



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HCC 226 OF 2003

FIROZE NURALI HIRJI (suing through his duly authorized

ATTORNEY SHAROK KHER MOHAMMED ALI HIRJI.....PLAINTIFF

Versus

HOUSING FINANCE COMPANY OF KENYA.....1ST DEFENDANT

WATTS ENTERPRISES LIMITED.....2ND DEFENDANT

RULING

Bank has acted inappropriately: Can order be Reviewed or setting aside?

[1] The application I should determine is a Motion dated 15th October 2014 filed by the 1st Defendant/Applicant. It is seeking:-

- (1) That the court be pleased to stay execution of the orders of the Hon. Justice Gikonyo made on 13th October 2014;***
- (2) That the said orders issued by the Hon. Justice Gikonyo on 13th October 2014 be reviewed and set aside; and***
- (3) That costs of this application be provided for.***

[2] The application is expressed to be brought primarily under Order 45 Rule 1 of the Civil Procedure Act and is supported by the Affidavit of Martin Machira sworn on the 15th day October 2014. The Applicant also filed written submissions and List of Authorities in support of the application

The Applicant's gravamen

[3] The Applicant's complaint is that the court made orders on the 13th October, 2014 lifting the conditional stay of execution granted to the 1st Defendant on the 20th November, 2012 on the basis that the 1st Defendant had failed to deliver the original bank guarantee within the requisite time as ordered on the 22nd September, 2014. The order was issued despite the fact that the 1st Defendant had expressed the

challenges it faced in procuring the bank guarantee, but nonetheless, it had secured the guarantee on the 13th October, 2014 when the matter came up for mention to confirm if the documents had been procured. The bank guarantee is now present and for sufficient cause this application ought to be allowed. *Accordingly, the said order should be reviewed by virtue of the inability of the applicant to produce the document at the time the order was made, reason which have been explained.*

[4] The Applicant has invited the court to determine only one issue: “Whether the Applicant has satisfied the pre-requisite for this Honourable court to set aside and/or review the Orders issued on the 13th October 2014”. The application is primarily founded on Order 45 Rule 1 of the Civil Procedure Act which provides that:

“Any person considering himself aggrieved-

a. By a decree or Order from which an appeal is allowed, but from which no appeal has preferred: or

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

[5] The Applicant submitted that Order 45 Rule 1 has been judicially interpreted at various instances and cited the decision of Hon. Justice F. Gikonyo in the matter of **Salama Mahmoud Saad versus Kikas Investments Limited & Another (2014) eKLR**, where it was stated that:

“the jurisdiction of the Court under Order 45 of the Civil Procedure Rules is restricted to the grounds set out in the said Order which are:1) there has been the discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made; or 2) on account of some mistake or error apparent on the face of the record; or 3) for any other sufficient reason”. (Our emphasis)

[6] And further interpretation of Order 45 rule 1 of the CPR was provided in the case of **Maureen Cherotich Bett vs. Stephen Kamiti Wanganga (2012) eKLR** where it was stated that:

***“...the Application to set aside the judgment has been presented with unexplained delay. The Plaintiff knew her application was dismissed on the same day of the impugned order. The motion for review of setting aside was not made until 24 days late*”**

[7] So also in the case of **Nancy Wanjeri & 5 others versus Michael Mungai (2014) eKLR**, the Honorable Judge quoted the Court of Appeal decision in **National Bank of Kenya Limited vs. Njau (1996) LLR 469 (CAK)**, where it was stated that:

“A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law”.

[8] The Applicant believes it has established that the ruling was not just in the circumstances and ought to be reviewed. Failure to produce the guarantee within the time ordered by Court could not be met on the Applicant because the delay was caused by two major intervening factors. The first; the original

guarantee had to be obtained from the issuing bank; and, second, the issuing bank insisted on an undertaking by the Applicant that the guarantee would be returned within 7 days, since it is the only available copy. The Applicant is ready will and able to produce the guarantee in Court as will be directed. The production of the guarantee at this particular juncture will also ensure that a proper ruling is delivered and justice is administered with regard to the Plaintiff's application dated 29th January, 2014. These are sufficient reasons to review the Order. The Applicant cited the case of **Republic versus The Anti-Counterfeit Agency and 2 others ex-parte Surgrippharm Limited(2014) eKLR**, where the Honourable Judge quoted with approval the case of **Branco Arabe Espanol versus Bank of Uganda (1999) 2 EA 22**, wherein it was stated:

“The Administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his right and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fastened rather than hindered”.

