

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 416 OF 2015

HUNKAR TRADING COMPANY LIMITED....1ST PLAINTIFF

JACKSON KAHUNGURA KARIUKI.....2ND PLAINTIFF

VERSUS

SAMUEL WAWERU KIIGI.....1ST DEFENDANT

BLUE ROSES LIMITED.....2ND DEFENDANT

RULING

On 13th October, 2016 this court delivered a ruling on two applications at the instance of the defendants herein dismissing the plaintiffs' suit with costs.

There is now before me an application by way of Notice of Motion dated 6th March, 2017 under Article 50 of the Constitution, Sections 1A, 1B, 3A, 3B and 80 of the Civil Procedure Act, Order 45 Rule 1 and Order 51 of the Civil Procedure Rules for the substantive order that this court reviews its ruling of 13th October, 2016. There is also a prayer for stay of execution of the said ruling.

The application is supported by an affidavit sworn by the advocate for the plaintiffs alongside the grounds set out on the face of the application. The application is opposed and the parties herein have filed their respective submissions. Several authorities have also been cited.

Order 45 Rule 1 of the Civil Procedure Rules provides for application for review of any decree or order by any person considering himself aggrieved thereby.

The provisions of rule 1 specify the perimeters to be applied in such applications. The applicant has a duty to show that there 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 or order made, or on account of some mistake or error apparent of the face of the record, or for any other sufficient reason.”** It is also provided thereunder that such an application should be made **“without unreasonable delay.”**

The thrust of the application is that, the court should have allowed an amendment to the plaint to ensure that the plaintiffs are accorded a fair hearing. In fact, it is the plaintiffs' position that they are in a position to file an application to amend the plaint upon review of the ruling.

The defendants have submitted jointly and severally that, the applicants have not disclosed any new fact or error on the face of the record and in any case, this is an application for review not amendment of the plaint.

There is also no indication that the plaintiffs intended to amend the plaint at any stage before the application to dismiss the suit was filed, except the hollow statement that they were preparing to do so. In that regard, the defendants may be right that the present application is an afterthought.

I have related the application to the pleadings and the provisions of law that have been cited. In the ruling sought to be reviewed I considered, inter alia, some of the issues raised by the applicant herein and more so related to the principles of a fair trial. That notwithstanding, I held that the plaintiffs' suit could not be sustained.

The present application does not meet the test set out under Order 45 Rule 1 of the Civil Procedure Rules. Having said so, the order that commends itself is that, the application must be and is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Nairobi this 20th day of April, 2018.

A. MBOGHOLI MSAGHA

JUDGE