



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 44 OF 2013

KWANZA ESTATE PLAINTIFF

V E R S U S

DUBAI BANK LIMITEDDEFENDANT

RULING

1. The application under consideration by the Defendant is a Notice of Motion dated 4th December 2013 (**Notice of Motion**). The only prayer that this Ruling is directed at in that Notice of Motion is as follows-

“That this Honourable Court be pleased to review and/or set aside and/or vacate the Ruling delivered on 2nd August 2013 and all consequential orders the same having been obtained through perjury, fraud, mis-representation and non disclosure of material facts.”

The Notice of Motion is essentially brought under Section 80(a) of the Civil Procedure Act Cap 21 and Order 45(1)(a) of the Civil Procedure Rules.

2. The learned Mr. Justice M. Muya delivered a Ruling in this case on 2nd August 2013 (**impugned Ruling**). That was a Ruling in respect of a Notice of Motion dated 25th May 2013. It is that impugned Ruling that the Notice of Motion is directed at. When the Notice of Motion was brought before me and in view of Order 45(2)(1) of the Civil Procedure Rules I directed the matter be placed before The Learned Mr. Justice M. Muya for him to give directions on the hearing of Notice of Motion. The Learned Judge for personal reasons recused himself from hearing the Notice of Motion. That is how I found myself entertaining the Notice of Motion which seeks to review and to set aside the Ruling of Mr. Justice M. Muya of 2nd August, 2013.

BACKGROUND

3. By its plaint Plaintiff sought various prayers. Plaintiff sought a permanent injunction to restrain Defendant from selling or dealing with its various properties in Watamu Kilifi District; a permanent injunction restraining Defendant from invoking any rights under the debenture dated 13th April 2013; a declaration that Plaintiff is entitled to release by Defendant of Kshs. 167,000,000/- together with interest as at 31st March 2013 thereon bringing the total to Kshs. 197,801,205.48; a declaration that Defendant statutory power of sale has not accrued; a declaration that the Defendant’s intention to sell charged property was illegal; a declaration that redemption notice issued by Defendant was illegal; a declaration that Plaintiff’s account No.

81147035 with Defendant was manipulated and cannot therefore be a proper basis of the Defendant exercising its statutory power of sale; that the Defendant be ordered to give accurate account of the Plaintiff's account No. 81147035; and a claim in general damages.

4. The Plaintiff and Defendant relationship is one of a customer and a banker. Parties are in agreement that the Defendant granted Plaintiff an overdraft facility of Kshs. 160,000,000/- amongst other facilities which facilities were secured by Plaintiff's properties namely Title Nos. CR Nos. 11589, 11590, 11732, 11609, 11610, 12531, 12668, 11739, 11740, 11741 and 13086 (also known as portions Nos. 28, 32, 33, 34, 36, 49, 52, 53, 54, 55 and 64) Watamu Beach Hotel and Kilulu Island, Malindi. Additionally that security was secured by First Ranking Floating Debenture over all of Plaintiff's assets and was also secured by personal guarantees and Indemnity of Plaintiff's Directors.
5. What however is denied by Defendant is Plaintiff's allegation in its plaint that there was a Memorandum of Agreement entered into between Hassan Zubeidi (**Zubeidi**) whom the Plaintiff describes as the Chairman and Director of the Defendant's Bank, and Geoffrey M. Asanyo (**Asanyo**) the Plaintiff's Managing Director. It is alleged by Plaintiff that under that Memorandum of Agreement Zubeidi received from Asanyo USD 2,500,000.00 for the purpose of Zubeidi securing financing arrangements for a project known as Talent Youth Academy between Government of Kenya and Point Streak Technologies of Canada. It is important to reproduce that Memorandum because it is very central to this action. It is in the following terms-

“Kwanza Estates Ltd,

P.O. Box 61784-00200,

Mpaka Plaza, 4th Flr,

Mpaka Road,

Westlands, Nairobi

Tel: 020 444-2532

Fax: 020 444-2533

5th March 2012

RE: TALENT YOUTH ACADEMY PROJECT: MEMORANDUM OF AGREEMENT

This Memorandum of Agreement is made this day of 5th March 2012 between Kwanza Estates Ltd represented by Mr. Geoffrey M. Asanyo and Mr. Hassan Zubeidi, as the Chairman & Director of Dubai Bank Kenya Ltd.

It is hereby mutually agreed as follows:-

1. **Mr. Zubeidi hereby acknowledges receipt of USD 2,500,000 (USD Two Million Five Hundred Thousand) paid to him by Geoffrey M. Asanyo in cash.**
2. **Mr. Zubeidi shall hold the sum of USD 2,500,000 (USD Two Million, Five Hundred Thousand) in trust and to the order of Mr. Asanyo and subject to the following conditions;**
 - a. **The said sum shall be appropriated by Mr. Zubeidi as his commission/negotiations fees IF and ONLY if Mr. Zubeidi procures execution of financing arrangements for the above mentioned project between GOK & Point Streak Technologies of Canada on or before the 19th March, 2012.**

- b. If Mr. Zubeidi fails to comply as set out on (a) above, the said sum shall be repaid or paid by Mr. Zubeidi to the order and/or as instructed by Mr. Geoffrey M. Asanyo.