[9] The Applicant argued that the application for review was brought without any unreasonable delay, having been filed two days after the Order was issued. The error or omission herein is self-evident and should not require an elaborate argument to be established. The Application has no intention of showing that the Honourable Judge was incorrect in the exposition of the law and that there was an erroneous conclusion of the law but is instead to seek the Court review of the Order issued on 13th October, 2014 and be allowed to produce the bank guarantee to enable the court arrive at a proper ruling on the Plaintiff's application dated 29th January 2014. They urge the court to exercise its unfettered discretion judiciously and allow the application. The Application is not out to delay this matter and is amenable to any orders which the court may issue in order to facilitate expeditious disposal of this matter.

The Respondent fired back

[10] The Respondent opposed the application and filed Grounds of Opposition dated 21st October 2014 which they relied entirely. But, the Respondent drew Court's attention to the following indisputable facts which the record will bear out:-

1. That the 1st Defendant/Applicant has committed a forgery and has come to court seeking the exercise of its equitable jurisdiction with soiled hands and is therefore not deserving of this court's exercise of discretion in its favour. This is because the copy of the duplicate bank guarantee that they have now presented to court and which they allege to be the original of the copy earlier filed in court clearly differs substantially from the copy they had earlier presented to court as evidence of compliance. If it were an original of the copy earlier filed in court (as the Applicant falsely alleges), it would be the mirror image of the same and would be a complete replica, word for word, paragraph for paragraph, which it is not. A detailed study with the naked eye will immediately reveal that it is a false document which alleges to be the original of the copy filed in court but which it is not. The Court will upon study of the 2 documents side by side also confirm that it is not the original of the first copy filed in court but a forgery and an attempt to replicate the first copy whose original was never filed in court at all and which to date has never been filed as required or at all;

2. That the 1st Defendant/Applicant's belated and futile attempts to now produce the Original Guarantee (which it has not succeeded in doing to date) is in itself an admission of the fact that they have failed repeatedly to comply with the Court's various orders directing them to do so within the time required or directed by this Court.

3. That in addition to the fact that the alleged Guarantee now produced is a fraud and a forgery and also being produced outside of the legitimate windows of time allowed by the Court, it is also not a valid or lawful or legal instrument of Guarantee within the meaning ascribed by the Law and does

not satisfy the requirements of the Court's Order and specifically, the following requirements have not been met:-

- i. The alleged Guarantee offends the requirement of the Stamp Duty Act and is therefore not admissible in evidence before this Court.
 - ii. The alleged Guarantee does not indicate which High Court and in respect of which suit it was prescribed for.
 - iii. The alleged Guarantee does not show or indicate or identify or mention the Ruling of the Court that ordered its issuance.
 - iv. The alleged Guarantee does not indicate what dates or what time period it relates to or applies to.
 - v. The alleged Guarantee does not indicate or identify which parties were involved.
 - vi. The alleged Guarantee does not define who the Plaintiff/Applicant is nor does it specify her as the beneficiary nor does it describe her at all.
 - vii. The alleged Guarantee does not indicate who executed it and in what capacity they are alleged to have executed it, yet only directors and or a director and a secretary of a company are capable of the authority to sign such an instrument.
 - viii. The alleged Guarantee is not sealed by the Guarantor.
 - ix. The alleged Guarantee is not signed by two of the Bank Directors and or the Bank's duly appointed Attorneys.
 - x. The alleged Guarantee is not addressed to the plaintiff/Applicant and may not apply to him.
 - xi. Both and each one of the separate Defendants/Respondents were required to secure and furnish separate Guarantees as they are different entities and as required by the order of the court in its Ruling at page 29 thereof last paragraph.
 - xii. There is absolutely NO CONSIDERATION provided for in the alleged Guarantee, the absence of which elementary ingredient prevents it from being binding under Basic Contract Law.
 - xiii. The alleged Guarantee has not been stamped as required under the Stamp Duties Act.
 - xiv. The alleged Guarantee is not an UNCONDITIONAL Guarantee as stipulated and directed by the Court.
 - xv. In the case of a default in carrying out the Court Orders issued on the 20th November 2012, which failure has already been demonstrated by the Defendants/Respondents, the Honourable Justice Odunga directed that the Application shall be dismissed and the Plaintiff will be at liberty to execute. In this regard, therefore, the court is already FUNCTUS OFFICIO.
4. It is also worthy of note that the Applicant has been given numerous opportunities to state its case and defended itself but has with impunity defied two clear and unambiguous Court Orders and directions. The Honorable Justice Odunga in the Court's Ruling dated 20th November 2012 at page 29 and 30 thereof directed that;

