



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 546 OF 2014 (O.S)**

**MANJULA ZAVERCHAND SHAH.....PLAINTIFF**

**-VERSUS-**

**GULF AFRICAN BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**ALDERMAN LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Application before the Court for Ruling is the 3<sup>rd</sup> Defendant's Notice of Motion dated **16<sup>th</sup> September 2015** and filed on **17<sup>th</sup> September 2015**. It is expressed to be brought under the provisions of **Sections 1A, 1B & 3A of the Civil Procedure Act, Order 45 of the Civil Procedure Rules and Section 99 of the Land Act, 2012.**

2. The 3<sup>rd</sup> Defendant prayed for several orders but most of them are either spent or have been overtaken by events. The only prayers outstanding are prayers 4, 5 and 6, namely:

**1) Spent**

**2) Spent**

**3) Spent**

**4) THAT this Honourable Court be pleased to review the Ruling and Order of the Hon. Lady Justice Jacqueline Kamau made and/or delivered on 30<sup>th</sup> July, 2015;**

**5) THAT as a consequence to (4) above:-**

**This Honourable Court be pleased to set aside the Ruling and Order of the Hon. Lady Justice Jacqueline Kamau made and/or delivered on 30<sup>th</sup> July, 2015; and**

**This Honourable Court be pleased to strike out all affidavits filed in this cause by MANJULA ZAVERCHAND SHAH, and make such other consequential orders necessarily arising therefrom;**

**The terms of the conditional injunction order issued by the Court (the Hon. Lady Justice Kamau), on 11<sup>th</sup> December 2014, be reinstated with effect from 1<sup>st</sup> August 2015 in terms of prayers 4 (v) and (vi) of the said order pending further orders of the Court;**

**The Court proceed to immediately rehear/reconsider the Plaintiff's injunction motion dated 25<sup>th</sup> November 2014 and/or make such order further or alternative orders as it thinks fit in the circumstances obtaining; and**

**6) THAT the costs of this motion be provided for.**

3. The application is based on the grounds set out therein and is supported by the Affidavit of **HARISH RAMJI**, the director of the 3<sup>rd</sup> Defendant, sworn on **16<sup>th</sup> September, 2015**. The application is further supported by the depositions previously filed on behalf of the 3<sup>rd</sup> Defendant, being the Replying Affidavit sworn on **19<sup>th</sup> December, 2014** as well as the supplementary affidavit sworn on **11<sup>th</sup> February, 2015**. The 3<sup>rd</sup> Defendant also filed a list of authorities on **1<sup>st</sup> October, 2015** in support of its application.

4. The brief background to this application is in that this suit was instituted by way of Originating Summons by **Manjula Zaverchand Shah** on 25<sup>th</sup> November 2014. The matter was filed under certificate of urgency to pre-empt the sale of Land parcel No. 209/6/14 IR 30865 on the grounds that the requisite statutory notices pursuant to sections 90 and 96 of the Land Act, 2012 had not been served. The sale was scheduled to take place the same date of 25<sup>th</sup> November 2014. It is apparent from the court record that because the Notice of Motion dated 25<sup>th</sup> November 2014 could not be served and heard on the same date, the sale proceeded as scheduled, whereupon the 3<sup>rd</sup> Defendant was declared the highest bidder. The 3<sup>rd</sup> Defendant was consequently enjoined to this suit following the direction of the court to that effect on 4<sup>th</sup> December 2014. The court thereafter proceeded to hear the parties in respect of the application dated 25<sup>th</sup> November 2014, after which it delivered its Ruling dated 30<sup>th</sup> July 2015.

5. The tenor and effect of that Ruling was that the 1<sup>st</sup> Defendant, Gulf African Bank Ltd, was thereby restrained from exercising its Statutory Power of Sale for as long as the Plaintiff and/or charger (who is the husband of the Plaintiff) were ready to rectify their default. The court having found that the Statutory Notices by both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were invalid and irregular proceeded to nullify the sale that took place on the 25<sup>th</sup> November 2014. Accordingly the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were directed to issue the mandatory statutory notices afresh.

6. The 3<sup>rd</sup> Defendant's case is that being an innocent purchaser for value of property that was sold by the 1<sup>st</sup> Defendant at an auction, it is aggrieved by the said Ruling and wishes it reviewed. The 3<sup>rd</sup> Defendant pointed out that though it had filed a Notice of Appeal in respect of the said decision, no appeal has thus far been preferred.

