proper names, addresses, and other inclusion in Court orders and judgments; in what has come to be referred to as a slip of the pen. I should point out that this is not the case in this application.

The second category concerns wrong or inadvertent insertion in the judgment; or an accidental omission of an important matter from the judgment. In the ***Montan*** case (supra), the Court presented a clear distinction between the two categories of errors. Rodger Ormrod LJ noted therein that:

"The error which is at the root of the trouble arose during the preparation of the award and consisted in the arbitrator, in a momentary lapse, confusing, and thereby transposing in his mind, the identity of the parties which led him in his calculations to credit (or debit) the wrong party with an important item. This is not the type of mistake or error which one normally associates with the slip rule. Reading it and s 17 (which is in almost identical terms) one tends to run together 'clerical mistake' and 'error due to an accidental slip or omission'. But it is common ground that s 17 must be considered disjunctively, so that it is directed at two quite different situations, clerical mistake on the one hand and accidental error on the other. No question of clerical mistake arises in this case, but there

has undoubtedly been an error which, in my judgment, was due to an 'accidental slip' within the section, the accident being the mental lapse which caused the arbitrator to transpose in his mind the parties which led him to refer to the one when he plainly intended to refer to the other. My conclusion therefore is that this case falls within s 17 and it was open to the arbitrator to amend his award to bring it into line with his findings of fact."

The Courts have not found it easy to come up with a test for the determination of when an error is amenable to review. In ***Sutherland & Co v Hannevig Bros Ltd [1921] 1 KB 336, [1920] All ER Rep 670*** and also in ***[1921] 1 KB 336 at 341, [1920] All ER Rep 670 at 672)***, Rowlatt J said:

'Here we get upon ground which is almost metaphysical. An accidental slip occurs when something is wrongly put in by accident, and an accidental omission occurs when something is left out by accident. What is an accident in this connection, an accident affecting the expression of a man's thought? It is a very difficult thing to define, but I am of the opinion that this was not an accident within the meaning of the clause. I cannot pretend to give a formula which will cover every case, but in this case there was nothing omitted by accident: the arbitrator wrote down exactly what he intended to write down, though it is doubtful what that really meant when considered from a legal point of view ... I do not think that inadvertence is the right word. A man may inadvertently put down a word which if he had thought more about the matter he would have put down differently, but that means that he has merely gone wrong.' (***Emphasis is mine***)

Goff LJ also commented on the difficulty but did not go as far as defining what an accidental error or omission is; opting for the view that it is usually self-evident when encountered. He said:

"The crucial question, under this part of the slip rule, is whether the error does indeed arise from an accidental slip or omission. Rowlatt J once

observed, in ***Sutherland & Co v Hannevig Bros Ltd [1921] 1 KB 336 at 341, [1920] All ER Rep 670 at 672****: 'Here we get upon ground which is almost metaphysical.' That case itself and* ***Oxley v Link [1914] 2 KB 734*** *provide examples of the limits within which the courts have confined the concept of accident in this context. Plainly, as Sir John Donaldson MR observed in* ***R v Cripps, ex p Muldoon [1984] 2 All ER 705 at 710, [1984] 1 QB 686 at 695****, the power under the slip rule cannot be exercised to enable a tribunal 'to reconsider a final and regular decision once it has been perfected'. I do not think that it would be right for me to attempt in this judgment to define what is meant by 'accidental slip or omission': the animal is, I suspect, usually recognisable when it appears on the scene."*

The problem usually arises when distinguishing between having second thoughts or intentions and correcting an award or judgment to give true meaning and effect to the first thoughts or intentions. It is however settled that a mistaken or erroneous appreciation of evidence, or of the law, differs from an accidental slip or omission. In this regard, Rowlatt J expressed himself thus:

"The High Court slip rule (RSC Ord 20, r 11), which is similarly worded, was considered only recently by this court in ***R v Cripps, ex p Muldoon [1984] 2 All ER 705, [1984] QB 686****. We there pointed out the width of the power, but also drew attention to the fact that it does not enable the court to have second thoughts (see* ***[1984] 2 All ER 705 at 711-712, [1984] QB 686 at 697****). It is the distinction between having second thoughts or intentions and correcting an award of judgment to give true effect to first thoughts or intentions, which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility. If he assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected either under s 17 or under Ord 20, r 11. It cannot normally even be corrected under s 22. The remedy is to appeal, if a right*

of appeal exists. The skilled arbitrator or judge may be tempted to describe this as an accidental slip, but this is a natural form of self-exculpation. It is not an accidental slip. It is an intended decision which the arbitrator or judge later accepts as having been erroneous.

In ***H v W [2019] EWHC 1897 (Fam)***, when considering section 57 which was textually similar to rule 35 of the Rules of this Court, the Court noted thus:

"63. *The husband was correct in submitting that section 57 does not allow an arbitrator to give effect to second thoughts (See also* ***Ases Havacilik v Delkor [2012] EWHC 3518 (Comm)*** *referred to in* ***DB v DLJ [2016] EWHC 324)****. Section 57 does not allow an arbitrator to improve or revisit his decision or correct a mistaken assessment of the facts or the law. The husband was also correct in submitting that if an arbitrator 'assesses the evidence wrongly or misappreciates the law' this error does not come within section 57 (as per* ***The Montan and R v Cripps ex p Muldoon****).*

64. *Whether an error comes within section 57 is an objective matter, it is not simply a matter of the arbitrators discretion under what is often termed the slip rule. ...*

65. *There may be sometimes a fine distinction between an accidental slip or omission (correctable under s.57) and an error or gap in the reasoning or a mistaken assessment of the facts (outside section 57). The arbitrator's powers under section 57 should not be construed broadly for this purpose ... Section 57 is not intended to allow parties "another bite of the cherry" and it should not be construed broadly so as to permit costly and time consuming - attempts to re-open the arguments or the evidence. Section 57 does not allow for the introduction of fresh evidence for the purposes of identifying or correcting errors.*

... ...

71. ... *However, attempts by parties or a tribunal to perfect or improve an award (except for narrow powers under section 57) are not allowed under the 1996 Act where finality is valued more than meticulous accuracy."*

With regard to the second category of review under rule 35 (1) of the Rules of this Court, it is important for this Court to establish the existence of an error; and if so, whether the error falls within the category of what is contemplated under rule 35. The issue, then, is whether what is sought to be reviewed is an error in the appreciation of the evidence adduced, or of the law, or an error due to an accidental slip or omission. In the ***Mutual Shipping*** case (supra), this came out clearly, when the Court made this observation:

"Into which category does Mr Clark's action fall? ... Section 17 is directed to clerical mistakes in the award, which this was not, and to errors in the award, which this was. It is then necessary to consider carefully why the award was erroneous. Was it due to a mistaken appreciation of the evidence or of the law? Or was it due to an accidental slip or omission? Section 17 of the 1950 Act applies to the latter, but not to the former. Mr Clark correctly recorded the competing views of the expert witnesses, but accidentally and erroneously attributed the views of the owners' expert to that of the charterers' expert and vice versa. As an exercise in judgment, he accepted the evidence of the charterers' expert and he does not have any second thoughts about having done so. Having accepted that evidence, he sought to give effect to his acceptance in his award. That he did not succeed was due solely to the accidental attribution of the evidence to the wrong parties in his reasons - which he used as a tool in constructing his award. This seems to me to be a classic case of 'error [in an award] arising from ... accidental slip [in the recording of material contained in the reasons]'. I therefore think that Mr Clark could have himself corrected the error by issuing an amendment to his award."

The rule extends to matters which were overlooked; such as specifying a date for compliance with an order ***(Re Walsh (1983) 83 ATC 4147)***, or adding an amount for interest to the judgment ***(L Shaddock and Associates Pty Ltd v Parramatta City Council (No 2) (1982) 151 CLR 590)***, or where the judge has misunderstood the evidence ***(Hall v Harris (1900) 25 VLR 455 at 457)***; or counsel's submissions: ***Yore Contractors Pty Ltd v Holcon Pty Ltd (unrep, 17/7/89, NSWSC)***. The rule further extends to a correction made in order to carry into effect the actual intention of the judge and, or, to ensure that the order does not have a consequence which the judge intended to avoid adjudicating upon (see: ***Newmont Yandal Operations Pty Ltd v The J Aron Corp & The Goldman Sachs Group, Inc (2007) 70 NSWLR 411***, at paras ***[114], [116], [185], [194]***.

In ***Fang Min v Dr. Kaijuka Mutabaazi Emmanuel - Civil Application 6 of 2009***, which was an application under rules 2(2), 35 & 42 of the Rules of this Court, the Applicant urged this Court to recall its judgment for rectification under the slip rule; *"so as to remove the order for payment of the market value of the suit house in lieu of specific performance."* In allowing the application, this Court held that:

> *"Both counsel agreed that the prayers of the Respondent, who was the appellant in that appeal, did not include payment of the market value of the suit house if the specific performance cannot be performed. For clarity, we reproduce here below the Respondent's prayers: "It is proposed to ask the court to allow the appeal, set aside the judgment and orders of the Court of Appeal and reinstate the judgment and orders of the High Court with costs to the appellant." Clearly, payment of the market value of the suit house if the specific performance cannot be performed was not included in the Respondent's prayers. The inclusion of the order of payment of the market value of the suit house if the specific performance cannot be performed was therefore a slip.*

The fact that the Respondent did not include that relief in his prayer was overlooked. Had that fact been brought to the attention of the court, without doubt, the order for payment of the market value of the suit house if the specific performance cannot be performed, would not have been made. To give effect to the intention of the court is to remove the alternative order "for payment, by way of damages, of the market value of the suit house if the specific performance cannot be performed." The order should stop at restoring the judgment and orders of the High Court."

The Applicant broadly raises *"manifest illegality"* as a ground for review. I find that this does not fall under the 1st or 2nd category.

However, it is apparent from the affidavit and submissions made that the specific grounds upon which the application for review are founded, are the allegations of a violation of the right to a *fair hearing* and the *finding on fraud.* Thus, I have to first to determine whether these allegations merit recall and review of the judgment under this rule.

Fraud, removal as a liquidator, valuation, fair hearing

This Court is in the instant application, as has already been noted, dealing with errors falling in the second category. The grounds of the application relating to the finding of fraud, removal of a liquidator, and lack of a fair hearing, cannot fall under error of inadvertent slip provided for in rule 35; because these decisions arose from the Court's appreciation of the evidence and law on the matter. There was nothing accidental about them as that was what the Court intended. The contention of the 2nd Respondent regarding Court's wrongful reliance on the valuation report in attaching a value to the machinery that were on the suit property at the time of sale, would suffer the same fate. I also note that the determination of this contention would require the production of fresh evidence to this Court to determine the correct valuation; which would amount to a re-evaluation of the decision of this Court, that of the Court of Appeal, and of the trial Court.

This Court has no power to overturn that decision, since it was the final decision of the Court; on which both parties were heard. Ordinarily, the remedy therefor would have been an appeal. However, that option is unavailable to the Applicant and 2nd Respondent; since this is the last appellate Court, from which no appeal lies. The fact is that this Court did not consider the issue of refund at all during the judgment in the appeal; which is what might be termed as an accidental omission. The issue was also raised in Civil Application No 16 of 2019 (No. 1); and I therefore proceed to consider it here below.

Refund

This matter having arisen in the response made by the 2nd Respondent, I find that it was properly before this Court for consideration. The 2nd Respondent contends that it was entitled to the refund of the monies it had paid for purchase of the machinery, if it was to be returned to the ATM (in liquidation). The 1st Respondent countered this with the contention, *inter alia*, that these prayers had already been considered but were rejected in Civil Application No. 16 of 2019 (No. 1). The question then, is whether the Court accidentally left out that crucial aspect; wherefore, dealing with it here would not amount to a rehearing of the appeal or a reconsideration of the evidence afresh. The error in the circumstance would be the Court omitting to determine that issue when it ordered for a return of the machines to ATM (In Liquidation). The other argument is that the 2nd Respondent was not heard over it during the hearing of the appeal; which is a matter I will deal with in the course of considering the category of review falling under rule 2 (2).

The determination of such an issue should not amount to a reconsideration of the appeal, but instead deal with a matter that the Court accidentally overlooked. In ***Tibbles v SIG plc (t/a Asphaltic Roofing Supplies) - [2012] 4 All ER 259***, in respect of a rule granting the Court the wide discretion to vary or revoke an order, Rix LJ noted:

"[41] Thus it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the first time." ***(Emphasis is mine)***

I have no doubt that the failure to order for the return of the machines was due to it having been overlooked in the judgment when their sale was set aside. This was corrected in the 1st review application; but unfortunately, the consequential order for refund of the purchase price following the order for return of the machines, was overlooked. Its consideration is vital; more so, because that issue was not part of the submissions made during the hearing of the appeal in this Court, upon which the 2nd Respondent was heard. In this regard, this would not be a reconsideration of the evidence before the Court.

In Civil Application No. 16 of 2019 (No.1) filed by the 2nd Respondent, this Court considered the issue of refund following the affidavit evidence adduced in support of the application. I reproduce part of the ruling here in *extenso*:

"We however note that the issue of the status of the plant and machinery was not clearly captured in the orders of the Court. The uncertainty is clearly brought to light in the 1st Respondent's affidavit in reply in which he avers as follows: We will state them for easier reference.

"13. In further reply to the contents of paragraph 8 of the affidavit in support of this Application I contend that upon taking possession of the

suit property, the Applicant sold off all machinery belonging to M/s African Textiles Mills Ltd in liquidation some of which were brand new.

*16. In further reply to the contents of paragraph 8 of the affidavit in support of this application I contend that if this Honourable Court is inclined to order M/s African Textile Ltd in liquidation to refund the US $ 1,200,000 purchase consideration to the Applicant, the stated refund should be conditioned on the Applicant handing over the suit property to M/s African Textile Mills in Liquidation together with all the machinery the Applicant found on the suit property as at the time when the Applicant took possession of the same." (**Emphasis mine**)."*

The Court then continued:

"The 1st Respondent's averments are to the effect that the Applicant sold off the plant and machinery as soon as it took possession of the suit property. The 1st Respondent is under the impression that the decision of the Court in SCCA No. 6 of 2017, was not a natural consequence of the nullification of the transaction of the sale of the suit property and prays that if the court is inclined to order for a refund of the purchase price to the Applicant, it should be conditioned on the handing over of the suit property to ATM (in Liquidation) together with all the machinery the Applicant found on the suit property when it took over.

That is not a correct representation of the intention of the court in SCCA No. 6 of 2017. On 6th November, 2018, when this Court allowed the appeal, set aside the concurrent findings of the Court of Appeal and the High Court and made its own orders, the intention of Court was to set aside the illegal sale of the suit property and return all the property to the 1st Respondent and the Company.

Order 2 of this Court's Orders reads as follows:

*"2. <u>The transfer of the suit property</u> by the 1st Respondent to the 2nd Respondent is hereby nullified and order hereby issues for cancellation of the 2nd Respondent's name from the certificate of title and restoration of the name of M/s African Textile Mills Limited, in Liquidation." (**Emphasis Mine**)*

It is implied in the aforesaid order that all the property that was subject of the nullified sale would be returned to their original owner ATM (In liquidation). This is in line with clause 5(c) of the 1st Respondent and another's amended plaint that read as follows:

'5(c):

"Recovery of the suit land comprised in LRV 786 Folio 12 plot 78-9, the factory machinery, the buildings and other developments thereon (herein after collectively referred to as "the suit property")

The suit property has always consisted of the land, buildings and machinery.

....

The import of this decision is that all the property that is subject to the illegal sale remains the property of the initial owner and upon the decision of this court all the property that the Applicant had obtained pursuant to the illegal sale was to be returned to its original owner.

This however, has not been the case.

In order to give effect to the Court's intention as of 6th November 2018, when the judgment of this Court in SCCA No. 6 of 2017 was delivered, we would make the following orders:"

The Court then went ahead to issue the order already stated within the background of the judgment that the machines be returned to the '1st Respondent', which was later rectified to refer to ATM (in liquidation) for clarity. The question then is whether when a contract is nullified or fails, a

refund can be ordered; and whether ordering for such a refund in a review application be a rehearing of the appeal.

In ***Zaituna Kawuma v George Mwa Lurum - Supreme Court Civil Application No. 3/92*** the Applicant sought this Court's order correcting its own judgment in a previous appeal; where the Court had held that the contract of sale and purchase of the suit property was null and *void ab initio* owing to lack of consent, fraud and a total failure of consideration. The Applicant contended that following the finding of total failure of consideration, the Court ought to have ordered for the refund of the purchase price, under r. 35(1). The Respondent contended that this was not a proper circumstance for the application of r. 35, which is limited to correcting arithmetical or clerical slips. The Court, Manyindo DCJ & Seaton JSC, held thus:

> *"As for the instant case, we have no doubt that had the matter of refund of the purchase price been raised in the hearing of the appeal and submissions made before us by learned counsel, we would have considered and dealt with the matter in our judgment. The Court ought to have also considered whether the 2nd Respondent was entitled to the purchase price paid for the suit property as that had everything to do with return of previously purchased suit property."*

On the authority of this decision immediately above, it is clear that failure to consider the issue of refund in a judgment can be out of an accidental omission. The question, thus, is whether the 2nd Respondent herein was entitled to refund of the purchase price of the machinery. The 2nd Respondent asserts that it is only just that it is refunded the funds it paid for the machinery; since the machinery had been included in the amount to be repaid to ATM (in liquidation). The 1st Respondent opposed this on the ground that the 2nd Respondent had been in occupation of the suit property and made profits there from for 13 years; hence, it did not deserve any refund of the purchase price, which by the time of the judgment it had recovered anyway.

A similar argument was made in the ***Zaituna Kawuma v George Mwa Lurum*** case (supra); where Manyindo DCJ & Seaton JSC held as follows:

> *"Learned Counsel for the plaintiff/Respondent does not deny that this Court may, in an appropriate case exercise its powers to a 'slip order'. His contention, if we understand it correctly, is that the instant case is not a fitting occasion for the exercise of that power. He points out that in allowing the appeal, this Court implicitly, if not expressly, held that the contract of sale was null and void because of fraud, duress and coercion on the part of the defendant/Applicant. The Courts, Learned Counsel submits, will never assist persons who come before it with unclean hands. The parties who initiated and executed such a transaction should be driven away empty-handed from the seat of justice. In support of his submission, learned counsel cited several authorities.*
>
> *We have no doubt of the validity of such a proposition in certain circumstances. When, for example, the plaintiff seeks the court's aid to recover a debt incurred in gambling or to recover rent due from a tenant to whom premises have been let for use as a brothel, or where the contract was prohibited and made a crime (as was the case in* ***Broadways C. vs Kasule and others [1972] EA 76.*** *It must be borne in mind, however, that in all such circumstances the court will look at the conduct of both parties. If it would offend public policy to ask the plaintiff/respondent to refund the money paid by a fraudulent buyer, what would be the effect on public's perception of justice if it winks at the retention by a seller of money for which no consideration was given."*

The Court went ahead to order for a refund. Thus, there is an exception to the rule that in a transaction founded on a crime no refund can be made of the funds that were paid out. In ***Beresford v Royal Insurance Co. Ltd [1938] ALL ER 586*** the insurance contract contained a clause that the assured person would be paid the amount assured if the assured person committed suicide after

one year from the commencement of the policy; while sane. The assured person committed suicide; and the House of Lords had to consider whether that provision in the contract could be enforced when the true construction therefor would, it was alleged, be illegal or contrary to public policy. The House of Lord upheld the Court of Appeal decision against recovery. Lord Atkin said (at 599):

> *"I think that the principle is that a man is not to be allowed to have recourse to a Court of Justice to claim a benefit from his crime whether under a contract or a gift ... to hold otherwise would in some cases offer an inducement to crime or remove a restraint to crime".*

This Court distinguished that case in ***Zaituna Kawuma*** (supra) on the ground that in that case there was a criminal act of the assured. The Court said:

> *"In the instant case, counsel for the plaintiff/Respondent did not go so far as to submit that fraud and duress or coercion were crimes. The defendant/Applicant's acts were, however, described as "unlawful" and the present application called "an abuse of the process of court".*
> *If the no-refund of the purchase price were simply to have the effect of a sanction or punishment, and thus serve as a deterrent to future leaders in Uganda from misusing their powers or offices, then the learned counsel for the Respondent's submission would have a certain validity. But such non refund would (also) have the effect of handing to the Respondent, an unearned profit, a bonus.*
>
> *On the ground, the application could not, in our view succeed. On the main ground on which counsel argued this application, however, we are of the view that there is merit."*

The Court further stated that:

"We agree with Counsel for the defendant/Applicant that it follows logically from our finding (implied if not expressed) that the contract was null and void, that an order should be made for repayment of the purchase price. The plaintiff/Respondent cannot have his house back and his name registered as the proprietor and at the same time retain and enjoy the purchase price paid by the defendant/Applicant."

Basing on this ruling in ***Zaituna*** (supra), I am satisfied that had the matter of refund of purchase price been brought to the attention of the Court at the hearing of the appeal, this Court would have made an order for refund in its judgment. It was consequential from the decision on the main issues. In his submission against refund, counsel for the 1st Respondent contended that the 2nd Respondent had already been in possession for years and had made profits from the suit property; thus disentitling it from recovering the purchase price. I find this argument to be without any legal basis. If the 1st Respondent wanted an account of profits made, he would have prayed for mesne profits in his pleadings. Instead, the prayers in the plaint were for:

"(a) A declaration that the sale and transfer of the suit land and developments thereon comprised in LRV 786 Folio 12 plot 78-96 Pallisa Road, Mbale, Mbale measuring up to 9.19 Hectares by the 1st defendant to the 2nd defendant, illegal, irregular and therefore unlawful.

(b) An order that the sale of the suit property comprised in LRV 786 Folio 12 plot 78-96 Pallisa Road Mbale be nullified and the property revert to M/S African Textiles Mill Ltd.

(c) Recovery of the suit land comprised in LRV 786 Folio 12 plot 78-96, the factory machinery, the buildings and other developments thereon (herein after collectively referred to as the "suit property.

(d) General damages.

(e) A permanent injunction severally and jointly against the defendants their agents servants and/or workmen from interfering with the suit property or taking possession of the suit property.