“...I grant a stay of the decree herein on condition that the defendants secure an unconditional Bank Guarantee in the sum of Kshs. Thirty Million Only (Kshs. 30,000,000.00)

with a reputable Bank other than the 1st Defendant within forty five (45) days. In default of compliance this application shall be deemed to have been dismissed with costs and the plaintiff will be at liberty to execute.” (Emphasis ours)

BOTH the defendants DID NOT comply with the above orders and DID NOT secure or file in court an unconditional bank guarantee within the 45 days ordered or at all. As a result, and in default of compliance by the defendants, the Defendants’ application for stay pending appeal was deemed to have been dismissed 45 days after the 20th November 2012 (on 4th January 2013).

5. On the 25th September 2013 we appeared before the Honorable DEPUTY REGISTRAR NYAMBU to press for production of the Original Guarantee, if any, by the Defendants who again failed to do so prompting the court to ONCE AGAIN ORDER the Defendants to furnish the Plaintiff and the Court with the Original Guarantee within 14 days. Needless to state, the Defendants never did so and were in contempt of the Court’s further order FOR THE 2ND CONSECUTIVE TIME. Such conduct only means that the Defendant had through mischief attempted to pull the wool over the court’s eyes in respect of the Guarantee and had been caught in the act and were unable to now present the original as the same was not in existence and or was a fake and a forgery and or ineffective and not valid as a Guarantee.

6. Despite many written and telephone reminders from ourselves, the Defendants once again threw away several opportunities to set matters right in as much as they failed, refused and or neglected to provide either us and or the court with the original of the alleged Guarantee as twice directed by orders of this court. As a result, the Plaintiff was forced to file the Application by way of Notice of Motion dated 29th January 2014 seeking orders, inter-alia, that they be at liberty to execute the judgment obtained in their favour and as directed by the Court.

7. On 6th February 2014 the court certified the matter as urgent and noted the breach of the court’s orders and on 7th February 2014 the said Application was served upon the Defendants’ Advocates as is evidenced by the Return of Service filed in court on 27th February 2014. The Defendants even then had the opportunity to obey the court’s orders, albeit belatedly, but they chose NOT TO OBEY and they chose NOT TO PRODUCE THE ORIGINAL GUARANTEE to the Plaintiff and to the Court as ordered twice by the court.

8. Despite the matter coming up in court variously on 4th February 2014, 27th March 2014, 13th June 2014, 22nd September 2014 and 13th October 2014, the Defendants made no attempt either to obey the 2 court orders directing them to provide and file into court the Original Guarantee and or to supply the same to the Plaintiff or at all. The conduct of the Defendants proved beyond a shadow of doubt that they were not only in contempt of the court orders, but in fact did not have a valid or any Guarantee as directed by the Court and as such were incapable of producing the same and DID NOT IN FACT produce or file any such Guarantee within 45 days as directed and ordered by the Court or at all.

9. The inescapable position of this court is therefore that it is FUNCTUS OFFICIO in respect to the matter of the Defendants’ provision of the Guarantee within a period of 45 days and after the expiry of that window of time, exactly on the 4th of January 2013, the Defendants’ Application dated 12th January 2011 by way of Notice of Motion was deemed to have been dismissed with costs and the PLAINTIFF WAS AUTOMATICALLY AT LIBERTY TO EXECUTE (a course of action that was prevented only by the registry in its reluctance to allow the procedure to commence). The court by law remains bound by the fact that it is and remains FUNCTUS OFFICIO in this regard and it is only proper and correct that the Plaintiff proceeds to execute and enjoy the fruits of its judgment.

10. That the court is and remains FUNCTUS OFFICIO particularly since the Defendants have neither appealed against the Court’s Rulings, Orders and or decisions and or applied to this honorable Court for the enlargement of the time within which they may file or produce in Court the

Guarantee as directed and ordered by the Court and this application seeks only to make the Court act in futility.