7. The first ground for review is that there has since been **discovery of new and important matter or evidence** which was not within the Applicant's knowledge at the time the decision of 30<sup>th</sup> July 2015 was made. This new evidence is to the effect that the Plaintiff herein, who is the wife to the owner of the suit property, Mr. Zaverchand Shah, had not been in the country since October 2013 and accordingly, she could not have made the Notice of Motion application dated 25<sup>th</sup> November, 2014.

8. The 3<sup>rd</sup> Defendant, through the supporting affidavit sworn by **Harish Ramji**, averred that following a tip off from a third party, it made inquiries into the allegation that the Plaintiff was not in the country at all times material to this suit. The said verifications are particularised at paragraph 9 (9.1-9.3) of the 3<sup>rd</sup>

Defendant's affidavit in support to the present application. The 3<sup>rd</sup> Defendant avers that it used a copy of a passport attached to one of the Plaintiff's affidavits to make the verifications. In a request dated 4<sup>th</sup> September, 2015 the 3<sup>rd</sup> Defendant's Counsel wrote to the Immigration Department seeking confirmation from the records whether the said passport had been used for entry or exit from Kenya during the past 5 years. The Immigration Department replied vide their letter dated 15<sup>th</sup> September, 2015 indicating that they had no records showing that the said passport had ever been used to enter or exit Kenya. However, in their records there was evidence that the Plaintiff had last entered the Country on 16<sup>th</sup> October, 2013 and left on 28<sup>th</sup> October, 2013 using British Passport No. 505817835.

9. In view of the foregoing, the 3<sup>rd</sup> Defendant posited that the Plaintiff was never in Kenya on or about the 25<sup>th</sup> November 2015, and therefore had neither authorised the filing of the Originating Summons nor the application dated 25<sup>th</sup> November, 2014. It was further the contention of the 3<sup>rd</sup> Defendant, that the Plaintiff, who is a British national, having not been in the country at all times material to this suit, could not have signed the affidavits in support of the Originations Summons and injunction application both dated 25<sup>th</sup> November, 2014. It is therefore the 3<sup>rd</sup> Defendant's argument that the Plaintiff's Motion dated 25<sup>th</sup> November, 2014 is a gross abuse of the Court process, having been lodged in her name by none other than her husband, who was already barred by *res judicata* from seeking an injunction against the Bank from exercising its statutory power of sale. The 3<sup>rd</sup> Defendant contends that the Court was moved on the basis of an application that was therefore a nullity from the outset.

10. The second ground for review is that the Ruling contains and is vitiated by a clear and substantial error of law apparent on the face of it in light of **sections 99 & 102 (2)** of the **Land Act, 2012** rendering the findings therein a nullity in law. The 3<sup>rd</sup> Defendant's case in this connection is that the findings in the Ruling under review are contrary to sections 99 & 102 of the Land Act. This is on the basis that the 3<sup>rd</sup> Defendant was a *bona fide* purchaser for value and in good faith for purposes of section 99 (1) of the Land Act.

11. According to the 3<sup>rd</sup> Defendant, the said auction could not be impeached granted the provisions of section 102 of the Land Act and therefore the only recourse for any aggrieved party would be a claim for damages. The 3<sup>rd</sup> Defendant thus urged the Court to correct the aforesaid apparent error on the face of the record by way of review to give effect to the said sections of the Land Act and to avoid injustice that would otherwise result from non-compliance with the law. In view of the foregoing, it was the 3<sup>rd</sup> Defendant's case that the grounds presented were sufficient to warrant a review and it therefore urged the Court to allow its application as prayed.

12. In response to the application, the Plaintiff filed a Notice of Preliminary Objection dated **29<sup>th</sup> September, 2015** thereby raising two grounds of objection; the first one was to the effect that this Court did not have the jurisdiction to determine the application for review as it is not the court that made the order. The second ground of objection was that the application was incompetent and the Court was *functus officio* as a notice of appeal had been filed by the 3<sup>rd</sup> Defendant on **6<sup>th</sup> August, 2015**. The Court made a determination on the first ground of objection and found that it had the jurisdiction to hear the application for review. The parties were in agreement that the second ground could be canvassed alongside the application itself.

13. The application was argued before this Court on **2<sup>nd</sup> October, 2015** whereby Mr. Njiru appeared for the Plaintiff while Mr. Ngaca appeared for the 3<sup>rd</sup> Defendant.