(f) An order for temporary injunction jointly and severally against the defendants, their servants agents and/or workmen from interfering with the suit property or taking possession of the suit property.

(g) An order directing the 1st defendant to render an account of the proceeds of the sale.

(h) Costs of the suit.

(i) Any other relief that this Honourable deems fit and just."

Where no prayer has been made for mesne profits, and no submission was made upon it by the 2nd Respondent during the trial or in the appeal, this Court cannot of its own volition do so; especially where it could occasion substantial injustice. Further, the basis of refund is not the profits made from the use of the property; but rather the failed contract of sale, which entitles the 2nd Respondent to his purchase price. This denies the ATM the double benefit of recovering the suit property, and as well retaining the funds it received as purchase price therefor. The 2nd Respondent is thus entitled to the grant of the order for the refund of the purchase price of the suit property to it by ATM (In liquidation).

Review under Rule 2 (2)

Review under rule 2 (2), which the Applicant has invoked alongside rule 35 (1), covers several instances where rule 35 (1) is inapplicable; for it is not only concerned with clerical and arithmetical errors or accidental acts and omissions. In ***Livingstone Sewanyana v Martin Aliker - S.C Civil Appl. No 4 of 1991 [1992] KALR 118***, this Court observed as follows:

> *"But rule 35 will not exhaust the inherent jurisdiction of the Supreme Court, otherwise Rule 1(3)* [now Rule 2 (2)] *would not have been necessary. The*

latter rule is there to provide for the many types of cases when the inherent jurisdiction will be necessary for the ends of justice".

See also: ***Isaya Kalya & 2 Ors v Moses Macekenyu - S.C Civil Appl. No. 28 /2015, Nsereko Joseph Kisukye v Bank of Uganda - Civil Appeal No.1 of 2002***, and ***Orient Bank Ltd v Fredrick Zaabwe & Anor*** (supra). Distinguishing between correction of errors under the slip rule and the one based on inherent jurisdiction, Lord Goff LJ had this to say in ***The Montan*** case (supra):

"... Now, it is to be observed that these two jurisdictions, though they may overlap, are not the same. The jurisdiction under the slip rule is concerned with (1) clerical mistakes in judgments or orders, and (2) errors arising in judgments or orders from any accidental slip or omission; whereas the inherent jurisdiction is concerned with ensuring that the judgment or order does give effect to the intention of the court at the time when it was made, whether the failure of the judgment or order to do so is the result of a clerical mistake in it, or of an error arising from an accidental slip or omission, or otherwise. No doubt, the inherent jurisdiction will not be invoked except in cases which do not fall within the slip rule."

The Court has the wider power to recall judgments and amend orders to carry out its intention, and to promote fairness by redressing injustices.

Power to correct injustice and/or carry out the intention of the Court

This power has been explained in ***Halsbury's Laws of England, Civil Procedure (Volume 11 (2020), paras 1-496*** at para 23, thus:

"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 vexation or oppression, to do justice between the parties and to secure a fair trial between them".

See also: ***Halsbury's Laws of England, Volume 12 (2020), paras 497-1206; & Volume 12A (2020), paras 1207-1740); Jacobs, 'The Inherent Jurisdiction of the Court' (1970) 23 Current Legal Problems at p.51; & Golden Forest Holdings Limited v Bank of Nova Scotia (1990) CanLii 2489 (NS CA) per Hallet J.***

On Courts and tribunals, ***Halsbury's Laws of England (Volume 24A (2019)*** provides at paragraph 63, that:

"Under its inherent jurisdiction, the Supreme Court has the power to correct any injustice caused by its own earlier order."

See also: ***Cassel & Co Ltd v Broome (No. 2) [1972] 2 ALL ER 849***; and ***R v Bow Street Metropolitan Stipendry Magistrate and Ors, exparte Pinochet Ugarte (No.2) [1999] 1 ALL ER 577.*** In the latter case, Lord Browne - Wilkinson had this to say:

"CONCLUSIONS

(1)Jurisdiction

As I have said, the Respondents to the petition did not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment, that concession was rightly made both in principle and on authority. In principle, it must be that your Lordships, as the ultimate court of appeal, have the power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered." ***(Emphasis added)***

This power has its origin under the Common law though it has been codified in several countries, including in our jurisdiction in the Rules of this Court under rule 2 (2). Lord Goff in ***The Montan*** case (supra) had this to say:

"Since 1879 it has been recognised that there existed in the High Court two parallel jurisdictions: first, the jurisdiction to correct errors in judgments or orders under the slip rule; and second, the inherent jurisdiction of the court, which always existed in the courts of common law before the Judicature Acts, and has since been recognised as always having existed in the Court of Chancery (see Lawrie v Lees 7 App Cas 19 at 34-35 per Lord Penzance and Re Swire 30 Ch D 239 at 246 per Lindley LJ), to rectify an order so as to make it carry out the intention and express the meaning of the court when the order was made (see Ainsworth v Wilding [1896] 1 Ch 673 at 677 per Romer J). It is probable that the inherent jurisdiction to rectify survived the Judicature Acts by virtue of the note to Sch 1 to the 1875 Act, setting out the new Rules of the Supreme Court, that, where no other provision was made by the Act or the new rules, the present procedure and practice remained in force."

In Uganda, Rule 2(2) of the Supreme Court Rules expressly provides for the inherent power of the Court to make orders in the pursuit of justice in the following terms:

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

See: the cases of ***Somani v Shirinkhanu (No. 2) [1971] E.A 79;*** and ***Independent Medico Legal Unito v A.G of the Republic of Kenya - Appl. No. 2 of 2012 (Com App. 1 of 2110 Appellate Division).***

Inherent in the wording of rule 2 (2) is the great breadth of the power granted to this Court; arising from the fact that there are no predetermined scenarios or classes of cases that fall within its ambit. However, the operation of the rule, just like the exercise of any other discretionary power, is not without limits. See: ***AIR Commentaries on the Code of Civil Procedure by Chitaley & Rao (4th Ed.) Vol. 3***, at 3227, where the authors point out that:

> *"A point which may be a good ground of appeal may not be a good ground for review. Thus, an erroneous view of evidence or law is no ground for a review though it may be a good ground for an appeal."*

In the Australian case of ***Autodesk Inc v. Dyason (No. 2) [1993] HCA 6; (1993) 176 CLR 300***, it was noted:

> *"(iii) It must be emphasized, however, that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their skills."*

In ***Elizabeth Nalumansi Wamala v Jolly Kasande & 2 Ors Civil Application No. 29 of 2017***, it was held that:

> *"This Court may nevertheless under its unlimited inherent powers review its final order in order to achieve the ends of justice and logic. We should however, caution that this court being the final court in the country, where the rule of finality should strictly be observed, the exercise of our inherent powers should be invoked in the rarest of the rare circumstances."*

As noted in ***Hoystead v Commissioner of Taxation [LR1926 AC155*** at p.165:

"[T]he parties are not permitted to begin fresh litigation because of new views they may entertain of the law on the case or new versions which they present as to what should be a proper apprehension by the Court of the legal result. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted." See also: ***Somani's v Shirinkhanu (No 2) [1971] 1 EA 79 (CAM) Law Ag V-P; Independent Media Legal Unito v Attorney General of the Republic of Kenya Application No. 2 of 2012.***

The Applicant lists specific errors he claims are on record, which are not expressly provided in rule 2 (2); but have occasioned injustice to him. In ***Isaya Kalya*** (supra) at p. 21, this Court noted:

"Where *a party believes that the court made an error of fact or law in its judgment, that party will only succeed in moving the court to correct that error if the error falls under the three instances indicated in rule 2 (2) of the rules of this court.*"

I should however point out that the grounds mentioned in rule 2 (2) are inclusive of other grounds not expressly listed therein. An application for review will be allowed under rule 2 (2), on the ground of error occasioning an injustice, if such error fall under the classes mentioned in the rule. They are to be determined on a case, by case, basis.

In order to further appreciate the specific provision of rule 2 (2), I find it necessary to have recourse to the rules of statutory interpretation; more specifically with regard to the *ejusdem generis* rule, which is a Latin phrase meaning "of the same kind". Under this rule, general words or phrases follow a number of specific words or phrases; where the general words are construed as limited, and apply only, to persons or things of the same kind or class as those specifically mentioned before. Hence, the grounds in an application under rule 2 (2) have to be in the same category with the other grounds stated in the rule. The rule is used only to help determine whether there is intent;

and if so, then ensure that the application of the *ejusdem generis* rule does not subvert that intent.

Rule 2 (2) lists the grounds for review as: first, achieving the ends of justice, second, preventing abuse of court process generally, third, specific intervention to prevent abuse of court process caused by delay, and fourth, setting aside judgments found to be null and void. The ends of justice sought in the first ground can be extrapolated to a wide and seemingly unfettered application; but, nonetheless, the more specific instances that follow it show that the grounds should be analogous and restricted to the category of those enumerated instances.

The third and fourth grounds, which follow, have nothing to do with an error on the merits; but instead point to some external factor that may affect the validity of a judgment or justice in a case, such as delay, a judgment that is null and void, or results from of an abuse of court process. This external element can be procedural; such as violating procedural rules of fair hearing, or one substantively affecting the whole proceeding by its mere existence such as newly discovered evidence or fraud that unravels the basis of the whole judgment and the orders ensuing there from. This differentiates it from an application under r. 35, which pertains to errors within the judgment only.

Instances of review

It is clear that review of judgments or orders have been carried out under rule 2 (2) in a number of clear-cut cases, and for several reasons. Such reasons include where there is need to achieve the ends of justice and logic (See ***Elizabeth Nalumansi Wamala v Jolly Kasande*** (supra), where a judgment or order is obtained by fraud (See ***Orient Bank*** (supra) and ***Livingstone Sewanyana*** (supra), where there is discovery of new and important matter or evidence (See ***Arbam Tuleshwar v Arban Piyshek Sharma (1979)4 SC 389,*** and ***Indian SC, Independent Medical***

Legal Unit v A.G of the Rep. of Kenya (supra), where the judgment is null and void for contravening the law, where there is an unenforceable judgment and or order (See ***Isaya Kalya*** (supra), and where the purpose is to give clarification on orders previously issued, so as to align them with the intention of the Court ***(NPART v General Parts (U) Ltd. - Misc. Appl. No. 8 of 2000,*** and ***Nsereko & Ors v BoU - Civil S.C Application No. 1 of 2002).***

It is noteworthy that there is a similar trend in other jurisdictions with regard to the grounds of review applicable under the inherent jurisdiction of the Court and rules of the Supreme Court. For instance, Rule 28 of the Supreme Court Rules of Kenya provides that:

"The Court may review any of its decisions in any circumstance which the Court considers meritorious, exceptional, and in the public interest, either on the Court's own motion, or upon application by a party."

Some of these grounds include situations where the judgment, ruling, or order: (i) was obtained through fraud, deceit or misrepresentation of facts, (ii) is a nullity by virtue of having been made by an incompetent Court, (iii) resulted from the Court being misled into giving it or under the belief that the parties had consented, or (iv) was rendered on the basis of a repealed law, or as a result of a deliberate concealment of a statutory provision. In Nigeria, it further includes, where the judgment, ruling or order was obtained through a procedure, which has the effect of depriving it of the character of a legitimate adjudication. See: S. 21A of the Supreme Court Act of Kenya as amended by Act 26 of 2022. See also: The Supreme Court decision of Nigeria in ***Stanbic IBTC Plc v L.G.C Ltd (2020) 2 NWLR (Pt. 1707); & Bar Orker Jev & Others v Iyortom & Others [2015] NWLR (Pt. 1483) 484.***

I need to reiterate here that a decision will not be varied or rescinded merely because it is later found to be wrong (See. ***R v Bow Street Metropolitan Stipendry Magistrate and Ors, exparte Pinochet Ugarte (No.2)*** (supra)). Accordingly, I find that

the alleged injustice purportedly occasioned by the criticisms of the judgment by the legal fraternity, which the Applicant argued and deponed in his affidavit, is not a valid ground for recall and review of the judgment; because the injustice, if any, does not fall under rule 2 (2) of the Rules of this Court, which I have already examined above.

I should also add that it is now settled that the type of error provided for review under rule 35 (1) of the Rules of this Court, should strictly be one that is "*apparent on the face of the record*"; meaning it applies where the requirement for additional evidence is excluded. There are certain types of errors that are not apparent on the face of the record, but are subject to review. This is covered under rule 2 (2). Instances of such error, as has been pointed out above, include Court's reliance on a repealed law or having been misled by a deliberate concealment of a statutory provision. These are not apparent on the face of the record; thus it requires evidence of such repeal or misleading of Court to be adduced or presented before Court.

Review on account of fundamental errors

Counsel for the Applicant argued that there was an error apparent on the face of the record when the Court denied the Applicant due process in the appeal before making its judgment and orders; and, as well, in the Civil Application No. 16 of 2019 (No. 2) which was on Court's own motion. The 2nd Respondent agreed with the Applicant; but the 1st Respondent maintained that there was a fair hearing, hence no injustice has been occasioned to the Applicant. The question is therefore whether there was an error of failure of due process apparent on the face of the record; and if that error would be sufficient ground for review under rule 2 (2).

I hold the view that the use of the term *'error apparent on the face of the record'* as the definitive test to determine whether an error in a judgment or ruling merits recall and review of such decision, is misleading and therefore

wrong. It appears to me that there is a variation in the jurisprudence on the meaning of the term '*an error apparent on the face of the record*'. In our jurisdiction, the test is in essence similar to that laid down in some Indian Court decisions, which are based on 'Common law' or 'English' authorities we have previously applied. Even if there are tests postulated in several decisions, I note that there is still no uniform criterion upon which review under rule 2 (2) can be based. In those decisions, the "error apparent" must first be self-evident and not one that has to be detected by a process of reasoning, as no error can be said to be apparent where one has to consider beyond the record to see the correctness of the judgment.

Second, the error must be self-evident, such that it strikes anyone on mere looking at the record. It should not require any long-drawn process of reasoning on points raised; and there should conceivably be no two opinions. In short, the error must 'stare one in the face'. See ***Isaya Kalya & 2 ors v Macekenyu - S.C. Civ Appln. No. 28 of 2015*** where this Court noted at p. 21:

> *"Where a party believes that the Court made an error of fact or law in its judgment, that party will only succeed in moving the court to correct that error if the error falls under the three instances indicated in rule 2 (2) of the rules of this court. And as rightly stated in* ***Haridas v. Suit. Usha Rani Banik & Others*** *(supra) the error should be apparent on the face of the record where, without argument, one sees the error 'staring one in the face."*

See also: ***Smti Meera Bhanja v. Smti Nirmala Kumari (Choudry) - 1995 SC 455, Nyamogo & Nyamogo v Kago [2001] 1 EA 173.***

Third, the "*error apparent on the face of the record* has been differentiated from a mere erroneous decision, in an attempt to give mo clarity to the test for review under rule 2 (2). In ***Nyamogo & Nyamogo v Kago [2001] 1 EA 173***, the Court noted:

"An error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be determined judiciously on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two or more opinions, can hardly be said to be an error apparent on the face of the record. Again, if the view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be a ground of appeal." ***(Emphasis is mine)***

Fourth, the authorities above all show that an error apparent on the face of the record is always determined on the facts of each case.

However, this proposition of the law on error apparent on the face of the record (EFR) has been criticized, rightly in my opinion, by H.M. Seervai in ***"Certiorari & Error Apparent on the face of the Record in India Law" The International and Comparative Law Quarterly, Vol. 13, No. 4 (Oct., 1964), pp. 1491-1500 (10 pages).*** He explains that that criteria of EFR is a term borrowed from English Law on certiorari, whose meaning has been distorted in its application to review. He explains as follows:

"JUDGMENTS of the Supreme Court of India show the strange phenomenon of a doctrine purporting to be based on the English law of certiorari, which nevertheless departs widely from it. In this article it will be respectfully submitted that this departure is undersigned and proceeds from a misconception of the English authorities and from failure to ascertain the real difference between supervisory and appellate jurisdiction."

H.M. Seervai retraced the origin of '*error apparent on the face of the record*' to the jurisdiction the Queen's Bench possessed through certiorari, which was supervisory and not appellate or by way of rehearing. He notes that in ***Overseers of the Poor of Walsall v London & North - Western Railway Co. [1874-80] ALL E.R. Rep.*** *Ext. 1602*, the Court explained how the Kings Bench or Queen's Bench used to correct or quash erroneous orders of the court of quarter sessions in review thus:

> *"The court of quarter sessions was in the first instance the court of appeal before which objections to rates of this kind were to be brought. When the court of quarter sessions had determined a rate that determination was, as a general rule, final upon the merits. There was no court of appeal in the ordinary sense of the term before which the facts upon which the court of quarter sessions had proceeded could be brought by way of review. But the court of quarter sessions, like every other inferior court in the kingdom, was open to this proceeding: if there was upon the face of the order of the court of quarter sessions anything which showed that the order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and upon the face of it to put an end to its existence by quashing it ... not to substitute another order in its place, but to remove that order out of the way as one which should not be used to the detriment of any of the subjects of Her Majesty. That jurisdiction of the Court of Queen's Bench was found in many cases in reference to the quarter sessions a useful jurisdiction."*

He notes further that in the same case, with regard to the issue of errors on the face of the record, Lord Penzance said:

> *"The cases are abundant to show that the Court of Queen's Bench was in the habit of dealing with and reviewing these orders of an inferior court upon the face of them, and if upon the face of them they were found insufficient, of quashing them; if they were not found insufficient they would not be*

quashed; that is to say, they would be affirmed. That was the function which the court discharged, at a time when the court of quarter sessions were still in the habit of consulting the judges of assize. The practice was for the court of quarter sessions, when they were in doubt upon a question of law, to consult the judge of assize, but notwithstanding that, the Court of Queen's Bench at that time exercised the same jurisdiction which it did up to the time that the Judicature Act passed, of quashing any order of a court of quarter sessions for any insufficiency which appeared upon the face of it. Of course, until the court of quarter sessions set out some facts upon the face of their order, the Court of Queen's Bench could not interfere with it, except upon matters of form; but whenever they did set out facts ... and it is shown that for centuries the practice was to set them out whenever they had doubts ... the Court of Queen's Bench dealt with the facts as they appeared upon the face of the order, pronounced the order insufficient and quashed it, if they saw reason to do so ... But the certiorari itself bringing up the proceedings, independently of the order subsequently made upon it, put an end to all further jurisdiction in the court of quarter sessions to deal with the matter. Therefore the Court of Queen's Bench then had the proceeding before them, and could either quash it or let it stand; but the magistrates in quarter sessions were then functi officio, they could no longer deal with the latter either by way of affirming or quashing the order. It seems to me, therefore, that it is abundantly made out that, according to the old practice of the court, the function of the Court of Queen's Bench was that which has been argued for ... namely, to consider an order of a court of quarter sessions upon the face of it, and, if the facts were stated upon the face of the order, to deal with them as they appeared upon these proceedings, and to apply the law to those facts, and then either to affirm the order or to quash it."

Regarding what errors were amenable to certiorari, and what I find to be relevant in this case, is where he further notes that:

"English decisions on certiorari make no distinction between a self-evident error and mere error; the distinction they make is between a speaking order and an unspeaking order. A speaking order is one, which contains reasons in point of law for the order which has been made. An unspeaking order is one which contains no reasons in point of law for making the order. No error can appear in an unspeaking order for it contains no proposition of law of which it can be said that it was erroneous. This does not mean that the order may not in fact be based on an erroneous proposition of law in the mind of the tribunal which made the order; but since the error is not expressed in the order itself, it does not appear in the order or is not apparent on the face of the order. But an error can appear in a speaking order or is apparent on the face of a speaking order because the order contains reasons in point of law for making it, and it is possible to examine those reasons and decide that they are wrong in law. Thus, the proposition "there is no error apparent on the face of the order" means one of two things: (1) the reasons stated in the order in point of law are correct (2) since no reasons are given in the order in point of law, no error appears on the face of the order. The opposition between "an error apparent" and "an error not apparent" is not an opposition between an error which is self-evident and an error which requires argument to expose it; it is an opposition between an error which can be detected in the order because it is expressed in it and an error which cannot be detected because the materials for detecting such error do not appear in the order. When the British Parliament wished to prevent interference by certiorari in quashing convictions for error on the face of the order - and many convictions were quashed for defects of form and not substance - it enacted the Summary Jurisdiction Act, 1849, which prescribed a common form of conviction that omitted all mention of evidence or the reasoning by which the decision had been reached. The effect of this common form is best described in the words of Lord Sumner:

"... it did not stint the jurisdiction or alter the actual law of certiorari. The result was not to make that which had been error, error no longer; but to remove nearly every opportunity for its detection. The face of the record 'spoke' no longer; it was the inscrutable face of a sphinx." ***(Emphasis added)***

In rejecting the test of *'error apparent on the face of the record"* as the definitive test for whether an application is amenable to review in this Court, I am fortified by the text of the ***Halsbury's Laws of England/Courts and Tribunals (Volume 24A (2019))/2. Courts/ (2) The Jurisdiction of Courts/ (i) In General/29. Review of decisions.*** Even if it refers to review by the High Court, it adds meaning to the text of H.M Seervai (supra) above of its origin in applications for *certiorari* and its subsequent application in the highest Court. It did not have a natural birth; it was primarily adopted by the High Court to review decisions of other authorities and was borrowed by the Ugandan Supreme Court in review of its own decisions. It states:

"29. Review of decisions.

In certain cases the power of a court to review the decision of another court or tribunal or of a body of persons en-trusted by law with a discretion may depend upon its ability to inform itself of the reasons for the decision. Where an application is made for judicial review to remove a decision of a statutory tribunal into the High Court to be quashed, not on the ground that the tribunal exceeded its jurisdiction but on the ground that its decision was wrong in law, the application can be granted only if the error of law is apparent on the face of the record of the proceedings.