Signed this 5th Day of March 2012.

Hassan Zubeidi

Chairman & Director

Dubai Bank Kenya Limited

Geoffrey M. Asanyo

Managing Director

Kwanza Estates Limited.”

6. Plaintiff pleaded in its plaint that Zubeidi failed to secure the aforesaid financing which led Asanyo to instruct Zubeidi as follows-

“Kwanza Estates Ltd

P.O. Box 61784-00200,

Mpaka Plaza, 4th Flr,

Mpaka Road

Westlands, Nairobi

Tel:020 444-2532

Fax: 020 444-2533

21st March 2012

Mr. Hassan Zubeidi

Chairman

Dubai Bank Kenya Limited

ICEA Building

P.O. Box 11129-00400

Nairobi

Dear Sir,

RE: MEMORANDUM OF AGREEMENT DATED 5TH MARCH 2012

I refer to the above memorandum of agreement dated 5th March 2012 since you have failed to procure the execution of financing agreement between the GOK & Point Streak Technologies as agreed. I hereby now direct and instruct you to deposit and credit the sum of USD

2,500,000 (USD Two million five hundred thousand) equivalent to Kshs. 200,000,000 at an exchange rate of Kshs. 80 per USD into our current account No. 81147035 with your bank.

We further hereby enclose our Cheque No. 200001 for Kshs. 200,000,000 (Kshs. Two hundred million) in favour of Rachuonyo & Rachuonyo Advocates being payment to their client M/s National Bank of Kenya Ltd to enable your bank to remit the said sum Kshs. 200,000,000 (Kshs Two hundred million) in favour of Rachuonyo & Rachuonyo Advocates being payment to their client M/s National Bank of Kenya Ltd to enable your bank to remit the said sum Kshs. 200,000,000 (Kshs Two hundred million) to Rachuonyo & Rachuonyo Advocates by RTGS.

I will come to sign the relevant RTGS application forms and other necessary documents.

Kindly Oblige.

Yours Faithfully,

Geoffrey M. Asanyo

Managing Director.”

7. Plaintiff pleaded in its plaint that contrary to the above instructions Defendant debited Plaintiffs account with Kshs. 200,000,000/- to honour Plaintiff's liabilities and created an overdraft in that account, which according to the Plaintiff distorted Plaintiff's financial position.
8. Plaintiff also pleaded that Defendant had failed to give it Statutory Notice of Sale as required under the Lands Act No. 6 of 2012. That accordingly Defendant's Power of Sale of the charged properties had not arisen.
9. Further that Defendant had failed to release to Plaintiff its call deposits of Kshs. 165,000,000/- and Kshs. 1,500,000/- plus accrued interest.
10. Further that Defendant contrary to Section 44 of the Banking Act had increased the interest charged on Plaintiff's account.
11. And further that Defendant intended to sell Plaintiff's properties at under value.
12. The Defendant by its Defence admitted that Plaintiff had three (3) bank accounts at its Kenyatta Avenue Branch. That the Defendant was entitled without notice to set off Plaintiff's indebtedness against any other account. That Defendant could charge interest on overdrawn accounts of Plaintiff at any rate and such interest could be calculated on daily balances and debited monthly.
13. Defendant pleaded in its Defence that the Memorandum of Agreement, referred to above, was fraudulent and false which had been "**manufactured**" by the Plaintiff in its attempt to avoid its contractual obligations with Defendant. In that regard Defendant denied that Zubeidi received from Asanyo USD 2,500,000/-.
14. Defendant denied all the allegations of wrong doing as pleaded in the plaint and further pleaded that Plaintiff failed to operate the overdraft facility as required and accordingly this led to Plaintiff being served with Statutory Notices of Sale of the charged properties.
15. Plaintiff's Notice of Motion dated 25th April 2013 after being heard was Ruled upon on 2nd August 2013 (impugned Ruling) when the following orders were issued-

- **THAT pending the hearing and determination of this suit, an interlocutory injunction be and is hereby issued restraining the Respondent, its servants and/or agents from advertising, for sale, selling, entering into, accessing, alienating, transferring, interfering with and/or in any manner whatsoever altering or dealing with the Applicant's properties known as Title Nos. CR Nos. 11589, 11590, 11732, 11609, 11610, 12531, 12668, 11739, 11740, 11741 and 13086 (also known as Portions Nos. 28, 32, 33, 34, 36, 49, 52, 53, 54, 55 and 64) Watamu, Kilifi District.**
- **THAT pending the hearing and determination of this suit, a mandatory injunction be and is hereby issued restraining the Respondent, its servants, employees and/or agents from taking any action whatsoever and exercising and/or invoking any of its rights whether accrued or otherwise under the Charge dated 11th April 2012 and Debenture dated 13th April 2012.**
- **THAT a mandatory injunction be and is hereby issued, compelling the Respondent to deposit in Court a sum of Kshs. 167,000,000.00 together with interest thereon in total Kshs. 197,801,205.48 as at 31st March 2013, being the Applicant's call deposit within forty-five (45) days from 2nd August 2013.**
- **THAT a mandatory injunction be and is hereby issued compelling the Respondent to furnish and/or provide the Applicant with a complete, proper and accurate statement of account in respect of Account Nos. 81147035, M1207281002 and M1206881003 all in the name of the Applicant.**
- **THAT the Applicant be and is hereby granted the costs of this Application.**

It is that impugned Ruling Defendant seeks this Court to review by the Notice of Motion.

