



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 762 OF 2009**

**HON. YUSUF KIFUMA CHANZU.....PLAINTIFF/APPLICANT**

**VERSUS**

**EQUITY BANK OF KENYA LIMITED...1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CAPITAL CONSTRUCTION LIMITED....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

1. The application before the court is a **Notice of Motion** dated **15th September 2014**, filed by the Plaintiff/Applicant who seeks to review orders of this court issued on 30th May 2013, and that pending the said review the court be pleased to issue temporary injunctory orders restraining the 1st and 2nd Defendants/Respondents from interfering with or selling the suit property.
2. The orders of this court sought to be reviewed were as follows:-
  - a. *That if the 1<sup>st</sup> Defendant intends to proceed and sell the suit property a fresh Statutory Notice be issued to the chargor and the Defendant be at liberty to proceed with the sale upon the lapse of the said notice.*
  - b. *That prayer (a) above was conditional on the Applicant paying the 1<sup>st</sup> Defendant the guarantee amount of Kshs.19,000,000/= within 30 (thirty) days from the date hereof.*
  - c. It is now the Applicant's case that the 1st Defendant has sought to sell the suit property afresh without issuing the afresh Statutory Notice.
4. The application is opposed by the the 1st Defendant vide Grounds of Opposition filed herein on 17th October 2014. The Responded states that the Applicant was issued with a Statutory Notice on 28th June 203 following the said ruling on 30th May 2013. Further, the Respondent states that the Applicant is in contempt of court having failed to pay the 1st Defendant the said Kshs.19,000,000/= which was part of the said orders. It is further stated by the Respondent that the application herein is brought after undue delay of more than 1 year after the said Ruling.
5. Parties filed submissions which were highlighted in court, and which I have considered. To determine this applicator I will raise the following issues:-
  - i. *Whether the application for review is properly grounded on law.*
  - ii. *Whether the Applicant's hands are clean in this matter.*

**The application for review is defective**

6. Section 80 of the Civil Procedure Act, Cap 21 and Order 45 of the Civil Procedure Rules provide for review of an order or decree. Order or ruling being reviewed must be attached. The order or decree to be reviewed should be extracted and attached. Failure to do is fatal as was decided in the case of **Orchid Pharmacy Ltd. Vs Southern Credit Banking Corporation Ltd & 2 others [2005] eKLR**. The order the Plaintiff/Applicant seeks to be reviewed has not been attached to the application at hand therefore this raises the question on which specific order is to be reviewed.

#### **Discovery of new evidence**

7. Order 45 Rule 1 of the Civil Procedure Rules states as follows:-

*Any person considering himself aggrieved –*

- a. *By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
- b. *By a decree or order from which no appeal is hereby allowed,*

*And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

There is clearly no discovery or new facts or evidence which has been cited by the Applicant in the application.

#### **Unreasonable delay**

8. Order 45 Rule 1 provides that the application for review should be brought to court without unreasonable delay. The case of **Henry Thande vs Benson Kamau Karigithi [2002] eKLR** reiterated this. In this case, an application for review was brought 13 years after judgment was passed. Aganyanya J. stated that 13 years delay, and without giving reason or any sufficient reason for the delay, was really an unreasonable delay and therefore dismissed the application on that ground. There has been delay on the Plaintiff/Applicant's side in bringing this application before this court. The ruling was delivered on 30th May 2013 and the application has been made in September 2014, 17 months after the Ruling date. The Applicant has not attempted to explain the reasons for this delay.
9. The Applicant contravened the orders issued on 30th May 2013 which were as follows:-
  - a. That if the 1st Defendant intends to proceed and sell the suit property a fresh statutory notice be issued to the chargor and the Defendant be at liberty to proceed with the sale upon the lapse of the said notice.
  - b. That prayer (a) was allowed on CONDITION that the Applicant pays the 1st Defendant the guarantee amount of Kshs.19,000,000/= within 30 days from the date of the ruling.
10. From the foregoing, it is evident that the application does not satisfy the requirements of Order 45 of the Civil Procedure Rules or Section 80 of the Civil Procedure Rules and is not merited.
11. On the second issue, the Applicant has not come to court with clean hands, having himself failed to observe the condition upon which the said orders were given. It has also transpired during the hearing of this application that the Applicant has been given opportunity to pay at least any sum of money to the 1st defendant, but he has not done that. This court has twice, delayed the reading of this Ruling on 18th September 2015 and 23rd October 2015 to give chance to the Applicant to make any payments to the 1st Defendant. The Applicant has not done that. It is not the duty of this court to re-write the contract between the parties. The Plaintiff has come to court with unclean hands on this matter and so he cannot get any remedy in equity.

12. Arising from the foregoing, the Plaintiff's application dated 15th September 2014 is dismissed with costs to the 1st Defendant.

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 27TH DAY OF OCTOBER 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Teresia – Court Clerk