What constitutes the 'record' has been widely interpreted; it is not confined to the formal order, but extends to the oral or written reasons given by the judge or tribunal. On an appeal as to the judge's exercise of his discretion, even though the judge may have given no reasons, it may nevertheless be possible to say on looking at the facts that, if the judge had taken into

*consideration all relevant facts and had excluded all irrelevant facts, he could not have arrived at the conclusion to which he came." **(Emphasis added)***

The documents that constitute a speaking order or error apparent on the face of the record was explained in ***R v Northumberland Compensation Tribunal*** (supra); where Denning LJ explained what the record entails, thus:

*"The record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision. Affidavit evidence is admissible on an application for certiorari on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself. An error admitted openly in the face of the court can be corrected by certiorari as well as an error that appears on the face of the record." **(Emphasis added)***

In the Privy Council case of ***Champsey Bhaza v Juvraj Ballo Spg. & Wg. Co [1923] AC 480,*** Lord Dunedin precisely laid down the correct approach to determining the expression *'error apparent on the face of the record'*, thus:

"An error in law on the face of the record of the award means, in their Lordships view, that you can find in the award or document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous ... But they (i.e. the arbitrators) were entitled to give their own interpretation to r. 52 or any other article, and the award will stand unless, on the face of it, they have

tied themselves down to some special legal proposition which then, when examined, appears to be unsound." ***(Emphasis added)***

One of the difficulties in dealing with the test for 'error apparent on the face of the record' reflected in the ***Nyamogo*** case (supra) is brought out in the question posed by Court; thus: "*When does an error cease to be an error and become an error apparent on the face of record*?" This is the more confusing because, first, the plain meaning of the expression *"error apparent on the face of the record"* is simply that the reasons for a decision are contained in the judgment or ruling. Second, it presupposes that there are instances of mere errors that can be corrected, and then instances of substantive errors that can only be addressed by way of appeal. In any case, as I have pointed out above, 'error on the face of the record' for review under rule 35 (1) differs from the errors applicable under rule 2 (2).

In ***Edwards v Goulding [2007] EWCA Civ 416***, in considering a provision allowing Court to review and vary its previous order, the Court referred to the distinction between a 'mere error' and a *'fundamental error'*, as contradistinguished from a 'mere error' and an *'error apparent on the face of the record'*. Cognizant of the fact that the rule granting the power to vary or revoke an order of the Court was quite wide, Buxton LJ held that:

"The basis of that jurisprudence is that under order 3.1(7) is not a substitute for an appeal. There must be additional material before the court in the form of evidence, or possibly argument. I would reserve the issue of whether additional argument in itself is enough to attract the jurisdiction of rule 3.1(7), but the general thrust of Collier is that the case before the court before which rule 3.1(7) is moved must be essentially different from one of simple error that could be righted on appeal."

26. I would respectfully agree. The procedure adopted by Mr. Edward's lawyers was misconceived. It led Master Eyre making an order that he had

no power to make ... It was open to the judge to hold that since the application should never have been made in that form, it could be set aside. That is not to usurp the power of the Court of Appeal, but rather to correct a fundamental error. "

In the instant application before this Court, I find the proposition of the law on the term '*fundamental error*' expounded in the authority immediately above, quite relevant. It is a strong factor for the consideration of whether the error referred to in the impugned judgment of this Court, is one that could render the judgment subject to recall and review by this Court.

The need for review of a decision may arise due to an injustice occasioned by fundamental errors on the record. Such an error may be procedural or substantive. In ***Transport Equipment v Devra P. Valambhia, 1998 TLR 89***, the Court of Appeal of Tanzania held that:

"[A] *final judgment being res-judicata is not easily set aside, but the Court will do so on various grounds such as fraud, discovery of new documents, error and irregularities in procedure.*"

An irregular procedure includes instances where, through no fault of the party to a suit, the Court denies such a party a fair hearing; which then occasions injustice in the resultant judgment or order of the Court (See: ***Cassel & Co Ltd v Browne (No.2) [1972]2 ALLER 849; and R v Bow street Metropolitan Stipendry Magistrate & Others Exparte Pinochet No.2 1999 1 ALLER 577).*** The right to be heard or a fair hearing as part of natural justice has always been a securely protected right; and is accordingly a cardinal tenet of our judicial process. In a trial where this right has been denied, there has been no fair trial owing to there having been no hearing on the merits. In that event, owing to the fundamental error of denial of the right to be heard, the matter has not been finally determined. See: ***DJL v The Central Authority [2000] HCA 17 - 201 CLR 226,*** per Callinan J at [189]; ***Miltonbrook Pty Ltd v Westbury Holdings Kiama Pty Ltd (2008)***

71 NSWLR 262 at [85]-[87]. In ***R v Bow Street Metropolitan Magistrate & Ors exparte Pinochet*** (supra), Lord Browne-Wilkinson, in agreement with the Counsel for Senator Pinochet, held:

> *"However, it should be made clear that the House will not reopen any appeal save in the circumstances where, through no fault of a party he or she has been subjected to an unfair procedure ... although there was no exact precedent, your Lordships House must have jurisdiction to set aside its own orders where they have been improperly made, since there is no other court which could correct such impropriety."* ***(Emphasis added)***

Derogation from the right to a fair hearing has also been held in Australia to be a ground for review. In the High Court case of ***Autodesk v Dyason [1993] HCA 6***, Mason CJ noted:

> *"The exercise of jurisdiction to reopen a judgment and to grant a rehearing is not confined to circumstances in which the Applicant can show that, by accident and without fault on the Applicant's part, he or she has not been heard. It is true that the jurisdiction is to be exercised with great caution...."*
> **(My emphasis)**

In ***Cassel & Co Ltd v Broome (No.2) [1972] ALL ER 849, [1972[AC 1136***, their Lordships varied an order for costs already made by the House in circumstances where the parties to the suit had not had a fair opportunity to address argument on the point.

In the instant application before this Court, the Applicant argues that this Court's decision in Civil Application No. 16 of 2019 (No.2) was made in error because the Applicant was not given an opportunity to address Court before the orders were given. In addition, this application also raises the issue of the procedure to adopt for the review; especially the one done on Court's own motion. I consider it advisable to dispose of this, first.

Procedure for review:

Unlike the elaborate procedure of appeal a party to a suit would go through to challenge the decision of a Court before a superior Court, review is an expeditious and easier process by which a Court rectifies the errors contained in its own decision. This saves both time and resources. In ***IC v RC [2020] EWHC 2997 (Fam), [2020] All ER (D) 74 (Nov)***, Judge Knowles stated at para 32 that:

> *'[The] [c]orrection of accidental slips or omissions at any time is thus consistent with the interests of justice and the fair resolution of proceedings.'*

However, even when the review process has the attribute of expeditious resolution of the matter in dispute, the Court must ensure that it is conducted with fairness; because fair hearing is an indispensable tenet of justice. In ***Bhag Bhari v. Mehdi Khan [1956] E.A. 94 (CA-K),*** at p. 104, the east African Court of Appeal clarified that: "*The rules of procedure are designed to formulate the issues which the court has to determine and to give fair notice thereof to the parties*". In ***Iron & Steelwares Ltd. V. C.W. Martyr & Co. (1956) 23 E.A.C.A. 175 (CA-U)*** at P.177, Court stated that procedural rules: *"are intended to serve as the hand maidens of justice, not to defeat it ..."*

There is no specific procedure in the Rules of this Court for the review provided therein. Rule 35 provides that the Court may review a judgment or order on the application of the parties or on its own motion. A person who seeks the review of a decision moves Court in that regard; and notice of such motion is served on the other party as required in the Rules of this Court. To the contrary, there is admittedly no procedure provided for within the rules for the conduct of review on Court's own motion. Nonetheless, in light of the need to do justice, it is pertinent that where necessary the parties are notified, even if informally, of the impending review. This accords them the opportunity to be heard on the matter if they so wish.

I qualify the notification of the parties to where it is 'necessary' because not every review process requires that Court gives the parties notice in the name of procedural fairness, since there are instances where review does not require a hearing. Such instances include reviews falling under the first category of rule 35 (1), which I have discussed herein above; to wit, clerical and arithmetical errors (See: ***Decision Restricted [2018] NSWSC 4*** at [32]). Under this head, Courts are empowered to correct obvious drafting errors in all legal documents, including primary and delegated legislation (See also: ***Coal & Allied Operations Pty Ltd v Crossley [2023] NSWCA 182*** at paras [43]-[54]; ***Director of Public Prosecutions (Nauru) v Fowler (1984) 154 CLR 627.***

In ***Coal & Allied Operations Pty Ltd v Crossley*** case (supra), the Court of Appeal was not required to quash the decision and remit the matter, but was empowered to correct an obvious drafting error of figures in the scale of costs; hence, there was no need to give the parties a hearing. This also applies where the parties have consented on the review; or where the Court, on reasonable grounds, determines that a hearing of the parties would not be required. Otherwise, in all other cases, there is always need to give notice to conform to the requirement under Article 28 of the Constitution that parties must be accorded a hearing. This covers all review cases falling under the second category in rule 35 (1) of the Rules of this Court, for accidental slips or omissions, and as well, all instances of review falling under rule 2 (2). In ***The Montan*** case (supra), Donaldson MR, had this to say:

> *"Counsel for the owners pressed on us that this would lead to dissatisfied disputants scanning reasons with a microscope in order to detect accidental slips or omissions leading to error. I regard this as quite fanciful. Such situations are extremely rare, but where they occur the arbitrator will be the first to wish to correct them. Section 17 gives him the power to do so without resort to the courts. Where he is minded to exercise this power, he should notify the parties and give them an opportunity to make*

representations and, if so minded, to challenge in the courts the applicability of the power to the facts of the particular situation."

Notice of the application can be made informally by letter to the Court, or by a formal application; and in either situation, pointing out the error complained of, and as well, proposing the correction to be made. The notice in either situation has to be served on the other party to the case to avail them the opportunity to be heard; and thereby enable Court come to its decision after having heard the parties.

Where the process is due to Court's own volition, the Court can deal with the matter without involvement of the parties if the error is obvious (under the first category in rule 35). Otherwise, Court may - and in any other case - serve notice or direct that notice is served on the other party or parties before the application is set down for hearing (See: ***Halsbury's Laws of England***) (supra) para 1214.

Removal as a liquidator

The instant matter before this Court pertains to a situation where the Court removed the Applicant as a liquidator, specifically citing rule 2 (2); after making a clarification that machines forming part of the suit property at the time of purchase by the 2nd Respondent, or their value, should be returned to African Textiles Mills Ltd (in liquidation). For convenience, I reproduce here in *extenso* what the Court said:

"The Court is permitted under rule 2(2) of the Court's rules to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of court. We therefore, make the following additional orders to give effect to the Court's decision.

5. The 2nd Respondent, Mr. Sylvester Henry Wambuga, is removed as liquidator of African Textiles Mills Ltd (in liquidation) with immediate effect."

The order was brief and did not state the abuse of process that was being addressed, or the ends of justice that would be attained by the Applicant's removal. It is quite apparent that the Court made a mistake in ordering for the return of the suit property to the 1st Respondent, instead of the Company in liquidation; and this was what had come up for rectification to the knowledge of the parties. The Court made the additional order or removal as a liquidator without giving the Applicant a hearing, since there had been no other application from the 1st Respondent requesting for the Applicant's removal. Further, the issue of removal was also never part of the litigation or prayers of any of the parties; but it arose for the first time in the impugned application. It was only fair to grant the Applicant a hearing. It is clear that because no submissions were made, the Court's attention was not drawn to the Insolvency Act; which is a legal regime that governs the removal of a liquidator, and the Applicant now contends is the legal principle applicable in his situation. The determination of the jurisdiction for removal as a liquidator would have been a point on which the parties would have had to make submissions.

As for the injustice resulting there from, it is overwhelmingly clear that this order affected the Applicant as it was directed at him. It is not clear what part of the Court's decision was being given effect to; and yet this is a crucial element in the exercise of powers of review. This was a clear violation of the Applicant's right to a fair hearing; for which the impugned order cannot be allowed to stand.

Review on account of a null and void judgment

In his submission in paragraph 28, the Applicant criticized this Court for introducing new facts, and raising new issues, that had not been argued by the parties; upon which it made new findings not based on anything on the record of appeal. This, it was submitted, resulted in the orders this Court issued in Civil Application No. 16 of 2019 (No.2) that rendered its judgment

on the matter null and void. A judgment of the Court that is void can be challenged in an appropriate Court, either directly or collaterally; as long as the person challenging the judgment is properly before the Court. Reasons for finding a judgment void include judgment entered by a Court lacking jurisdiction over the parties or the subject matter, lack of inherent power in the Court to enter the particular judgment, or where the Court order was obtained by fraud (***See: Long v. Shorebank Development Corp., 182 F.3d 548 (C.A. 7 Ill. 1999***).

The Applicant contends that this Court had no jurisdiction to issue the order for the removal of a liquidator; while the Respondent counters that the order was encompassed within the prayer "*any other order that the Court deems fit.*" A Court cannot enjoy jurisdiction where none has been conferred on it; and similarly, it cannot validate any proceeding that is void. Where a Court acts in excess of its jurisdiction, its judgment and orders in that particular matter are treated as nullities. A void judgment is a nullity *ab initio*; and is not attended by any of the effects that would result from a valid judgment. Any person who is affected by it may, therefore, challenge it in Court.

In the instant application, the determination of this issue is dependent on the resolution of the issue whether the Court had jurisdiction to remove the Applicant as liquidator. However, owing to the fact that the Applicant was not heard on this matter, the Court did not have the benefit of hearing arguments now presented before us on the issue, most of which are rooted in the Insolvency Act. Having found that the removal of the Applicant as a liquidator without a hearing was unfair, hence a fundamental error, I find the issue of jurisdiction merely moot; and therefore unnecessary to dwell on.

Finding of fraud

The Applicant also argued that the finding of fraud could not stand because it resulted from a process that violated his right to due process, owing to the

fact that the new issue raised by this Court itself in its judgment, was not argued either in the trial Court or Court of Appeal; and the Applicant was not afforded the opportunity to submit on it since the Court raised it only in its judgment. On the other hand, the 1st Respondent argued that the Applicant was granted a fair hearing; and in any case, the resolution of that new issue did not involve any new evidence or submissions as the Applicant had already been heard upon the issue of fraud. As already recounted in the background to this ruling, the Applicant impugned the Court's finding that he fraudulently effected the sale of the suit property to the 2nd Respondent; contending that while hearing the appeal, the Court itself raised another issue upon which the Applicant was not allowed to address the Court. The issue was raised, in the judgment, thus:

> *"I shall now address the question of whether the sale of the suit property by the 1st Respondent was lawful and devoid of any other fraudulent conduct. In my view, this is a separate question from the allegation of fraudulent conduct in form of receiving an illegal commission or bribe that was not proved."*

The question to determine is whether the Applicant was given a hearing when the Court was seeking to resolve this issue. The answer to this will depend on whether this issue was actually a new issue that could be raised, and whether it was one upon which the applicant had not yet been heard.

Could the Court raise a new issue?

It is trite that in order to do justice by resolving all the issues in controversy between the parties to a suit, a Court may in addition to addressing the issues raised by the parties thereto, itself raise a new issue during the proceedings. This power is equally enjoyed by this Court as an appellate Court; and is strengthened by the general powers provided for under Rule 2 (2) of the Rules of the Court; which confers on the Court unlimited inherent powers, thus:

"... to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court."

In ***Ham Enterprises Ltd & 2 Ors vs DTB (U) Ltd & Anor - SCCA No. 13 of 2021,*** I stated thus:

> *"There is a long line of authorities on the proposition that an appellate Court has the discretion to deal with issues that do not arise from the grounds set out in the appeal, if this would enable Court achieve the ends of justice. The new issue could be raised by any of the parties, or by the Court of its own volition."*

The new issue can only be raised on matters or facts that are beyond controversy. In ***Ham v DTB*** (supra), I cited with approval, the case of ***Warehousing & Forwarding Co. of East Africa Ltd. v. Jafferali & sons Ltd. [1963] E.A. 385,*** where the Privy Council stated at p. 390, as follows:

> *"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interest of justice to entertain the plea." ... ... But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."*

Of paramount importance however is that in the exercise of this discretion, the appellate Court must ensure that all the parties to the appeal are accorded the opportunity to exercise their respective right to be heard on the issues raised either by the parties, or by the Court itself. In the ***Interfreight Forwarders*** case (supra), this Court noted thus:

"Therefore, the correct position of the law is that while an issue or ground of illegality or fraud not raised in the lower Court, may be raised on appeal, the parties must be given an opportunity to address Court on it before the Court makes a decision. Even where a judge wishes to consider an issue after the hearing has been concluded, the judge must give the parties opportunity to address court on the issue."

In resolving the sub or new issue, the Court alluded to a new angle of consideration based on illegality, in the nature of the sale of the suit property by the Applicant as a liquidator; which could not be ignored by the Court. Indeed, this is the correct approach to resolving illegalities. See: ***Cardinal Wamala v Makula International 1982 HCB 11***. An illegality, once discovered, has to be dealt with by the Court. However, I have to sound out a caveat on this; namely, the need for the parties to be accorded the right to be heard on the issue of illegality so raised, and that this illegality must be rooted in matters raised in the Court below. This serves to promote a fair hearing to ensure justice is done to the parties. In ***Mohammed Hamid v Roko Construction Ltd Civil Appeal No. 1 of 2003***, the Court referred to the case of ***H. Singh v S.S. Dhiman (1951) 18 EACA 75***, where the Court of Appeal for East Africa stated thus:

"... it is the right and duty of the Court of Appeal to consider illegality at any stage yet, when it has not been pleaded and not raised in the Courts below, or at best only raised at a late stage, an appellate court must be cautious and must consider whether the alleged illegality is sufficiently proved and must be satisfied that if there are matters of suspicion in the plaintiff's case, an opportunity was given for explanation and defence."

From the analyses above, it is clear that in the instant case before this Court, the Court committed no error in framing a new issue for determination. It is pertinent however to determine whether the sub issue raised met the test laid down above. First is whether, or not, this new issue had been raised before or was not new, so that the parties had already been heard on it. Second, if

new, is whether, or not, it was based on matters proved beyond controversy in the lower Court. Then, third whether, or not, the parties were accorded the opportunity to be heard on the issue.

This Court, in its judgment, came to a finding that the sub issue was distinct from and independent of the issue of fraud with regard to which the Applicant had been absolved. The 1st Respondent contended that the issue was actually not separate or new, albeit that it was stated as such, as it had already been in issue and had been submitted upon in the Courts below. Therefore, to determine whether the issue was in substance a new one, I need first to resolve the second question; namely, whether the issue arose from matters proved beyond controversy in the lower Court. In the High Court, two issues that are relevant for this application were issues 2 and 3; which were:

"2. Whether the sale of the suit property was fraudulent or unlawful.

3. Whether the second defendant is a bona fide purchaser for value."

In issue 2, fraud and the unlawfulness or illegality of sale were framed as one issue, despite their being separate and distinct from each other; and accordingly, the trial judge, Kiryabwiire J, as he then was, determined them as a single issue. The claim by the Plaintiff (1st Respondent herein) was that the 1st Defendant (Applicant herein) as liquidator, had fraudulently and unlawfully sold off the suit property to the 2nd Defendant (2nd Respondent herein) with secrecy, by inserting a confidentiality clause in the agreement, and in executing the sale of the suit property at an under value, after receipt of a bribe. The unlawfulness alleged, was sale of the suit property without obtaining the requisite consent of the members of the company through a company resolution.

The trial Judge made the finding that the Applicant as liquidator had committed a procedural error in his failure to call the annual meeting of creditors, director and directors in voluntary liquidation as required by the

repealed Companies Act *"... because in reality he treated the liquidation as if it was a receivership!"* He however declined to fault the Applicant as liquidator for failing to obtain consent of members of ATM before sale of the suit property; holding that such consent was unnecessary. He also found no evidence that the Applicant had received the bribe alleged by the 2nd Respondent, or that he had sold at an undervalue. He thus held that there was no proof that the Applicant had acted fraudulently; and, therefore, the sale was lawful. On issue 3, the Judge found that no fraud was proved or was attributable to the 2nd Respondent; and that insufficiency of consideration could not negate the contention by the 2nd Respondent that it had acted in good faith, and was a *bona fide* purchaser for value, without notice of any adverse circumstance.

In the Court of Appeal, the relevant issues were similar to issues 2 & 3 in the High Court. However, it also included a new issue pertaining to the finding of the trial judge regarding the effect of the procedural irregularity in the sale of the suit property by the Applicant without first convening the annual meeting of creditors, contributories and directors in a voluntary winding-up as required under the Companies Act Cap 110. The relevant grounds of appeal from which the issues arose were:

Ground 1: *The learned trial judge erred in law and fact when he held that the sale of the suit property to the 2nd Respondent by the 1st Respondent wasn't unlawful and fraudulent.*

Ground 9: *The learned trial judge erred in law and fact, when he failed to hold that impropriety of the liquidator in carrying out his duties in a voluntary liquidation amounted to an illegality which couldn't be sanctioned by court other than being a procedural error.*

The Court of Appeal framed two distinct issues, namely 'unlawfulness' and 'fraud', out of Ground 1 of the appeal; and then resolved them separately. It also dealt with the new issue on procedural impropriety as an illegality. In determining whether the procedural impropriety was an act of illegality, the Court did not find the arguments raised sustainable. The Court said as follows at paras 395-404:

> *"It was contended for the appellants on this ground that the sale of the suit property to the 2nd Respondent by the 1st Respondent was fraudulent and unlawful. The Appellants in their written submission did not point to any law that was contravened ... However, they raised in ground 9 the issue of impropriety of the 1st Respondent in carrying out his duties as a liquidator in a voluntary liquidation. We shall revert to that in ground 9. Suffice it to say, that in respect of ground one we find no sustainable argument on the question of illegality. The second leg of this ground refers to fraud and it is on this that the appellant dwelt."* ***(Emphasis added)***

From the above extract it becomes clear that the procedural irregularity established was not linked to or handled as evidence of fraud, but instead to an illegality in terms of violation of the Companies Act. There is a material distinction between the two, flowing from the consequences of a positive finding on either of them. The Companies Act provides sanctions such as fines for violations; while a finding on fraud may have more far-reaching consequences, beyond the action complained of, and also covering 3rd parties who are privy to it. I will advert to this.