14. Counsel for the 3<sup>rd</sup> Defendant essentially reiterated the case of the 3<sup>rd</sup> Defendant as laid out in its application. He submitted that since the Plaintiff was not in the Country at the time the present suit was filed, someone must have lodged the Originating Summons in her name. It was further his submission that the Originating Summons filed in Court being a perjured document, the Court was deceived into believing that it had jurisdiction to determine the same. Counsel also maintained that there was an error apparent on the face of the record by virtue of sections 99 and 102 (2) of the Land Act.

15. In reply, Counsel for the Plaintiff submitted that there was no ground that had been established to warrant a review. It was his submission that the 3<sup>rd</sup> Defendant had not disclosed the 3<sup>rd</sup> Party mentioned in its application who supposedly informed them that the Plaintiff had not been in the Country since October, 2013. According to Counsel, this offended the provisions of **Order 19 Rule 3** of the **Civil Procedure Rules**. It was further his submission that the affidavits sworn by the Plaintiff were sworn in Nairobi before a Commissioner of Oaths and should therefore be taken at face value.

16. With regard to the subject passport, it was Counsel's submission that several documents had been attached to the Plaintiff's affidavits but nowhere had the Plaintiff attached the passport produced by the 3<sup>rd</sup> Defendant at page 68 of its application. He further submitted that the said passport produced by the 3<sup>rd</sup> Defendant had not been authenticated as there was no indication that it had been sworn before a Commissioner of Oaths. As for the report from the Immigration Department, it was Counsel's submission that the same was not good enough for an application of this nature, and that there ought to have been an affidavit filed herein from a responsible officer at the Department of Immigration. It was therefore Counsel's submission that there was no discovery of new or important matter to warrant the review sought.

17. On the second ground for review, being an error apparent on the face of the record, Counsel for the Plaintiff submitted that the ruling under review was well considered and the same dwelt mainly on the contents of Statutory Notices under Sections 90 and 96 of the Land Act. Counsel further submitted that the Judge was entitled to her opinion and that the proper forum for challenging that decision was by way of an appeal. It was also his submission that the 3<sup>rd</sup> Defendant having filed a Notice of appeal was precluded from going for a review. In the circumstances, Counsel for the Plaintiff concluded that the present application was incompetent and did not meet the requirements under Order 45 of the Civil Procedure Rules.

18. In reply, Counsel for the 3<sup>rd</sup> Defendant contended that no excuse had been given as to why the Plaintiff, her husband or even their Counsel had not filed any affidavit to show that the illegality of the documents filed in the present suit as raised by the 3<sup>rd</sup> Defendant was frivolous.

19. With regard to the preliminary objection that was raised by the Plaintiff/Respondent to the effect that this Court was *functus officio* as a Notice of Appeal had been filed by the 3<sup>rd</sup> Defendant on **6<sup>th</sup> August, 2015**, the question that falls for determination is whether the Notice of Appeal as filed by the 3<sup>rd</sup> Defendant amounts to an appeal and therefore barring the 3<sup>rd</sup> Defendant from seeking a review. In **Republic Vs Anti-Counterfeit Agency & 2 others Ex-parte Surgipharm Limited (2014) eKLR** the Court expressed the view that as long as an appeal had not been instituted in accordance with Rule 82 of the Court of Appeal Rules, a party who had filed a Notice of Appeal was not barred from applying for review from the said decision. Under the aforesaid rule, an appeal is instituted by lodging in the appropriate registry within sixty (60) days of the date when the Notice of Appeal was lodged, a Memorandum of Appeal, the Record of Appeal, the prescribed fee and security for costs. The Court in so holding placed reliance on the case of **Yani Haryanto vs E.D & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992 (U.R.)**.

20. There is another opposing view by a different bench of the Court of Appeal with regard to the filing of a Notice of Appeal as brought out in the case of **Equity Bank Ltd –vs- West Link Mbo Ltd (2013) eKLR in which Musinga JA** rendered himself thus on the issue:-

**“I must go back to the question – “What is an appeal?”**

**The Constitution does not define what an appeal is. The constitution is the fundamental law of the land and provides general framework and principles that prescribed the nature, functions and limits of government or other institutions. Acts of Parliament and subsidiary legislation contain the details regarding its operationalization. I must therefore turn to rule 2 (2) of the Court of Appeal Rules which states that:-**

*“appeal” in relation to appeals to the court, includes an intended appeal.*

What is an intended appeal?

Rule 75(1) states as follows:-

*“Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court”.*

The first step in instituting an appeal is the filing of a notice of appeal. Order 42 rule 6(4) of the Civil Procedure rule is also relevant in considering what an appeal is. It states that:-

*“for purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that court notice of appeal has been given”.*

It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence----“.

Given the foregoing scenario, the court is at liberty to adopt either of the alternative views, and as I would be of the view that, for the purposes of review, a Notice of Appeal should be treated as a formal notification of intention to appeal, and that until an appeal properly so called is filed, such a notice remains, for all intents and purposes, an expression of intention. Accordingly, this court takes the view that, as far as can be ascertained, the 3<sup>rd</sup> Defendant has not lodged or preferred an appeal in the Court of Appeal as envisaged under the Court of Appeal Rules. Thus the application for review is competently before this Court. The Plaintiff’s preliminary objection to the effect that the court is *functus officio* is therefore without merit and is overruled.

21. Turning to the substantive part of the application, the applicable law for Review is provided for under Order 45 of the Civil Procedure Rules which provides as follows;

**“(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) by way 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, 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.”**

22. The above provisions were restated in the case of *Muyodi –vs- Industrial & Commercial Development Corporation & Another (2006) 1 EA 243* where the court held thus:-

*“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”*

23. The 3<sup>rd</sup> Defendant has raised two grounds as provided for under Order 45 Rule 1 of the Civil Procedure Rules and restated in the above case.

24. The first ground is the discovery of new and important matter or evidence which was not within the 3<sup>rd</sup> Defendant/Applicant's knowledge at the time the decision was made.

In Rose Kaiza v Angelo Mpanju Kaiza [2009] eKLR, the Court of Appeal rendered itself thus:

**“An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is**

***“...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.....”***

The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by *Mulla* on similar provisions of the Indian Civil Procedure Code, 15<sup>th</sup> Edition at page 2726, thus:

**“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”**

25. In the instant case, the basis of the 3<sup>rd</sup> Defendant's inquiry with the Director of Immigration in September 2015 was the Plaintiff's Passport No. 703189356, a copy of which was annexed to the Supporting Affidavit at page 68. Whereas it is true, as was pointed out by the Plaintiff's Counsel, that that document is not authenticated by a Commissioner for Oaths, the fact of the matter is that it comprises the two sets of documents that were filed herein along with the Originating Summons and the Notice of Motion of 25<sup>th</sup> November 2014 on behalf of the Plaintiff. Accordingly, though it is not a document that has just come to the notice of the 3<sup>rd</sup> Defendant/Applicant, it is apparent that the Plaintiff/Respondent annexed or caused this document to be annexed to her application filed on 25<sup>th</sup> November 2014, when to her knowledge, she was then holding British Passport Number 505817835.

26. Secondly, and more importantly, it is that inquiry that triggered the response by the Director of Immigration that the Plaintiff was last in Kenya in October 2013. In the supporting affidavit of **Harish Ramji**, it was deponed that this information was not within the knowledge of the 3<sup>rd</sup> Defendant at the time the Motion was argued and the decision thereon rendered on 30<sup>th</sup> July 2015. If, as seems apparent the Plaintiff was not holding Passport No. 703189336 at the material time, and if, she was not in Nairobi on 25<sup>th</sup> November 2014 when the affidavit in support of the Originating Summons and Notice of Motion of even date were sworn, then it is apparent that, on both levels, the Plaintiff acted in contravention of Section 11 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya, by knowingly and wilfully making a statement which was false in a material particular in a statutory declaration.

27. In the case of Edward Odembo Ajulu and Another vs. Wanga Oniangi [2005] eKLR that was relied on by the 3<sup>rd</sup> Defendant, the court had this to say in similar circumstances:

**“I have been urged to grant leave to the applicant to withdraw the 1<sup>st</sup> Applicant's claim against the Respondent because he is already dead. It is not denied that the proceedings were**

filed when Edward Odembo Ajulu was already dead. It is not denied that he died on 10<sup>th</sup> March 1988 and there is no evidence that he rose from the dead to file the affidavit in support of the originating summons. Who then signed the affidavit on behalf of the deceased: Such a person obviously committed perjury....None has explained to this court the circumstances under which such an affidavit was sworn...Such acts cannot be countenanced by a court of law..."

Kimaru J was of the same view in Shirika La Kusaidia Watoto wa Kenya & Another vs. Rhodah Rop and 4 Others, 2005 eKLR when he observed thus:

**"When the Plaintiff embarked on the path of litigation, it had to play by the rules of the game...In this instance, the plaintiff has deliberately breached the mandatory provisions of the law. It deliberately chose to swear falsehoods in its verifying affidavit...The plaint having not been verified by an affidavit as required... is incompetent and therefore incurably defective..."**

It is trite that a judgement or order obtained by playing fraud on the court is a nullity and should not be countenanced. Accordingly, the court is satisfied that a new and important matter has arisen in connection with the application dated 25th November 2014 that goes to the core substance of the court's Ruling dated 30th July 2015 as to warrant a review thereof.

28. The second ground raised to support the application for review is the contention by the 3rd defendant that there is an error apparent on the face of the record. This argument was predicated on the protection afforded to innocent purchasers by Sections 99 and 102(2) of the Land Act, 2012. It is the case of the 3<sup>rd</sup> Defendant that the court did not make any reference to these provisions of the law and yet proceeded to declare the sale a nullity, thereby suggesting that the Ruling was made *per incuriam*.

29. A careful reading of the Ruling however reveals otherwise. At paragraphs 26 to 29 thereof, the court analyzed the submissions touching on the chargor's right of redemption under section 102(2) of the Land Act and observed thus at paragraph 28:

**"Although such person who is entitled to discharge a charged property other than a chargor ought not to be served with the mandatory Statutory Notices, it does appear from the said provisions of section 102(2) of the Land Act, that a chargor and/or such person entitled to discharge a charged property have an equal right of redemption and a chargee is best advised to issue the said notices upon the chargor in a proper manner to give such other person an opportunity to redeem the property within the confines of those mandatory notices, if he or she desires to do so."**

Furthermore, it is evident at paragraph 51 that the court had in mind the provisions of Section 99 of the Land Act, when it noted that;

**"The invalidity of the said Statutory Notices protected the chargor and/or the Plaintiff from losing their right of redemption, irrespective of the 1st Defendant's Statutory Power of Sale having crystallized following the default by the Chargor herein. It was immaterial that the 3rd Defendant was a *bona fide* purchaser of value as the 1st and 2nd Defendants contended as there was a clear breach of the law in which case the purported sale could not legitimize the said irregular and invalid Statutory Notices."**

In the premises, I entertain no doubt at all that the Hon. Lady Justice Kamau applied her mind to the entire body of the applicable law, including sections 99 and 102(2) of the Land Act. In this respect, I find instructive the decision of the Court of Appeal in National Bank of Kenya Ltd versus Njau (1995-1998) 2 EA 249 (CAK); at page 253 of the judgment, the Court said:-

***A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and***

**should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review.** (Emphasis supplied)

It is plain therefore that the second ground for review lacks merit for the reason that it has as its target, not at an error on the face of the record, but the Hon. Judge's interpretation of the aforesaid provisions of the Land Act, 2012. I would agree with the Plaintiff's Counsel on this score, that the Hon. Judge was entitled to her opinion and that if the 3rd Defendant was dissatisfied therewith, then their option was to go on appeal on that ground.

In the result, having found that the 3rd Defendant has demonstrated that there has since been discovery of new and important evidence which, after due diligence, was not within its knowledge or could not be produced at the time the application dated 25th November 2014 was heard and the decision of 30th July 2015 made, I would allow the application for review on that particular ground and grant the orders prayed for in **paragraphs 4, 5.1, 5.2, and 5.3** as more particularly set out hereunder:

- 1) The Ruling of the court dated 30th July 2015 is hereby reviewed and the orders flowing therefrom set aside;**
- 2) The impugned affidavits of Manjula Zervachand Shah filed herein in support of the Originating Summons and the Notice of Motion dated 25th November 2014 be and are hereby struck out;**
- 3) The terms of the conditional injunction issued on 11th December 2014 be reinstated pending further orders of the court;**
- 4) In view of Order No. 2 above, prayer No. 5.4 of the Notice of Motion would not lie and is hereby declined.**
- 5) Costs of the application to be in the cause.**

Orders accordingly.

**OLGA SEWE**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2015**

***In the presence of:***

***Mr. Waziri holding brief for Gitonga present for 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Applicant***

***Mr. Ibrahim present for the 3<sup>rd</sup> Defendant/Applicant***

***No appearance for the Plaintiff/Respondent***