REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISCELLANEOUS APPLICATION NO. 1100 OF 2003 (O.S)

CHRISTOPHER MUSYOKA MUSAU.…..…..PLAINTIFF

VERSUS

N. P. G WARREN

D. J. G MC VICKER

L. W. MURIUKI

K. H. W. KEITH

Z. H. A. ALIBHAI

RUBINA DAR

A. BHANDARI

S. RAVAL

T/A DALY & FIGGIS ADVOCATES.....DEFENDANTS

RULING

By a Notice of Motion dated 31st October 2012 expressed to be brought under the provisions of Sections 3A and 80 of the Civil Procedure Act (Cap 21), Order 45 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law, the Defendants/Applicants seek the following orders:

1. **This application be certified as urgent and heard ex parte in the first instance.**

2. **The enforcement of the orders made by this Honourable Court on 20th September 2012 be stayed pending the hearing and determination of this application.**
3. **The judgement made and delivered by this Honourable Court in this suit on 20th September 2012 be reviewed.**

4. **The cost of this application be provided for.**

The Motion is based on the grounds:

1. **that there are mistakes and/or errors apparent on the face of the record on account of the following matters:**

a. **An assumption that the Plaintiff carried out and completed water works on the subdivisions of LR No. 11077 (The property);**
b. **An assumption that a certificate has been issued confirming that water works on the subdivisions of the property are complete;**
c. **An assumption that a "complete certificate" issued by Blueline Construction Company (the Contractor) in the year 2003 dealt with water works.**

2. There are sufficient reasons for review of the judgement, including the following:

a) In this suit, the sale by the Plaintiff of subdivisions of the Property and the corresponding purchase of those subdivisions by the Defendants' clients has been taken as one transaction whilst there were actually several transactions, each involving a sale by the Plaintiff to the Defendants' clients of one or more subdivisions of the property;

b) The total balance of the purchase price for the subdivisions purchased by the Defendants'' clients is much less than the amount of Kshs. 11,568,790/= claimed by the plaintiff. There is a need to establish precisely by whom and how much has been paid to the Plaintiff and what remains unpaid;

c) There is a need for a determination based on the facts and circumstances of the case;

d) There is a need for a substantial justice.

3. This Honourable Court is yet to make a final determination regarding *inter alia* costs, hence it is premature to extract a decree.

4. It is in the interest of justice that the orders sought be granted.

The application is supported by affidavits sworn by **Kenneth Hamish Wooler Keith**, **Richard Philip Hechle**, **Bruno Illi** and **Eva Illi**, **Barry Michael Tomlinson** and **Suzanne Margaret Tomlinson**, **Daniel Grenfell Hill**, **Nicholas Le Poer Trench** and **Adrian Hughes**.

According to Kenneth **Hamish Wooler Keith**, the Managing Partner of **Daly & Figgis Advocates**, he has perused the Judgement and noted various fundamental mistakes and/or errors apparent on the face of the record in particular erroneous assumptions that the Plaintiff carried out and completed water works on the subdivisions; that a certificate has been issued confirming that water works on the subdivisions of the property are complete; that a "complete certificate" issued by **Blueline Construction Company** (the Contractor) in the year 2003 dealt with water works. According to the deponent, the Plaintiff did not assert that the water works had been carried out and completed and that to the contrary the replying affidavit contended that the water works had not been carried out which contentions were uncontroverted but were disregarded by the Court; there was no evidence that the water works which were to be carried out and which were listed in a letter dated 17th February 1994 from **Sewco Engineering Services** to the Defendants had been carried out; no certificate confirming that water works are complete has been issued and none was presented to the Court; the "completion certificate" issued by **Blueline Construction Company** related solely to a road network (i.e. road works) at the property and did not mention water works; all correspondences relating to Blueline Construction Company related solely to completion of road works; **Blueline Construction Company** did not carry out any water works but were involved in construction of roads only; and in the letter dated 4th August 2003 by which the Defendants acknowledged receipt of the "completion certificate" issued by **Blueline Construction Company**, the Defendants requested the Plaintiff's Advocates to provide "an agreed report detailing the works that were to be completed in connection with the water works". It is deposed that the fact that the water works were

not completed, and consequently the subdivisions of the Property were not serviced with water, is further borne out by the contents of Affidavits sworn by some of the Defendants'' clients. As the condition for payment of the balance of the purchase price (i.e. issuance of a certificate by the Engineer that water works are complete) is still outstanding, the deponent believes that the contents of the judgement are mistaken and/or erroneous and ought to be reviewed. Further, in his view there are further sufficient reasons for review of the Judgement. Throughout the suit and the judgement the subdivisions of the property and the corresponding purchase of the same by the Defendants' clients has been taken as one transaction which is inaccurate as each subdivision of the property constituted a separate transaction, though the terms were similar and this is borne out by the fact that payment of the purchase price was not synchronised and a problem suffered in the sale/purchase of one or a number of subdivisions did not affect the progress of the other transactions. In effect the defendants acted for its clients in 68 separate transaction involving 32 clients out of which 2 clients Shah & Associates and Mr & Mrs Piers Bastard withdrew instructions and entered into separate arrangements with the plaintiff details whereof are unknown to the defendants. Although another client, **Mr Adrian Luckhurst**, retained the Defendants he entered into subsequent agreements directly with the plaintiff. Out of the arrangement entered into between Mr Piers Bastard and the plaintiff, it is deposed that the plots were paid in full and more land received as commission for selling other plots on the plaintiff's behalf. With respect to **Mr Adrian Luckhurst**, the effect of the subsequent agreement s was to discharge him from obligation to pay the balance of the purchase price. With regard to the remaining 29 clients, it is deposed that according to the Defendants' records the balance of the purchase price in the year 2003 was Kshs 8,960,220/= and not the Kshs 11,568,790.00 claimed in the Originating Summons. From information received from of the purchasers and their subsequent assignees, private settlement arrangements have been entered into in which some of the subdivisions have been purchased and the initial purchasers discharged of their obligations by the plaintiff. Therefore, the deponent contends that the total outstanding balance of the purchase price for the subdivisions is much less than Kshs 8,960,220/= and the plaintiff ought to provide an account of all monies paid to him by or on behalf of the various purchasers. Since the issue of the costs is pending, it is the deponent's view that the extraction of a decree is premature. The review of the judgement, according to him will ensure substantial justice and a determination based on the facts and circumstances of the case hence it is in the interest of justice that the orders sought be granted.

The gist of the other affidavits is that the reason for the failure to pay the balance of the purchase price has been the failure by the Plaintiff to carry out the water works and the non-issuance of a certificate by the Engineer confirming that road works and water works are complete.

In opposition to the application, the plaintiff **Christopher Musyoka Musau**, swore an affidavit on 12th November 2012 in which he deposed that the issue of non-completion of road works and water works was dealt with at the trial hence there is no error or assumption made by the Court that the plaintiff had carried out or completed waterworks on the suit property. In his view, the depositions in paragraphs 5 and 6 of the supporting affidavit concern the underlying contract between the plaintiff and the several purchasers of the suit property and have no relevance to the germane issue in this suit, namely the enforcement of a professional undertaking issued by the Defendant to his advocate on record. In his view, the Court took into account all the issues that were placed before it by the parties prior to arriving at its judgement. Since all conditions for payment were met, it is averred that there is no mistake or error apparent on the face of the record of the judgement to warrant review. To the deponent, it is a little too late in the day for the deponent to change the facts of this case and that the contents of paragraph 17 of the supporting affidavit constitute neither new evidence nor new matter that was not known to the deponent prior to the filing of the application and hence the application does not meet the threshold standards set by the rules for review of judgement. With respect to the other affidavits it is deposed that the same are prepared with the sole intention of distracting the Court from enforcement of the professional undertaking and that the Defendants cannot at this stage take the Court back to find out whether or not the purchasers had or had not paid their respective balances of the purchase price.

Suffice to state that **Kenneth Hamish Wooler Keith**, swore a supplementary affidavit in support of the application and apart from reiterating his averments in the supporting affidavit further deposed that another purchaser, **Mr Charles Fraser** also entered into a subsequent agreement with the Plaintiff in August 2006 pursuant to which he paid the plaintiff Kshs 315,000.00 as final payment of purchase of 2

sub-divisions of the Property.

The application was prosecuted by way of written submissions. According to the defendants, although the Court found that the balance of the purchase price was to be released on receipt of a certificate from the Engineer confirming that the roads and water works were complete, while it found that there was a final certificate from the contractor who did the roads, the Court did not find that the water works were carried out and that there was a certificate to that effect hence this constitutes an error on the face of the record in terms of Order 45 Rule 1 of the Civil Procedure Rules. Citing ***Mulla the Code of Civil Procedure, 17th edn. Vol. 4 page 4116 to 4121***, it is submitted that an error on the face of the record cannot be defined precisely or exhaustively there being an element of indefiniteness inherent from its very nature. And must be left to be determined on the facts the case. An error contemplated however, must be apparent on the face of the record and not an error which has to be fished out and searched and must be an error of inadvertence. Further it is submitted that a review may be granted whether on any other ground urged at the original hearing of the suit or not, whenever the court considers that it is necessary to correct an evidence error or omission and it is immaterial how the error or omission occurred. It is the defendants' view that in the present case a drawn out process of reasoning is not required and there are evident errors and omissions. The failure to deal with the question whether or not the plaintiff carried out water works and a certificate to the effect issued in the defendants' view warrants a review. On the ground of sufficient reason, it is submitted that the fact that there were different transactions involving sale of the subdivisions; that the total balance is much less than the Kshs 11,568,790/- and the need to establish the actual sum paid and the amount due as well as the need for substantial justice warrants review on the ground of sufficient reason not only under Order 45 Rule 1(1) of the Civil Procedure Rules but also under Article 159(2)(e) of the Constitution as well as sections 1A(2) and 1B(1) of the Civil Procedure Rules. Citing **Mbogoh vs. Muthoni & Another [2008] 1 KLR (G&F)** it is submitted that a review application may be granted so that evidence that is crucial to the case could be introduced to facilitate determination of an important issue with finality, thereby avoiding an absurd conclusion that is not supported by the facts. With respect to the failure to extract a decree, it is submitted that to strike out the application on that ground would be contrary to the current Kenyan Constitutional dispensation, current Kenyan jurisprudence and the overriding objective of Civil Procedure Act and Rules and further that the said failure does not prejudice the plaintiff in any way.

On the part of the plaintiff it is submitted that where an appeal has been preferred, an application for review cannot be entertained and relies on **Kisya Investments Ltd vs. Attorney General and Another Civil Appeal No. 31 of 1995** as well as **Mulla** in his ***Code of Civil Procedure,9th Edition at page 105*.** Further based on **Jivanji vs. Jivanji [1929-1930] KLR 41, Uhuru Highway Development Ltd vs. Central Bank of Kenya & Others HCCC No. 29 of 1995** and **Bernard Githii vs. Kihoto Farmers Co. Ltd NBI HCCC No. 32 of 1974**, it is submitted that failure to extract and annex an order or decree to be reviewed renders an application for review fatally defective. With respect to **Equity Bank Ltd vs. Capital Construction Ltd & 3 Others [2012] eKLR** cited by the defendants it is submitted that the decision therein is merely persuasive and in any case the fact that the Civil Procedure Rules, 2010 came into force after the New Constitution reinforces the fact that the requirement of a decree or order is not a mere technicality but is anchored in the law. Citing **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** and **Safaricom Limited vs. Ocean view Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009**, it is submitted that any party who deliberately omits to have regard to any procedure set out in the law and then falls back on the O2 argument should not be entertained by the Court. On the merits, it is submitted that the applicants want the Court to sit on appeal against its own judgement and help them procrastinate their obligation to honour their professional undertaking. Since the Court was alive to all the facts alluded to there is nothing new, erroneous or any sufficient reason calling for the review of the judgement of the Court. Citing **National Bank of Kenya Ltd vs. Ndungu Njau Civil Appeal No. 211 of 1996**, **Balinda vs. Kangwama & Another [1963] EA 558** as well as **Njoroge & 104 Others vs. Savings & Loan Kenya Ltd [1990] KLR**, it is submitted that an error for the purposes of review must be self-evident and should not require elaborate argument to be established and that an erroneous view of evidence or law is no ground for review though it may be good ground for appeal. The errors alluded to, in the plaintiff's view, do not amount to errors apparent on the face of the record. Since the issue of road and water works was one of the contested issues the same cannot be regarded as an error apparent on the record as the same was dealt

with extensively. According to the plaintiff the issues being raised are issues pertaining to the original contract which cannot be said in this suit. If the Engineer omitted to mention water works in the certificate, that is similarly an issue that underlie the contract and relies on **Philip Kisaka T/A P S Kisaka & Co. Advocates vs. Thomas Agimba T/A Agimba & Associates Civil Case No. 411 of 2009**. The Defendants having given a blanket undertaking, they must bear the consequences and hence, in the plaintiff's view the issue of separate transactions does not arise. Relying on **Kenya Re-Insurance Corporation vs. Muguku Muriu Civil Appeal No. 48 of 1994**, it is submitted that a careful advocate would obtain very clear instructions before giving a professional undertaking on his behalf and if he does so without elementary precaution then he must take the consequences. Since the undertaking has not been reviewed the defendants have no option but to honour the same. With respect to the issue of the amount and separate agreements, it is submitted that what the defendants are attempting to do is to mend the undertaking. In the plaintiff's view the application ought to fail.

In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the Civil Procedure Rules, certain requirements must be met. The said provision provides as follows:

> ***"(1) Any person considering himself aggrieved—***
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> 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 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.***
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> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."***

The foregoing provisions are based on section 80 of the Civil Procedure Act Cap 21 Laws of Kenya which states as follows:

> ***"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,***
>
> ***may 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."***

Before I deal with the merits of the application, I wish to deal with the preliminary issues raised. It is clear from the foregoing that the review remedy is only available to a party who is not appealing. See **Orero vs. Seko [1984] KLR 238.** Who, then is a party who is appealing. There are two contradictory decisions from the Court of Appeal. In **Kisya vs. Attorney General** (supra) the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However in **Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992** the Court of Appeal was of the following view:

> **" The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal".**

In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the **Haryanto Case** reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review.

However, the same Court in **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi Civil Application No. 277 of 2005** had this to say:

> **"The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed. An aggrieved party under Order 44 of the Civil Procedure Rules can apply for the review of a decree or order either where "no appeal has been preferred" or where "no appeal is allowed". An appeal is allowed on orders made under Order 9A rule 2 Civil procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. 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".**

Whereas under Order 45 rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision, in my respectful view, is not a *carte blanche* for abuse of the process of the Court. In the case of **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of**

2009 Kimaru, J dealing with the issue of abuse of the process of the Court stated as follows:

> **"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".**

Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the Civil Procedure Act under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of "any person considering himself aggrieved". An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the Civil Procedure Act whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court's seal of approval to persons who wish to play lottery with judicial process. Accordingly I associate myself with the decision in **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi** (supra) that both options cannot be pursued concurrently or one after the other.

The next issue for determination is the effect of failure to extract and annex a copy of the decree or order sought to be reviewed. On 23rd July 2009 the Statute Law (Miscellaneous Amendments) Act No. 6 of 2009 came into force. The said Act introduced *inter alia* sections 1A and 1B in the Civil Procedure Act. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. The said provisions have since their promulgation received judicial interpretation both by the High Court and the Court of Appeal. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009,** the Court of Appeal held *inter alia* that:

> **"on 23rd July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and**

3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective…The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

Again in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** the same Court held that:

"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case".

Similarly in **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court expressed itself as follows:

"the applicant's submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act...**The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.** ***In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives".***

What the said provisions as well as the authorities relating thereto mean is that the Court in determination of any matter under the Civil Procedure Act and the Rules made thereunder must strive to give effect to the said overriding objective and that where there are alternative options available to striking out or dismissal of a cause or matter, the Court ought to defer to those alternatives as much as possible before resorting to the drastic step of terminating the suit.

*This is not to say that the Court is nolonger entitled to strike out or dismiss a cause or matter; rather it means that each case must turn on its own circumstances and in appropriate cases the Court would still be perfectly entitled to strike out where not to do so would amount to abetting an abuse of the Court process. Accordingly the C*ourt must be guided by the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in

exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

Accordingly, I am not prepared to state that it is nolonger necessary to extract the decree or order sought to be reviewed. It must be noted that Order 45 rule 1 talks of either an order or decree rather than a judgement or ruling. As was stated by ***Koome, J*** *(as she then was) in* **Peninah Wambui Mugo vs. Moses Njaramba Kamau Nakuru HCCS No. 238 of 2004** the purpose of the decree or order to be reviewed being annexed is to enable the court appreciate the order or decree that the applicant is unhappy with. I however agree with **Musinga, J** (as he then was) in **Equity Bank Limited vs. Capital Construction Limited & Others** (supra) that in the circumstances of this case Article 159(2)(d) of the Constitution would come in aid of the applicants.

*In the present case the Court did not make an order in respect of the costs. This was deliberate since under Order 52 rule 7(2) of the Civil Procedure Rules it is provided that s*ave for special reasons to be recorded by the judge, the order shall in the first instance be that the advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made. Accordingly, by the time the present application was made, the stage of enforcement had not been attained. In the peculiar circumstances of this case and more particularly in recognition of the provisions of Article 159(2)(d) of the Constitution, it is my view and I so hold that the failure to extract the order or decree sought to be reviewed is not fatal to the application for review.

On the merits section 80 of the Civil Procedure Act, unlike the provisions of Order 45 aforesaid, does not prescribe the conditions upon which an application for review may be granted. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the Civil Procedure Act enables a court to make such orders on review application which it thinks just so that the words "or any sufficient reason" as used in Order 44 rule 1 of the Civil Procedure Rules are not *ejusdem generis* with the words "discovery of new and important matter" etc. and "some mistake or error apparent on the face of the record" and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for review and so the words "for any sufficient reason" need not be analogous with the other grounds specified in the Order.

In dealing with the delegated legislation made under the Act **Farrell, J** in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself :

> **"In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules "not inconsistent with the provisions of this Ordinance". If a rule is inconsistent it is to that extent *ultra vires;* and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires.* If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle *"út res magis valeat quam pereat".* If the words "or for any other sufficient reason" can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review".**

The Defendants have relied on two grounds under Order 45 in support of the present application and these

are that there is an error apparent on the face of the record and that there are sufficient reasons disclosed to warrant the review.

What then constitute error apparent on the face of the record? In **Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo Civil Appeal No. 322 of 2000 [2001] 1 EA 173** the Court of Appeal held that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. Nevertheless the Court held that there is a distinction between a mere error and an error apparent on the face of the record and that where an error on a substantial point of law stares one in the face, and could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. However, an error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record neither can a view which is adopted by the Court in the original record, if a possible one, be an error apparent on the face of the record even though another view is also possible: mere error or wrong or an erroneous view of evidence or of law is certainly no ground for a review although it may be a ground for appeal. See also **Muyodi vs. Industrial and Commercial Development Corporation and Another [2006] 1 EA 243.**

The Defendants' contention that there is an error on the face of the record is based on the fact that whereas the Court held that the professional undertaking that was given by the Defendants was that on receipt of a certificate from the Engineer confirming that roads and water works were complete the balance of the purchase price, being 30% would be released to the Plaintiff's Advocate, there was no specific finding that the water works were complete and that a certificate was issued to that effect. The fact of the completion of the water works was in fact, according to the defendants denied.

In my judgement herein I expressed myself inter alia as follows:

> **"According to the plaintiff the undertaking was contained in the letter dated 24th May 1994. The letter exhibited is, however, a letter dated 25th May 1994 and it states at the material part as follows:**
>
> > ***'In the circumstances, it appears that the agreements for sale as they stand do not reflect the true position vis a vis completion. We suggest that the agreements be amended to provide that completion take place on registration of transfers after the release to us of the new grants and on registration of transfers we shall release to you sixty (60%) per centum of the purchase price, which together with the ten (10%) per centum held by the stakeholder, makes an aggregate of seventy (70%) per centum thereof. As agreed at the meeting held in our Chambers on the 28th April 1994, the balance thereof being thirty (30%) per centum to be released to you on our receipt from the Engineer, of a certificate confirming that the roads and water works are complete'.***
>
> **In simple terms what the above letter stated was that on registration of the transfers and release of the new grants to the defendant firm by the plaintiff's advocates, the defendant firm would release to the plaintiff's advocates 60% of the purchase price. There was a clear unequivocal understanding that the release of the 60% was to be done by the defendant firm. The balance of the 30% was to be released to the plaintiff's advocates on receipt by the defendant firm of a certificate from the Engineer of a confirming that the roads and water works were complete. Again one does not have to be a wordsmith to decipher where the money was coming from. In my view the defendant firm was clearly giving an undertaking that on receipt of a certificate from the Engineer confirming that the roads and water works are complete the plaintiff's advocates would release the balance being 30%."**

Later in the judgement, I expressed myself as follows:

> **"The next issue is whether the Certificate of the Engineer confirming that the roads and water works was issued and received by the defendants. In their letter dated 4th August**

> **2003, the defendants acknowledged receipt of the plaintiff's advocates dated 30th July 2003 together with enclosures. According to the letter dated 30th July 2003 what was enclosed was the final certificate from the contractor who did the roads...With respect to the issues whether or not the road works and the water works were completed to the specifications, those were not issues contained in the undertaking. Whereas those issues may constitute a basis for a cause of action for breach of contract a professional undertaking is not dependent on the original contract since it is not affected by the existence of consideration in the main contract. It is a means of enforcing discipline among officers of the Court. Before an advocate gives a professional undertaking, it is always advisable to ensure that he has his client's money in his bank account. If he decides to gamble with the undertaking he will be doing so at his own risk. It is therefore my view that there is no reason why the defendant firm cannot be compelled to honour its professional undertaking."**

As rightly contended on behalf of the Defendants there was no specific finding by the Court that the water works were complete let alone the issuance of a certificate to that effect. The certificate that was alluded to in the letter referred to in the judgement only expressly mentioned that the certificate was issued by the Engineer who did the roads. Whether or not the said Engineer also did the water works does not come out clearly from the said correspondence. In the submissions filed on behalf of the plaintiff the plaintiff seemed to have appreciated this fact since it was submitted on his behalf that if the Engineer omitted to mention water works in the certificate, that is an issue that underlie the contract.

In my respectful view, I disagree with this line of argument. The issuance of the Engineer's certificate confirming the completion of both the water works and the road works was a pre-condition to the satisfaction by the defendants of the professional undertaking and that condition cannot be transferred to the original contract. As was rightly submitted on behalf of the defendants, an error apparent on the face of the record has an element of indefiniteness inherent from its very nature and must be left to be determined judicially on the facts of the case. I do also agree that it is incumbent upon judges at the stage of the hearing of an application for review to inquire fully into the correctness of the facts and that it would suffice if the court is satisfied that the facts brought up after the event are such as to merit a review of the judgement. On the face of the record it is in my view clear that the judgement was arrived at as a result of in inadvertence arising from the fact that there was clearly no averment or evidence that the water works as opposed to the roads works had been completed and a certificate to that effect issued. This error appears on the face of the record and does not require a long drawn process of reasoning on points on which there may conceivably be two opinions. In arriving at the judgement it is clear that the issue of whether or not the water works had been completed, an issue that was central to the professional undertaking was not addressed and from the evidence on record, there is no evidence that the said water works were completed and a certificate to that effect issued. Failure by the Court to address an issue central to the decision as opposed to addressing the issue and arriving at a wrong conclusion can properly be a subject of an application for review. In my respectful view the issue fell within the former category. I accordingly agree that there was an error apparent on the face of the record that led to the entry of judgement in favour of the plaintiff.

With respect to the other issues raised, the Court of Appeal in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** expressed itself as follows:

> **"The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."**

In other words the review jurisdiction of the Court ought not to be used as second bite at the cherry. In other words a review is not an avenue by parties to fill in the blanks that were left during the hearing, but which were, due to negligence, inadvertence, or even accident, omitted. To do so would defeat the well-known legal maxim that litigation must come to an end. Accordingly, I am not satisfied that the issues raised in the affidavits other than the affidavit sworn by **Hamish Wooler Keith,** warrant the review of the

judgement herein. Similarly, the allegation that there were subsequent agreements entered into between the plaintiff and other parties do not warrant the review sought more so as there is no allegation that these matters were not within the knowledge of the applicants at the time of the hearing and secondly, some of the said third parties have not sworn any affidavit and the allegations made in the supporting affidavit amount to inadmissible hearsay. See **Kentainers Limited vs. V M Assani and Others Nairobi HCCC No. 1625 of 1996.**

However, having found that there was an error on the face of the record I am satisfied that the decision of this Court made herein on 20th September 2012 ought to be reviewed. Accordingly, the same is hereby reviewed, the said judgement set aside and substituted therefor an order dismissing the Originating Summons herein with costs to the Defendants. The Defendants will also have the costs of this application.

Dated at Nairobi this 18th day of January 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chepkosgey for the Plaintiff

Mr. Omondi for the Defendants

Mr. Litoro for the affected party