Regarding unlawfulness, the Court of Appeal upheld the finding by the trial Judge that the impugned process had been devoid of any unlawfulness; and did not contravene any provision of the Companies Act. On the issue of failure to obtain the consent of the members of the company for the sale of the suit property, the Court found that the Companies Act had not been contravened. Its finding on this, as with the issue of procedural impropriety,

had nothing to do with determination of the issue of fraud. The Court pronounced itself as follows at paras 728- 757:

> *"It was submitted strongly that the 1st Respondent had no power to sell the suit property without their prior consent. This was a voluntary winding up and as such it is deemed to have commenced on the date of passing the resolution. Once the resolution had been passed there was no relating back. The company ceased to carry on its business except so far as may have been required for its beneficial winding up.*
>
> *In this case the duty of the liquidator was to sell company assets, pay off its debts and distribute the remaining money to the shareholders. Upon appointment of a liquidator in a voluntary winding up, all the powers of the directors cease except so far as a general meeting or the liquidator sanctions their continuance. We agree with the learned trial Judge that the 1st Respondent carried out his duty as a liquidator in accordance with the law. We find that there was no legal requirement for him to seek prior consent of the Directors or members before selling the suit property to the 2nd Respondent or to any other person.*
>
> *This is acknowledged by the appellants when in a letter dated 30th March 2007 from their lawyer to the 1st Respondent reproduced above they requested the 1st Respondent not to sell the suit property before 23rd April 2007. The suit property was sold in September 2007; the agreed restriction had long ceased. In any event it was never made part of the consent order and was therefore not binding on the 1st Respondent. The consent order was later withdrawn. **(Emphasis added)***

When it came to determining the issue of fraud, the Court of Appeal considered three instances adduced as evidence to prove the alleged acts of fraud. These were: first, that the sale was at an undervalue. Second, was that a sum of US$ 300,000 was given to the liquidator as an inducement for the

sale at a price below the market value. Third, was the insertion of a clause binding the parties to secrecy with regard to the sale of the suit property. The Court dealt with these issues, at paras 712-726, thus:

> *"Following the advert the liquidator had only 30 (thirty) days to find a buyer, and he did. Had he not done so he would have risked having the property sold by the bank probably at a much lower price than he eventually did. There was no evidence that there was any other buyer willing to pay a higher price. The proposals for funding that were ongoing at the time the property was sold could not be said to amount to any serious offers taking into account the fact that none of such proposals had materialized in the three years that the properties were on sale.*
>
> *There is no evidence that the 1st Respondent sold the property in haste and secrecy and deliberately denying the company a chance of better offers. This property was already on sale, having been advertised by Crane Bank. The appellants were at all times at liberty to pay the bank and redeem the property. They failed to do so."* (My emphasis)

On the alleged bribe, the Court concluded as follows at paras 759-767:

> *"We find no evidence that the 1st Respondent was paid US $ 300,000 outside the contract of sale ... This on its own would not vitiate the contract of sale concluded with a third party such as the 2nd Respondent. We find that the 1st Respondent lawfully sold the suit property to the 2nd Respondent who obtained good title."*

Thus, the Court of Appeal upheld the finding by the High Court that the Plaintiff/Appellant had failed to prove the alleged fraud. The fraud, which the Court found had not been proved, was not confined to the bribe or illegal commission allegedly received by the Applicant. It included all other allegations of fraud, which were also resolved. These were, secrecy owing to the insertion of a confidentiality clause in the sale agreement, and sale at an

under value. Otherwise, albeit that this Court stated that there was "*a separate question from the allegation of fraudulent conduct in form of receiving an illegal commission or bribe that was not proved*", there was in reality no separate issue raised and determined by this Court. The problem first arose when this Court analyzed the judgment of the Court of Appeal, but without alluding to the other elements of fraud covered in the judgment. At page 18-20 of the judgment, this Court stated thus:

> "*The Court of Appeal on the other hand dismissed the appellant's first appeal holding that the 1st respondent lawfully sold the suit property to the 1st respondent which acquired a good title. Their Lordships held that the 1st respondent was not legally required to seek consent of the directors or members of the company before selling the suit property to the 2nd respondent. Further, it was held that there was no evidence of the sum of US $ 300,000 allegedly paid to the 1st respondent and that no fraud was proved against him. The Court of Appeal awarded costs only to the 2nd respondent but none for the 1st respondent.*"

From the extract above, it is evident that this Court acted on the misapprehension that the Court of Appeal had not considered the other allegations of fraud. This misapprehension guided its findings on fraud; as is shown below:

> "*In my view, the respective findings of fact by the High Court and the Court of Appeal regarding the failure by the appellant to prove receipt of a bribe of US $300,000, are unassailable. The appellant did not adduce sufficient and credible evidence to prove that the 1st respondent indeed received a bribe when he carried out the sale of the suit property. That particular from of fraud was therefore not proved. Consequently, this partially resolves the issue as to whether the sale of the suit property was tainted with bribery. In agreement with the respective findings of fact by the High Court and the Court of Appeal, I find that the appellant*

did not prove that the 1st respondent was involved in receiving a bribe as a form of fraud in the sale of the suit property and this aspect of the ground of appeal fails.

Similarly, the contention that exhibits D1 And D2 were irregular and pointed to fraudulent conduct on the part of the 1st Respondent in the bidding process crumbles in light of the respective findings of act by the High Court and Court of Appeal...

I shall now address the question of whether the said sale of the suit property by the 1st respondent, in exercise of his powers as a liquidator, to the 2nd respondent was lawful and devoid of any other fraudulent conduct. In my view, this is a separate question from the allegation of fraudulent conduct in the form of receiving an illegal commission or bribe that was not proved."

This Court had two issues to consider. First, was the lawfulness of the sale pursuant to the requirement of consent under the Companies Act, and instances of any other fraudulent conduct besides the alleged receipt of a bribe, and irregularities in the bidding process. However, the Court made no mention of the other allegations of fraud that had not been dealt with by the Court of Appeal.

The second problem arose from this Court's misapprehension of the issue of fraud; and thus its failure to formulate the issue regarding fraud in a succint and clear manner that could properly capture the issues in controversy as argued and considered in the lower courts. In framing the issue *"... whether the sale of the suit property by the 1st Respondent was lawful and devoid of any other fraudulent conduct"*, what this Court treated as any other fraudulent conduct had been determined by the trial Court and the Court of Appeal.

The appellant contends also the secretive manner, devoid of any transparency, in which the 1st respondent sold the suit property to the 2nd

respondent also amounted to fraud. It is further argued that the sale was done in violation of the provisions of the Companies Act, Cap 110, specifically sections 244 and 301 thereof and that the 1st respondent, as liquidator, did not discharge his professional duty in a transparent and ethical manner expected of him."

I need to make three observations from the extract above that affected the judgment of this Court. First, it shows that the secrecy is treated as a hitherto unconsidered evidence fraud; and yet it was not. Secrecy in the form of insertion of the confidential clause had already been considered. Second, for the first time, the failure to seek consent is also introduced as evidence of fraud and classified as lack of transparency. Third, an element of breach of professional duty that is later resolved as negligence is also introduced for the first time.

To explain this further, in this Court's resolution, both the lack of secrecy and transparency was resolved not basing upon the acts of fraud alleged in the lower courts, but from the liquidator's *'failure to seek consent of the members,'* which had been considered under unlawfulness of the sale- not fraud. Put succinctly, under the 'any other' fraudulent conduct, the Court did not allude to any fraudulent conduct that had not been considered by the lower courts. Instead, the Court created its own issue regarding failure to seek consent as an act of fraud. Under the purported *'new'* issue it raised, this Court also considered matters such as negligence, which had not been part of the pleadings or cause of action, or canvassed in the lower Courts. Further, under negligence, it brought back matters of sale at undervalue that it had earlier pronounced itself upon as having not been proved.

This Court also used the order by the lower courts for the account of proceeds of sale, as evidence of fraud. This was also new. From the above analysis, it is clear not only that this Court contradicted itself in its findings on 'any other' fraudulent conduct, this Court also made a new determination

upon which the Applicant and 2nd Respondent were not heard: *"That the unlawfulness or failure to obtain consent of the members of the company before sale of the suit property amounted to fraud and gross negligence."* I find that in this regard, this Court committed an error in its judgment in Civil Appeal No. 6 of 2017; necessitating this Court to determine, in the instant application, whether it justifies a review.

The Court had a misapprehension with regard to the findings of fact by, and decision of, the lower Courts on the issue of fraud; whereupon, without any justifiable reasons, it made fresh findings of fact as if it were a trial Court or 1st appellate Court. The misapprehension and error led the Court to raise new issues that were not tried in the lower Courts or submitted upon by the parties. It also led to the Court's error of re-evaluating evidence of fact as a 1st appellate Court would; and overturning factual findings of the lower court, without any valid justification for exercising that discretion. Most disturbing, is that it did all this without according the Applicant a hearing on the purported new issue.

In ***Autodesk Inc v Dyason (No 2) [1993] HCA 6*** (supra), Mason CJ said:

> *"So much was acknowledged by Brennan, Dawson, Toohey and Gaudron JJ. in* ***Smith v N.S.W. Bar Association (1992) 176 C.L.R. 256,*** [at pp. 264-266] *when their Honours said: "if reasons for judgment have been given, the power is only exercised if there is some matter calling for review." ... ...*
>
> *These examples indicate that the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law. As this Court is a final court of appeal, there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it*

perceives to be an apparent error arising from some miscarriage in its judgment ... ...

What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases." ***(Emphasis added)***

In ***New South Wales Bar Association v Smith [1991] NSWCA 213***, following the submission that the Court had, at the earlier hearings and disposal of the matter, acted on the erroneous assumption that a particular evidence had not been presented before it, the New South Wales Court of Appeal reconsidered orders it had made therein; and undertook the review. In the instant review application before us, this Court had, acting upon a misapprehension of the evidence on record, proceeded on the erroneous assumption that both the trial Court and Court of Appeal had not considered what it purported to raise as other instances of fraud. It thereby raised new issues in its judgment now under review, which had nothing to do with fraud. It also delved into the resolution of certain matters of fact without any justification. Neither the Applicant nor the 2nd Respondent contributed in any way to the Court's making of the error.

As I have already noted, it is trite that Court is obliged to accord parties the opportunity to address it on whatever issues that the parties may themselves raise, or are done by the Court of its own volition. In the instant case, what transpired instead, including on the issue of negligence upon which the Court made far-reaching findings leading to this review application, amounted to a trial by ambush; thus denying the parties the opportunity to prepare and present their case. This offends against the cardinal rule regarding the right to be heard; which is a fundamental principle of natural justice securely

enshrined in the 1995 Constitution. This derogation shakes the very foundation of the tenet of a fair hearing on which our judicial system rests. In the event, I would sum up my findings on this matter as follows:

(i) This Court erred in handling issues of fact relating to fraud as if it were a trial Court or first appellate Court. However, while this Court may in certain instances exercise powers enjoyed by Courts seized with original jurisdiction in a particular matter, it has no mandate to re-evaluate evidence as a 1st appellate Court (here the Court of Appeal) would. The Court of Appeal having come to its finding on the matter, the powers of this Court were restricted to matters of law, or mixed law and fact. This proposition of the law was authoritatively expressed in the case of ***Milly Masembe vs Sugar Corporation & Anor - Civil Appeal No. 01 of 2000***, where Mulenga JSC expounded succinctly that:

> *"In a line of decided cases, this Court has settled two guiding principles at its exercise of this power. The first is that failure of the appellate Court to re-evaluate the evidence as a whole is a matter of law and may be a ground of appeal as such. The second is that the Supreme Court, as the second appellate Court, is not required to, and will not re-evaluate the evidence as the first appellate Court is under duty to, except where it is clearly necessary."* ***(Emphasis added)***

In resolving the issue of 'any other fraudulent conduct' of the Applicant, which it had raised of its own volition, this Court considered new issues touching on alleged negligence that was in breach of fiduciary duty by the Applicant. In doing so, it acted *ultra vires*; as, generally, it is not conferred with any power to determine any issue basing on facts only. Furthermore, these were neither grounds of appeal, nor issues that arose in the Court of Appeal. Similarly, negligence was not a cause of action in the High Court. It is therefore my finding that the Applicant was denied the opportunity to submit on the issues of negligence and breach of fiduciary duty, which

this Court held amounted to fraud. This was separate from the issue of procedural irregularity basing on the Applicant's failure as Liquidator, to seek members' consent, or to hold an annual meeting of the creditors, in violation of the Companies Act; which this Court pronounced itself on.

(ii) This Court found that the fraud pleaded in the plaint, basing on allegations of receipt of a bribe and irregularities in the bidding process, had not been proved. I should like to add that failure to seek consent would not, without more, amount to fraud. More important, the finding that gross negligence and failure to seek consent amounted to fraud, could not stand without first according the parties a hearing. In the same vein, it would be wrong to impute fraud from the procedural irregularity of attempting to resuscitate the company instead of winding it up. This is because fraud in this regard would equally be imputed to the 1st Respondent and the 2nd Plaintiff (Mr. Jayantilal V. Patel) who as majority shareholders, were complicit in obtaining the loans and trying to secure more funding to resuscitate ATM.

In all this, the decisions made by the Applicant as a liquidator could merely have been an error of judgment on his part; which does not, without more, amount to an act of fraud. The holding by the two lower Courts that such consent was unnecessary attests to this. It would be unjustified to suggest that in giving such interpretation to the Companies Act, as the two lower Courts did, they condoned '*fraud*' allegedly committed by the Applicant. As with the case of fraud, an error of judgment owing to gross negligence has to be pleaded; and requires strict proof. It was thus wrong in the instant case, for this Court to impute fraud and gross negligence on the Applicant without first giving him a hearing thereon, followed by a fresh re-evaluation of the evidence adduced.

(iii) Similarly, this Court did not accord the 2nd Respondent a hearing on the issue of a *bona fide* purchaser for value without notice of the fraud, which

the Court had itself raised. This is the reason for the contention by the 2nd Respondent, in Civil Application No. 16 of 2019, (No.1) that arose from the judgment of the Court in issue herein, that he was a *bona fide* purchaser for value without notice. Had the 2nd Respondent been accorded a hearing, Civil Application No. 16 of 2019, (No.1) would not have arisen. Had the 2nd Respondent or the Applicant been heard on this new issue of fraud, and negligence, they could have addressed the Court and thus avoided the grievances that have led to the instant application for review.

Conclusion

In the premises, I would recall the impugned judgment, set aside the decision made on the purported new issue of *'any fraudulent conduct'*, and the orders arising therefrom. Accordingly, this ground of the application succeeds. I should point out that owing to this decision, the Court's finding on the requirement for a liquidator in a voluntary winding up to obtain consent before sale of property of a company in liquidation is equally set aside, because this finding was premised on the finding of this Court on the purported new issue of *'any fraudulent conduct'*. Since the requirement for consent prior to sale had been addressed in the High Court, Court of Appeal, and as well in this Court during submissions, this Court ought to have determined it without making it an issue of *"any other fraudulent conduct"*. Thus, to do justice in the matter, it is incumbent on this Court to resolve the issue of the requirement for consent prior to sale of the suit property, as an independent issue from that of fraud. This is a matter I will shortly advert to.

Valuation

The need for a fair hearing raised by the Applicant, equally applies to the issue of valuation raised by the 2nd Respondent. The valuation report was neither agreed upon by the parties, nor was it admitted in evidence as an exhibit during trial. To the contrary, the 2nd Respondent had in fact challenged the valuation report before the trial Court. The purported valuation report

was not a report in the real sense; but rather a one-page valuation certificate. During the cross examination of Jayantilal V. Patel who testified as PW1, as is evident from the Record of Appeal at page 211, the trial judge spelt out the reasons for his dissatisfaction with the report. These were that the certificate purported as a report did not state the basis upon which the figures therein had been determined, what the forced sale market value was, and did not take into consideration the wear and tear of the machines. The Judge stressed the need for a comprehensive valuation report, thus:

> *"Court: Can you make it available to Court? Because only what has been exhibited is the certificate which is normally at the end. That does not help the court to appreciate the breakdown of what is in the valuation report, for example; had he said or if it is there we can use it now. Does it indicate in the event of a sale what price would be attracted? That would be useful. What would be a fair market value ... But he also ultimately - the cost sale value does make a reference but I do not see the figure ... what he does not show us is; in the event of a forced sale what the price would be. Would that be a fair assessment of this report? Is it a yes or no Sir?*
>
> *PW1; Yes."* (sic)

Having identified the deficiency in the certificate of valuation, to which PW1 conceded, the trial judge rightly declined to rely on it in his considerations. The Court of appeal, too, did not place reliance on it. It was, however, this Court that placed reliance upon it; and consequently making the order for the 2nd Respondent to return the machines, or else pay an amount therefor, basing on the impugned certificate of valuation purporting to be a valuation report. Unfortunately, this Court made these orders without according the 2nd Respondent a hearing on the matter. This was a fundamental and an incurable error, which has occasioned a miscarriage of justice to the 2nd Respondent; thus justifying recall and review of the judgment. This application succeeds

on this ground too. I would accordingly set aside the orders this Court made basing on that valuation certificate.

Parameters of review after reopening

I must reiterate, but with a caution, the proposition of law that this Court's remit in a review process such as the instant one is strictly supervisory; which is at variance with the powers conferred on the Court in the exercises of its appellate jurisdiction. Having determined that the impugned decision of the Court should be re-opened, I find it appropriate to set out the duty of the Court upon re-opening its judgment. The requisite factors for Court to recall and re-open its decision, differ from what it should take into account upon the recall and re-opening of such decision. The considerations that apply in the latter, serve to ensure that the parties get a fair resolution of the findings and decision that gave rise to the review; which in law is known as a speaking order. There is thus no need or requirement for additional evidence or further submissions in reiteration upon re-opening the decision for review.

The compelling consideration for review by this Court, which places it at variance with review in the lower Courts, includes the reality that it is the final Court in our jurisdiction; from which no appeal lies to any other Court. Furthermore, this Court is under duty to ensure that it renders substantive justice, pursuant to the provisions of Article 126 (2) (e) of the Constitution; and in the exercise of the wide discretion conferred on this Court by Rule 2 (2) of the Rules of this Court. This was the core consideration Court emphasized in ***R v Bow Street Metropolitan Stipendry Magistrate and Ors, exparte Pinochet Ugarte (No.2)*** (supra), where Lord Browne - Wilkinson stated thus:

> *"... In principle, it must be that your Lordships, as the ultimate court of appeal, have the power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of*

*the House in this regards and therefore its inherent jurisdiction remains unfettered." **(Emphasis added)***

In ***Smith v New South Wales Bar Association [1992] HCA 36, 176 CLR 256;*** or ***66 ALJR 605;*** or ***108 ALR 55***, the High Court of Australia, as the highest Court in Australia, was determining an appeal from a review decision of the Court of Appeal of New South Wales. The Court of Appeal had reviewed its judgment and found that it had committed an error; but it nonetheless saw no reason to vary its order of disbarment of Mr. Smith. In the High Court, Mahoney J.A. of the Court of Appeal was faulted in submission for *inter alia* erroneously basing his opinion on a conversation he had earlier held; thus resulting in the Court's failure to render proper consideration to the case at the second hearing. Second, the contention was that the Court had wrongly refused to allow the Appellant to lead character evidence at the second hearing.

The High Court considered the duty that lies upon Court in a second rehearing of a matter that has been recalled. Before remitting the file to the Court of Appeal to make a fresh finding on the disbarment of Mr. Smith, the Court pronounced itself on the nature and extent of the review required in the second hearing, thus:

"26. It is convenient to consider the first and second arguments of the appellant together, for, in combination, they raise a question as to the nature of the review required once it was decided that the case should be re-opened....

*27...The power is discretionary and, although it exists up until the entry of judgment, it is one that is exercised having regard to the public interest in maintaining the finality of litigation (2) **Wentworth v. Woollahra Municipal Council (1982) 149 CLR 672, at p 684.** Thus, if reasons for judgment have been given, the power is only exercised if there is some matter calling for review (3) **Marinoff v. Bailey (1970) 92 WN (NSW) 280,** at p 284; **National Benzole Co. Ltd. v.***

Gooch (1961) 1 WLR 1489, at pp 1492-1494. And there may be more or less reluctance to exercise the power depending on whether there is an avenue of appeal (4) State Rail Authority of N.S.W. v. Codelfa Constructions Pty.Ltd. (1982) 150 CLR 29, at pp 38-39, 45-46; Wentworth v. Rogers (No.9) (1987) 8 NSWLR 388, at pp 394-395. It is important that it be understood that these considerations may tend against the re-opening of a case, but they are not matters which bear on the nature of the review to be undertaken once the case is re-opened, as this case was." (Emphasis added)

In essence, the Court opined that the grounds for recall of judgment for review are not necessarily the same considerations after Court has reopened the case. The Court further observed that:

"28. It is said in Ritchie's Supreme Court Procedure that the power to review a judgment in a case where the order has not been entered will not ordinarily be exercised to permit a general re-opening; (5) Ritchie's Supreme Court Procedure, New South Wales, vol.1, p 2855. As a general statement that is correct, both as to whether leave to re-open will be granted and, if it has been, as to the nature of the review involved. But it is a general statement only and, once a matter has been re-opened, the nature and extent of the review must depend on the error or omission which has led to that step being taken. Very little will be required in a case where, for example, all that is involved is a mathematical error in the calculation of some particular item of loss or damage. And, in the case of a factual error, the extent of the review will vary depending on whether the error goes to the heart of the matter or whether its significance is confined to some discrete subsidiary issue.

29. The error which led to the re-opening of the present case may or may not have been of critical importance in the evaluation of the appellant's conduct by each of their Honours. That was not the factor on which the nature and extent of the review depended. What must be considered is the

question to which the error was relevant and the significance of that question to the decision reached.

30. The error in the present case was relevant to the appellant's honesty ... Once the decision to re-open was made, what was required was a reconsideration of his truthfulness in relation to that matter and, because it also bore on the matter, his truthfulness generally." ***(Emphasis added)***

Dean J agreed with Brennan, Dawson, Toohey, and Gaudron JJ.and concluded at para 7:

"On that reopened hearing, it was apparent that the original finding that the appellant had deliberately lied to the Court of Appeal was affected by the mistake of fact which the Court of Appeal had made. Accordingly, it was necessary for the Court of Appeal to examine afresh the whole question whether a specific finding of deliberate lying should be made." ***(Emphasis added)***

I find this decision highly persuasive with regard to the extent of review this Court may exercise upon its finding that it had made some fundamental error in its earlier decision. In the instant case, as I have pointed out, this Court itself raised a new issue; but, in denying the parties a fair hearing thereon, it committed a fundamental error. This is exacerbated by the fact that it was upon this new issue that this Court made its finding on fraud, liability of the Applicant and 2nd Respondent, and nullification of the sale, which were at the core of the appeal. It acted in misapprehension of the fact that the Court of Appeal had considered the arguments on fraud; hence, it made fresh re-evaluation of the facts, as if it were a first appellate Court, which was entirely unjustified. It placed reliance upon a purported valuation report that was evidently deficient; and erroneously made a finding on an issue of negligence, which was not a cause of action at all at the trial.

