



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 345 OF 2001

SAFE RENTALS LIMITED PLAINTIFF

VERSUS

MERIDIAN HOLDINGS LIMITED

T/A MERIDIAN COURT HOTEL DEFENDANT

R U L I N G

1. In the Judgement entered herein on 3rd December 2012, this Court detailed that from the prayers in the Amended Plaint the first claim was the delivery of all the safes being the subject matter of this suit to the Plaintiff or, alternatively, their value. The Court went on to say that it did not consider that the Plaintiff could claim both. Taking the evidence of DW 1, Mr. De Souza, that the safes had been retained by the Defendant in a safe place, this Court ordered that they should be delivered up to the Plaintiff. Now the Plaintiff has come with its Application by way of Notice of Motion dated 11th March 2013 seeking for a review of the Judgement in this connection. The Application is brought under the provisions of **Order 45 rules 1 and 2, Order 51 rule 1** of the *Civil Procedure Rules* as well as **Sections 1A and 1B** of the *Civil Procedure Act*. The Plaintiff now seeks the alternate prayer for judgement in the amount of Shs. 3,430,000/- being the value of the safes as per the Amended Plaint, rather than the delivery of the same to it. The Plaintiff maintained that the Defendant had failed to store the safes in good condition and had treated the same with a total lack of care. Basically, the Plaintiff maintained that the safes were undeliverable in the condition that they were in.
2. The Plaintiff's said Notice of Motion was supported by the Affidavit of **Stanley Mareng** the Plaintiff's Sales and Marketing Manager. He maintained that together with a Mr. William Omusi, he had visited the Defendant's premises on 6th February 2013 in order to inspect the condition of the safes. He maintained that he was escorted by the said Mr. De Souza to what he described as a "dungeon" located in the basement of the Defendant's hotel. That "dungeon" the deponent alleged was dark, filthy, full of litter and junk metal. As a result, the deponent and his colleague were unable to view or access any of the safes. Mr. De Souza had pointed out where the safes were stored but, in the view of Mr. Mareng, the condition of the "dungeon" was not favourable due to the moisture and atmosphere therein and, as a result, the safes had rusted and could not be used by the Plaintiff. To this end, the deponent attached photographs of the basement area of the Defendant's hotel where the safes were stored. Finally, Mr. Mareng detailed that the safes were valued at Shs. 35,000/- each and there were 98 of them yielding an aggregate sum of Shs. 3,430,000/-.
3. The Replying Affidavit of the said **Gabriel Victor De Souza** was sworn on 15th May 2013. He opened his Affidavit by detailing that he had been advised by the Defendant's advocates on record

that the Notice of Motion before Court was incurably defective and bad in law as the Decree or Order sought to be reviewed had not been extracted and annexed thereto by the Plaintiff. Without prejudice to that submission, the deponent noted that the Order that the safes be delivered up to the Plaintiff had emanated from its own pleadings and was not made at the instance of the Defendant. Once the Order had been issued, the Defendant immediately ensured that the safes were available for collection by the Plaintiff and the deponent attached photographs of the said safes awaiting collection. In fact, the deponent maintained that the Defendant had called the Plaintiff on many occasions to come to collect the safes as ordered by Court. Mr De Souza denied that the safes were stored in a “filthy dungeon” but kept securely in a storage area located below the Defendant’s hotel basement car park. He further denied that the safes were in an “undeliverable state” and noted that as per the affidavit in support of the Application, the deponent thereto had detailed that he had not viewed the safes. The fact that all the safes were still stored in the Defendant’s storage area was testament to the fact that it had safely stored the same as pointed out by the Court in its said Judgement. Finally, Mr. De Souza had been advised by the Defendant’s advocates on record that no new material evidence that was unavailable during the trial hereof had been unearthed to justify a review of the Judgement. Further, there was no mistake or error apparent on the face of the record or any other reason for the Court to review its decision. The Plaintiff was seeking to obtain what it considered a “desirable” judgement whereas there was already a “just and valid” Judgement on record.

4. When counsel for the parties appeared before this Court on 13th May 2014, Miss Ogutu for the Plaintiff submitted that there was an error apparent on the face of the record as per page 13 of the Court’s Judgement as it referred to the Plaint as opposed to the Amended Plaint. Secondly, counsel maintained that the new information that had come to the Plaintiff’s knowledge was that the safes in their present state were undeliverable as the storage area was damp. There had been no delay in bringing the Application before Court and the Plaintiff was seeking the alternative pleading as per the Amended Plaint. Counsel noted that there was a valuation of the safes carried out and the same was contained at page 3 of **Ibrahim J’s** Ruling delivered on 7th October 2005. Counsel relied on the Plaintiff’s authorities being **Equity Bank Ltd v Capital Construction Ltd & 3 Ors (2012) eKLR** as well as **National Bank of Kenya Ltd v Ndungu Njau (1997) eKLR**.
5. In his turn, Mr. Kuria for the Defendant emphasised the criteria for obtaining a review of a Judgement under the provisions of **Order 45 rule 1** of the *Civil Procedure Rules, 2010*. Such were very clear:
 - a. an error apparent on the face the record
 - b. new evidence not before the court at the time of trial
 - c. for any other sufficient reason.

In counsel’s view there was no apparent error on the face the record and in its Judgement, the Court had been categorical that the Plaintiff could only have the value of the safes or the delivery up of the same, not both. The Court had ordered that the same to be delivered up. As per the affidavit of Mr. De Souza, the Plaintiff had been unwilling to collect the safes which were in safe custody. Counsel emphasised that the deponent to the Affidavit in support of the Application before Court had not had sight of the safes. At the trial, counsel noted that the Plaintiff’s director had come to Court and maintained that the safes should be delivered up. During the hearing, the Plaintiff had not produced any expert witness as to the value of the safes and had not proved their value. As a result, to allow the Plaintiff’s claim would be tantamount to be giving judgement on unproved facts. Counsel concluded that there was no error apparent on the face of the record and no new evidence brought before Court to warrant the review.

