



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 96 of 2005**

**DHIRAJ D. POPAT**

**MANSKUHLAL D. POPAT T/A**

**DAYALAL BHANJI & SONS.....1<sup>ST</sup> APPLICANT/ LANDLORD**

**CASH CROP AUCTIONEERS.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**CHARLES MWANGI KOGONIA.....RESPONDENT**

**R U L I N G**

Before me is an application brought by way of Notice of Motion under Order XLIV Rules 1A and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders of review of my judgment delivered on 16<sup>th</sup> February 2006. In support of the application **MANSKUHLAL D. POPAT** has sworn an affidavit giving grounds.

The facts which gave rise to this litigation briefly may be stated. On the 18<sup>th</sup> February 2003 the applicant entered into a Lease Agreement with the Respondent over the suit premises being LR No. 209/138/25 for a period of 5 years and 1 month.

The said Lease Agreement provided that the respondent would pay rent regularly 6 months in advance. The lease also provided that the respondent would not assign or sublet the premises or part thereof without the written consent of the applicant. The respondent breached the two conditions above. He sublet part of the premises to third parties and defaulted in rent payment and was in arrears to the tune of Shs. 284,375/=. The applicant sent auctioneers to levy distress for rent.

The respondent moved to this court to seek redress. When the suit was heard, it became evident that the main lease between the applicant and the Government had expired long before the lease agreement was entered between the applicant and the respondent and this was within the knowledge of the applicant who failed to disclose the same to the respondent. The court made a finding that since the applicant had entered into unlawful lease agreement fully aware that his interest in the suit premises had ceased he alone could bear the illegality. For the court to grant the prayers sought it could amount to giving effect to the unlawful contract so that neither the applicant nor the respondent could be allowed to enforce an unlawful contract and the court dismissed the respondent's suit as well as the applicant's counterclaim for rent arrears.

On 14<sup>th</sup> March 2007 the applicants filed this notice of motion for review alleging that the applicants

have discovered important evidence after the exercise of due diligence was not available to them at the time the judgment was delivered in that the applicants have not been issued with a Letter of Allotment for a term of 50 years from 1<sup>st</sup> September 2006 but was back-dated to 1<sup>st</sup> September 2002.

The application for review is opposed by the respondent on the ground that the letter of allotment was issued to the applicants 6 months after the judgment was delivered and that allotment letter is only an offer, conditional and does not constitute a lease.

Miss Njuguna for the applicant submitted the applicants having secured a Letter of Allotment to the suit property, they are entitled to the rent while Mr. Mwangi for the respondent submitted that review can only be granted upon discovery of new evidence or facts that were not available at the time of judgment. He further submitted that at the time the lease agreement was entered into between the applicant and the respondent on 18<sup>th</sup> February 2003 the main lease between the applicant and the Government having expired there was nothing for extension and the lease agreement entered into between the applicant and the respondent was an illegal contract and therefore could not be validated by any subsequent action by the parties. The purportedly new evidence presented by the applicant was the Letter of Allotment issued to the applicant on 5<sup>th</sup> July 2006 over 6 months after the judgment had been delivered.

An application for review can succeed only if the applicant proves, an error or mistake apparent on the face of the record, discovery of new evidence or any other sufficient reason.

There is no strict proof of the allegations about the discovery of the new evidence or any other sufficient ground for review. For an application for review to succeed the evidence must only be not new but the applicant must prove that he did not have them in his possession at the time and could not have detained it despite due diligence in the instance at the time the court delivered its judgment the applicants had not received communication from the Government of the review of the lease. This was communicated to them after the judgment had been delivered. The applicants having secured renewal of the lease, they are entitled to their rent and I so order.

Accordingly the applicants' notice of motion dated 14<sup>th</sup> March 2007 succeeds and the judgment of this court delivered on 16<sup>th</sup> February 2006 and the dismissal order is set aside and substituted with the flowing order. The Plaintiff's claim be and is hereby dismissed and the defendant's counterclaim succeeds. The defendant is entitled to recover rent arrears.

The defendant is also awarded costs of this suit as well as of this application plus interest at court rates.

Dated and delivered at Nairobi this 29<sup>th</sup> day of July 2008.

**J.L.A. OSIEMO**

**JUDGE**