DEFENDANT'S SUBMISSIONS

16. Parties filed their written submissions in respect to the Notice of Motion.

17. Defendant in its written submissions set out the provisions of Section 80 of the Civil Procedure Act Cap 21 and Rule 45(1)(a) of the Civil Procedure Rules upon which the Notice of Motion is predicated. I shall proceed to reproduce the same below. Section 80 provides-

“Any person who considers himself aggrieved-

- a. **by a decree or order from which an appeal is allowed by this Act but from which no appeal has been preferred; or**
- b. **by a decree or order from which no appeal is allowed by this Act;**
- c. **my apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”**

Order 45(1)(a) provides-

1. **(1) 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. ...

And who from the discovery of new and important matter or 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 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.”

18. Defendant submitted that the above provisions lay three limbs for an application for review to succeed.

19. First that Order 45(1) (a) requires that the party applying for review be one who is aggrieved by an order of the Court.

20. Secondly that such a party will have discovered new and important evidence.

21. Thirdly that such discovery of new evidence could not be produced at the time the order was passed. In that regard Defendant cited the case: **TOKESI MAMBILI & OTHERS –Vs- SIMIONLITSANGA CIVIL APPEAL NO. 90 OF 2001** as follows-

“In order to obtain a review, an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made Where the application is based on sufficient reason, it is for the Court to exercise its discretion.”

Defendant also cited the case **NATHAN ONDEGO MDEIZI –Vs- NATIONAL HOUSING CORPORATION KISUMU HCCC No. 34 of 2000** as follows-

“A person who applies for review has to be aggrieved by a formal order or decree The provisions of Order 44 would only apply where there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the Applicant at the time the order was made.”

22. Defendant submitted it had discovered evidence that was novel and which would show that Plaintiff was not truthful when it argued its Notice of Motion dated 25th April 2013. And that since the Court had unfettered discretion under Section 80 and Order 45(1)(a) it could review the impugned Ruling. Defendant cited the case **NAIROBI CITY COUNCIL –Vs- THABITI ENTERPRISES LTD (NAI) C.A. NO. 264 OF 1996** where the Court stated as follows in regard to an application under Section 80 and Order 45(1) (a)-

“The current position would, then appear to be that the Court has unfettered discretion to review its own decree or order for any sufficient reasons.”

23. Defendant submitted that Plaintiff based its application of 25th April 2013 on false and perjured evidence with intention to deceive the Court and accordingly the orders issued in the impugned Ruling were void for want of legality. Defendant by the affidavit of NICODEMUS KIKOLYA of 4th December 2013 deponed that Defendant had subsequent to the impugned Ruling obtained information from the Police that unequivocally confirmed that the Memorandum of Agreement dated 5th March 2012 which the Respondent (Plaintiff) annexed in its application (Notice of Motion dated 25th April 2013) as a basis of claiming USD 2,500,000.00 from the Applicant (Defendant) is a forgery. The details of that alleged forgery were in an affidavit sworn by Zubeidi dated 3rd December 2013. Zubeidi stated thus in his said affidavit-

2. THAT I am the Chairman of the Defendant/Applicant Bank.

3. THAT I am aware of the allegations made by the Plaintiff/Respondent inter alia in paragraph 4, 5, 6, 7, 8, 9 and 11 of its Supporting Affidavit to the Notice of Motion

application dated 25th April 2013.

4. THAT as earlier stated in my Affidavit sworn on 4th June 2013 the aforesaid allegations are false and blatant fabrications by the Respondent with the sole intention of avoiding liability and hoodwinking and deceiving the Court into granting illegal Orders.
5. THAT following disclosure of the purported 'Memorandum of Agreement' dated 5th March 2012 (Respondent's Annexure 'GMA-5' to its Notice of Motion of 25th April 2013) that was alleged to bear my signature, I lodged a complaint at the Central Police Station, Nairobi vide OB No. 39/24/8/2013 and sought the Police to investigate the matter as I have never entered into any such transaction, agreement and/or arrangement with the Respondent and/or any of its directors.
6. THAT upon follow up on the status of the investigations in respect to my complaint, I have been informed by the Investigating Officer – Mr. Wambua who is seized of the matter that they did receive a report from a documents examiner that unequivocally confirms that my alleged signature in the 'Memorandum of Agreement' dated 5th March 2013 was indeed forged. (Annexed hereto is a copy of the alleged Memorandum dated 5th March 2013, a Report by the Forensic Document's Examiner dated 5th September 2013 and a copy of the intended charge sheet).
7. THAT the report confirms my fears and concerns that the Respondent did forge my signature with the sole intention of fraudulently and falsely advancing a claim as against the Applicant.
8. THAT it is quite apparent that the allegations by the Respondent were merely intended to deceive the Court into granting unwarranted orders at the expense of the Applicant.
9. THAT I swear this affidavit in support of the Application by the Applicant to have the Ruling and orders of 2nd August 2013 reviewed, discharged and/or vacated.

