IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 37 OF 2014

BETWEEN

DUBAI BANK KENYA LIMITED ……APPELLANT

AND

KWANZA ESTATES LIMITED……..….RESPONDENT

(*Appeal from the ruling and orders of the High Court of Kenya at Mombasa Commercial & Admiralty Division (Kasango, J.) dated 19th June 2014*

In

***H.C.C.C No. 44 of 2013*)**

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JUDGMENT OF THE COURT

The genesis of this case is through a plaint filed by **Kwanza Estates Ltd** (*hereinafter referred to as* ***the respondent***) as against **Dubai Bank Kenya Ltd** (*hereinafter referred to as* ***the appellant***) on the 25th April, 2013. The respondent, then the plaintiff, had prayed for the following orders:-

a. **A permanent injunction restraining the defendant, its servants, employees 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 Plaintiff'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."**
b. **A permanent injunction to restrain the defendant, its servants, employees and/or agents from taking any action whatsoever and exercising and/or invoking any of its rights under the Charge dated 11th April 2013 and debenture dated 13th April 2013 both issued by the Plaintiff in favour of the Defendant.**
c. **A declaration that the Plaintiff is entitled to a refund of Kshs.197,801,205.48 and a mandatory injunction compelling the Defendant to release a sum of KShs.167,000,000.00 together with the interest thereon in total being KShs.197,801,205.48 as at 31st March 2013 on account of its call deposit paid to the defendant vide receipts; CDR/FDR No. 002201 and CDR/FDR No. 002203 and now owed to the Plaintiff by the Defendant should issue.**

d. **A declaration that the Defendant's statutory power of sale has not accrued and the intended sale of the same by the defendant is illegal and therefore null and void** *ab initio***.**
e. **A declaration that the redemption notice dated 18th March 2013 by Siuma Auctioneers in respect of the Plaintiff's properties known as Title Nos. CR Nos. (sic) 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 is illegal, premature, irregular and therefore null and void** *ab initio***.**
f. **A declaration that the Plaintiff's Account Number 81147035 held with the Defendant is flawed, manipulated and cannot therefore form the basis for the exercise of the statutory power of sale in respect of the Plaintiff'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.**
g. **A declaration that the Plaintiff's Account Number 81147035 held with the Defendant has been manipulated and a proper and accurate statement of Account should be issued by the Defendant.**
h. **General damages.**
i. **Costs of this suit.**
j. **Any other or further orders that this Honourable Court may deem fit and just to grant in the circumstances of this matter.**

Contemporaneously, with the filing of the Plaint, the respondent also filed the Motion application dated the 25th April 2013 and supported by an Affidavit sworn by ***Geoffrey Makana Asanyo***, the respondent's director, of even date. The Motion application was expressed to have been brought pursuant to ***Order 40, Rule 1, Order 20 Rule 1*** and ***Order 51 Rule 1*** of the Civil Procedure Rules; ***sections 1A, 1B, 3A*** and ***section 63 (c) & (e)*** of the Civil Procedure Act; ***section 78, 103 (3)*** & ***(4), 104 & 106*** of the Land Act, 2012 and all other enabling provisions of the law. The respondent had sought *inter alia* the following orders as against the appellant;

1. **<u>THAT</u> pending the hearing and determination of this application *inter partes* a temporary injunction be and is hereby issued restraining the defendant/respondent, (hereinafter "the respondent"), its servants, employees 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 respondent'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.**
2. **<u>THAT</u> pending the hearing and determination of this application *inter partes* a temporary injunction be and is hereby issued restraining the defendant/respondent, (hereinafter "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 2013 and the debenture dated 13th April 2013 issued by the applicant in favour of the respondent.**
3. **<u>THAT</u> pending the hearing and determination of this suit, a permanent injunction be and is hereby issued restraining the respondent, its servants, employees 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 respondent'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.**
4. **<u>THAT</u> pending the hearing and determination of this suit, a permanent injunction be and is hereby issued restraining the defendant/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 2013 and the debenture dated 13th April 2013.**
5. **<u>THAT</u> a mandatory injunction be and is hereby issued, compelling the respondent to release to the applicant a sum of <u>KShs.167,000,000.00</u> together with the interest thereon in total <u>KShs.197, 801,205.48</u> as at 31st march 2013, being the applicant's call deposit owed to the**

applicant by the respondent, and in the alternative have the said amount deposited in Court or in a joint interest earning account of the parties herein or their duly appointed agents.