This Court also impeached the Applicant's honesty and propriety; thus putting his integrity into issue. Its consideration of these as the determinant issues alongside or relating to that of fraud had a direct bearing on its decision on the issues of fraud, and the requirement for consent prior to the sale of the suit property, which have given rise to the instant application for review. Aside from the erroneous determination of the issue of *'other fraudulent conduct'*, which it itself introduced regarding the sale of the suit property, its resolution of this issue was also inextricably intertwined with its finding on fraud and negligence. In its judgment, the Court said:

> *"I think there is merit in the appellants complaint that the 1st respondent approached his duty as a liquidator in disposing of the suit property bearing in mind only the interest of Crane Bank Limited. In that regard, the 1st respondent was clearly at fault as settling the said secured debt owing to the bank should not have been his only duty. He clearly placed the interest of one creditor over and above the interests of any other creditors as well as above the interest of the members of the company. This was contrary to the law.*
>
> *The suit property was mortgaged to Crane Bank who had a legal mortgage over the same. The 1st respondent justified the sale of the suit property on the ground that it was in danger of being sold off by the bank's auctioneer at a lower price.*
>
> *It is imperative first of all to resolve the question whether the liquidator's actions were consistent with the provisions of the repealed Companies Act especially section 301 thereof. I do not think so. The 1st respondent could not have sold the said property without the consent and or acquiescence of Crane Bank Ltd. Such consent and or acquiescence of Crane Bank amounts to an arrangement with a creditor within the terms of S. 244 (1) (e) of the repealed Companies Act. A liquidator can only execute an arrangement with*

the sanction of a special resolution as provided by section 301 of the said Act...."

This further becomes clear at p.32 para [1] where the Court notes:

"*Further, it is on record that the 2nd respondent had also been in discussions with the appellant's directors with a view to purchasing the suit property prior to the involvement of the 1st respondent but that no agreement had been reached on the price. Curiously, the 2nd respondent subsequently bought the suit property from the 1st respondent at a price way below their initial proposal made to the appellant and rejected by him. It cannot therefore be true that the 2nd respondent acted in good faith and with honesty.*

Consequently, the 2nd respondent's plea of bona fide purchaser for value without notice does not stand in light of its knowledge about the transaction and their participation in the purchase of the property to the exclusion of the appellant whose officers had previously held discussions with them. The 1st respondent's attempt to exclude the members of the company from the sale of the suit property should have been a red flag for them. At the very least, they should have inquired further whether the actions of the 1st respondent, in excluding the appellant's participation in the sale were legal. They chose not to do so and cannot claim to have acted bona fide." ***(Emphasis added)***

I have considered it an imperative need to reproduce here above, in *extenso*, part of the judgment of this Court as evidence that the Court inexplicably intertwined the issue of legality of the sale of the suit property with other issues; and unfortunately resolved them together as is elucidated herein. It is therefore incumbent on this Court to determine, in this review application, the issue of the sale of the suit property independent of the other issues. This can only be resolved upon making a correct construction of the provision in

the Act regarding the requisite consent prior to the sale of the asset of a company undergoing a winding up process, as I have already intimated above. I therefore find it inevitable to revisit, in this review process, the issue of legality of the sale of the suit property; as it is the only issue whose resolution has not been revisited.

Legality of the sale

The Court attributed the failure to obtain consent of the company, *vide* a special resolution before sale of the suit property, to dishonesty; the kind of which disentitled the 2nd Respondent from presenting itself as a *bona fide* purchaser for value without notice. There is thus need to settle the issue of a special resolution to authorize sale, separately from that of fraud; basing on the submissions made in this regard at the trial Court, Court of Appeal, and in this Court. I consider the resolution of this issue to be of paramount importance with regard to the insolvency regime in our jurisdiction. Without altering its substance and import, I would recast the issue of "w*hether the sale was lawful*", succinctly as:

> "*Whether the sale of the suit property without a special resolution of the Company contravened sections 301(1) (a) and 244(1) (d) and (e) of the Companies Act Cap 110; and if so, what is the effect of such sale?*"

Section 301 of the Act, relied upon by the 1st Respondent, provides as follows:

> "***301. Powers and duties of the liquidator in a voluntary winding up.***
>
> *(1) The liquidator may—*
>
> *(a) in the case of a members' voluntary winding up, with the sanction of a special resolution of the company, and, in the case of a creditors' voluntary winding up, with the sanction of the court or the committee of inspection or (if there is no such committee) a meeting of the creditors, exercise any of the powers given by*

section 244(1)(d), (e) and (f) to a liquidator in winding up by the court;

(b) without sanction, exercise any of the other powers by this Act given to the liquidator in a winding up by the court;

(c) exercise the power of the court under this Act of settling a list of contributories, and the list of contributories shall be prima facie evidence of the liability of the persons named therein to be contributories;

(d) exercise the power of the court of making calls;

(e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution or for any other purpose he or she may think fit." ***(Emphasis added)***

Section 244 (2), which the Applicant (who was the 1st Respondent in the appeal) relied on, grants broad powers to a liquidator in a winding up by Court; and this also applies to a liquidator in a voluntary winding up, who is acting without a special resolution. The section provides thus:

"(2) The liquidator in a winding up by the court shall have power—

(a) to sell the movable and immovable property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(b) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal ..."

It is therefore clear that even without a special resolution by the company, the liquidator in a voluntary winding up process has general powers similar

to those exercisable by a liquidator in a winding up by Court, as is provided for under s. 301 (1) (b) and s. 244 (2) (a) & (b) of the Act. This is so, but with the exceptions or limitations imposed under section 244 (1) (d), (e) and (f) of the Act; which are provisions requiring special resolutions. Section 244 (1) (d) & (e) provides, on a winding up by the Court, as follows:

> *"**244. Powers of the liquidator.***
>
> *(1) The liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection-*
> *(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;*
>
> *... ... ...*
>
> *(d) to pay any classes of creditors in full;*
>
> *(e) to make any compromise, or arrangement with creditors, or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;*

In my opinion, the determination of this question, in the light of the provisions above, lies in the correct classification of the transaction between ATM (in liquidation) and Crane Bank Ltd. It is important to note that at the time ATM executed the mortgage with Crane Bank, the funds whereof were applied to settle the company's indebtedness to the Cooperative Bank, ATM was not in liquidation; but rather in receivership. The status of ATM in receivership ceased, and converted to that of ATM in liquidation, upon the settlement of its indebtedness to the Cooperative Bank. For this, I find guidance in ***"Gower: Principles of Modern Company Law" Sweet & Maxwell, 11th Edition,*** wherein the authors explain at p. 1220 that a members' voluntary winding up, such as is in issue in the instant matter, *"is possible only if the company*

is solvent, in which event the company's members appoint a liquidator; whereas if it is not, the creditors have the whip hand in deciding who the liquidator shall be." The pertinent question then is whether the loan obtained from Crane Bank was in furtherance of ATM's business transactions, or it was for facilitating the winding up of ATM. This, I will advert to, shortly.

Be it as it may, the important point to note here is that a mortgage, such as the one that was held by Crane Bank over the suit land, "*involves a conveyance of property subject to a right of redemption*" (See ***Re Bond Worth Ltd [1980] Ch. 228 at 250***). In law, the mortgagee, being a secured creditor, enjoys a peculiar entitlement to realize the mortgaged property outside of the insolvency regime. This owes to the fact that a mortgagee is accorded priority and preferential treatment over, and to the detriment of, other classes of creditors in the winding up process. Hence, a mortgagee may choose to 'stand in line' with other creditors, and claim payment alongside them; or, instead, realize the mortgaged property outside of the insolvency regime, as Crane Bank did in the instant case. This position of the law is clearly expressed in "***Gower: Principles of Modern Company Law***" (supra), at p. 1178, thus:

> "***(ii) Preferential creditors***
>
> *The general rule on insolvency is that pre-insolvency rights are respected, and the Company's unsecured creditors share the losses pari passu. However, this general rule has been varied by statute, giving certain classes of creditors added protection by according them a statutory preference over some or all the company's other unsecured creditors. Typically this priority is over the other unsecured creditors not the secured creditors (who are entitled to realise the secured assets outside this insolvency regime).*"

The position in law is therefore that all unsecured creditors have to wait for any creditor secured by a mortgage to realize the security; then whatever remains therefrom, is applied to the other classes of creditors.

In the instant application, notwithstanding that the sale of the suit property was done in realization of the security for funds that Crane Bank had extended to ATM, which later underwent a winding up process, it was not done under the laws that govern the winding up of companies; but instead outside of the winding up process. The sale was, in reality, instigated by Crane Bank for the realization of the security, which ATM had mortgaged to secure the loan Crane Bank had extended to it. This effect of the sale would be the same with any other that was done under circumstances where the mortgagor was a solvent company not undergoing a winding up process. The payment of classes of creditors provided for and envisaged under section 244 (1) (d) of the repealed Companies Act, and the arrangement provided for under s. 244(1)(e) thereof, were thus inapplicable. I would accordingly uphold the decision of the Court of Appeal; which held in this regard, at p. 25, thus:

> *"We agree ... that the suit property was a subject of a legal mortgage and therefore was governed by the Mortgage Act. We find that the 1st respondent sold the suit property subject to encumbrances including the mortgage. The bank obviously permitted the sale to proceed subject to the mortgage and that is why the property including the land title was transferred to the buyer ... A mortgagor has right at all times under the law to sell the mortgaged property subject to the mortgage. The application of the mortgage Act in this transaction could not have been a hindrance to the sale."*

Indeed, Crane Bank the mortgagee had all the right to sell off the mortgaged property to realize its security over the loan it had advanced to ATM; and this, it set out to execute through bailiffs it had appointed. On the evidence, the Applicant intervened and, with the consent of the 1st Respondent acting for ATM the mortgagor, carried out the impugned sale of the suit property so as to prevent sale thereof by the bailiff at a lesser value. The sale was neither for payments to classes of creditors, nor in an arrangement or compromise provided for respectively under sections 301(1) and 244 (1) (d) & (e) of the

repealed Companies Act. The fact that the liquidator sought and obtained the consent of the 1st Respondent who was acting for the mortgagor, did not in any way bring the transaction within the purview of the provisions of the aforesaid sections 301(1) and 244 (1) (d) & (e) of the repealed Act; or in any way alter the nature of the transaction at all.

Furthermore, it is noteworthy that in an earlier case of ***African Textile Mill Limited (In Liquidation) vs Co-Operative Bank Limited (In Liquidation) HCT-00-CC-CS-20 of 2005,*** which related to ***HCT-00-CC-CS-0104-2002*** and ***HCT-00-CC-CS-0257-2005***, the controversy therein was over the rights of a mortgagee where the mortgagor company, the same ATM herein, was undergoing a winding up process. The Liquidator therein, Mr. Clive Mutiso, applied to the High Court seeking directions on whether a mortgagee could realize his security during the winding up process. Bamwiine J (as he then was), said:

> *"And this brings me to the thrust of the dispute between the parties, that is, whether the Plaintiff as the mortgagee should be restrained from exercising its contractual rights on account of the winding up process. On this point, I can do no better than re-echo the words of the learned author, William James Gouch,* ***Company Charges, 2nd Edn*** *at P. 949, on "Security Proprietary Interest:*
>
> > *'As in bankruptcy, a secured creditor in company liquidation can at his option effectively stand outside the liquidation altogether or come into the liquidation and prove. The nature of the election of a secured creditor was described in* ***Food Controller -vs- Cork [1923] AC 647*** *(at 670 - 671) by Lord Wrenbury:*
> >
> > > *'The phrase "outside the winding up" is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the*

mortgage my property. It is immaterial to me whether my mortgagor is winding up or not. I remain "outside the winding up" and shall enforce my rights as a mortgagee.'

This is to be contrasted with the case in which a creditor prefers to assert a right, not as a mortgagee, but as a creditor. He may say, "I will prove in respect of my debt." If so, he comes into the winding up.'

I wouldn't agree more with the learned author."

Having expressed himself thus, the learned judge made the following observations:

"From the records, the Respondent is doubly assured. It can enforce its rights as a mortgagee as well as a Judgment creditor. In my view, its election to realise its security and discharge the secured debt out of the sale proceeds as far as possible cannot be faulted. The Applicant must come to grasp with the reality if the company assets are to be protected from further waste through costly and unwarranted suits. It is the considered view of the Court that it would be honourable for the liquidator to leave the mortgagee to realise the security as by law established. It appears that the liquidator harbours the feeling that the Respondent may not conduct the sale in the best way possible. Such a feeling is natural but unwarranted.

True, a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so: ***Cuckmere Brick Co. Ltd -Vs- Mutual Finance Ltd [1971] 2 All ER 633****. But the law is not short of remedies if the mortgagee messes it up. The sale must be a genuine one by the mortgagee to an independent purchaser at a price honestly arrived at. The mortgagee is liable in damages to the mortgagor for negligence either of the mortgagee or his agent in connection with the sale. He has a duty to take reasonable steps to obtain the proper price in the interest of the mortgagor."*

I approve of this as being a correct proposition of the law. The matter now before this Court, is on all fours with the facts of the case referred to above regarding the company in issue. The sale of the suit property herein by the mortgagee, albeit that it was with the help of the Applicant, did not trigger the operation of s. 301(1)(a) and s. 244 (1) (d) or (e) at all. Thus, I am convinced and find that there was no requirement for the Applicant to obtain a special resolution from the company before sale of the suit property to the 2nd Respondent. Thus, I uphold the finding by the Court of Appeal that the sale of the suit property by the Applicant to the 2nd Respondent was entirely lawful; as it was not in contravention of s. 301 (1) and s. 244 (1) (d) & (e) of the repealed Act. Accordingly, this application succeeds on this ground too.

Before I take leave of this matter, I should like to make a well-considered observation. Under the repealed Companies Act, a voluntary winding up of a company could have been through members' voluntary winding up resolution or a creditors' winding up resolution. In the instant case, it was the former. Under section 276 (1) of the Act, voluntary winding up would have been triggered by the following;

" (a) when the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;

(b) if the company resolves by special resolution that the company be wound up voluntarily;

(c) if the company resolves by special resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up." ***(Emphasis added)***

Section 278 of the repealed Act provided that the process of voluntary winding up would commence from the time of the passing of the resolution for voluntary winding up; which in this case took place on the 13th May, 2005. From then on, ATM could only operate with the goal of concluding the settlement of liabilities to creditors, and ceasing business altogether. Section 279 of the Act provided as follows:

> "***279. Effect of voluntary winding up on the business and status of the company.***
>
> *(1) In case of a voluntary winding up, the company shall, from the commencement of the winding up, cease to carry on its business, except so far as may be required for the beneficial winding up of the company."*

Section 281 of that Act also provided that in the case of a voluntary winding up, the company needed to make a declaration as to its solvency to show that it can pay off its creditors in full. Section 281 provided;

> *"281. Statutory declaration of solvency in case of proposal to wind up voluntarily.*
>
> *(1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors, may, at a meeting of the directors make a declaration in the prescribed form to the effect that they have made a full inquiry into the affairs of the company, and that, having done so, they have formed the opinion that the company will be able to pay its debts in full within such period not exceeding twelve months from the commencement of the winding up as may be specified in the declaration." **(Emphasis added)***

In the instant case, it is not clear from the record of appeal whether s. 281 was complied with regarding ATM whose matter is before this Court. I therefore found it surprising that the company was struggling financially, unable to pay its creditors; and yet the 1st Respondent was inexplicably striving to refinance it. Since the liquidator's duty was strictly to pay off

creditors, and then wind up the company, it is not surprising that his focus was to assist in the realization of the security under the mortgage at a better price; and thereby, as much as possible, alleviate the burden of indebtedness that weighed on the company. This accords with the point made in "***Gower: Principles of Modern Company Law***" (supra) at p. 1223; namely that upon the appointment of a liquidator, the liquidation process proceeds with the objective to:

> *"secure that the assets of the company are got in, realized and distributed to the company's creditors; and if there is a surplus, to the persons entitled to it."*

In "***Gower: Principles of Modern Company Law***" (supra) the authors note, at page 1124, that:

> *"Once the winding up order is made, the winding up is deemed to have commenced as from the date of presentation of the petition (or, indeed, if the order is made in respect of a company already in a voluntary winding up, as from the date of the resolution to wind up voluntarily."*

The authors note further, at p.1225, that:

> *"A voluntary winding up is deemed to have commenced as from the date of passing of the resolution; there is no relating back as there is the case in a winding up by court. As from the commencement of the winding up, the company must cease to carry on its business, except so far as may be required for its beneficial winding up ..."*

In the instant case, notwithstanding that ATM was already undergoing a voluntary winding up process, the 1st Respondent surprisingly continued to operate the business of the company was still a normal going concern. The record of appeal has captured this fact on pp. 196 to 199 thereof, as follows:

"Bautu: Were you aware that there was a loan that had been incurred by the company and that this loan was meant to be offset?

PW1: Yes please.

Bautu; Did you take any efforts to offset that loan?

PW1: We were trying.

Bautu: Did you take any efforts to offset the loan at the time you were running the factory?

PW1: You see, our factory the main account is operated from Crane Bank Kampala by a liquidator. And whatever proceeds that come in we have to credit account in Mbale with Stanbic Bank.

... ...

Court: The question is this; he is saying that on the Crane Bank account which was run by the liquidator there was a loan to facilitate the running of the ATM. ATM was banking what it was able to get on Stanbic Bank. Was there any move to assist in the payment of the loan that Crane Bank had given?

PW1: No My Lord.

... ...

Bautu: Did you run this factory at the time the liquidator was appointed?

PW1: Yes up to February 2007."

It is therefore more perplexing that despite the company having obtained a loan from Crane Bank on the security of the mortgaged suit property, the 1st Respondent made no payment whatsoever to Crane Bank to service the loan. Consequent upon this default in servicing the loan, the Crane Bank justifiably moved to realize the suit property being the security for the loan. It was equally right for the Applicant as one of the guarantors of the loan (together with the 1st Respondent's director, Jayantilal V. Patel, who was a party to the suit in the High Court and in the Court of Appeal), to ensure repayment of the loan. In respect wherefore I concur with the Court of Appeal that the Applicant, as liquidator, commendably strived to obtain a better price for the

security than would have possibly been realized under a forced sale by the bailiff appointed by Crane Bank.

In the appeal from which the instant review application arises, this Court has pronounced itself that there was no proof of the alleged fraud; and the alleged negligence could not stand because it had not been pleaded as a cause of action. Therefore, there is no basis for making a finding that in his disposal of the suit property, the Applicant acted in contravention of any provision of the repealed Act. What the Applicant needed to do was rendering an account, to ATM, of the proceeds of the sale of the suit properties. This, he concedes he failed to do; but his explanation is that this is so because he was sued almost immediately after the sale, before he could account to the company.

In the premises, this application for review succeeds. Wherefore, I would make the following orders:

1. The judgment and orders of this Court, made in Civil Appeal No. 6 of 2017, are hereby recalled.
2. Upon review of the said judgment and orders, I would set aside the following findings, and, or orders and of this Court:
   (i) The finding of fraud imputed on, or attributed to, the Applicant.
   (ii) The finding that the 2nd Respondent was complicit in the fraud.
   (iii) The order in Civil Application No. 16 of 2019 (No. 2) for the removal of the Applicant as Liquidator of ATM (in liquidation).
   (iv) The finding that the sale of the suit property was unlawful for contravening s. 301 (1) and 244(1) (d) &/or (e) of the Companies Act Cap 110 (now repealed).
   (v) The order for cancellation of the 2nd Respondent's name from the certificate of title of the suit property.
   (vi) The order for the 2nd Respondent to return the machines that were on the suit property at the time the Applicant as liquidator of ATM

sold the suit property to the 2nd Respondent; and similarly, payment for their value as is indicated in the valuation certificate.

3. I therefore find no merit in Civil Appeal No. 6 of 2017 of this Court. I would uphold the decision of the Court of Appeal from which the appeal arose; and accordingly dismiss the appeal.
4. In the light of the history of this suit, as is set out herein above, I would also make the following consequential orders:
   (i) Each party to this application, and to Civil Application No. 16 of 2019 (No.1), as well as Civil Application No. 16 of 2019 (No.2), all of which are for review, shall bear their respective costs of each of the applications.
   (ii) I would, in agreement with the Court of Appeal, make no order as to costs, against the 1st Respondent (Ranchhodbhai Shivabhai Patel Ltd) in the appeal.
   (iii) I would order the Applicant to render an account of the proceeds of the impugned sale, by filing it in the High Court and by providing copies thereof to the 1st Respondent's Counsel, within a period not exceeding 180 days from the date of delivery of this judgment.

Since Tuhaise and Mugenyi, JJSC, agree, orders are hereby by majority decision of the Court, issued in the terms proposed in this judgment

Dated at Kampala, this **1st** day of **September** 2025

Alfonse C. Owiny - Dollo

CHIEF JUSTICE

Judgment delivered this 10th day of September, 2025.

Registrar, SC

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: OWINY - DOLLO, CJ; TIBATEMWA-EKIRIKUBINZA; TUHAISE; CHIBITA; MUGENYI; JJSC)

CIVIL APPLICATION No. 42 OF 2021

[Arising from Supreme Court Civil Appeal No. 6 of 2017 (Mwangusya, Opio-Aweri, Mwondha, Tibatemwa, Mugamba, JJ.SC), & Supreme Court Civil Application No. 16 of 2019 (Mwangusya, Opio-Aweri, Mwondha, Tibatemwa, Mugamba, JJ.SC).]

