



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 3568 OF 1994**

**MALAGAT UNIT FARMERS COMPANY LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MWALIMU INVESTMENT COMPANY LTD.....1<sup>ST</sup> DEFENDANT**

**G.M.MUHORO.....2<sup>ND</sup>  
DEFENDANT/APPLICANT**

**RULING**

1. The 2<sup>nd</sup> Defendant has filed the notice of motion dated 21<sup>st</sup> June 2012 and brought under order 51 rule 1, order 5 rule 16 and Part IX section 80 and section 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking orders:

- i. That the ruling by Honourable Ole Keiwua J. as he then was delivered on the 27<sup>th</sup> June 1997 be reviewed.
- ii. That the judgment entered hereto and the decree issued on 26<sup>th</sup> June 1997 be set aside.

2. The origin of this claim is an aborted land transaction. The brief facts are that the 2<sup>nd</sup> defendant's defence was struck out and summary judgment entered against him and the 1<sup>st</sup> defendant jointly and severally. The 2<sup>nd</sup> defendant's case is that the application for summary judgment was not fully canvassed to determine the claim as was stated in the plaint and that judgment was entered into against him without consideration of the merits of the case.

3. The 2<sup>nd</sup> defendant swore an affidavit in support of his application on 21<sup>st</sup> June 2012 in which he gave the history of the case. In opposition to the application and the preliminary objection, the plaintiff filed a replying affidavit sworn by Nganga Waweru Kiogi on 18<sup>th</sup> October, 2012.

4. I have read the affidavits and submissions of the parties together with the authorities supplied therein. I am of the view that what is for this court's determination is whether or not the 2<sup>nd</sup> defendant has met the conditions required for this court to review and/or set aside the judgment. I shall therefore during my determination limit myself only to the facts relevant to the said issue.

5. The 2<sup>nd</sup> defendant avers that he fulfilled his part on the transaction by depositing KShs. 1,000,000/- with Continental Credit Finance Company Limited as instructed by the plaintiff but he had no advantage of the relevant documents at the time the suit was filed. That further to the above, he ought to have been cross examined to determine the suit on merit.

6. He took issue with the plaintiff's action for executing years after the delivery of the judgment and argued that the execution would contravene the provisions of **section 4 (4) of the Limitations of Actions Act, (Cap 22) Laws of Kenya.**

7. The plaintiff on the other hand contends that there has been inordinate delay in bringing this application. It urges that it is not time barred in executing since the twelve years provided under the Limitation of Actions Act has not yet lapsed. The plaintiff has relied on **order 21, rules 7 and 8** of the Civil Procedure Rules to fortify its argument that the decree issued corrected any clerical errors or omissions that were in the judgment. Finally, it is argued that the 2<sup>nd</sup> defendant having been part of the consent recorded on the bill of costs, he is estopped from resiling his position that he would settle the decretal sum.

8. The principles to be applied by this court in reviewing its judgement are provided for under **order 45 rule 1 (1)** of the Civil Procedure Rules. It provides as follows:

***“1. (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.”***

9. The court in *National Bank of Kenya Ltd v. Ndungu Njau Nairobi C.A. Civil Appeal No. 211 of 1996* state 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... in the instant case the matters in dispute had been fully canvassed before the learned judge. He made a conscious decision on the matters 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 appeal but not review. Otherwise we agree that the learned judge would be sitting in Appeal on his own judgment which is not permissible in law...”***

10. Although the 2<sup>nd</sup> defendant alleges that he did not have the relevant documents at the time of filing the suit, he has failed to give a reason why he could not obtain them at the time and how he now has the said documents. The 2<sup>nd</sup> defendant has not also shown any mistake or error apparent on the face of the judgment he seeks to have reviewed. Finally, the 2<sup>nd</sup> defendant has failed to explain his delay in filing this application.

11. The 2<sup>nd</sup> defendant's main gravamen and reason for alleging that the suit was not determined on merit, is because it was decided summarily. It is noteworthy the 2<sup>nd</sup> defendant participated in the application dismissing his defence. It was therefore heard and determined on merit. The 2<sup>nd</sup> defendant should have sought recourse in the appellate court in the event he felt the suit was not heard on merit.

12. The 2<sup>nd</sup> defendant has not satisfied the requirements of order 45 that he has a basis for review of judgment. Accordingly, the application is dismissed with costs to the plaintiff.

Dated, Signed and delivered in open court this 24<sup>th</sup> of October 2014.

J.K.SERGON

**JUDGE**

In the presence of:

Gichuru D. N. for the Plaintiff

N/A Osoo for the 2<sup>nd</sup> Defendant