6. **<u>THAT</u> 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.**
7. **<u>THAT</u> the applicant is hereby granted a period of eight (8) months or any such reasonable period that the Court may deem just to grant within which to settle any outstanding amount if at all, on the loan account.**
8. **<u>THAT</u> this Honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.**
9. **<u>THAT</u> the Costs of this application be provided for.**

The Motion application was premised on the grounds that the respondent was the duly registered proprietor of all the parcels of land 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 however through a Debenture dated 13th April 2013; the appellant granted the respondent an overdraft facility of a sum not exceeding KShs.160,000,000.00. This overdraft facility was granted by the appellant on the condition that the respondent was to create and deliver to the appellant a First legal Charge securing KShs.160,000,000.00 or the equivalent thereof in any other currencies exclusive of interest and other charges over the respondent's properties aforesaid. However, before the overdraft facility was secured and/or perfected through registration, the Chairman and Director of the appellant, one ***Hassan Zubeidi***, entered into a "***Memorandum of Agreement***" dated 5th March 2012 with the Managing Director of the respondent, one ***Geoffrey Makana Asanyo*** for "purposes of financing arrangements for a project known as Talent Youth Academy Project between the Government of Kenya and Point Streak Technologies of Canada".

Under the Memorandum of Agreement, Mr. Zubeidi received a sum of USD. 2,500,000.00 from the respondent's Managing Director, Mr. Asanyo, to be appropriated by himself as his commission/negotiations fee only in the event or on the condition that he managed to procure execution of financing for the aforementioned project on or before 19th March 2012. According to the Memorandum, in the event Mr. Zubeidi failed to meet the condition, the sum of USD. 2,500,000.00 was to be refunded or paid according to Mr. Asanyo's instructions. It is alleged that Mr. Zubeidi failed to procure the financing for the project as agreed and Mr. Asanyo through a letter dated 21st March 2012 instructed Mr. Zubeidi to deposit and credit the sum of USD. 2,500,000.00 or the equivalent thereof at the exchange rate of 80 per USD into the respondent's current account No. 81147035 held by the appellant. The said amount, the equivalent of KShs.200,000,000/- was later, according to Mr. Asanyo's instructions to be transferred to the National Bank of Kenya through their advocates to meet some of the respondent's financial obligations. The amount was remitted to the National Bank of Kenya as instructed. However, instead of the appellant crediting the respondent's current account with them with the said sum and thereafter debiting the same when remitting funds to the National Bank of Kenya, they only debited the applicant's account with the sum of Kshs.200,000,000.00 and thus created a huge overdraft which in turn led to enormous charges on interest and penalties. The appellant thereafter on or about 18th March 2013 through its agents, Siuma Auctioneers issued the respondent with a Notice of Redemption notifying the respondent of its intention to sell the respondents parcels of land in Watamu Kilifi (the suit properties) and gave the respondent 45 days within which to pay 200,185,051.98 failure of which the appellant was to advertise and sell the properties *via* public auction. The respondent alleged that the Notice of Redemption was illegal and that the appellant's Statutory Power of Sale over the suit properties had not accrued. It also claimed the appellant had contrary to section 44 of the Banking Act increased the interest charged.