HENRY WAMBUGA :: APPLICANT
(Liquidator of African Textile Mills in Liquidation)

VERSUS

1. **RANCHHODBHAI SHIVABHAI PATEL LTD**
2. **MUKWANO ENTERPRISES LIMITED ::::::::::::::::: RESPONDENT**

RULING OF TIBATEMWA–EKIRIKUBINZA, JSC.

I have had the opportunity to read in advance the judgment prepared by my learned brother Owiny-Dollo, CJ.

The application before us seeks that this Court:

1. *"Recalls and reviews its judgment dated 6th November 2018 in Civil Appeal No. 6 of 2017, and ruling in Civil Application No. 16 of 2019 as it embodies several findings and holdings by the Court that on the face of the record occasion an injustice to the Applicant and contravene provisions of the Constitution and the law.*

2. *Recalls and reviews its decision to remove the Applicant (as liquidator of African Textile Mills Limited in Liquidation) in order to prevent injustice occasioned unto the Applicant.*
3. *Reviews the decision in Civil Appeal No. 06 of 2017 and Civil Application No. 16 of 2019 by reason of the errors of law apparent on the face of the record of the judgments.*
4. *Grants costs of and/or incidental to the application."*

I am in agreement with the learned Justice's CJ's pronouncement concerning the scope of review under Rule 35 of the Supreme Court Rules and his conclusion that none of the clauses thereunder is applicable to the present matter.

Review under Rule 2(2)

I now move on the relevancy of Rule 2(2) of the Supreme Court Rules to the matter before the Court and specifically answer the question whether the impugned ruling should be recalled based on the argument of the Applicant that he was adjudged fraudulent without being given a hearing.

The rule grants the Court inherent power to make such orders *as may be necessary for achieving the ends of justice* or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.

The Applicant seeks for a recall and review of the judgment of this Court in Civil Appeal No. 16 of 2017 delivered on 6th November 2018. Mugamba JSC who wrote the lead judgment upheld the findings of fact by the High Court and the Court of Appeal regarding the allegation that the Applicant received US$ 300,000 outside the sale agreement as an inducement to have the property sold below its market value - a bribe. The other Justices on the panel agreed with him. In his words Mugamba held that: "the respective findings of fact by the High Court and the Court of Appeal regarding failure

by the Applicant to prove receipt of a bribe of US $ 300,000 are unassailable".

However, Mugamba JSC went ahead to address the process through which the property was sold and juxtaposed it with the legal duty of a liquidator. Because of the importance of the analysis in answering the question whether the Applicant was denied the right to a fair hearing, I have fund it prudent to quote the relevant part of the judgment in *extenso* from page 19 – 29 as follows:

> *"I shall now address the question of whether the said sale of the suit property by the 1st respondent, in exercise of his powers as a liquidator, to the 2nd respondent was lawful and devoid of any other fraudulent conduct. In my view, this is a separate question from the allegation of fraudulent conduct in form of receiving an illegal commission or bribe that was not proved.*
>
> The appellant contends also that the secretive manner, devoid of any transparency, in which the 1st respondent sold the suit property to the 2nd respondent also amounted to fraud. It is further argued that the sale was done in violation of the provisions of the Companies Act, Cap.110, specifically sections 244 and 301 thereof and that the 1st respondent, as liquidator, did not discharge his professional duty in a transparent and ethical manner expected of him.
>
> In my view, the lower courts did not address with sufficient detail the contention by the appellant that the law required the 1st respondent to seek the consent of the members of the company prior to sale of the suit property. The 1st respondent strongly disputed that such legal requirement exists and the lower courts agreed with him. As a consequence of that finding, the courts did not address the issue of whether the sale of the suit property was done at an under value inevitably pointing to

the allegation that the 1st respondent had not competently fulfilled his duties as a liquidator.

Given the above, I find it necessary to review the applicable provisions of the repealed Companies Act Cap.110 that governed the powers of the 1st respondent in conduct of the voluntary liquidation of M/s African Textile Mills Limited, the erstwhile owners of the suit property. It is not in dispute that the said company was in a voluntary liquidation and that the shareholders initially appointed one Clive Mutiso a liquidator. Subsequently the same shareholders appointed the 1st respondent to replace the former following the former's resignation.

The relevant provisions in the context of this appeal are reproduced here below.

Section 301(1) of the repealed Companies Act provided as follows:

301. Power and duties of the liquidator in a voluntary winding up (1) The liquidator may-

(a) in the case of member's voluntary winding up, with the sanction of a special resolution of the company, and, in the case of a creditors' voluntary winding up, with the sanction of the court or the committee of inspection or (if there is no such committee) a meeting of creditors, exercise any of the powers given by section 244(1) (d), (e) and (f) to a liquidator in winding up by the court;

(b) without sanction, exercise any of the other powers by this Act given to the liquidator in a winding up by the court;

(c).....

(d).....

(e).....

The relevant provisions of Section 244 of the repealed Act provide as follows:

244. Powers of the liquidator

(1) The liquidator in a winding up by the court shall have power, with the sanction either of the court or of the committee of inspection-

(a).....

(b).....

(c).....

(d, to pay any classes of creditors in full

(e) to make any compromise, or arrangement with creditors, or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(2) The liquidator in a winding up by the court shall have power-

(a) to sell the movable and immovable property and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels;

It follows therefore that a liquidator, in a members' voluntary winding up, cannot pay creditors or enter into any arrangement with them without a special resolution by shareholders. This is an exception to the general principle in the repealed Act that a liquidator assumes all rights and responsibilities of officers and or directors of a company in liquidation. Under the cited provisions, any ordinary sale of movable and immovable assets of the company in liquidation can be done by the liquidator without the sanction of a resolution provided it does not amount to a form of payment to creditors and is not done in fulfilment of an arrangement or compromise with creditors.

It is trite law that in conducting a liquidation, a liquidator is expected to discharge that function with a high degree of care and diligence. The words of Maugham J in **Re Home and Colonial Insurance Co (1930) Ch. 102 at 125** are particularly relevant:

"..... high standard of care and diligence is required from a liquidator in a voluntary winding up. He is of course paid for his services; he is able to obtain whenever it is expedient the assistance of solicitors and counsel; and, which is most important consideration is, he is entitled, in every case of serious doubt or difficulty in relation to the performance of his statutory duties, to submit the matter to the Court, and to obtain guidance."

Similarly, the English Court of Appeal, in **Brook v Reed (2012) 1 WLR 419** to prove the following restatement as applicable to all insolvency office holders such as the 1st Respondent in this appeal:

"The essential point which requires constantly to be borne in mind is that office-holders are fiduciaries charged with the duty of protecting, getting in, realising and ultimately passing on to others assets and property which belong not to themselves but to creditors or beneficiaries of one kind or another. They are appointed because of their professional skills and experience and they are expected to exercise proper commercial judgment in the carrying out of their duties. Their fundamental obligation is, however, a duty to account, both for the way in which they exercise their powers and for the property which they deal with."

Lastly, the Supreme Court of South Africa, in **Standard Bank of South Africa vs Basil Brian Nel & 2 Others, Case No.103 of 2009** held that a liquidator owes a duty to the whole body of members and the whole body of creditors. In particular, the Court emphasized that a liquidator's conduct must be beyond reproach as he stands in a fiduciary relationship to the company

of which he is the liquidator and to the body of its creditors and members as a whole. Relying on a scholarly text, **Commentary on the Companies Act by M S Blackman et al, Vol.3** the majority endorsed the following statement:

"A liquidator must act with care and skilling the performance of his duties. He has a duty to exercise particular professional skill, are and diligence in the performance of his duties, and will incur liability if he fails to display that degree of care and skill which, by accepting office, he holds himself out as possessing. Thus a high standard of care and diligence is required of a liquidator, He must act reasonably in the circumstances...
The liquidator stands in a fiduciary relationship to the company of which he is the liquidator, to the body of its creditors as a whole, and to the body of its members as a whole. As a fiduciary, the liquidator must at all times act openly and in good faith, and must exercise his powers for the benefit of the company and the creditors as a whole, and not for his own benefit or the benefit of a third party or for any other collateral purpose. He must act in the interests of the company and all the creditors, both as individuals and as a group. He must not make a decision which would prejudice one creditor and be of no advantage to any of the other creditors or to the company."

In view of that well developed position regarding the duty of liquidators at common law and the Companies Act of South Africa, which is in *pari materia* with our own company law, it is a firmly settled position that the duty of care imposed on a liquidator is of a very high standard and this duty is owed, not only to creditors but also to the other members of the company. This position of the law has a bearing on the present appeal and the vigorous contention by the 1st respondent, the liquidator of

African Textile Mills Limited that his main responsibility was to settle the creditor who was also a registered mortgagee. I have also considered the manner in which he sold the suit property without the awareness or even consent of the appellant and his failure or outright refusal, up to the present day, to account for the proceeds of the sale save for noting that the main or even sole creditor, Crane Bank Limited, was settled. The 1st respondent was required by the judgment of the High Court to provide an account of the proceeds of the sale and file the same in the Court within 90 days of the Judgment. He is yet to do so.

I think there is merit in the appellant's complaint that the 1st respondent approached his duty as liquidator in disposing of the suit property bearing in mind only the interests of Crane Bank Limited. In that regard, the 1st respondent was clearly at fault as settling the said secured debt owing to the bank should not have been his only duty. He clearly placed the interests of one creditor over and above the interests of any other creditors as well as above the interests of the members of the company. This was contrary to the law.

The suit property was mortgaged to Crane Bank Limited who had a legal mortgage over the same. The 1st respondent justified his sale of the suit property on the ground that it was in danger of being sold off by the bank's auctioneers at a lower price.

It is imperative first of all to resolve the question whether the liquidator's actions were consistent with the provisions of the repealed Companies Act, especially Section 301 thereof. I do not think so. The 1st respondent could not have sold the said property without the consent and or acquiescence of Crane Bank Limited. Such consent and or acquiescence of the creditor amounts to an arrangement with a creditor within the terms of Section 244 (1) (e) of the repealed Companies Act. A liquidator

can only execute an arrangement with the sanction of a special resolution as provided by Section 301 of the said Act. It is common ground that there was no such special resolution and consequently, the implicit arrangement reached with Crane Bank Limited and readily admitted by the 1st respondent and the bank's auctioneer was in contravention of Section 301 of the repealed Companies Act.

The Court of Appeal justices held that the 1st respondent carried out his duties as a liquidator in accordance with the law and that there was no legal requirement for him to seek consent before selling the suit property. With respect, I disagree with this conclusion. Their Lordships appear not to have considered his import of Section 301 of the repealed Companies Act which I have referred to earlier. Further, the Court appears not to have addressed its mind to the fiduciary nature of the liquidator's duties to the company as well as to its members alongside the creditors.

It is worth noting that the High Court upheld the validity of the sale of the suit property but faulted the 1st respondent for having committed procedural errors in the liquidation exercise. It was for that reason the trial Judge ordered him to account for proceeds of the sale and allowed the appellants to recover their costs from him. It is evident that the trial Judge had misgivings about the manner in which the 1st respondent carried out his liquidation duties.

The Justices of the Court of Appeal appear not to have directed their minds to this aspect of the High Court decision. If they had done so, they would not have concluded that the 1strespondent arrived out his duty as liquidator in accordance with the law. He did not do so as I have labored to explain. I am in agreement with Counsel for the appellant in that regard. The law imposes

a very high duty of care on a liquidator because he/she is a professional and has a fiduciary relationship with the company in liquidation. He is therefore expected to act reasonably and in the best interests of the company as a whole.

The 1st respondent explained that he rushed to sell the suit property for the sum of US$ 1,200,000 in order to save the property of some guarantors since Crane Bank Limited had advertised the same. Both the Court of Appeal and the High Court accepted this justification. With the greatest respect, I do not agree that this rushed sale was in the best interests of the company, its creditors and members as a whole.

I note foremost that the 1st respondent did not bother to establish the market value and the forced sale value the suit property prior to its sale to the 2nd Respondent. If he had done so, he would possibly have reconsidered whether the consideration of US$ 1,200,000 was the best offer in the market.

The 1st Respondent was aware of the valuation two years before the sale which placed the market value of the suit property inclusive of machinery at Ug. Shs. 22,300,000,000/=. That sum was considerably higher than the price the property eventually fetched. I do not think it is possible that the suit property had depreciated that significantly in less than three years after that valuation to fetch a paltry price of US$ 1,200,000 that was then equivalent to approximately Ug. Shs. 2,200,000,000/= according to the record. Even if that were the case, the liquidator as a competent professional should have carried out a fresh objective valuation to determine the market value and forced sale value. The 1st respondent, who is an advocate and insolvency practitioner, must have been aware that even the bank could not legally sell the suit property for a price below the forced sale value.

In the event he did not bother to establish the forced sale value of the suit property from the auctioneer. Instead, upon learning from the auctioneer that two bidders had apparently offered very low amounts, he proceeded to speedily conclude a sale to the 2nd respondent without conducting a valuation of the property. With respect, the 1st Respondent did not carry out his duties like a competent insolvency professional placed in a fiduciary relationship to the company and its members. He did not discharge the duty of care imposed on him.

While I appreciate that the company had defaulted on its credit obligations with Crane Bank Limited that was not an excuse in my view, to dispose of the major asset of the company in such a reckless and out rightly negligent manner apparently for fear that the bank's auctioneer would sell it for a windfall. Being a lawyer, the 1st respondent ought to have known that the bank's auctioneer did not have powers to sell the property for a price below the forced sale value either. It defies logic that the 1st respondent never bothered to establish the fair market value of the property before concluding the sale. He did not act reasonably.

In view of my findings, I am in agreement with the appellant that the sale of the suit property was conducted unlawfully by the 1st respondent. The sale was done in violation of the provisions of the repealed Companies Act and in breach of the fiduciary relationship which the 1st Respondent has with the company and its members.

In the context of land law and specifically, the Registration of Titles Act Cap.230, the irregular and reckless manner in which the 1st Respondent conducted the sale of the suit property in violation of the law and his callous disregard or his fiduciary

duties amounts to fraud within the definition adopted by the Supreme Court in **Grace Asaba vs Grace Kagaiga, SCCA No.14 of 2014 at page 20** of the lead Judgment of Justice A.S. Nshimye.

In that case, this Court cited with approval the definition of fraud from Kerr on the Law of Fraud and Mistake, 5h Edition where fraud is stated to included:

"all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone."

I have no doubt that the 1st Respondent's egregious breach of his legal duty of care to the company in liquidation and to its members as well as his violation of the provisions of the now repealed Companies Act amounted to fraudulent conduct within the above definition. Doubtless the 1st respondent conducted the sale of the suit property in an irregular and fraudulent manner. He was guilty of fraud insofar as he breached his duty of trust and confidence justly reposed in him by the company in liquidation."

It is clear to me that the Court's finding that the Applicant's conduct was fraudulent was based on the evidence adduced before the court of first instance. It is this very evidence that the Court of Appeal re-evaluated to arrive at its own findings. Both courts below declined to define the conduct as fraudulent.

It is noted that one of the issues framed at the trial court was: whether the sale of the suit property was fraudulent or lawful? It follows that the conduct of the Applicant was evaluated on two fronts: whether it was unlawful on the one hand and on the other hand, whether it was

fraudulent. It was after evaluating the submissions of both the plaintiff and the defendants (the applicant as the first defendant) that the Trial Judge held that the sale of the suit property was not fraudulent or unlawful. The Supreme Court did not introduce anything new but departed from the findings of the courts below.

I therefore agree with the submission of the 1st Respondent that the Applicant cannot be heard to say that he was denied a hearing - the issue (of fraud) was actually not separate or new, it had already been in issue and had been submitted upon in the Courts below.

The Supreme Court reached a finding that the Applicant had violated/breached provisions of the Company's Act and described the Applicant's conduct *inter alia* as irregular, reckless, an egregious breach of legal duty. Citing precedent, the Court brought the impugned conduct within the definition of fraud.

The Applicant is challenging the Court's finding that his violation of the law fits in the definition of fraud. I have already pointed out that the finding of fraud was based on evidence adduced at the trial court which however, in the view of the courts below, did not qualify as fraud. In the opinion of this Court however, the conduct was fradulent. *So in essence, what the Applicant is challenging is the Court's appreciation of the evidence and the law.* As pointed out in the Lead Judgment, it is trite that "*an erroneous view of evidence or law is no ground for a review though it may be a good ground for an appeal.*" This was also held in **Abasi Belinda v Frederick Kangwamu & Another (1963) E.A. 557** thus:

> **"A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal".** (my emphasis)

It follows that even if we were to find that the Supreme Court erred in their appreciation of the evidence adduced and the law, that would not bring the issue within the ambit of a review. Interfering with the decision of the court on such ground would be tantamount to one panel of this Court sitting as an appellate court over a decision of an earlier panel.

However, I must also emphasise that in my opinion, the words of Mugamba JSC in stating that: "*the question of whether the said sale of the suit property by the 1st respondent, was lawful and devoid* ***of any other fraudulent conduct. In my view, this is a separate question*** *from the allegation of fraudulent conduct in form of receiving an illegal commission or bribe that was not proved*" are being misinterpreted and/or removed from the context in which the Learned Judge uttered them.

The Learned Justice uses the impugned phrase to distinguish the allegation of bribery which he had already dealt with and regarding which he had upheld the finding of both the trial court and the Court of Appeal, from the other conduct which the lower courts had adjudged NOT fraudulent, a finding which sitting as a second appellate court, he was entitled to deal with as a matter of mixed law and fact. I note that what the Supreme Court was handling was the ground of appeal by the appellants therein (1st Respondent before us now) that the Court of Appeal erred in law and fact when they held that the sale of the suit property by the Liquidator was not unlawful and was not fraudulent.

It therefore follows that the additional order 5 in Civil Application No. 16 of 2019 removing the Applicant as liquidator is based on the Court's findings in *Civil Appeal No. 6 of 2017* that his conduct was fraudulent.

In my considered opinion, there is no fundamental error inherent in the findings of the Court in Civil Appeal No. 6 of 2017 and related orders made in Civil Application No.16 of 2019. It would be a mockery of the Law and Justice that a court finds an individual to be fraudulent and yet does not remove the same individual from the position of a liquidator.

Further still, I am in agreement with my Learned Brother Chibita JSC in his opinion that a person who fails/refuses/neglects to comply with an order of court – to render an account of the proceeds of the sale and to do so by filing it in court within a specific time - cannot be heard to seek the ear of the court. In its judgment delivered on 6th November 2018, this Court re-affirmed the High Court's order of 16th December 2019, that the Liquidator files in Court an account of the proceeds of the sale. At the time of hearing Civil Appeal No.6 of 2017 by the Supreme Court, 9 years had elapsed since the High Court order had been issued. The Applicant has not come to court with clean hands and is not deserving of the exercise of this Court's discretion in his favour.

I would therefore dismiss this Application which seeks for a recall and review of *Civil Appeal No. 06 of 2017 and Civil Application No. 16 of 2019.*

I would dismiss the application with costs.

Signed: ..in absentia:.....

Prof. Lillian Tibatemwa-Ekirikubinza

Justice of the Supreme Court.

Date:..08/09/2025

Delivered at Kampala this.....10th.....**day of** September **2025.**

.....

Registrar, SC.

JUSTICE PROF. TIBATEMWA EKIRIKUBINZA ★ SUPREME COURT UGANDA ★ 08 SEP 2025

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: Owiny-Dollo, CJ, Tibatemwa-Ekirikubinza, Tuhaise, Chibita & Mugenyi, JJSC.

CIVIL APPLICATION NO. 42 OF 2021

HENRY WAMBUGA (Liquidator of African Textile Mills Limited in Liquidation) ……..**APPLICANT**

VERSUS

1.RANCHOBHAI SHIVABHAI PATEL

2.MUKWANO ENTERPRISES LIMITED ……..**RESPONDENTS**

Ruling of Percy Night Tuhaise, JSC

I have had the benefit of reading in draft the Ruling prepared by Hon. Justice Alfonse Owiny-Dollo, CJ. I agree with his analysis, decision and conclusions. I also agree with the orders he has proposed.

Signed at Kampala, this 20th day of August, 2025.

Percy Night Tuhaise
Justice of the Supreme Court

Delivered at Kampala this 10th **day of** September **2025.**

Registrar, SC

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: OWINY - DOLLO, CJ; TIBATEMWA-EKIRIKUBINZA; TUHAISE; CHIBITA; MUGENYI; JJSC)

CIVIL APPLICATION No. 42 of 2021

[ARISING FROM CIVIL APPEAL NO. 06 of 2017 AND CIVIL APPICATION No. 16 of 2019]

HENRY WAMBUGA (Liquidator of African Textile Mills Limited in Liquidation) :: APPLICANT

VERSUS

1. **RANCHHODBHAI SHIVABHAI PATEL**
2. **MUKWANO ENTERPRISES LIMITED :::::::::: RESPONDENTS**

RULING OF MIKE J. CHIBITA, DISSENTING.

I have had occasion to read the ruling of Owiny-Dollo, CJ, in draft. There are four major areas of departure from his ruling.

One is that there must be an end to litigation. When do we deem a matter to have been finally determined and decline to entertain it even under rule 2(2)?

Secondly, in matters of review, it is trite that the panel that handled the review be the one tasked with the review of their previous decision. The rationale behind this principle being that by its very nature a review is an invitation to the panel to review, rethink, reconsider their previous position.

Thirdly, the application at hand has had several applications for review considered before. Some of the applications were by members on the current panel. When does court say, enough applications for review?

Finally, he who comes to equity must come with clean hands. The record shows that the applicant does not have clean hands.

BRIEF BACKGROUND

Henry Wambuga (Liquidator of African Textile Mills Limited in Liquidation), hereinafter referred to as "the applicant", filed this application by Notice of Motion under Rule 2(2) of the Supreme Court Rules seeking orders that:

1. This honorable Court recalls its judgment dated 6th November, 2018, in Civil Appeal No. 06 of 2017, and the ruling in Civil Application No. 16 of 2019 as it embodies several findings and holdings by the court that on the face of the record occasion an injustice to the applicant and contravene provisions of the Constitution and the law.

2. That the Honourable Court recalls and reviews its decision to remove the applicant ((Liquidator of African Textile Mills Limited in Liquidation) in order to prevent injustice occasioned unto the applicant.