24. The annexed Police Report referred to in the above paragraphs is entitled-

“KENYA POLICE CRIMINAL INVESTIGATION DEPARTMENT

FORENSIC DOCUMENT EXAMINER'S REPORT

CASE WORK DIARY

STATION : OCS CENTRAL

CR NO. : OB 39/24/8/2013

ACCUSED : GEOFFREY M. ASANYO

OFFENCE : FORGERY C/SEC 345 AS READ WITH 349

OF THE PENAL CODE

REQUEST : AS PER MEMO FORM

DATE OF EXAMINATION : 5/09/2013.”

The findings of that report are as follows-

“REPORT ON EXAMINATION AND FINDINGS

I have examined and compared the Questioned signatures pointed by red arrows on exhibit marked CI (MEMORANDUM OF AGREEMENT DATED 5TH MARCH, 2012) with specimen signatures on exhibit marked B1-B3 and known signatures pointed by red arrow on exhibit marked A1-A2.

In my opinion the signatures are not made by the same author.”

Attached to that Report is a Charge Sheet of Criminal Case No. 111 of 2013. The person to whom the charge is directed is Geoffrey M. Asanyo the charge and particulars of the charge are-

“FORGERY CONTRARY TO SECTION 345 AS READ WITH 349 OF PENAL CODE CAP 63 LAWS OF KENYA

GEOFFREY M. ASANYO: On known date and place in the Republic of Kenya jointly with others not before Court with intent to defraud a certain Memorandum of Agreement for “Talent Youth Academy Project” purporting it to be genuine memorandum of agreement signed by Mr. Hassan Zubeidi, the Chairman Dubai Bank Kenya Ltd.

COUNT II

UTTERING A FALSE DOCUMENT CONTRARY TO SECTION 353 OF THE PENAL CODE

GEOFFREY M. ASANYO: On the unknown date at Mombasa High Court within Mombasa County with intent to defraud uttered a forged document namely Memorandum of Agreement for “Talent Youth Academy Project” in a Court proceedings purporting it to be a genuine Memorandum of Agreement signed by Hassan Zubeidi the Chairman Dubai Bank Kenya Ltd.”

25.It is because of the above evidence that Defendant argued that the

orders issued by the Court through the impugned Ruling were void and should be set aside. Defendant cited the following cases to advance its argument that the impugned Ruling had to be reviewed due to Plaintiff’s alleged illegality. **MEEK VFLEMING (1961)QB 366** where it was held-

“Where a party deliberately misleads the court in a material, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment as unfairly procured.”

JONESCO –Vs- BEARD HL298 where the House of Lords stated-

“Fraud is an insidious disease, and if clearly proved to be used so that it may deceive the Court, it spreads and infects the whole body of the judgment ... An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had material effect upon the decision of the Court. It must be shown that-

- i. **That the evidence could not have been obtained with reasonable diligence for use at the trial;**
- ii. **That the further evidence is such that, if given, it would have an important influence on the result of the trial, although it need not be decisive; and**

iii. **That the evidence is such as is presumably to be believed.”**

FLOWER –Vs- LLOYD (1877) CHANCERY DIVISION (VOL VI) 297 it was stated-

“If it is true that there was a fraud practiced upon the Court, by which the Court was induced to make a wrong decree, the way to obtain relief will be to bring a fresh action to set aside the decree on the ground of fraud.”

And in the case **LAZARUS ESTATE LTD –Vs- BEASLEY (1956)I ALL ER 341** where Lord Denning had this to say-

“No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.”

26. It is submitted on behalf of Defendant that Defendant did not deserve the orders it obtained through the impugned Ruling because it did not have clean hands. Defendant summarized the misrepresentation of the Plaintiff as follows-

“First, the Respondent misrepresented to the Court as to the existence of a Memorandum of Agreement that was basis of the payment of the alleged sum of USD 2,500,000.00 to the Applicant’s Managing Director, Mr. Hassan. The Memorandum of Agreement was later found by the Police to be a forgery.

Second, the Respondent deliberately and blatantly lied to the Court under oath and misrepresented the fact that it had dealt with Mr. Hassan whereas it was at all material times known to the Respondent that these allegations were false.

27. Defendant by supplementary affidavit of Nicodemus Kikolya dated 20th January 2014 deponed that the issue of the alleged forged Memorandum of Agreement was not only new evidence, and went into the very root of the dispute but that it could not be raised prior to the impugned Ruling being delivered.