The respondent stated that infact the appellant was also holding KShs.167,000,000/- in its favour on call deposit which it had deposited with the appellant, and which the appellant had acknowledged, on various dates in March 2012 and which continued to accrue interest at the rate of 18% per annum and which stood at KShs.197,801,205.48 as at 31st March 2013. This call deposit had never been released to the

respondent and the respondent claimed it could be used to offset any amount owed to the appellant, if at all. The respondent claimed any sale of the suit properties would be malicious, fraudulent and in bad faith as they were valued at close to a billion Kenya shillings in June 2010. The respondent claimed that the only amount owed to the appellant was KShs.3,917,489.19 as at 31st March 2013 if at all. It claimed that the intended sale of the suit property was aimed at unjustly enriching the appellant. The respondent's averred that the suit properties were of a great sentimental and commercial value and would be impossible to replace in the event of a sale and further that damages would be inadequate.

The respondent's Notice of Motion was opposed by the appellant through a Replying Affidavit sworn by, ***Nicodemus Kikolya***, the appellant's Chief Finance Officer, on 4th June 2013. He deponed that the respondent had applied to the appellant for a bridging facility of KShs.143 million to enable it finance part of the suit properties in Watamu, Kilifi from the National Bank of Kenya by a letter dated 5th march 2012. The purchase price for the suit properties was KShs.330,000,000/-. The respondent at the time advised the appellant that it had paid a deposit of KShs.33,000,000/- to the vendor (National Bank of Kenya) and had further given instructions to Housing Finance Company of Kenya (H.F.C.K) to remit KShs.167,000,000/- to its account held by the appellant. The appellant acknowledged receipt of the KShs.167 million from HFCK and which it stated it duly credited in the respondent's current account and later on 8th March 2012 placed the aforesaid sum in a call deposit bearing interest account. That on 13th March 2012 the appellant informed the respondent through their advocates that it was ready and willing to grant them a facility of KShs.130,000,000.00 to enable them purchase the suit properties. Thereafter, through a letter dated 19th March 2012, the respondent's advocates instructed the appellant to pay the balance of the suit properties purchase price, being KShs.297,000,000/- to the vendor through its advocates, Messrs. Rachuonyo & Rachuonyo Advocates.

However, on the 21st March 2012, the appellant transferred the sum of KShs.200,000,000/- to the vendor's advocates on instructions from the respondent by debiting the respondent's current account. The appellant later on 27th March 2012 advised the vendor's advocates that the balance of the purchase price i.e. KShs.97,000,000/- would be paid to them upon perfection of the securities. The appellant states that later on 27th March 2012 it set-off the outstanding debit balance in the respondent's current account and cancelled the call deposit of KShs.167,000,000/-. The appellant also states that on 3rd April 2012, the respondent applied for an enhancement of the bridging finance facility in order to complete purchase of the suit properties from KShs.143,000,000/- to KShs.160,000,000/-. This amount was secured by a First Legal Charge dated 11th April 2012 over Title Nos. CR Nos. 11589, 11590, 11732, 11609, 11610, 12531, 12668, 11739, 11740, 11741 and 13086 Watamu Kilifi and a Debenture dated 13th April 2012. The appellant stated that it remitted the balance of the purchase price being KShs.97,000,000 to the vendor's advocates who in turn furnished it with all the completion documents for purposes of the creation of the Charge in favour of the respondent.

The appellant stated that the respondent thereafter failed to operate the facility within the overdraft limit of KShs.160,000,000/- and issued demand to the respondent to regularize the account. When the respondent failed, it cancelled the facility and made a formal demand for KShs.171, 892,042/- on 26th September 2012 and gave the respondent 10 days to pay. The appellant thereafter made several demands for payment of the amount which were not met and it issued a Statutory Notice through its advocates giving the respondent 3 months to pay the outstanding sum or it would exercise its statutory power of sale over the charged properties. After failure by the respondent to comply, the appellant instructed Siuma Auctioneers to issue a Redemption Notice and Notification of Sale which were served on the respondent on 18th March 2013.

The appellant also denied that, its Chairman and Director Hassan Zubeidi ever executed the Memorandum of Agreement as alleged by the respondent and further that he never received the alleged sum of USD.2,500,000/-. The appellant maintained that all the relevant statutory notices were duly served upon the respondent and that its statutory power of sale was being exercised lawfully. The appellant also denied holding the KShs.167 million on call deposit or being indebted to the respondent at all. The appellant's position was that the KShs.167 million had been used to offset the respondent indebtness to

the appellant in the current account as at 26th March 2012. The appellant also stated that the valuation reports of the suit properties were inflated and that the interest rates charged were lawful in accordance with the provisions of the Banking Act.