3. Court reviews the decision in Civil Appeal No. 06 of 2017 and Civil Application No. 16 of 2019 by reason of the errors of law apparent on the face of the record of the judgments.

4. The costs of and/ or incidental there be granted too.

The application is supported by an affidavit sworn by **Henry Wambuga (Liquidator of African Textile Mills Limited in Liquidation)**

The grounds for this application are:

(i) The judgment of the Court in Civil Appeal No. 06 of 2017 and the Ruling in Civil Application No. 16 of 2019 embodies several holdings and findings by the court that....

(ii) That in reviewing its own, the Court submitted the Orders of the judgment in Civil Appeal No. 06 of 2017 and Civil Application No. 16 of 2019 and removed me as a liquidator without due process of the law which act was beyond the role of this Court in relation to the judgment earlier delivered and inconsistent with the right to a fair hearing and the law.

(iii) That it's in the interest of justice that the Court reviews its decision in Civil Application No. 16 of 2019 and Civil Appeal

No. 06 of 2017 in order to achieve the ends of the justice as there are apparent factual errors and matters of law that gravely occasioned an injustice.

(iv) That the decision in Civil Appeal No. 06 of 2017 and Civil Application No. 16 of 2019 characterizing him as fraudulent has negatively affected him.

Mr. Prafulchandra Ranchhobhai Patel swore an affidavit on behalf of the 1st respondent stating that the application is misconceived, frivolous and an abuse of court process. Mr. Trevor Turyagenda, the Legal manager of the 2nd respondent swore an affidavit in reply on behalf of his principal stating that the applicant has given grounds that show errors and illegality apparent on the face of the Court's judgment.

Background to the Application:

The facts leading to this application are as follows:

The 1st respondent and Jayantilal V. Patel (herein after called the 1st respondent and another) owned 49% share in African Textile Mill Ltd (herein called "ATM") while the Ugandan government owned 51% shares with full management and administrative powers. Sometime in 1996, the government sold the 51% share interest to the 1st respondent who then became the majority shareholder.

In 1998, the respondents in a bid to revitalize the operations of the company obtained a loan from the defunct Cooperative Bank Ltd. However, before the full repayment of the loan, the Cooperative Bank

Ltd was put under statutory liquidation by the Bank of Uganda and the entire loan was recalled.

The 1st respondent and another entered into a repayment schedule agreement with the Bank of Uganda to liquidate the loan but failed to comply with the schedule. In 2005, the 1st respondent and another put the company under voluntary winding up and appointed Mr. Clive Mutiso (one of the directors) as the liquidator. When Mr. Clive Mutiso resigned, the 2nd respondent took over as liquidator of the company.

At the time of appointment of the 2nd respondent as liquidator, the company's outstanding loan to the defunct Cooperative Bank Ltd was UGX. 1,200,000,000 (One billion, two hundred million shillings). The said loan was renegotiated and reduced to One billion shillings (UGX. 1,000,000,000) which was to be paid in lump sum. The respondent and another were unable to settle the said amount on their own. They obtained a loan of $ 800,000 (Eight hundred thousand US dollars) from Crane Bank Limited for a duration of 6 months to settle the old outstanding amount.

The aforementioned loan was secured by a demand promissory note, a letter of continuing security, a debenture covering a floating charge on all assets of the company. In consequence, there was a registered mortgage of the following properties: Plot 78-96 Pallisa Road Mbale in the names of African Textiles Mill Ltd, Plot No. 1 and 3 Kitintale Way Mbuya, Kampala in the names of M/s Art Investment Limited,

and Plot No. 152, 6th Street Industrial Area, Kampala in the names of Ravi Patel and Thakore Patel.

In addition, there were personal guarantees by Mr. J.V Patel, Mr. R.R Patel, Mr. Ashwin Patel, Mr. Thakore V Patel, Mr. Ravi C Patel and the 2nd respondent. The earlier loan owed by the company to Co-operative Bank Ltd (in liquidation) appears to have been paid off.

The company defaulted on their loan from Crane Bank Ltd and applied for an extension of the period for repayment for another 6 months. The repayment date was then moved to 18th June 2007.

On 12th and 13th, June, 2007, the 2nd respondent advertised the mortgaged properties for sale. The 1st respondent and another challenged the sale and obtained an interim order of stay. The 1st respondent still had not paid by the agreed date.

On 3rd August, 2007, Crane Bank Limited's lawyers advertised the properties for sale yet again.

On 4th September, 2007, the 2nd respondent sold the mortgaged property to Mukwano Enterprises Limited. Among the properties sold was land comprised in LRV 786 Folio 12 78-96 Pallisa Road, Mbale.

The 1st respondent and another sued the 2nd respondent **vide HCCS No.094 of 2008** for the following.

(a) A declaration that the sale and transfer of the suit land and developments thereon comprised in LRV 786 Folio 12 plot 78-96 Pallisa Road, Mbale measuring up to 9.19 Hectares by

the 1st defendant was fraudulent, illegal, irregular and therefore unlawful.

(b) An order that the sale of the suit property comprised in LRV 786 Folio 12 plot 78-96 Pallisa Road, Mbale be nullified and the property revert to M/s African Textile Mill Ltd.

(c) Recovery of the suit land comprised in LRV 786 Folio 12 plot 78-96, the factory machinery, the buildings and other developments thereon (herein after collectively referred to as "the suit property")

(d) General damages

(e) A permanent injunction severally and jointly against the defendants their agents, servants, and or workmen from interfering with the suit property or taking possession of the suit property.

(f) An order for temporary injunction jointly and severally against the defendants, their servants, agents and/or workmen wasting damaging, alienating or transferring the suit property to third parties.

(g) An order directing the 1st defendant to render account of the proceeds of the sale.

(h) Costs of the suit.

The High Court dismissed the suit. It found that though there were some irregularities in the conduct of the transaction of sale by the 2nd respondent as liquidator of ATM (in liquidation) they were not fatal to the transaction. The Court found that the Applicant was a bona fide purchaser for value without notice and issued a permanent

injunction against the 1st respondent from interfering with the applicant's enjoyment and possession of the suit property.

Being dissatisfied with the decision of the High Court, the 1st respondent unsuccessfully appealed to the Court of Appeal vide C.A.C.A No. 7 of 2010.

The 1st respondent, still being dissatisfied with the decision of the Court of Appeal, lodged a second appeal to this Court vide SCCA No. 06 of 2017. The appeal was allowed and the Court set aside the concurrent findings of the lower courts. The Court made the following orders:

1. Since the appeal has partially succeeded, the appellant is entitled to one third of the costs in this Court and the court of appeal to be borne by the 1st respondent. The High Court order on costs remains in force.
2. The transfer of the suit property by the 1st respondent to the 2nd respondent is hereby nullified and an order hereby issues for the cancellation of the 2nd respondent's name from the certificate of title and restoration of the name of M/s African Textile Limited (in Liquidation).
3. The order of the High Court for the 1st respondent to render an account of the proceeds of the sale is re-affirmed. He should do so by filing it in the High Court and this Court and by providing copies to the Appellant's counsel, all within a period not exceeding 30 days from the date of delivery of the judgment.

4. The 2nd respondent shall meet costs in this court and in the courts below.

Pursuant to that decision, the 2nd respondent brought an application vide **Mukwano Enterprises Ltd v Ranchhodbhai Shivabhai Patel Ltd & Henry Wambuga (Liquidator of African Textile Mill Ltd)** SC Civil Application No. 16 of 2019 under Rule 2 (2) of the Judicature (Supreme Court Rules) Directions S1 13-11 (hereinafter referred to as the Rules of this Court or Supreme Court Rules) asking Court to recall its judgment in SCCA No. 06 of 2017.

The Court, dismissed the application holding that it did not fall within the parameters of what merits a review.

The Court also clarified that its intention was that the plant and machinery which were all part of the suit property were affected by the illegality in the transaction of sale.

This Court made the following orders:

1. The Judgment of this Court in Civil Appeal No. 6 of 2017 is maintained subject to the clarifications.

2. The Applicant immediately returns to M/s African Textile Mills Limited (in liquidation) the plant and machinery that was in the factory as at the time it took over.

3. In the event the return of the plant and machinery as directed in (2) is not immediately practicable, the Applicant shall pay to the 1st Respondent [Ranchhodbhai Shivabhai Patel Ltd] the equivalent of Uganda Shillings 11,944,127,000/= per Valuation Certificate

dated 14th May, 2004, being the replacement value of the plant and machinery.

4. The Applicant will pay the costs of this Application.

On 23rd December, 2020, the applicant wrote to the Court praying that it moves itself to rectify the minor error in its ruling to provide for the payment to the Company in liquidation in case the plant and machinery cannot be returned and not the 1st Respondent.

On 9th March 2021, the Court on its own motion under Rule 2(2) made for the refund to be made to the company in liquidation and orders removing the applicant as Liquidator of African Textiles Mills Ltd (in liquidation) with immediate effect. It also directed the shareholders to take appropriate steps to complete the liquidation process and also to recover what had been decreed to the company. This was done by the same quorum that determined Civil Application No. 16 of 2019.

Being dissatisfied with the decision, the applicant filed SC Civil Application No. 42 of 2021 seeking for to recall its judgment SCCA No. 6 of 2017 and SCC Appl. No 16 of 2019.

Representation

At the hearing of the Application, Counsel Robert Bautu represented the Applicant; Paul Sebunya, the 1st Respondent; and Tony Arinaitwe, the 2nd Respondent. Counsel for the Applicant filed written submissions while Counsel for each Respondent made written submissions in reply. Counsel for the Applicant filed a rejoinder.

Issue 1:

Whether there is manifest illegality on the face of the record that justifies the Supreme Court's recall of its judgment in Civil Appeal No. 6 of 2017.

In relation to the Court's finding on fraud and the procedure followed in removing the Applicant as liquidator, Counsel argues that several serious legal errors amounting to illegality were made.

On the Finding of Fraud:
Counsel contended that it was both a legal and factual error for the Supreme Court to find the Applicant guilty of fraud in Civil Appeal No. 6 of 2017 and Ruling No. 2 of 2019. First, he argues that the Supreme Court, sitting on a second appeal, is limited to addressing issues of law not fact and therefore had no jurisdiction to make findings on fraud, which are factual in nature. Second, he asserts that his constitutional right to a fair hearing under Article 28 was violated when the Court introduced fraud as a new and unfamiliar sub-issue without giving him a chance to respond, which goes against the principles of the adversarial legal system.

Issue 2

Removal as a liquidator.

Counsel for the Applicant contended that the removal of the Applicant as liquidator was irregular and improperly framed as a Rule 2(2) matter. He argued that the Supreme Court lacked jurisdiction to make such an order in an appeal, as removal of a liquidator must be by a formal application or motion under Section 118(2) of the Insolvency Act, 2011 requiring notice, cause shown, and a hearing, none of which occurred. He further submitted that, under Section 2 of the Act, such jurisdiction lies with the High Court, not the Supreme Court. Additionally, that the order exceeded the scope of Rule 35(1), which is limited to clarifications, rendering Civil Application No. 16 of 2019 a nullity.

1st Respondent's case

Counsel for the 1st respondent opposed the application. He argued that the applicant has no locus to bring this application since he no longer holds the position of Liquidator of M/s African Textile Mills Ltd in Liquidation.

He argued that the applicant was guilty of dilatory or inordinate delay in filing this application. He also argued that this application was not an application for review but rather a disguised appeal and therefore falls out of the ambit of Rule 2(2) of the Court's rules. He argued further that the applicant was always part of the proceedings from High Court to the Supreme Court and that he was always accorded a fair hearing. He contended that the Application is marred with bad faith as the applicant only wants to take charge of a liquidation

process that he has been guilty of failing. He sought to rely on the case of **Orient Bank Ltd vs. Fredrick Zaabwe & Anor,** SCC Appl. No. 17 of 2007. He also argued that the removal of the applicant as liquidator was in line with section 118 of the Insolvency Act. He prayed the Court to dismiss the application.

2nd Respondent's case

Counsel for the 2nd Respondent supported with the Application and prayers that the Court's judgment and ruling should be recalled and reviewed. He submitted that there are credible errors and illegalities on the record, the correction of which would remedy the injustice suffered by the 2nd Respondent. He sought to rely on the cases of **Elizabeth Nalumansi Wamala vs. Jolly Kasande & Others** SCC Appl. No. 29 of 2017 and **Mohammed vs. Roko Construction Ltd** Misc. Cause No. 18 of 2017 Hamid for the proposition that the court was within its power to review its decision.

He argued that the Court unjustly enriched ATM (In Liquidation) by ordering the 2nd Respondent to pay UGX 11.9 billion based on a questionable valuation, without ordering a refund of the purchase price. He sought to rely on the case of **National Social Security Fund vs. Alcon International Ltd,** SCCA No. 15 of 2009 for the argument that this relief was founded on an unpleaded matter.

He further contended that the 2nd Respondent was unfairly condemned for purchasing the property, despite that purchase facilitating loan redemption and release of guarantees. He thus

prayed that in the interest of justice, the Court to allows the application, recalls the entire judgment and rulings thereunder and correct the identified illegalities.

CONSIDERATION

The application, brought under Rules 2(2) and 35(1) of this Court's Rules, seeks to determine whether the judgments in Civil Appeal No. 6 of 2017 and Civil Application No. 16 of 2019 should be recalled and reviewed on the ground of manifest illegality. The Applicant points to alleged errors in the finding of fraud, the procedure followed, and his removal as liquidator. He also refers to these as errors apparent on the face of the record. The 2nd Respondent supports the application, adding that the Court relied on a flawed valuation report to wrongly conclude that it was not a bona fide purchaser. The 1st Respondent disputes these claims.

The key issue is whether any such manifest illegality would justify a review and whether the removal of the applicant as liquidator for African Textile Mill Limited was done lawfully.

Rule 2(2) of the Rules of this Court, under which the applicant has brought this application provides as follows:

> ***"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court...to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that***

power shall extend to setting aside judgments which have been proved null and void after they have been passed..."

The scope of this Court's inherent power under rule 2(2) was explained in **Orient Bank Ltd. v. Fredrick Zaabwe & Anor,** SCC Appl. No. 17 of 2007 which cited with approval ***Sir Charles Newbold P's holding in Lakhamshi Brothers Ltd vs. R. Raja & Sons (1966) E.A. 313*** at ***page 314*** where he attempted to define the scope of the power of review as follows:

"These are the circumstances in which this court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter.

But this application ... goes far beyond that. It asks, as I have said, this court in the same proceedings to sit in judgment on its own previous judgment. There is a principle which is of the very greatest importance in the administration of justice and that principle is this: it is in the interest of all persons that there should be an end to litigation." (Emphasis added)

This position was reiterated in the case of **Isaya Kalya & 2 others vs. Macekenyu Ikagobya, SCC Appl. No. 28 of 2015** where the court stated as follows:

"Where a party believes that the court made an error of fact or law in its judgment, that party will only succeed in moving the court to correct that error if the error falls under the three instances indicated in rule 2(2) of the rules of this court. And as rightly stated in Haridas v. Suit. Usha Rani Banik & Others (supra) the error should be apparent on the face of the record where, without argument, one sees the error "staring one in the face". See also **Uganda Taxi Operators & Drivers Association vs. Uganda Revenue Authority** SCC Appl. 24 of 2019.

These excerpts underscore the foundational legal principle of *finality in litigation.* The Court makes it clear that while it retains limited jurisdiction to recall or correct its own judgment specifically to give effect to its true or intended decision it will not re-open concluded matters simply because one party is dissatisfied.

As the apex court, the Supreme Court's authority must be upheld not only by lower courts, litigants, and legal practitioners, but also by the Justices themselves who bear the responsibility of safeguarding certainty, finality, and the credibility of the judicial process.

In a troubling recent trend, we have witnessed litigants exploiting Rule 2(2) of the Judicature (Supreme Court) Rules by filing multiple applications for review of the same decision, each time hoping that the composition of the panel will have changed.

The idea behind it is simple, if one cannot succeed before one panel, perhaps a differently constituted bench will be more sympathetic to their cause. This is what has been named forum shopping. This practice undermines the very essence of the Supreme Court's finality.

In the instant case, Mugamba JSC, authored the original lead decision in **Ranchhodbhai Shivabhai Patel Ltd & Anor vs. Henry Wambuga (Liquidator of African Textile Mills Ltd & Mukwano Enterprise Limited**, SCCA No. 06 of 2017. Crucially, all the other four Justices namely, Mwangusya JSC, Opio Aweri JSC, Mwondha JSC, Tibatemwa JSC on the panel fully concurred with his reasoning and conclusion. This decision was made on the 6th of November 2018.

The orders of Court read as follows:

1. **Since this appeal has partially succeeded, the appellant is entitled to one third of the costs in this Court and the Court of Appeal to be borne by the 1st respondent. The High Court order on costs remains in force.**
2. **The transfer of the suit property by the 1st respondent to the 2nd respondent is hereby nullified and an order hereby issues for the cancellation of the 2nd respondent's name from the certificate of title and restoration of the name of M/s African Textile Mills Limited, in Liquidation**
3. **The High Court order for the 1st respondent to render an account of the proceeds of the sale is re-affirmed. He should do so by filling it in the High Court and this Court and by**

providing copies to the Appellant's Counsel, and within a period not exceeding 30 days from the date of delivery of this judgment.

4. **The 2nd respondent shall meet its costs in this Court and the Courts below.**

The application for review vide **Mukwano Enterprises Limited vs. Ranchhodbhai Shivabhai Patel and Henry Wambuga (Liquidator of African Textile Mill Limited)** SCC Appl. No. 16 of 2019 was before Opio Aweri JSC, Mugamba JSC, Muhanguzi JSC, Tuhaise JSC and Chibita JSC.

I am highlighting the members of the quorum because the review was determined by a panel whose composition had the original author of the lead judgment sought to be reviewed.

The logic behind maintaining the same or substantially similar panel for purposes of review where practicable is sound. It promotes continuity of judicial thought and preserves the original intention of the Court. However, due to natural attrition through retirement, death, or other institutional changes, this ideal cannot always be achieved.

Yet, the real danger in the current practice lies not in the inevitable changing composition of the Supreme Court, but in the conduct of newly constituted panels that effectively re-hear and overturn settled decisions not because of any demonstrable miscarriage of justice, but

merely because individual Justices would have reached a different conclusion.

This growing trend where new panels, under the guise of Rule 2(2) of the Judicature (Supreme Court Rules), purport to review and reverse prior decisions, reflects a troubling misapprehension of the doctrine of finality and the principle of institutional continuity that undergirds the Supreme Court's legitimacy. Once the Supreme Court has rendered a final decision, that judgment becomes the law of the land. It binds lower courts, litigants and critically future panels of the Court itself, save for narrowly defined exceptions provided by the Rules and constitutional jurisprudence.

It is both jurisprudentially unsound and institutionally dangerous for a later panel to disregard a standing decision of the Supreme Court simply because its members, had they sat on the original panel, would have decided the matter differently. Even more alarming is the practice of such panels reinstating decisions of the Court of Appeal, thereby effectively reversing the judicial hierarchy not through legislative reform, but via judicial overreach.

No one panel is bigger than the Supreme Court of Uganda. The Court's authority does not reside in the personal views of its changing membership, but in the institutional legitimacy of its decisions. To allow otherwise is to reduce the Supreme Court to a revolving judicial committee whose decisions lack consistency, predictability, and binding force.

Such an approach offends the rule of law, undermines judicial independence, and erodes public confidence in the administration of justice. It creates uncertainty for litigants, encourages forum shopping within the Court itself, and blurs the essential distinction between review and appeal.

The Supreme Court must rise to this jurisprudential challenge. It must draw a principled line between legitimate review and disguised appeal. It must reaffirm that once a matter has been lawfully and finally decided, it cannot be reopened merely because the composition of the bench has changed or judicial philosophy has evolved.

Institutional memory, consistency, and finality are not optional features of an appellate system; they are its foundation. To do otherwise, is to court chaos and to permit individual panels to substitute their personal interpretations for the institutional voice of the Court. Furthermore, it is to surrender the majesty of justice to the ephemerality of judicial turnover.

The fact that a Supreme Court decision rendered in 2018 can be overturned in 2025 seven years later undermines public confidence in the authority of the Court and erodes the integrity of judicial institutions.

It should be noted that three of the Justices on the current panel, namely Lillian Tibatemwa-Ekirikubinza, JSC, Percy Night Tuhaise, JSC and I were involved in this matter at various stages before this

same court and were therefore part and parcel of the decisions being challenged by the instant application.

Speaking for myself, I am not convinced about the need to depart from the earlier decisions of this court in this matter.

In determining SCC Appl. No. 16 of 2019, the Court stated as follows:

"We however note that the issue of the status of the plant and machinery was not clearly captured in the orders of the Court.

The uncertainty is clearly brought to light in 1st respondent's affidavit in reply in which he avers as follows:

We will state them for easier reference.

"13. In further reply to the contents of paragraph 8 of the affidavit in support of this Application I contend that upon taking possession of the suit property, the Applicant sold off all machinery belonging to M/s African Textiles Mills Ltd in liquidation some of which were brand new.

16. In further reply to the contents of paragraph 8 of the affidavit in support of this application I contend that if this Honorable Court is inclined to order M/s African Textile Ltd in liquidation to refund the US $ 1,200,000 purchase consideration to the Applicant, the stated refund should be conditioned on the Applicant handing over the suit property to M/s African Textile Mills Ltd in liquidation together with all the machinery the Applicant found on the suit property as at the

time when the applicant took possession of the same." (Emphasis mine).

The 1st respondent's averments are to the effect that the Applicant sold off the plant and machinery as soon as it took possession of the suit property. The 1st respondent is under the impression that the decision of the Court in SCCA No. 6 of 2017, was not a natural consequence of the nullification of the transaction of sale of the suit property and prays that if the court is inclined to order for a refund of the purchase price to the Applicant, it should be conditioned on the handing over of the suit property to ATM (in liquidation) together with all the machinery the applicant found on the suit property when it took over.

This is not a correct representation of the intention of the court in SCCA No. 6 of 2017. On 6th November, 2018, when this Court allowed the appeal, set aside the concurrent findings of the Court of Appeal and the High Court and made its own orders, the intention of court was to set aside the illegal sale of the suit property and return all the property that constituted part of the suit property to the 1st respondent and the Company.

