



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO. 16 OF 2013**

**PAVIWA LIMITED .....PLAINTIFF**

**versus**

**CO-OPERATIVE BANK OF KENYA .....DEFENDANT**

**RULING**

1. By a notice of motion dated 28/1/2014 under Section 1A,1B and section 3A of the Civil Procedure Act the applicant moved the court for orders :
  1. ***THAT this application be certified as urgent and service be dispensed with and heard ex-parte in the 1st instance.***
  2. ***THAT the ruling of this honourable court made on 3rd October 2013 dismissing notice of motion application filed herein on 23rd May 2013 together with all other consequential orders be reviewed and varied and or set aside.***
  3. ***THAT the honourable court do issue an order granting the prayers sought in the notice of motion application filed herein on 23rd May 2013.***
1. The application was grounded on the grounds that there is discovery of new and important evidence which after the exercise of due diligence was not within the applicant's knowledge and could not be produced at the time when the order on preliminary object was made and argued.
2. It was supported by the affidavit of PATRICK MAINA and LYDUR SKULASON in which they deponed that by the time the ruling to be reviewed was made they did not have in their possession the list of payments made by Civicon Ltd to the plaintiff applicant and neither did they have list of payments made by Green Energy Group.
3. The application was certified urgent and ordered to be served upon the defendant/respondent who in reply thereto filed grounds of opposition on 20th February 2012 in which they stated that the applicants did not meet the threshold for review as per order 45 Civil Procedure Rules and that the alleged new matters have always been in the knowledge of the applicant.
4. It was submitted by Mr. Ojienda for the applicant that there were certain facts which were not within the possession of the plaintiff being documents in support of who transferred the funds to the plaintiffs account which have now been supplied.
5. Mr. Kioni for the respondent submitted that all the information alleged had always been in the possession of the applicant. It was submitted that there were no special circumstances for the court to grant a mandatory injunction. It was submitted that under order 45 (1) the court can review its orders on the discovery of new matters that could not have been produced when the order was made.
6. The only issue for determination in this application is whether the applicant has made a case for

- review of the order issued and whether they are new and important matter of evidence.
7. The powers of the court to review its judgment is provided for under order 45 rule 1 on the following terms.

**1) any person considering himself aggrieved:**

***a) by a decree or an order from which a 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 of evidence which after the exercise of due diligence was not within his knowledge or would not be produced by him at the time when the decree was passed on the order made or on account of more 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”.***

8. It is clear from the reading of this rule that a party to a review must be aggrieved by the order of the court which is sought to be reviewed. This was the holding in GULAMHUSEIN MULLA JIVANJI & ANOTHER V EBRAHIM MULLA JEVANJI & ANOTHER (1929-30) 12KLR 41 where the court had this to say at page 44 and 45.

***“Apart from any consideration whether the course adopted by the learned judge in relation to the exparte order was or was not well founded, the question emerges as to the precise character of the grievance which must be expressed by a person applying for a review of judgment under order XLII (emphasis added)”.***

But in my opinion however aggrieved a person may be at the various expression contained in a judgment or even at various rulings embodied therein, unless that person is aggrieved at the final decree or the final/order based upon the judgment as a whole, the person cannot under order XLII appear before the judge who passed the judgment and argue whether this or that passed in the judgment is tenable or untenable.

9. From the affidavit in support of the application for review the new discovery are said to be payments made into the plaintiffs account between 28th February 2013 to 10th July 2013. These to my mind are not new facts or important evidence that could not have been discovered by the applicant after the exercise of due diligence. Further the application has also not been made without unreasonable delay the ruling sought to be reviewed have been made on 3rd October 2013.
10. This court cannot therefore sit on appeal against its own decision since the issues raised on the affidavit in support might not have affected the decision rendered herein. In this holding I find support in the COURT OF APPEAL DECISION IN NATIONAL BANK OF KENYA LTD V NDUNGU NJAU NAIROBI CA CIVIL APPEAL NO. 211 OF 1996 where the court had this to say

***“A review may be granted whenever the court consider that it is necessary to correct an appellants error on omission on the part of the court. The error or omission must be self evidence and should not require a deliberate argument to be established. It will not be 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 expression of the law.***

***In the instance case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matter in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for an appeal but not for review.”***

11.I therefore find that the applicant has failed to convince this court that the matter stated in the affidavit in support are new discoveries and therefore find no merit on the application herein which I hereby dismiss with cost to the respondent.

Dated signed and delivered at Nyeri this 30th day of May 2014.

J. WAKIAGA

JUDGE

Mr. Kioni for the defendant.

Mr. Thuku for Mr. Ojienda for the applicant.

Court: Ruling read in open court in the presence of the advocates for the parties.

J. WAKIAGA

JUDGE