The appellant also contended that any loss which the respondent would suffer through sale of the suit properties was compensable by way of damages. It denied that the respondent had established a *prima facie* case with a probability of success for grant of an interlocutory injunction and stated its sole aim was to realize its security and that any interim orders would gravely prejudice its position as it was owed substantial amounts by the respondent and on which interests continued to accrue. It prayed that the application be dismissed.

By a ruling dated and delivered on 2nd August 2013, the Hon. Justice Muya found in favour of the respondent and issued several orders, amongst of which was, that the appellant does deposit in court a sum of Kshs.197,801,205.48/-. It would appear the appellant was dissatisfied with the said orders as it filed a Notice of Motion application dated 4th December, 2013 expressed to have been brought pursuant to ***section 1A, 1B, 3A*** and ***80 (a)*** of the Civil Procedure Act and ***Order 45(1)*** of the Civil Procedure Rules. In its application the appellant sought the following orders;

> **"1. THAT this Honourable Court be pleased to certify the instant Application as urgent and service of the same upon the Plaintiff/Respondent be dispensed with in the first instance.**
>
> **2. <u>THAT</u> pending the hearing and determination of this Application *inter partes* this Honourable Court be pleased to order a Stay of execution of the Ruling delivered on 2nd August 2013 and all and/or any consequential Orders.**

3. **<u>THAT</u> pending the hearing and determination of this Application *inter partes* this Honourable Court be pleased to order a Stay of all and/or any pending Application for Contempt and/or any consequential Orders.**
4. **<u>THAT</u> 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.**
5. **<u>THAT</u> the costs of this Application be provided for.**

The appellant premised his application on the grounds that it now had evidence that was not available to it during the hearing of the respondent's application seeking interlocutory orders and had obtained from the police information that the aforementioned Memorandum of Agreement was a forgery. The appellant also stated that the respondent herein had deliberately and misrepresented to the court on oath by stating that it had dealt with Mr. Zubeidi. The appellant further denied that it had any call deposits in favour of the respondent as the same had been used to off-set the respondent's indebtedness to the appellant on 26th March 2012 and that the respondent was well aware of the same. According to the appellant, the respondent had not gone into court with clean hands and was therefore undeserving of the equitable orders granted in its favour. The appellant had stated that it stood to suffer gross prejudice and exposed to massive losses if the amount ordered was to be deposited in court as such funds would be sourced from the depositors funds. It maintained that the orders granted in favour of the respondent were illegal.

By a ruling dated and delivered in Mombasa on 19th June 2014, ***Kasango, J.*** dismissed the appellants Notice of Motion seeking review and/or setting aside of the ruling delivered on 2nd August 2013. That dismissal triggered the appeal before this court. The appellant's Memorandum of Appeal raises 15 grounds of appeal. The appellant contended that the learned judge of the superior court erred in law and fact by dismissing the application with costs to the respondent without merit: that the learned judge lacked jurisdiction to entertain the application for review under ***Order 45 Rule 2(3)*** of the Civil Procedure Rules especially since ***Muya,J.*** was still attached to the High Court at Mombasa; that the learned judge failed to evaluate the evidence properly as the judge having found that the alleged Memorandum of Agreement was central to the action in court went on to rule that the validity of the Memorandum of Agreement did not in any way influence the orders issued; that the learned judge failed to take into

