REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 240 OF 2001

RAMESH CHANDRA J SETH

T/A MAGANLAL & COMPANY. …… APPELLANT

VERSUS

TWIGA INTERTRAD LIMITED. ……. RESPONDENT

(From the Judgment and Decree of C N Kanyangi, SPM in Nairobi SPMCC No. EJ 149 OF 2000)

J U D G M E N T

In this case the Respondent had instituted a claim in the lower court against the Appellant in a Plaint dated 19th February, 2000, seeking judgment in the sum of Ksh.337,500/- being recovery of an amount the Respondent had earlier loaned to the Appellant. In his defense dated 25th March, 2000, the Appellant, as Defendant, denied having made any request to the Respondent/Plaintiff for the claimed amount or having received the alleged sum as a loan. He however, admitted having received said amount in form of a cheque but in payment for goods sold and delivered to the Plaintiff.

On 22nd August, 2000 the Respondent in an application, sought the striking out of the Defence on the grounds that it was scandalous, frivolous and vexatious and otherwise an abuse of the court process:. The Plaintiff/Respondent had already on 12th June, 2000, served the Defendant with a Request for particulars of the goods sold and delivered to the Plaintiff for which the sum of Kshs.337,500/- would have been a settlement from the Plaintiff. The Defendant/Appellant, even after two reminders dated 4th July, 2000 and 1st August, 2000, failed to respond to or supply. Hence the Plaintiff/Respondent also used the Defendants failure to respondent as another reason to call the defence a sham and accordingly seeks its striking out.

During the hearing of the above application, this court observed that the Defendant, in his argument, still admitted receiving the claimed amount from the Plaintiff in form of a cheque and repeated that the money was for goods received by the Plaintiff from the Defendant. The Defendant further admitted receiving a request for particulars of the goods so received and other relevant details. He admitted also that he had not supplied the particulars.

The trial magistrate on 2nd February, 2001 ruled that in the circumstances of this case, the defence indeed amounted to a mere denial and a sham and did not raise any triable issue. He struck out the said defence and entered judgment for the Plaintiff/Respondent in the sum of Ksh.337,500/-

Two and half weeks later on 20th February, 2001 the appellant sought stay of execution and a review of the judgment, the latter on the ground that the Defendant had discovered an "***Important matters of***

evidence which were not available at the hearing of the application subsequent to which orders are now sought to be reviewed."

In his supporting affidavit to the application, the Defendant gave the new and important matter which was now available as: -

> **"the business of J Magnalal and Co. has been closed for four years… and I was unable during the hearing of the application for particulars that prompted the judgment, to provide the details aforesaid as the option had long been closed down and the particulars were unavailable (sic)".**

The trial magistrate, C. O. Kanyangi, dismissed the application for review. He explained that from the circumstances revealed in the record, the documents allegedly with new and important evidence alleged to have been discovered, were all along in the premises where the Defendants were trading and yet they were not supplied to the Plaintiff although he had allegedly given the cheque for Kshs.337,500/- as a settlement thereto. Furthermore, the trial magistrate concluded upon the evidence before him, that the documents, not only appeared forged and unreliable, but also did not really constitute newly available and/or important evidence within the purview of the then Order 44 of the Civil Procedure Rules.

The dismissal once more aggrieved the Appellant who filed this appeal on largely the following grounds: -

1. ***That the trial court erred in finding that the documents forming the new and important evidence were not newly discovered but were always available.***

2. ***That the trial magistrate erred in finding that the documents were forged without evidence to that end.***

3. ***That the trial court failed to act in accordance with the principles laid down for review under Order 44 aforesaid and in failing to consider the application on the facts and evidence before him.***

I have perused the appeal record, the grounds of appeal and the written submissions from both sides. It is this court's duty to re-assess and re-evaluate the grounds upon which the trial court acted to satisfy itself that the facts and the law were properly applied and that the trials court's finding was justified.

In this case, trial court had refused to grant a review of the orders to strike out defence and set aside the entered judgment. The ground put forward by the Appellant/Defendant was that a new and important piece of evidence or matters in form of documents in support of the Defendants defence had been discovered. The trial magistrate had considered this ground in detail. He had found, and this court agrees with his finding, that the documents were not newly discovered material, important as it may be found to be. The trial court had also found that the documents may have been forged to align them in support of the Defendant's defence. This court cannot easily discard a finding of the trial court which saw and heard the parties argue the original application for review, unless wrong principles of law and unreasonable and illogical conclusions of fact, were applied or arrived at, respectively.

In this case, the trial court found that the documents which formed the ***'new material'***, were not new. He found that the documents were always available to the Defendants even during the four years he claimed the business premises were closed. He did not explain who had closed the premises and how he was not able to access them or who held control thereof, or even how the documents were finally availed to him. His defence did not disclose the unavailability of the documents. More importantly, when detailed particulars of the defense were properly requested for and the Defendant could have used the opportunity to explain the unavailability of the documents which allegedly formed his defence, the Defendant failed to reveal the existence and placement of those documents. In the view of this court, the moment the Defendant admitted receipt of the cheque carrying the claimed sum, it immediately thereafter automatically became his obligation and burden to demonstrate proof of existence of the documents. He

however, failed to take up the chance until too late when any attempt to do so became suspect.

Furthermore, it cannot be denied from the facts herein that the Defendant was not ignorant of the existence and placement of the so called new material or evidence. That he failed to demonstrate that he had exercised due diligence in the retrieval of the documents which he knew were crucial in his case, is also clear. The Defendant did not either explain the flipside. His conduct was clearly indolent. As stated in the case **of Mulembe Farm Limited & another Vs John B Masika & 3 Other**. By the Court of Appeal: -

> ***"….. a party who is sworn to have taken all essential steps in a matter, but because of matters beyond his control, he was not able to avail all relevant material or evidence, or that an error occurred.."***

Is the party the court can aid in the request for Review as Equity does not aid the indolent. Indeed Order 44(3) of the Civil Procedure, as it then was has a proviso as follows:-

> ***"Provided that no application shall be granted on the ground of discovery of a new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed without strict proof of such allegation."***

This court, as was the trial court, is satisfied on the balance of probability that the Defendant failed to strictly prove that the matters or the evidence was new and was not available to him during the trial of the Review **Application Mulla, The Code of Civil Procedure, 16th Ed. At P. 4115** expresses the principle as follows: -

"Applications on this ground must be treated with great caution…. 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 could be allowed on the discovery of the evidence it has to be established that the applicant had acted with due diligence and that the existence of the evidence wasn't within his knowledge; ….. In a case where there was no material to show that the petitioner had acted with every diligence all through the trial, having not been possessed with new material now sought to be introduced, the application for review was rejected as it was held that there was nothing on record to show that the petitioner was not having the custody of the said document, nor was he deprived of the said material."

In this case there was nothing on record to show that the Appellant was not having the custody of the relevant documents all along, nor is there evidence to demonstrate that he was deprived of the custody of the same during the hearing of the Review Application.

For the above reasons, the appeal grounds show little or no merit. The appeal is accordingly dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 25th day of March, 2015.

D A ONYANCHA

JUDGE