PLAINTIFF’S SUBMISSIONS

28. It was submitted on behalf of the Plaintiff that the Defendant’s Notice of Motion was incompetent in as much as it sought to overturn the entire impugned Ruling. Plaintiff cited the case **FRANCIS ORIGO & ANOTHER –Vs- JACOB KUMALI MUNGALA [2000]eKLR** where the Court stated-

“In Lakhamshi Bros case supra and in Vallabdas Karsandas Raniga v. Mansukhlal Jivraj and Others [1965]E.A. 700 the Courts held that there cannot be review where the Court is asked to overturn its own judgment in the same proceedings”

29. Further that the Defendant had to meet the following conditions in order to succeed in an application for review-

- **The discovery of new and important matter or 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.**
- **Mistake or error apparent on the face of the record.**
- **Any other sufficient reason.**
- **Unreasonable delay.**

30. Plaintiff on the first condition above submitted that therein are two intertwined and interwoven limbs which Defendant must prove. That is-

- **THAT the evidence or matter discovered must be new and important;**
- **THAT after the exercise of due diligence, the said new evidence was not within the Applicant's knowledge or could not have been produced by the Applicant at the time when the decree was passed.**

31. Plaintiff argued that the alleged issue of fraud and forgery of the Memorandum of Agreement dated 5th March 2012 is not new and important matter because that issue was raised before the impugned Ruling was delivered and was in issue in the affidavits of Nicodemus Kikolya and of Zubeidi both sworn on 4th June 2013 and 26th June 2013 respectively which were considered in the impugned Ruling. Kikolya in his affidavit of 4th June 2013 stated thus-

"25. THAT in reply to paragraphs 7, 8 and 9 of the Plaintiff's affidavit, I wish to state as follows-

- a. I am informed by Mr. Hassan Zubeidi which information I verily believe to be true that the contents thereof are false in that he never executed the alleged Memorandum of Agreement dated 5th March 2012 and he has never received the alleged sum of USD 2,500,000 as alleged therein or at all;**
- b. I am informed by the said Hassan Zubeidi, which information I verily believe to be true that the contents thereof are false in that he never received the purported letter dated 21st March 2012 purportedly instructing him to allegedly deposit the sum of USD 2,500,000 allegedly equivalent to Kshs. 200,000,000/- into the Plaintiff's Current Account as alleged and/or at all;**
- c. That I am aware of my own knowledge that the Defendant did not and has never received the purported letter dated 21st March 2012 and specifically, the aforesaid purported letter was never signed and/or received on behalf of the Defendant by any authorized officer as required.**

Annexed hereto and marked "NK-21" is an affidavit from the said Hassan Zubeidi."

32. Further Plaintiff submitted that Mr. Justice M. Muya by his Ruling (impugned Ruling) considered the issue which are the subject of the Notice of Motion and that accordingly the said issue is *res judicata* according to Section 7 of Cap 21.

33. Plaintiff submitted that what Defendant is seeking by the Notice of Motion is an appeal against the finding in the impugned Ruling. Plaintiff relied on the case **KIZINGO DISTRIBUTORS (1984) LTD -Vs- TIBBETTE & BRITTEN KENYA (2013)eKLR** where the Court considered two cases as follows-

"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 for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

That statement was made in the case **NATIONAL BANK OF KENYA LTD -VS- NJAU [1995-98]2EA.**

In that case **NATIONAL BANK OF KENYA LTD -Vs- NJAU** (supra) the Court also stated as

follows-

“In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters on controversy and exercised his discretion in favor of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it.”

34. Plaintiff attacked the Defendant’s attempt to rely on handwriting report, referred to above and the charge sheet, thereof, by stating that the same were fraudulent and were not authentic.

35. Plaintiff’s learned Counsel Mr. Nyachoti’s Law firm received a reply to their complaint to the Inspector General of National Police Service which the Plaintiff relied upon, which is as follows-

“NPS/IG/SEC/3/2/13/B/Vol. III/ (74)

14th January, 2014

M/s Nyachoti & Co. Advocates

Museum Hill Centre, 4th Floor,

P.O. Box 39252-00623

Parklands

NAIROBI

Dear Sir,

RE: MOMBASA HCCC NO. 44 OF 2013

Kwanza Estates Limited vs Dubai Bank Limited

The Inspector General of National Police Service has received your letters Ref. K27/1/PN/am dated 11th December, 2013, K27/1/PN/am dated 7th January 2014 and ordered for investigations to be carried out.

The following are the findings after the investigations were carried out:-

- The Charge Sheet attached to the affidavit of Hassan Zubeidi is not valid. The O.C.S Central Police Station Nairobi whose purported signature appears thereon has denied ever signing it and the Charge Sheet number appearing thereon refer to unrelated matters with regard to offences of house breaking and theft of motor vehicle which are unrelated to this matter. The said annexure is therefore not an authentic document.**
- The confidential and privileged documents attached to the said affidavit including the forensic examined report were illegally obtained from a police investigation file. Their illegal possession by an unauthorized civilian Mr. Zubeidi are now the subject of criminal investigations with a view of charging all the suspects involved in this fraud.**
- In the meantime, the parties ought to concentrate in the High Court Civil Case Number 44/2013 in Mombasa to its logical conclusion without involving the police until such a time that the same court gives orders to the police as appropriate.**

Please be advised.