account that the Court had relied entirely on the alleged Memorandum of Agreement to found a basis for a *prima facie* case with a probability of success to arrive at the impugned ruling; that the learned judge erred when he failed to consider the validity or otherwise of the respondent's report by one ***Nyanjwa***, the handwriting expert, and whether it was admissible or not but rejected the appellant's handwriting expert's report on the Memorandum of Agreement; that the learned judge erred to find that the ruling under review had fully considered evidence on the validity of one Hassan Zubeidi's signature and acknowledgment of the alleged Memorandum of Agreement; that the learned judge of the superior court erred in law and fact to pour cold water at the review stage on the fact that a report had been made to the police concerning the authenticity of the alleged Memorandum of Agreement; that the learned judge erred in law and fact when he found that the appellant's application for review was an appeal in disguise against the ruling of Muya, J.; that the learned judge of the superior court erred in law and fact to find that the appellant had delayed in bringing evidence to court and had acted without due diligence; that the learned judge erred in law and fact in gindingh that Hassan Zubeidi is the alter ego of the appellant capable of binding the appellant concerning a matter that would be purely personal to Hassan Zubeidi if valid; that the learned judge of the superior court erred by not according the appellant a fair trial and for lack of impartiality; that immediately after delivery of the ruling on the review application, the learned judge proceeded to issue orders that Hassan Zubeidi and ***Binay Dutta*** to appear in court to show cause why they should not be committed to civil jail for disobeying court orders; and finally that the learned judge of the superior Court erred in ordering costs against the appellant.

During the hearing of the Appeal, learned counsel ***Mr. Mwenesi*** appeared for the appellant and stated that the appellant raised a number of issues of law. Among the issues counsel raised was whether the court had jurisdiction and whether the court proceeded as was required in law. Counsel also questioned whether the learned judge of the superior court, Kasango, J. was properly seized of the matter since according to him, the rules required the same judge who made the order subject of the review to hear the review application under ***Order 45 Rule 2(3)*** of the Civil Procedure Rules. He submitted that it was only the Chief justice who could designate another judge to hear the matter and in the present case, that was not done. Learned counsel therefore asked this court to find that the proceedings and ruling were made without proper jurisdiction. He further stated that the matter was not one simply of technicality as they sought review since they were aggrieved as per ***Order 45*** of the Civil Procedure Rules. He stated that a jurisdictional issue could be raised at any time including an appeal. Counsel further submitted that if indeed Kasango J. had jurisdiction, then the power of the court to review the evidence was not properly exercised as per ***Order 45*** of the Civil Procedure Rules, as the judge was supposed to review the whole ruling and not just a particular order. Counsel stated that the learned judge of the superior court misdirected herself in holding that the matter of the Memorandum of Agreement was not before the court while an issue involving the same was still being questioned and therefore did not consider the ruling as such. Counsel urged that the issue of the Memorandum of Agreement was central to the dispute and it was therefore important that the same judge who heard the matter hear the application for review. Counsel pointed out that the Memorandum of Agreement was central and key and without the Memorandum of Agreement the orders sought ought to have been set aside under ***Order 45*** of the Civil Procedure Rules. He stated that the appellant's application for review had been dismissed on the basis that the respondent's counsels had been able to convince the court that there was forgery of the "new evidence" produced by the appellant. He stated that strict proof of forgery and strict proof of manufacturing required strict proof which could only come through evidence and as there was no strict proof by either side, there was no reason for the judge to believe one side and not the other. Counsel therefore urged that the appeal should be allowed and the application heard afresh by a judge nominated by the Chief Justice.

On his part, learned Counsel for the respondent, ***Mr. Nyachoti*** opposed the application and adopted his client's written submissions made in the Superior Court. In summary, the respondent had through the written submissions stated that the appellant had not satisfied/met the conditions requisite for a review application to be successful. Specifically, that the appellant's application for review was not based on the discovery of new and important matter or evidence which after the exercise of due diligence, was not within its knowledge or could not be produced by him at the time when the decree was passed and without unreasonable delay. That the issue of fraud and/or forgery of the Memorandum of Agreement dated 5th March 2012 which the appellant had presented as new and important had been categorically and