11. The court will also take note that the facts and grounds raised by the Applicant are not new and in indeed have earlier been taken into account by and dealt with by this Court;

12. That it is has been 2 years since the Court Ordered the Applicant to prepare a bank guarantee in favor of the Respondent/Plaintiff and more than 1 year and 1 month since this court again on the 25th September 2013 directed the Defendants to furnish the Plaintiff with the Original Guarantee within 14 days of that date. The Defendants have ignored both orders and ignored both windows of 45 days and 14 days respectively granted by the Court and further failed to produce the Original Guarantee within any period of time or at all but chose to be indolent and contemptuous and therefore this application has come too late in the day;

13. That the Applicant has failed to satisfy the requirements and criteria set down by the law for the grant of the orders sought;

14. That the Respondent/Judgment Debtor has suffered and continues to suffer prejudice as she is unable to enjoy the fruits of the Judgment granted 4 years ago by the continued actions of the Applicant who has not even filed their intended appeal and is happy to sit on the stay orders without complying with the terms thereof or without filing any appeal;

15. It is a cardinal principle that litigation must come to an end and no party, the defendants included can be allowed to drag out litigation unnecessarily;

16. That the Applicant's application has no merit and should be dismissed with costs.

[11] The Respondent is convinced that this court is functus officio after it issued the 2 orders to the Defendants-by the Honourable Justice Odunga dated 20th November 2012 and the order of 25th September 2013 by the honourable Deputy Registrar Nyambu- and which the defendant ignored and failed to comply with. The court remains FUNCTUS OFFICIO particularly since the Defendants have neither appealed against the Court's Rulings, Orders and or decisions and or applied to this honourable Court for the enlargement of the time within which they may file or produce in Court the Guarantee as directed and ordered by the Court and this application seeks only to make the Court act in futility. The Application by the Defendants stands automatically dismissed and the Plaintiff stands at liberty to proceed with the execution. For and to what purpose then, would the court be setting aside its ruling in the face of the fact that it is functus officio in the matter it is being taken back to? The court cannot be asked to act in vain.

[12] The Respondent cited judicial authorities to support their position. The case of **Raila Odinga vs. The Independent Electoral & Boundaries Commission & 3 Others** where the Supreme Court made the following observations and findings at paragraphs 18 and 19:

“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

This principle has been aptly summarized further in Jersey Evening Post Limited v. A1

Thani [2002] JLR 542 at 550:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”

[13] The Applicant is of the view that the Applicant cannot take refuge in the provisions of ORDER 45 RULE 1 of the Civil Procedure Act as they have neither discovered any new and important matter of evidence which was not at the hearing within their knowledge nor was there any mistake or error apparent on the face of the record, nor was there any other sufficient reason that can enable the defendant to qualify for a review of the order of the court as alleged. What the 1st Defendant/Applicant alleges to be ‘sufficient reason’ is the production of the Original Guarantee, a matter in which they had already been in contempt of 2 previous court orders and in respect of which they had over 2 years’ worth of time to act on and produce the said Guarantee. They failed, refused and or neglected to do so. In accordance with the case of **Shah vs. Mbogo & Another [1967] E.A** court’s discretion to set aside an ex-parte judgment or order is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice (Emphasis ours). There is not injustice nor hardship visited on the Defendant/Applicant who has been availed of all manner of opportunities by this court and by the Plaintiff and who has instead twice disobeyed the court directly and has been in contempt of the same court in addition to failing, refusing and or neglecting to date to produce a valid and lawful Original Guarantee. Instead the Defendant/Applicant has attempted to lie to this court and has submitted what is obviously a forgery and wants it to pass for a Guarantee. Even if it was argued that it is not a forgery, it is certainly not a valid Guarantee as known to the law for the reasons listed earlier hereinabove.

[14] The Respondent claims the conduct of the Applicant is reprehensible and contemptuous of court orders and is bent at deliberately obstructing or delaying the course of justice. It should, therefore, not expect any assistance from the court at least on the standard of law as set out in the case of **Shah vs. Mbogo & Another** and as stressed in the case of **Maina vs. Mugiria, Civil Appeal No 27 of 1982**. In **Leonard Njoroge Kariuki vs. Fuelex Kenya Limited HCCC No 610 of 2004 [2012] eKLR** the court emphasized the principle that as far as it is practicable, the court must place parties on an equal footing by applying the overriding objective as approved by the Court of Appeal in the case of **E. Muiru Kamau & Another vs. National Bank of Kenya Ltd (2009) eKLR** from which the court quoted the following;

“The Courts including this court in interpreting the Civil Procedure Act or the Appellate jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objectives include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by enduring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on an equal footing.”