LEO N. IJORA (EBS, OGW)

Ag. DIRECTOR INTERNAL AFFAIRS UNIT

c.c

1. Director of Public Prosecution

NSSF Building, Block “A” 19th floor

Nairobi

2. Director of CID

CID Headquarters,

Nairobi

3. Ethics & Anti-Corruption Commission

Integrity Centre

Nairobi

4. OCPD

Nairobi Central Division

Nairobi

5. Ahmednasir Abdikadir & Company

Advocates,

Nairobi

6. Deputy Registrar,

High Court of Mombasa

Mombasa

7. Independent Policing Oversight Authority

IPOA”

36. Plaintiff also relied on a letter dated 29th January 2014 from the office

of Inspector General National Police Service which was written to Defendant’s Counsel which in part is as follows-

- 1. Internal Affairs Unit pursuant to its functions as stipulated in the National Police Service Act of 2011 perused the case file at Central Police Station and discovered that there was no copy of such charge sheet as annexed by you in the file.**

2. **The signature on the charge sheet which was annexed and allegedly paginated 600 and 601 was out rightly disputed by the Nairobi Central Police Station OCS C.I. Alphonse Ngundo a fact that demands investigations on who signed the charge sheet and yet the OCS was not absent from the Station area.**
3. **The closing remark of the investigating officer on the covering report indicates that the case was still pending under investigations. It is unbelievable for a case which is pending under investigations to have a charge preferred against an accused. Therefore the charge sheet was at that particular time null and void.**

5. From the statement of your client that he recorded at Central Police Station Nairobi on 24/8/2013, he alluded to the fact that he noticed the alleged Memorandum of Agreement on the 8th day of April 2013 and informed his lawyers. From the case file, the lawyer who stamped the affidavit was Muriuki D. Mwenda on behalf of Kiplangat and Associates Advocates. Your client's lawyer then did not report the matter to any police station other than the report made vide OB 39 of 24/8/2013. Over four months since he noted the anomaly he did not report to the police station.

37. **Plaintiff referred to the hand writing report of Antipas Nyanjwa which Plaintiff submitted was more reliable than the one produced by Defendant. In that report Antipas Nyanjwa compared the original Memorandum of Agreement dated 5th March 2012, reproduced above, with documents filed in this case and signed by Zubeidi. In his conclusion the document examiner stated-**

“Report on Examination & Findings:

As per the request, I have today examined and compared the disputed signature of Mr. Hassan Zubeidi on the Memorandum of Agreement dated 5th March 2012, with his known and undisputed signatures on the original sworn affidavit dated 3rd December 2013, the original sworn affidavit dated 4th June 2013, the original witness statement dated 26th June 2013, the original charge dated 11th April 2012, and the original debenture dated 13th April 2012. The signatures are in my opinion made by the same author.

I have also examined and compared the disputed receiving stamp impression for Dubai Bank Kenya Limited on the Letter of Authority for RTGS dated 21st March 2012, with standard and undisputed Dubai Bank Kenya Limited receiving stamp impression on the letter from Kwanza Estates Limited dated 3rd April 2013. The stamp impressions are in my opinion made by the same instrument.

Methodology

In my examination I have subjected the questioned signatures to image enhancement and magnification procedures on digital platforms for better visibility and inspection of the miniature individual characteristics for absolute identification.

Characteristics & Similarities

I have considered all the possibilities of natural variations resulting from the time span the signatures were made, sickness, age factors, poor eyesight, the writing instrument, natural pen failures, fatigue, surface beneath the paper, voluntary intoxication with alcohol, and the changing writing habits.

My considerations in arriving at my opinion are based on the peculiar individual characteristics in the signatures that provided me with forensic evidence of common authorship.

For each document, I have individually considered the graphology reminiscence of the author, character initialization and their terminal strokes, the character construct and their arrangements, pen fluency, pen pressure, pen speed, curvatures, natural pen lifts, character spacing and their baseline alignment, ink distribution in the characters, writing quality, and the general resemblance.

The documents under my review are originals. That has provided me with clarity needed for comparison and conclusive opinion. In my opinion I could not find any forensic evidence of digital manipulation of the documents like scan superimpose and print.”

38. It is in view to the above that Plaintiff submitted as follows-

“In view of the foregoing ..., it is clear that the aforesaid documents which have been presented as ‘new and important evidence’, are documents which were deliberately prepared, manufactured and/or fraudulently obtained after the Ruling of the Honourable Mr. Justice Martin Muya with the sole intention of assisting the Applicant in its current Application. The said documents are therefore intended to mislead this Honourable Court and this Honourable Court should on its own motion commit the Applicant and its Directors for contempt of Court in view of their conduct as submitted above and by deliberately attempting to mislead this Honourable Court using forged documents.”

39. Plaintiff was also of the view Defendant failed due diligence test in an application for review. Plaintiff submitted Defendant knew of the existence of the Memorandum of Agreement as far back as 30th April 2013 when Plaintiff’s application was served on them. The Defendant however only made its complaint on the alleged forgery of Zubeidi’s signature in that Memorandum on 24th August, 2013. Plaintiff argued that Defendant had failed to act with due diligence to have the document examiners report prepared on its behalf and had therefore failed to satisfy Order 45(1) (a). The case JACKSON GATERE –Vs- MOUNT KENYA BOTTLERS LTD [1997]eKLR was cited as follows by Plaintiff to support its submission-

“There is nothing on the record to show when the appellant instructed his accountant to prepare the analysis or report. The appellant had been furnished with a comprehensive statement of account by the respondent since January, 1993. He did not have his accounts ready until February 1, 1995 after summary judgment had been entered. We are not persuaded that the appellant could not have had his accounts ready if he had acted with diligence. In the result, the review sought was not available to him.”

Plaintiff also cited the case ROSE KAIZA VANGELO MPANJU KAIZA (2009)eKLR where the Court discussing requirement of due diligence stated-

“Where such a review application is based on fact of the discovery of fresh evidence the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

ANALYSIS

40. Although the issue whether the Notice of Motion is defeated by existence of an appeal by Defendant, was not very forcefully argued it is important to state that the authorities clearly show that a review application is not defeated because Applicant has filed a Notice of Appeal. As it will be recalled from the reproduced Order 45(1) (a) above a party is only entitled to seek review where such a party has not filed an appeal. Judge G. V. Odunga in the case LEONARD GIKARU WACHIRA –Vs- SOUTHERN TRAVEL SERVICES LTD & ANOTHER (2012)eKLR stated thus-

“In THE CHAIRMAN BOARD OF GOVERNORS HIGHWAY SECONDARY SCHOOL – Vs- WILLIAM MMSOI MOI CIVIL APPLICATION NO. 277 OF 2005 had this to say-

“... then a notice of appeal however is only a formal notification of an intention to appeal and it cannot be said that the aggrieved party has “preferred” an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent having filed a notice of appeal, which had not been withdrawn, was answered in the affirmative by the Court of Appeal in Yani Haryanto Vs. E. D. & F. Man (Sugar) Ltd Civil Appeal No. 122 of 1992 (UR) ... The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other.”

Also in the case **FRANCIS ORIGO & ANOTHER –Vs- JACOB KUMALI MUNGALA [2005]eKLR** the Court stated-

“Review application should be filed before the appeal is lodged. It is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with A review application is incompetent after appeal is preferred.”

41.As I understand it Defendant has filed a Notice of Appeal against the impugned Ruling but the Record of Appeal has not been filed. Defendant therefore can in my view seek review of the orders issued by the impugned Ruling.

42.The question however I ask myself is; What am I being asked to review? I ask that question because the Court by the impugned Ruling of 2nd August 2013 issued various orders, all of them touching on various and different issues raised by the Plaintiff in its present claim. In this regard I refer to the orders reproduced above in this Ruling. I have also read the very voluminous documents in this case and it does seem that although the Defendant presents to this Court its handwriting expert report and the alleged Charge Sheet of Mr. Asanyo, those two documents relate to the Plaintiff’s claim that Zubeidi was given USD 2,500,000 which it is alleged he failed to repay back to Asanyo. As far as I can discern the orders issued on 2nd August 2013 by the impugned Ruling did not determine one way or the other whether that money USD 2,500,000 was paid to Zubeidi or whether Asanyo was entitled to its refund and did not get that refund. It is true that the Court through its impugned Ruling, “threw cold water” to Zubeidi’s allegation that the Memorandum of Agreement allegedly evidencing the payment of that amount, was a forgery, the Court did however not determine whether such monies were paid to Zubeidi or not or what bearing if any, such money had to the Defendant’s intention to realize the sale of the Plaintiff’s charged properties. The Court in totality in respect of that Memorandum stated in the impugned Ruling as follows-

“I am satisfied that the question of the sum of USD 2,500,000 has not sufficiently been dislodged by the Defendant.”

Since that is my finding. I do not find that the evidence presented by Defendant of its handwriting expert or the alleged Charge Sheet relating to alleged charges against Asanyo can be used to review orders of impugned Ruling.

43.The Court in its consideration of the Plaintiff’s application as it reached its decision in the impugned Ruling considered Plaintiff’s allegation that the Defendant’s Statutory Notices did not meet the legal requirements under the Land Act No. 6 of 2012; considered the Plaintiff’s claim

that the Defendant intended to sell the charged properties at under value and in that regard Defendant intended to sell more properties than was required to recover the alleged debt owed by the Plaintiff; and considered that the Defendant had failed to give Plaintiff credit for its call deposits of Kshs. 165,500,000 and Kshs. 1,500,000/- which Plaintiff alleged together with accrued interest totaled Kshs. 197,801,205.48. That total amount is the amount the Court by its impugned Ruling, reproduced above, ordered the Defendant to deposit into Court, within forty five (45) days from 2nd August, 2013.

44. The Court's decision in respect of the above issues would not stand to be reviewed on the basis of the documents Defendant brings to Court by its Notice of Motion because as it will be seen the orders of impugned Ruling did not touch on the validity or otherwise of the Memorandum of Agreement. The evidence on the validity or otherwise of the Memorandum of Agreement did not influence the orders issued by the impugned Ruling.