elaborately canvassed in the proceedings resulting in the impugned ruling and the same was therefore *res judicata* as per the provisions of ***section 7*** of the Civil Procedure Act. The respondent had submitted that the appellant's remedy if aggrieved lay on an appeal rather than review. The respondent had also submitted that the appellant had not demonstrated that after its exercise of due diligence the new evidence which had necessitated the application for review could not have been within its knowledge especially since the Memorandum of Agreement alleged to have been forged was part of a bundle of documents served upon the appellant on 25th April 2013 and the appellant had not produced any evidence to show any complaint made to the police on the issue immediately or soon after service. The appellant made a report to the police for the first time on 24th August 2013, three (3) weeks after the impugned ruling had been delivered. The respondent had also stated in its written submissions that the appellant was guilty of unreasonable delay since the purported new evidence being the Forensic Document Examiner's report had been obtained by the appellant on or about 5th September 2013 and the review application was filed in court on 4th December 2013 which is over four (4) months from the date of the ruling and over three (3) months after obtaining the purported new evidence.

During the hearing of the appeal, counsel for the respondent, ***Mr. Nyachoti*** submitted that the issue of jurisdiction was not raised in the High Court and could not be argued on appeal. He contended that ***Order 45 Rule 2(3)*** of the Civil Procedure Rules only applied where the judge who made the order has not been able to hear it within three (3) months. He pointed out that ***Muya, J.*** was dealing with criminal matters and not commercial matters and therefore ***Kasango, J.*** was properly seized of the matter. Counsel argued that the appellant's only ground for review was discovery of new and important documentary evidence. One of the documents was a draft charge sheet and a report from a document examiner and from the record the charge sheet was denounced by the Inspector General as being a forgery. Mr. Nyachoti submitted that the issues of fraud and Memorandum of Agreement were raised extensively before Muya, J. and therefore were not new matters or evidence. Counsel for the respondent stated that the application subject of the ruling of Muya, J. was filed on 25th April, 2013 and immediately served on the appellant. He denied that the ruling of Kasango, J. was erroneous and urged the court to dismiss the appeal with costs.

In his reply, Mr. Mwenesi learned counsel for the appellant reiterated that the under ***Order 45 Rule 2*** that the judge who made the ruling was the right judge to hear the application for review of his ruling as a judge is attached to a particular station and not a particular division. He stated that Muya, J. was still attached to Mombasa and that the issue of jurisdiction had to be resolved first. He urged the court to allow the appeal.

We have considered the oral submissions and find that the issues arising for determination are as follows:

i. Whether or not the High Court had jurisdiction to hear and determine the appellant's review application?
ii. If the answer to the issue above in the affirmative, whether or not the learned judge of the Superior court misdirected herself and/or applied the wrong principles so as to arrive at a wrong conclusion?

The main thrust and essence of the appellant's appeal appears to be the fact that, another court/judge, other than the one who heard the respondent's Notice of Motion application dated 25th April 2013 heard and determined the appellant's application for review of the ruling emanating therefrom. This is despite the fact that the court that heard and determined the respondent's Notice of Motion was still attached to the Court i.e. Mombasa High Court. These facts have not been controverted or denied by the respondent and has led the appellant to contend that the court lacked jurisdiction to entertain the review application. This contention no doubt stems from ***section 80*** of the Civil Procedure Act (hereinafter "**the Act**") which provides 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 judgement to the court which passed the decree or made the order, and the court may make such orders as it thinks fit."*** *[Emphasis added].*

During the hearing, learned counsel for the appellant, was keen to point that a jurisdictional issue could be raised at any time including during an appeal. However, counsel for the respondent argued that the issue of jurisdiction had not been raised before the High Court and therefore could not be raised on appeal. The gravity of jurisdictional mandate by a court over a certain matter or dispute cannot be overemphasized. It has been held and quoted numerous times that jurisdiction is everything and without it the court has no power to make any further step and must down its tools. (See ***The Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Ltd (1989) KLR 1***). However, in the same case, ***Nyarangi J.*** held as follows:

> *"**I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it**"*

It would therefore have been prudent for the appellant to raise the question of jurisdiction before the superior court as that way this court would have had the benefit of reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In ***Floriculture International Ltd v Central Kenya Ltd & 3 Others (1995) eKLR,*** the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows:

> ***"It has been held in the case of Kenidia Assurance Co. Ltd v Otiende (1989) 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."***

The reasoning is that even where the question of jurisdiction is not raised that does not necessary confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court.