[15] According to the Respondent, there can neither be equal footing nor justice if the Applicant is allowed to get away with its deliberate refusal to obey court orders to submit a valid original Guarantee: to add insult to injury, they seek to be allowed to produce a forged Guarantee purporting it to be the Original of the Copy earlier produced out of time. They sought support in the case of **Mawji Vvs. Lalji LLR No 2778 (CAK)** where Kwach J.A. said as follows;

“...All said and done, the bottom line is that the applicant finds himself in this unfortunate position of negligence, pure and simple, on the part of his Advocates. I do not regard what happened in this case as a genuine error or mistake on the part of the Advocates.

I have arrived at the conclusion that the delay involved is inordinate and has not been explained to my satisfaction. This is one of those cases where I agree entirely with the remarks of Lord Griffiths in his speech in the case of KETTEMAN v HANSEL PROPERTIES LTD [1988] 1 ALL E.R. 38 AT PAGE 62 where he said:

“...another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings.”

“For these reasons, I decline to exercise my discretion in favour of the applicant and dismiss the application with costs.”

[16] In conclusion, the Respondent submitted that any order barring the Respondent from executing the consent judgment it secured against the Applicant would in essence prevent the Respondent from ever realizing the fruits of the judgment in its favour. This would be an injustice to the Respondent. The failures of the Applicant to uphold the law, the directives and orders of this court did not arise as a result of any accident, inadvertence, or honest or excusable mistake or error but were negligent or deliberate acts of an indolent, mischievous and malicious litigant whose aim is to delay or obstruct the cause of justice. Their request should be refused.

THE DETERMINATION

[17] This case presents disturbing circumstances. They are apparent on the record. I will consider all matters herein and act justly and boldly in accordance with the law and oath of office. The application before me is primarily one of review and is founded on Order 45 Rule 1 of the Civil Procedure Rules which provides that:

“Any person considering himself aggrieved-

c. By a decree or Order from which an appeal is allowed, but from which no appeal has preferred: or

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

[18] The said rule is fairly straight forward and has been explicated upon by courts time without number. I need not re-invent the wheel or spill more judicial ink on any further enunciation of Order 45 Rule 1 except I am content to cite the following cases: **Salama Mahmoud Saad versus Kikas Investments Limited & Another (2014) eKLR**, where the court stated that:

“the jurisdiction of the Court under Order 45 of the Civil Procedure Rules is restricted to the grounds set out in the said Order which are:1) there has been the discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made; or 2) on account of some mistake or error apparent on the face of the record; or 3) for any other sufficient reason”. (Our emphasis)

The case of **Nancy Wanjeri & 5 others versus Michael Mungai (2014) eKLR**, which quoted the decision of the Court of Appeal decision in **National Bank of Kenya Limited vs. Njau (1996) LLR 469 (CAK)**, where it stated that:

“A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law”.

Issues

[19] After meticulous consideration of all the rival submissions of the parties, the affidavit evidence, the record as well as the law applicable on the matter, the following questions represent the issues for determination by the court.

- a. Has there been the discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made; or**
- b. Has there been some mistake or error apparent on the face of the record; or**
- c. Is there any other sufficient reason which may make the court to review its order?**

Discovery on new and important matter of evidence

[20] Under this head, there are three things which required substantiation. The first one; the discovery should be of new and important matter of evidence. Second, the discovery of new and important matter of evidence per se does not entitle the Applicant to a remedy of review under order 45 Rule 1 of the Civil Procedure Rules. And, third, such discovery should be true discovery in the sense of order 45; i.e. the discovered new and important matter of evidence, should be one which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made. Indeed, the remedy of review lies on the fact that, after exercise of due diligence, the matter was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made and not on the act of discovery per se.

[21] Applying the above threshold, is the procurement of the “Original Guarantee” which the Applicant is proposing to submit to court a discovery of a new and important matter of evidence, which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made? The answer to this question will come from the following rendition. The Honorable Justice Odunga in the Court’s Ruling dated 20th November 2012 at page 29 and 30 thereof directed that;

“...I grant a stay of the decree herein on condition that the defendants secure an unconditional Bank Guarantee in the sum of Kshs. Thirty Million Only (Kshs. 30,000,000.00) with a reputable Bank other than the 1st Defendant within forty five (45) days. In default of compliance this application shall be deemed to have been dismissed with costs and the plaintiff will be at liberty to execute.”

[22] The next time the matter was mentioned was on 25th September 2013 and the purpose of the mention was to confirm or otherwise if the Defendant had filed Original Bank Guarantee as ordered. The Respondent had raised concerns that the document the Defendants are purporting to be a Guarantee was not a Guarantee and so he needed the court to order the Applicants to file in court an Original Guarantee. The Deputy Registrar after hearing arguments of counsels ordered the Applicant to supply the court and the counsel for the Respondent the Original Guarantee within 14 days. That was not done until the

Respondent filed an application dated 29th January 2014 where they sought to be allowed to execute on the decree herein. The application was adjourned for several occasions but it was heard on 22.9.2014. Mr Ayisi who argued the application for HFCK continued to insist that the order of Odunga J was not specific that original guarantee be deposited in court, and, therefore, a certified copy which they deposited in court would suffice. After hearing the counsels, the court came to the conclusion that the major issue at hand was whether the certified copy of the original guarantee is a true copy of the original? Or in other words whether the ‘guarantee’ deposited in court was a guarantee for purposes of securing a stay order? The court delivered an ex tempore judgment and ordered the Applicant to produce before court the original guarantee issued by Barclays Bank of Kenya within 14 days of 22.9.2014. The matter was mentioned on 13th October 2014-they had not complied with the order of the court. The court then noted that the Applicant had consistently disobeyed court orders on deposit of original guarantee despite several indulgences extended to the Applicant by the court. The court took the view that this was a fragrant abuse of court process and the further promise by counsel that the guarantee would be deposited at 2.30pm was yet another attempt to obstruct or delay the cause of justice. The court discharged the stay order issued by judge Odunga and allowed the Respondent to execute on the judgment herein.

[23] The above rendition does not reveal discovery of any new and important matter of evidence. The Court had ordered several times that the Applicant produces before court the original guarantee of the copy they supplied to the court as security for ‘*a stay of the decree herein*’ and the terms of the security were ‘*on condition that the defendants secure an unconditional Bank Guarantee in the sum of Kshs. Thirty Million Only (Kshs. 30,000,000.00) with a reputable Bank other than the 1st Defendant within forty five (45) days*’. The Applicant did not secure a guarantee as ordered by the Court, but somehow and inadvertently, the period of 45 days granted was technically enlarged when the court ordered production of the original guarantee within a specified period of time. The extensions were as a result of the directions which were sought by the Respondent on the matter and were lawfully and competently given. Therefore, I do not think it will be right for the Respondent to raise an objection to the said extensions. And on that basis, they are precluded from asserting that the court was *functus officio* after the initial 45 days lapsed. But what is unsettling the conscience of the Court is that, even with the generous extensions, the Applicant did not comply with the court order. The original guarantee sought was the one from which the copy that they had filed in court was made; for all purposes the original ought to have been available because I note the Applicant is not alleging that the original is lost or cannot be found. Therefore, by any stretch of legal craft, the original guarantee cannot qualify as ‘*a new and important matter of evidence, which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made*’. I repeat, in ordinary cause things, the original is deemed to have been available at the time of depositing the so called ‘certified copy’ of the original guarantee. The ground discussed above as long as it has been cited to be in support of the application for review fails and is rejected.

[24] Matters do not end there. I have compared the two copies of guarantee; the one which was initially filed in court and the one which is annexed to the application by the Applicant herein. Both are different from each other and none is a copy of the other; the difference is in fact in plain eye-sight of the court. The one deposited in court is labeled ORIGINAL on the front face while the one lodged with the application herein is labeled DUPLICATE COPY and even with a naked eye none is a copy of the other. One wonders; if Mr Ayisi was truthful on 13.10.2014 when he made a passionate request to the court and almost swore to it that the original guarantee was available and was to be deposited in court at 2.30pm on that day. If he was, why didn’t he annex a true copy of or the original Guarantee in the affidavit by the Legal Manager of HFCK Mr. Martin Machira? The copy annexed was totally different document from the document they initially lodged in court. The facts of this case reveal some element of calculated and deliberate maneuvers to obstruct and delay the course of justice. And the discretion of the court was never meant to assist such offending litigants. I am aware as a judge I should use measured words and language. But I am also acutely aware that any writing of a judge is governed by the law, the facts of the case, the record, the conduct and demeanors of parties. Conduct and demeanor of parties in a suit is an important evidentiary matter in adjudication of cases, and a court of law should never be modest when giving a description of conduct unbecoming or offending of the law of a party which has manifested itself before the court. If the conduct is overt and fraudulent, or covert and stealthily obstructive of justice, the court should depict it exactly as it has manifested itself as a way of disapproving and suppressing fraud and

perversion of justice. In this case, I am unable to describe in any other terms the conduct of the Defendants particularly the 1st Defendant which is a reputable bank in its deliberate refusal to provide the original guarantee from which the one deposited in court was cut. Understand this in the context that the guarantee was to secure a stay of execution which the Defendants have been enjoying all this time. Other than denying such party remedy sought herein, but without making any determination on whether the DUPLICATE COPY of the guarantee is a forgery or not, I think that this is a matter which should catch the attention of the regulatory authority of banks in Kenya. When a court sets a condition that *the defendants secure an unconditional Bank Guarantee in the sum of Kshs. Thirty Million Only (Kshs. 30,000,000.00) with a reputable Bank*, as security for the grant of a stay of execution, it means security in real terms of the law; i.e. a bank guarantee which effectively acts as security for the performance of the decree which might ultimately become binding on the Applicant. A copy of Bank Guarantee is not a Guarantee in law, and I do not think this reality of law is hidden from even an advocate who has just started practice. As I have stated, the Respondent did not and has not up to this moment filed in court the original Bank Guarantee as ordered by the court. I have also noted that what they have annexed in their application is DUPLICATE COPY and is different from what they had filed in court earlier on. It bears repeating that these are serious matters and more so when a registered bank is in the center of things, which I believe should catch the attention of the regulator of banks in Kenya. When these matters are put together on scale, the purported error or misstate on the face of the record, to the best, is a deliberate omission and commission by the Defendant to defeat or delay the cause of justice. The so called error or mistake becomes stealthily obnoxious and poisonous substance in the springs or streams of justice. With a lot of trepidation, I hereby reject and suppress the offensive argument by the Defendant. I find that there is no error or mistake or irregularity apparent on the face of the record on which a review can be had or set aside the order of 13th October 2014 *ex debito justitiae*. The ground fails totally and is rejected.

[25] Is there any other sufficient reason on which the court may review its orders of 13th October 2014? In the face of what I have stated, there is no any sufficient reason why I should review my order of 13th October 2014. The order is not tainted with any error or irregularity on the face of the record. There is no any discover of ‘‘ a new and important matter of evidence, which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made’’. If the copy of guarantee filed was deduced from the original, and there was no claim that the original was lost or could not be found, production of the original guarantee is not a discovery of any new and important matter of evidence since it was always there unless the copy provided to court was not from the original. These issues leave ragged edges which only the bank knows why it chose to leave matters as such. In these circumstances, there could never be any good reason to review my order. The Respondent also submitted that the Applicant has not filed any appeal since the orders by Odunga J. Although that is an important issue in this case, there was no rejoinder to that submission by the Applicant and I am not in any position to determine the issue. I wish to state also that in view of the conduct of the Applicant, the argument on equality of parties being advanced by them cannot be a sufficient reason of review; indeed it is a comedy of extravagant humour, and it is, therefore, without any foot on which to stand. I will leave that issue at that. There are other submissions by the Applicant which were made as if the orders of 13th October 2014 were granted *ex parte*. The said orders were granted *inter partes*, and, therefore, I need not address those submissions.

The upshot

[26] The upshot is that I dismiss the Motion dated 15th October 2014 with costs to the Respondent. For the avoidance of doubt, the Respondent is at liberty to execute the decree herein which is drawn in accordance with the law. The Registry is accordingly directed. It is so ordered.

Dated, signed and delivered in court at Nairobi this 30th day of January 2015

F. GIKONYO

JUDGE

On 30th January 2015

Before Gikonyo J.,

Ayisi for Applicant/Defendants

Taib for Respondent/Plaintiff

Court: Ruling delivered in open court.

F. GIKONYO

JUDGE