45. Even if the documents presented by the Defendant's Notice of Motion did have a bearing to the orders issued by the impugned Ruling the issue raised on the validity of those documents in my view would disqualify them to be considered for review of Court orders. In reaching that determination I am guided by the letter of Inspector General of Police dated 14th January 2014, reproduced above. That letter categorically termed the Charge Sheet allegedly directed to Asanyo as fraudulent. That letter stated that the release of the Defendant's document examination report to be irregular and without authority. That in itself, in my humble view did not invalidate that report. However I do find that the report in its form cannot be relied upon by this Court because the handwriting expert relied on certain documents in reaching his conclusion, which documents were not attached to the report. The Court has a duty to satisfy itself whether such a report can be accepted, it cannot now do so because of the absence of those documents. I am guided here by the case: ASIRA –Vs- REPUBLIC [1986]KLR 227 as follows-

“6. The most an expert on handwriting can properly say is not that somebody definitely wrote a particular thing but that he does not believe a particular writing was by particular person or that the writings are so similar as to be undistinguishable.

7. It is the duty of a court to make an examination and satisfy itself whether the handwriting expert's opinion can be accepted and the court cannot blindly accept such an opinion. The failure to demonstrate to the court the features of the so-called disguised handwriting meant that the court did not itself decide the issue.”

The decision on handwriting, whether it is genuine or not, always rests with the Court.

46. For the purpose of this Ruling, and having made the above finding on Defendant's handwriting report, it is not necessary to make any finding on the validity or otherwise of Plaintiff's report by Anyanjwa. It is not necessary to make a finding at this stage.

47. As correctly submitted by the Plaintiff, if nothing more Defendant's application for review will fail because firstly the allegation of forgery of the Memorandum of Agreement is not new evidence, and secondly because Defendant failed to act with due diligence to present that evidence.

48. In respect on the first ground of refusal to accept Defendant's evidence, it will be noted that Mr. Justice M. Muya received extensive

submissions on whether Zubeidi's signature on the Memorandum was forged or not and the said Learned Judge made a determination as set out above, that Defendant had failed to “dislodge” the Memorandum. The issue of forgery is therefore not new. I refer to the case FRANCIS ORIGO & ANOTHER (supra) as follows-

“The Applicants before this Court claim that they were unable to produce a key witness at

the trial. This is, of course, not ‘discovery’ of “new and important evidence” as envisaged by the first criterion. The word ‘discover’, according to the Oxford English Dictionary, means “to invent or find something not known before.” The Applicants have shown that they “discovered” a new witness, whose testimony now is likely to affect the Court’s decision. The witness existed, and was known to all the parties. It is the Court that did not allow his evidence. This may be a ground of appeal “but not review.” In the circumstances, the Applicants have not satisfied the first criterion outlined above.”

49. Secondly, Defendant did not deny that the application attaching the Memorandum was served on Defendant on 30th April 2013. Defendant waited until 24th August 2013 before making a formal complaint to the Police alleging that the Memorandum was forged. And even then, after receiving the handwriting report dated 5th September 2013, Defendant did not file the present Notice of Motion until 4th December 2013. Order 45 requires a party seeking review does so with diligence. Defendant in this case cannot be said to have acted with due diligence. The delay of bringing before Court the material Defendant now relies upon, as evidencing forgery of Zubeidi’s signature, was not explained by Defendant. On that ground alone, Defendant’s application for review will fail. I am in this regard well guided by the authorities cited by Plaintiff discussing the need to act with due diligence.

50. It does become clear to me that the Defendant by its Notice of Motion seeks the Court to sit in appeal against the Ruling of 2nd August 2013 (impugned Ruling). I cannot, being a High Court Judge, sit on appeal against the decision of another High Court Judge Justice M. Muya, of 2nd August 2013. I would echo what was stated in the case NEWTON WANJOHI MWAI –Vs- EPHANTUS NGARI NJIRAINI (2011)eKLR where it was stated-

“It is obvious from what I have enumerated hereinabove that there is no error apparent on record. The issue was raised, argued and determined. Such an issue cannot be re-argued via an application for review. If the Applicants are not happy with the decision of Lady Justice Kasango, they had the option to appeal against it. The Applicant seems to argue that the court arrived at an erroneous finding of the evidence and law. The Court of Appeal expressed itself in NYAMOGO & NYAMOGO ADVOCATES –Vs- KOGO E.A. [2001]173 at page 174-5 in part as follows:

“Again, if a 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 of wrong view is certainly no ground for a review although it may be for an appeal.

As was said in the A.I.R. Commentaries on the code of Civil Procedure by Chitaley and Rao (4th ed.) Vol. 3 at 3227. “A point which may be good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”

51. It is because of the findings above that I find the Notice of Motion dated 4th December 2013 is without merit and the same is hereby dismissed with costs to the Plaintiff.

DATED and DELIVERED at MOMBASA this 19TH day of JUNE, 2014.

MARY KASANGO

JUDGE