Order 2 of this Court's orders reads as follows:

"The transfer of the suit property by the 1st respondent to the 2nd respondent is hereby nullified and an order hereby issues for the cancellation of the 2nd respondent's name from the

certificate of title and restoration of the name of M/s African Textile Limited, in liquidation." (Emphasis mine).

It is implied in the aforesaid order that all the property that was subject of the nullified sale would be returned to their original owner ATM (in liquidation). This is in line with the clause 5(c) of the 1st respondent and another's amended plaint that read as follows:

5 (c):

"Recovery of the suit land comprised in LRV 786 Folio 12 plot 78-9, the factory machinery, the buildings and other developments thereon (herein after collectively referred to as "the suit property")"

The suit property has always consisted of the land, buildings and machinery.

This decision is in line with this court's decision in the case of **Sinba (K) Ltd and 4 others vs. Uganda Broadcasting Corporation,** SCCA No. 3 of 2014, which clearly stipulates the effect of illegality on a transaction. In that case, the Court adopted the High Court's position in the case of **Kanoonya David vs. Kivumbi & 2 Others HCCS No. 616 of 2003** (unreported) that stated that:

> ***"An illegality vitiates the transfer of title with the result that the sold property remains the property of its owner. In this case the property cannot vest in the owner and at the same time vest in the purchaser the second defendant."***

The import of this decision is that all the property that is subject to the illegal sale remains the property of the initial owner and upon the decision of this court all the property that the applicant had obtained pursuant to the illegal sale was to be returned to its original owner."

The discussion above makes it abundantly clear that this Court did not deviate from its original orders in **SCCA No. 6 of 2017**, but rather exercised its inherent jurisdiction to clarify the true intention and scope of its prior decision, based on ambiguities brought out in the pleadings in the review application.

The affidavit evidence cited by the 1st respondent and the 2nd respondent (then applicant) underscored a misunderstanding of the effect of the Supreme Court's nullification of the sale. The 1st respondent contended that any refund of the purchase price should be conditional upon the return of the suit property, inclusive of the machinery. This, however, showed a misunderstanding of both the spirit and letter of the Supreme Court's original judgment, which already implied the restoration of *all* property subject to the illegal sale.

Indeed, the Court rightly observed that **Order 2** of its judgment explicitly nullified the transfer and required restoration of ownership to African Textile Mills Ltd (in liquidation).

The implication here is not speculative it is rooted in the pleadings themselves, particularly the amended plaint, which consistently

referred to the land, factory buildings, and machinery collectively as "the suit property."

Thus, the clarification was not a new order, nor did it alter the substance of the original ruling. Rather, it reaffirmed that the machinery formed an integral part of the suit property and, as such, remained the property of the company, consistent with established jurisprudence on the effect of illegality.

The clarification was necessary to give full effect to the Court's intention and to ensure justice is not subverted by ambiguity.

The final orders as stated below clearly support this argument.

"In order to give effect to the Court's intention as of 6th November, 2018, when the judgment of this court in SCCA No. 6 of 2017 was delivered, we would make the following orders:

1. **The judgment of this court in Civil Appeal No. 06 of 2017 is maintained subject to the clarifications.**

2. **The Applicant immediately returns to the M/s African Textile Mills Limited (in liquidation) the plant and machinery that was in the factory as at the time it took over.**

3. **In the event the return of the plant and machinery as directed in (2) is not immediately practicable, the Applicant shall pay to the 1st Respondent the equivalent of Uganda Shillings 11, 944,127,000/= in United States Dollars per**

Valuation Certificate dated 14th May, 2004, being the replacement value of the plant and machinery.

4. The Applicant will pay the costs of this application."

This clarification was positively received by the Applicant, who, in a written communication to the Court, expressed appreciation for the precision and consistency with which the Court reaffirmed the intention of its original orders. However, the Applicant also sought a further clarification regarding the specific party to whom the refund of the purchase price should be made.

I will reproduce the letter for easier reference.

"AA/01/20 ***December 23rd, 2020***

The learned Justices of the Supreme Court,

Through the Registrar Supreme Court of Uganda

Attn:

1. ***Hon. Justice Rubby Opio- Aweri, JSC***
2. ***Hon. Justice Paul. K. Mugamba, JSC***
3. ***Hon. Justice Ezekiel Muhanguzi, JSC***
4. ***Hon. Justice Mike. J. Chibita, JSC***
5. ***Hon. Justice Percy Night Tuhaise, JSC***

Your Lordships,

CIVIL APPLICATION NO. 16 OF 2019:- MUKWANO ENTERPRISES LIMITED –V- RANCHHODBHAI SHIVABHAI PATEL LIMITED & ANOR.

We represent the 2nd Respondent in the captioned Application, the ruling of which was delivered by this Honourable Court on the 23rd day of December 2020.

In orders of Court at page 33 of the ruling, the Honourable Court ordered as follows:

1. ***The judgment of the Honourable Court in Civil Appeal No. 06 of 2017 is maintained subject to the following clarifications;***
2. ***The Applicant immediately returns to M/s African Textile Mills Limited (In liquidation), the plant, machinery that was in the factory at the time it took over.***

The honorable court in the alternative ordered:-

3. ***In the event the return of the plant and machinery is not immediately practicable, the Applicant shall pay to the 1st Respondent the equivalent of Uganda Shillings 11, 944,127,000 per valuation certificate dated 14th May 2004 being the replacement value of the plant and machinery.***

<u>Going by the order of Court in paragraph 2, we believe the Honorable Court intended to return the property to the Company in liquidation.</u>

The reading of the alternative order in paragraph 3 of the ruling at page 33 however directs the payments should be made to the 1st Respondent who is not African Textile Mills (In liquidation) or the Liquidator.

The said anomaly was brought to the attention of the Learned Registrar of this Honorable Court who advised that the same is brought to your attention.

We therefore pray that the Court moves itself to rectify the minor error in its ruling to provide for the payment to the company in Liquidation in case the plant and machinery cannot be returned and not the 1st Respondent who for all intents and purposes is not African Textile Mills Limited (In liquidation)

Most Obliged.

Sincerely,

M/s Arcadia Advocates" (Emphasis Added)

By writing to the Court and asking it to "move itself to rectify the minor error," the Applicant was accepting the judgment as valid and enforceable; seeking implementation, not nullification, characterizing the issue as a "minor error", not a fundamental misdirection or miscarriage of justice.

This conduct signals acquiescence, that is, an acceptance of the decision with full knowledge of its terms. The same person cannot be

allowed by the same Court to return and turn around to challenge its validity.

This, in my view, would amount to approbation and reprobation. *The* maxim ***qui approbat non reprobate*** *reflects the principle that a person cannot both approve and reject an instrument, often more commonly described as blowing hot and cold, or having one's cake and eating it too.*

The maxim is a facet of the doctrine of estoppel as was discussed in the case of **Harrison vs. Wells, 1966(3) All ER, 524**.

In Uganda, the doctrine of estoppel is provided for in the Evidence Act. **Section 114 of the Evidence Act** reads as follows;

"When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative to deny the truth of that thing." (Emphasis Added) *See also:* ***Stanbic Bank Ltd vs Uganda Crocs Limited*** **(Civil Appeal No. 04 of 2004) [2005]**

The Applicant refers to the anomaly as a "minor error", not an error of law or misdirection on facts. This reinforces the inference that the

party has abandoned any intention to challenge or substantially challenge the decision and is acting as an officer of Court to aid in realizing the ends of justice through compliance with court orders.

Subsequently challenging the entire decision especially, the core finding or order upheld in paragraph 1 would risk a finding of abuse of process, particularly if it appears the party is shifting position only because enforcement or compliance has become unfavorable.

It would, therefore, follow that the prayers 1 & 3 for orders that this honorable Court recalls its judgment dated 6th November, 2018, in Civil Appeal No. 06 of 2017, and the ruling in Civil Application No. 16 of 2019 as it embodies several finding and holdings by the court that on the face of the record occasion an injustice to the applicant and contravene provisions of the Constitution and the law cannot be entertained.

Issue 2: Applicant's Removal as liquidator

What would remain for this Court to determine is the question as to whether the Court's decision to remove the applicant as Liquidator of African Textile Mills Limited in Liquidation was done lawfully?

It was the Applicant's contention that the Supreme Court lacked jurisdiction to issue such an order within the context of an appeal. He argued that the removal of a liquidator must be initiated through a formal application or motion under Section 118(2) of the Insolvency Act, which expressly requires notice, cause shown, and the opportunity for a hearing none of which were satisfied in this case.

He further contended that, pursuant to Section 2 of the same Act, such jurisdiction is vested in the High Court, and not in the Supreme Court.

Section 118 of the Insolvency Act.

"Enforcement of liquidator's duties.

(1) Where the liquidator fails to comply with any of the duties of a liquidator, the court may, on such terms and conditions as it considers fit

(a) .....

(b) .....

(c) or remove the liquidator from office."

Interestingly, while counsel for the applicant relies heavily on Section 118(2), he overlooks Section 118(7), which defines what constitutes a failure to comply with the requirements of the section. I will invoke it in order to finally put this matter to rest.

The phrase "**failure to comply**" is described under Section 118 (7) to include:

"In this section 'failure to comply" includes a failure of a liquidator to comply with any relevant duty arising under-

(a) **the appointing document;**

(b) **this or any other Act or rule of law or rules of court;**

(c) **or any order or direction of the court other than an order made under this Section." (Emphasis Added)**

This clause is deliberately expansive. It reflects Parliament's intention to impose a high standard of legal and procedural fidelity on liquidators' professionals entrusted with preserving and managing the assets of insolvent estates.

Contrary to a narrow interpretation that might require a finding of fraud or gross misconduct as a prerequisite for removal, section 118(7)(b) clarifies that even a non-fraudulent breach of statutory or procedural duty may suffice. A liquidator's failure to comply with any provision of the Insolvency Act, other Acts, applicable common law duties, or court procedural rules can validly trigger judicial intervention under section 118(1), including removal from office.

Section 118(7)(b) must be read in light of the liquidator's role as an officer of the court with fiduciary duties to creditors, contributories, and the justice system. A liquidator who, even without fraud, disregards statutory procedures such as improperly disposing of company assets or failing to notify creditors may be found to have failed to comply under this provision.

It holds liquidators to a standard that values not only honesty, but also full compliance with the law promoting fairness, accountability, and public confidence in Uganda's insolvency regime.

At page 26 of the judgment of this Court in Civil Appeal No. 2017

"***Section 301 of the said Act. It is common ground that there was no such special resolution and consequently, the implicit***

arrangement reached with Crane Bank Ltd and readily admitted by the 1st respondent and the bank's auctioneer was in contravention of Section 301 of the repealed Companies.

The Court of Appeal justices held that the 1st respondent carried out his duties as a liquidator in accordance with the law and there was no legal requirement for him to seek consent before selling the suit property. With respect, I disagree with this conclusion. Their Lordships appear not to have considered the import of Section 301 of the repealed Companies Act which I have referred to earlier. Further, the Court appears not to have addressed its mind to the fiduciary nature of the liquidator's duties to the company as well as to its members alongside the creditors.

It is worth noting that the High Court upheld the validity of the sale of the suit property but faulted the 1st respondent for having committed procedural errors in the liquidation exercise. It was for that reason that the trial judge ordered him to account for the proceeds of the sale and allowed the appellants to receive their costs from him. It is evident that the trial judge had misgivings about the manner in which the 1st respondent carried out his liquidation duties."

This Court further found that:

"This position of the law has a bearing on the present appeal and the vigorous contention by the 1st respondent, the

liquidator of African Textile Mills Limited, that his main responsibility was to settle the creditor who was also a registered mortgagee. I have considered the manner in which he sold the suit property without the awareness or event consent of the appellant and his failure or outright refusal, up to the present day, to account for the proceeds of the sale save for noting that the main or even sole creditor, Crane Bank Limited was settled. The 1st respondent was required by the judgment of the High Court to provide an account of the proceeds of the sale and file the same in the Court within 90 days of the judgment. He is yet to do so."

Order 4 of the decree in **Ranchhodbhai Shivabhai Patel Ltd & Anor vs. Henry Wambuga** (HCCS No. 094/2008) was clear. It read as follows:

"The order is hereby granted to the plaintiff directing the first defendant to render an account of proceeds of the sale and to do so by filing it in court within a period of ninety days from the date of this judgment."

The decree was dated 18th December 2009. But nearly a decade later by the time the Supreme Court delivered its decision in SCCA No. 6 of 2017 on 6th November 2018 the applicant had still not complied.

So the question must be asked: **why should this Court now place its trust in someone who blatantly refused to obey the High Court order?**

This wasn't a minor delay. It was a deliberate disregard for the authority of the Court and the sanctity of its orders. If justice is to mean anything, it cannot bend to the will of those who obey the law only when it suits them. Trust must be earned not demanded after years of non-compliance.

This non-compliance coupled with the breach of statutory obligations under sections 301 and 244 (1(e) of the Repealed Companies Act falls within the ambit of section 118(7) of the Insolvency Act. It not only undermines the rights of other stakeholders but also calls into question the integrity of the liquidation process itself. It provides justifiable grounds for removal under Section 118(2), as the liquidator has failed to uphold the high standard of diligence required of an officer of the court.

Process for the Applicants removal.

Having established that the liquidator's conduct amounted to non-compliance within the meaning of Section 118 of the Insolvency Act, we now turn to address the contention that the jurisdiction to order his removal lies with the High Court, not the Supreme Court.

Rule 2(2) gives the Supreme Court wide and flexible discretion to make any order necessary to achieve the ends of justice, including consequential orders that flow from its findings.

Once the Supreme Court had found that the liquidator's conduct was illegal and the transaction he/she oversaw was null and void, it had

the jurisdiction and discretion under its inherent powers to make any further consequential orders, including the removal of the liquidator.

To require a referral back to the High Court in such a scenario would be redundant, as the Court has already established illegality at the highest level, judicially inefficient, delaying justice unnecessarily and unjust, as the liquidator would remain in office despite being found to have engaged in illegal conduct.

There is no statutory requirement that only the High Court can remove a liquidator. While the Companies Act vests the High Court with powers to remove a liquidator in certain contexts (e.g., where it is supervising the winding up), that does not preclude the Supreme Court from exercising its own inherent jurisdiction, particularly in matters that are already before it and where it has made a substantive determination on illegality involving the liquidator.

As the final appellate authority, the Supreme Court is not limited to declaring rights. It is equally empowered to enforce them, especially where to fail to do so would render its decision ineffective or incomplete. The removal of the liquidator was not just logical, but necessary. To do otherwise would risk the Court frustrating its own judgment and perpetuating a process tainted by misconduct.

It was the applicant's contention that he was condemned unheard. This is not true. The applicant was a party to the proceedings at all three levels High Court, Court of Appeal, and Supreme Court and actively participated in defending or explaining the transaction, it

becomes difficult to argue that they were denied a fair hearing on the issue of the legality of their conduct.

The principle of *audi alteram partem* (right to be heard) as enshrined in article 28 of the constitution was satisfied.

- The Applicant was at all times aware that his conduct in relation to the transaction was under scrutiny;
- They had notice of the issues and allegations;
- The applicant was given an opportunity to respond, adduce evidence, or make submissions.

The bigger question is, was the applicant really seeking justice or just positioning himself to stay in control?

He claimed to want the Court to "correct" its order so he could manage the company's assets. But if his true goal was justice, why the outrage when the Court ensured those assets went where they rightfully belonged, just not through him?

You can't say you welcome the recovery, then protest because you're no longer the one in charge. That's not justice. That's control dressed up as principle.

And can the Court truly rely on someone who disobeyed the High Court order to account for proceeds, without complying with the law, and never accounted for the proceeds? It's about protecting the integrity of the liquidation process from those who follow the law when it suits them.

This ground also fails.

For the foregoing reasons, I am not satisfied that this application falls under the ambit of Rule 2(2) of this Court's Rules.

In the result, I would dismiss the application with costs.

Dated at Kampala, this 25th day of August 2025

Hon. Mike J. Chibita

JUSTICE OF THE SUPREME COURT

Delivered by the Registrar this 10th day of September 2025.

Registrar, SC

THE REPUBLIC OF UGANDA

THE SUPREME COURT OF UGANDA
AT KAMPALA

(Coram: Owiny-Dollo, CJ; Tibatemwa-Ekirikubinza, Tuhaise, Chibita & Mugenyi, JJSC)

CIVIL APPLICATION NO. 42 OF 2021

[Arising from Supreme Court Civil Appeal No. 6 of 2017 (Mwangusya, Opio-Aweri, Mwondha, Tibatemwa & Mugamba, JJSC)]

BETWEEN

HENRY WAMBUGA
(Liquidator of African Textile Mills
In Liquidation) ..... **APPLICANT**

AND

1. **RANCHODBHAI SHIVABHAI PATEL LTD**
2. **MUKWANO ENTERPRISES LTD** ..... **RESPONDENTS**

RULING OF MONICA K. MUGENYI, JSC

1. I have had the benefit of reading in draft the lead decision of His Lordship the Chief Justice, as well as the dissenting opinion of my brother Chibita, JSC, in respect of this Application.

2. I am in general agreement with his lordship, Chibita, JSC on the finality of decisions from the apex court and the role of its judges in preserving the sanctity of the Court's decisions. That indeed bespeaks the rule of law principle of legal certainty, which underscores the need for stability and predictability of the law so as to foster trust and confidence in a legal system. I do additionally join his lordship in eschewing the utterly unprofessional practice where settled positions of the law are abandoned not because they demonstrably perpetuate any unjust mischief or miscarriage of justice, but in deference to individual judges preferred and oft-times convenient positions. Without a doubt, once a matter has been lawfully and finally determined by the apex court, it ought not to be re-opened whimsically least of all on account of supposedly new judicial philosophy and form that is otherwise thin on substance.

3. However, the flip side of that proverbial coin must unavoidably be pondered as well. A clear mistake by any court of law (including the apex court) ought not to be condoned or accommodated under the guise of adjudicational finality or judicial infallibility. High judicial office depends as much on the values of prudence, circumspection and professional integrity[1] on the Bench as in the legal astuteness and procedural propriety of its decisions and processes. Therefore, where judges err (as they will inevitably do) it is imperative that there is due latitude for the correction of those mistakes either by way of appeal to a higher court, where the right of appeal is available; or review of a court's own decision on a party's motion or *suo moto*.

4. It is trite law that applications for review before the Supreme Court would ensue under rules 2(2) and 35 of the *Judicature (Supreme Court) Rules, SI 13-11* ('the Supreme Court Rules'). For ease of reference, I reproduce those provisions below.

> *Rule 2(2)*
>
> **Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been**

[1] Sometimes referred to as professional honesty or the ability to concede and correct a professional mistake or error.

passed, and shall be exercised to prevent an abuse of the process of any court caused by delay.

Rule 35

(1) **A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in an order, be corrected by the court, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was given.**

(2) **An order of the court may at any time be corrected by the court, either of its own motion or on the application of any interested person, if it does not correspond with the order or judgment it purports to embody or, where the judgment has been corrected under subrule (1) of this rule, with the judgment as so corrected.**

5. The rationale of the slip rule highlighted in rule 35(1) above is clarified in **Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia, The Montan [1985] 1 ALL ER 520 pp. 526, 527**, that is, to spare the courts the cost in terms of time and resources of the re-hearing of a matter on account of clerical mistakes in decrees or orders, or errors arising from any accidental slip or omission.

6. In the earlier case of **Sutherland & Co v Hannevig Bros Ltd [1921] 1 KB 336 at 341** Rowlatt, J compellingly clarifies that '***an accidental slip occurs when something is wrongly put in by accident, and an accidental omission occurs when something is left out by accident***.' Drawing a distinction between an error apparent on the record that would justify an application for review under the slip rule as opposed to a mistake that would give rise to a ground of appeal, he proposed as follows:

> If (a judge) assesses the evidence wrongly or misconstrues or mis-appreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected either under s 17 or under Ord 20, r 11. It cannot normally even be corrected under s 22. The remedy is to appeal, if a right of appeal exists. ... **It is not an accidental slip. It is an intended decision which the arbitrator or judge later accepts as having been erroneous**. *(my emphasis)*

7. My understanding of that proposition is that a mistake that ensues from a court's misapplication or miscomprehension of the law and evidence and which in any case cannot be corrected with the record as is (without seeking additional evidence or legal arguments), may be challenged by appeal

rather than review. In the apex court owing to the rule on finality of its decisions, this would not be tenable.

8. Another dimension to the slip rule is espoused in **Fang Min v Dr. Kaijuka Mutabaazi Emmanuel, Civil Application No. 6 of 2009**, an application brought under rules 2(2), 35 and 42 of the Supreme Court Rules where the Court had erroneously granted a relief that was not pleaded. The application was allowed in the following terms:

> Clearly, payment of the market value of the suit house if the specific performance cannot be performed was not included in the Respondent's prayers. The inclusion of the order of payment of the market value of the suit house if the specific performance cannot be performed was therefore a slip.

9. It becomes apparent that the application of the slip rule ought not to be restricted to the clarification of the intention of the court, as would appear to be the thrust of the dissent opinion in reference hereinabove. Such clarification would appear to be only but one of its intended objectives. Neither, at any rate would I consider the availability of remedial options for litigants that suffer the fate of judicial errors to amount to judicial over-reach, which largely relates to the constitutional principle of separation of powers.

10. Having carefully considered the material on record and the thrust of the lead decision in this matter, I am satisfied that the legal position on applications for reviews before the Supreme Court has been quite elaborately clarified, and the grant of such applications has been correctly restricted to extremely rare but deserving cases so as to preserve the finality of apex courts decisions. Additionally, due care has been taken to avoid potential overlap between a matter for appeal, where a court's considered opinion cannot be considered to have been accidentally wrong; and the basis for judicial review either on account of accidental slip or omission under rule 35, or for the ends of justice as contemplated under rule 2(2) of this Courts Rules of Procedure.

11. In the result, therefore, I do agree with the findings and conclusions arrived at by the learned Chief Justice that the application substantially succeeds, and do abide the declaration and orders issued in the terms proposed.

Signed this 25th day of August, 2025.

Monica K. Mugenyi

Monica K. Mugenyi

Justice of the Supreme Court

Dated and delivered at Kampala this 10th day of September, 2025.

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Registrar, SC.