6. In a short rejoinder, counsel for the Plaintiff maintained that she had pointed out the error on page 5 of the Judgement in reference to the Plaint and she maintained that the Amended Plaint was not before Court. As regards the safes being undeliverable, counsel referred the Court to the photographs annexed to the supporting Affidavit of the Plaintiff. As to the value of the safes, there was no challenge in the value detailed in the Plaint or Amended Plaint in the Amended Defence.
7. It is incorrect that the Amended Plaint was not before this Court. The Ruling of **Ibrahim J.** delivered on 7th October 2005 allowed the amendment as proposed by the Plaintiff in relation to the value of the safes. The draft Amended Plaint was attached to the application that the learned

Judge was considering dated 6th February 1996. If this Court accidentally failed to include the word “Amended” on page 5 of the Judgement then that is a slip that can be easily cured under the provisions of **section 99** of the *Civil Procedure Act*. As a result, I make nothing of the Plaintiff’s counsel’s submission in that regard and it certainly does not warrant a review of the Judgement. Accordingly I have taken note of the case cited by the Plaintiff being **National Bank of Kenya Ltd v Ndungu Njau** (supra) when the Court of Appeal detailed as follows:

“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 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 provision of law cannot be a ground for review.” (Underlining mine).

In my view, the slip that the Plaintiff has pointed out in the Judgement does not necessitate the correction of the same as it has no bearing on the determination of this suit.

8. In my view, the provisions of **Order 45 rule 1** are very clear, they read 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 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 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”. (Underlining mine).

It is therefore imperative, that for the Court to consider an application for review, the aforementioned provisions under **Order 45 Rule 1** have to be satisfied. The Plaintiff has maintained that the fact or evidence unknown to the Court at the time of the delivery of the Judgement herein was that the safes were in no condition to be delivered to the Plaintiff. In response, the Defendant maintains that the safes were in a condition to be delivered to the Plaintiff both at the time when Judgement was delivered and as of now. As a result, it is the Defendant’s position that no new evidence has been put before this Court to warrant a review under the provisions of **Order 45 rule 1**.

9. Before coming to whether there is new evidence placed before this Court or otherwise, I would first wish to deal with the Defendant’s submission as to the necessity of extracting and attaching to the Application before Court a copy of the Judgement sought to be reviewed. In this regard, I heartily endorse the finding of my learned brother **Musinga J.** (as he then was) in the case cited to Court by the Plaintiff being **Equity Bank Ltd v Capital Construction Ltd** (supra) when he stated:

“Lastly, the defendants contended that the Plaintiff’s application was bad in law since the orders sought to be reviewed had not been extracted and annexed to the affidavit. The defendants cited, inter alia, KENFREIGHT E.A. LIMITED V STAR EAST AFRICA COMPANY LIMITED [2002] 2 KLR 783, where it was held that a party who seeks to apply for review of an order must extract the order sought to be reviewed and annexe it to the affidavit in support of the application. That requirement dates back to 1929/1930 when the

Court of Appeal so held in G. N. JIWAJI vs. JIWAJI & ANOTHER (1929-30) 12 KLR 44.

While the above submission may be right in law, I do not think that in the new constitutional dispensation it can be a ground for dismissing an application for review that is otherwise merited. I say so because Article 159 (2) of the Constitution of Kenya, 2010 requires the court to administer justice without undue regard to procedural technicalities. The defendants were not prejudiced in any way by the plaintiff's failure to extract the orders following delivery of the ruling of 22nd November, 2011.

The provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 are very important in dispensation of justice. The inclusion of such a provision was very deliberate and I believe it was informed by public outcry regarding serious injustices that were occasioned to litigants due to the judiciary's rigid observance of procedural technicalities. Article 159 (1) states that judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitution, and I may add, in accordance with the provisions of the Constitution. If courts continue to accord procedural technicalities undue prominence in administration of justice they will be negating an important constitutional requirement”.

In this regard therefore, I do not consider that it is fatal to the Plaintiff's said Application before Court that it has not extracted and attached a certified copy of my Judgement herein.

10. I have carefully perused both the Affidavit in support of the Application before Court and the Replying Affidavit more particularly the photographs annexed to both documents. In my view, the photographs annexed to Mr. De Souza's Replying Affidavit clearly show the safes although badly stacked. On the other hand, the photographs annexed to Mr. Marengé's Affidavit in support of the Application do not even show the safes and can only be described as non descript. Safes by their very nature are strongly constructed usually from steel or other heavy metal. Such are not normally prone to rust here in Nairobi. It may be a different scenario at the Coast from whence the Plaintiff hails. Weighing up the two Affidavits, it does not appear to me that Mr. Marengé even saw or bothered to see the safes. Quite obviously the value that the Plaintiff puts on them at Shs. 3,340,000/= may have been what they were worth when new. Nobody can expect them to hold anywhere near that value 13 years further down the line. Obviously, the Plaintiff would prefer to have the value of the safes awarded to it rather than the safes themselves in their current condition. However, from what I can see from Mr. De Souza's photographs the safes cannot be said to worthless even at scrap value.

11. As a result, I see no reason for me to review the Judgement herein and the same shall stand as delivered. The Plaintiff's Application dated 11th March 2013 is dismissed with costs to the Defendant.

DATED and delivered at Nairobi this 18th day June, 2014.

J. B. HAVELOCK

JUDGE