Having come to the that conclusion, can the court that heard and delivered the now impugned ruling on the appellant's review application be said to lack jurisdiction since it was not the same court that heard the respondent's Notice of Motion? The respondent's advocate explained during the hearing of this appeal that Muya,J who heard the respondents Motion application was still attached to Mombasa High Court when ***Kasango, J.*** heard the review application and delivered her ruling on the same. Counsel however explained that he was then not attached to the Commercial Division but rather to the Criminal Division. This fact was not contested or denied by the appellant. Jurisdiction flows from the law as the authority is imposed by the Constitution or legislation under which the court is constituted. The superior court derives its mandate from ***Article 165*** of the Constitution**;** the said Article provides that the High Court shall have unlimited jurisdiction in criminal and civil matters. It therefore follows that, the two courts, being courts of coordinate jurisdiction, *prima facie* had jurisdiction to entertain the matter herein being a civil matter. However, this must be viewed in light of section 80 of the Civil Procedure Act which states that a review application should be made to the same court that passed or made the order/decree. In ***Francis Origo & Another v Jacob Kumali Mungalia [2000] eKLR***, the court observed:

> *"**A review should, normally, under the relevant Rules, go before the judge whose judgement or order is to be reviewed. However, where such a judge is no longer attached to the Court the review may be heard by any other judge attached to the court at the time it is called up for hearing…**"*

The provision that review applications should be heard by the same judge whose decree or order is being reviewed is a procedural technicality rather than substantive statutory provision which if not complied with due to particular reasons would not go into the root of the matter thereby resulting to a miscarriage of justice. When ***Order 45 Rule 1*** is read in isolation, it would appear to fortify the appellant's position

that a review should only be entertained by the same court who determined the impugned ruling. However, ***Order 45 Rule 2*** provides as follows:

> ***"1. An application for review of a decree or order of a court, upon some other ground other than the discovery of such new and important matter or evidence as is referred to in rule I, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.***
>
> 2. ***If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.***
>
> 3. ***If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of three months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate."***

As a result, the only limitation there is, is where the review pertains to '*some other sufficient reason*' that is the only review that must go before the same judge who made the decree or order. It may be heard either by the judge who made the order or by any other judge attendant at the station. By extension, the three month requirement or rule under ***Order 45 Rule 2 (3)*** is also limited to reviews that do not fall in the ambit of "discovery of new and important matter" or clerical error or mistake. As such, ***Order 45 Rule 2(3)*** is inapplicable to this case. It can thus not be argued that the chief justice had to designate a judge whether within the three months or otherwise; as this was a review that was open and eligible to be heard by any judge in the division at the time.

In ***John Peter Kamau Ruhangi v Kenya Reinsurance Corporation [2012] eKLR,*** this Court differently constituted faced similar issue(s). A review application had been filed against the ruling of ***Aganyanya, J.,*** however, for some reason; Aganyanya,J. was not able to hear the review application. ***Aluoch, J*** (as she was then) heard and delivered her ruling on the review. When the matter came up for appeal, the court stated thus:

> ***"It is also not in dispute that Justice Aluoch had jurisdiction to hear the respondent's review application, Justice Aganyanya having declined to hear it. What is in issue is whether or not, in hearing the application, Justice Aluoch, a judge of coordinate jurisdiction with Justice Aganyanya, went beyond the purview of review jurisdiction and in effect sat on appeal on Justice Aganyanya's decision. "***

The court went on clarify that in determining the above issue it was important to bear in mind that ***Order 44 Rule*** 1(*now order 45 Rule 1*) of the Civil Procedure Rules sets out the purview of review jurisdiction. In the case of ***National Bank of Kenya v Ndungu Njau, Civil Appeal No. 211 of 1996*** (Unreported) the Court of Appeal had these to say as a guide to a court considering a review application:

> *"**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 provisions of law cannot be a ground for review."***

The issue therefore falling for determination before this court is whether Kasango, J. went beyond the purview of review jurisdiction and in effect sat on appeal on Muya, J's decision. In this case, the two grounds that were advanced or upon which the review application was founded were that the appellant had discovered new and important evidence which after the exercise of due diligence was not within their knowledge or could not be produced by it by the time when the decree was passed and that the review application was made without unreasonable delay. The appellant had averred that since the delivery of the impugned ruling, the appellant had obtained new evidence from the police that the Memorandum of Agreement dated 5th March 2012 which was the basis of the payment of the alleged sum of USD

2,500,000.00 to Mr. Hassan Zubeidi, was a forgery and therefore any orders obtained pursuant thereto were void *ab initio* for want of legality. In support of their claim, the appellant produced a report from a forensic document examiner to show that Mr. Zubeidi's signature in the Memorandum of Agreement was allegedly forged. They also produced a copy of an intended charge sheet of Criminal Case No. 111 of 2013 against Mr. Geoffrey M. Asanyo, the respondent's Managing Director for forgery and uttering a false document contrary to section 353 of the Penal Code. The learned Kasango, J. however found in her ruling that both the report and the charge sheet could not be used to review the impugned ruling as the evidence of the validity or otherwise of the Memorandum of Agreement did not influence the orders in the impugned ruling. The learned judge observed that Muya J. in his consideration of the respondent's application considered and based his ruling on the facts that the appellant's statutory notices did not meet the legal requirements under the Land Act No. 6 of 2012; that the appellant intended to sell the charged properties at an under value and in that regard the appellant intended to sell more properties than was required to recover the alleged debt owed by the respondent; that the appellant had failed to credit the call deposits and the accrued interest totaling to Kshs.197,801,205.48/- and that is the total amount that the court ordered the appellant to deposit into court within 45 days from 2nd August 2013. The learned judge held that that the impugned ruling did not touch or anchor on the validity or otherwise of the Memorandum of Agreement and therefore did not influence the orders.

In her ruling the learned judge stated as follows:

> ***"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…That letter categorically termed the Charge Sheet allegedly directed to Asanyo as fraudulent. That letter stated that the release of the defendants document examination report to be irregular and without authority. That in itself, in my 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."***

Furthermore, in her ruling, the learned judge also agreed with the respondents submissions that the review application would still have failed because the allegation of forgery of the memorandum of Agreement was not new evidence, and secondly that the appellant failed to act with due diligence in presenting that evidence. The only way to tell if a party has exercised due diligence from one who is merely out to re-litigate the matter is by their conduct. In this case, the appellant's conduct and pursuit of the purported new evidence does not appear to have been zealous; bearing in mind when it learnt of the forged documents. If anything, the purported new material appears to have been a calculated move to keep the respondent from enjoying the fruits of its success in litigation. The burden of proof lay with the appellant to show that it had moved with due diligence and expediency in having the alleged fraud and/or forgery investigated. The appellant made a complaint to the police in regard to the alleged fraud/forgery of the signature on the Memorandum through a letter dated 1st October 2013. However, at the time of filing its Replying Affidavit on 4th June 2013, the appellant had knowledge of the purported forgery. No explanation was ever given as to why there was a delay of over three months before investigations could be pursued.

In our view, the learned judge exercised her discretion properly and we pay homage of the principle enunciated in ***Shah v Mbogo [1968] E.A. 93*** thus:

> ***"I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration any matter which it should have taken into consideration and in doing so arrived at a wrong conclusion"***.

The learned judge in her ruling also was alive to the fact that it could not sit on appeal against the ruling of Muya, J. as they were courts of coordinate jurisdiction and further stated that an issue that had been raised, argued and determined could not be re-argued via an application for review but any aggrieved party had the option of appeal.

In view of the foregoing reasons, we have come to the inevitable conclusion that this appeal must fail. The same is dismissed with costs to the respondent.

Dated and delivered at Mombasa this 12th day of March, 2015

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR