



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

Civil Suit 159 of 2000

CYRUS NYAGA KABUTE PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....1ST DEFENDANT

SAMUEL P. GACHORA.....2ND DEFENDANT

RULING

By his Notice of Motion dated 9.2.2007 the plaintiff moved the court under Section 80 of the Civil Procedure Act and Order XLIV Rules 1,2,4 and 6 of the Civil Procedure Rules for review of the judgment of Kasango J dated 14.12.2006. The application was made on two primary grounds that there had been discovery of new and important matter/evidence which after the exercise of due diligence, was not within the plaintiff's knowledge and could not otherwise be submitted at the trial and that it was in the interest of justice that the application be granted.

The application was supported by an affidavit sworn by the plaintiff to which affidavits were annexed several exhibits. That affidavit mainly substantiated the grounds on the face of the application.

The application was opposed and the defendant filed a Replying affidavit sworn by one Joseph Kania, the 1st defendant's Legal Manager. The affidavit exhibited several annexures detailing the history of the dispute between the parties.

The application was canvassed before me on 9.5.2007 and 18.7.2007 by the plaintiff in person and Ms. Chelagat Learned counsel for the 1st defendant. The record shows that earlier on in the proceedings, the plaintiff obtained an order that he was proceeding against the 1st defendant alone. The 2nd defendant did not therefore participate in the proceedings.

I have carefully considered the application, the affidavits filed together with the annexures thereto. I have also given due consideration to the submissions made before me. Having done so, I take the following view of the matter. The plaintiff contended that the defendant had in a Newspaper article expressly admitted that its accounting system was faulty resulting in the levying of illegal charges. The exhibited article was dated 27.8.2002. I have perused the same, I cannot connect the article to the dispute between the plaintiff and the defendant. In any event, a general publication in a Newspaper is not admissible against the defendant. Besides, the article was published on 27.8.2002 long before the judgment sought to be reviewed was delivered. In my view, the contents of the article do not constitute evidence of admission of error by the defendant. I find and hold that that is not a discovery of new and important matter or evidence which after the exercise of due diligence was not within the plaintiff's knowledge.

The plaintiff further contended that there was admission by the defendant of errors in the statement of account which statement was not in his possession at the trial. That contention was clearly not borne by the record and indeed was expressed addressed by Kasango J in her judgment. The Learned Judge further expressly considered the plaintiffs allegations of fraud and held against the plaintiff. The plaintiff did not demonstrate what new discovery he had made in respect of the fraud allegation with respect to his account.

There was a further contention by the plaintiff that his relationship with the defendant had changed by virtue of the decisions of the court in HCCC No.4610 of 1990 and C.A. No.158 of 1996 and the provisions of Section 6 of the Mortgages (Special provisions) Act Cap 304 of the Laws of Kenya. I fail to see how that can be considered a new and important discovery as Kasango J expressly considered the two matters in her judgment and made conclusive findings thereon.

The plaintiff also contended that he had discovered breach of Sections 44 and 52 of the Banking Act as read with Section 39 of the Central Bank Act Cap 491 of the Laws of Kenya. Once more, the Learned Judge considered the provisions of the Banking Act and disregarded submissions made thereon on behalf of the plaintiff on the basis that the plaintiff had not led evidence in respect of the submission. In the premises, no new issue or discovery can be alleged in respect of the provisions of the Banking Act and the Central Bank of Kenya Act. In any event the issue had not been pleaded by the plaintiff.

The plaintiff further contended that the defendant's failure to credit certain deposits on his account amounted to clogging and frustrating the plaintiff's attempt to redeem the charge. That issue was expressly considered by the Learned Judge and she made her definitive findings thereon. In my view, the plaintiff has not demonstrated that there has been discovery of credible and additional evidence in that regard.

The plaintiff also contended that there was additional evidence pertaining to the completion of the mortgage debt by virtue of the decision of the Court of Appeal in Civil Appeal No.158 of 1996. I was unable to see the new and additional evidence alleged. It is clear however, that the Learned Judge in her judgment cited the said judgment and quoted extensively from the same. She still found conclusively that the plaintiff as at 31.12.2005 was indebted to the defendant to the tune of KShs.16,116,471.35.

From my findings above, it is clear that the plaintiff has not persuaded me that there has been discovery of new and important matter/evidence which after the exercise of due diligence was not within his knowledge and could not otherwise be submitted before Kasango J before passing her judgment.

I have further carefully considered the background of this dispute leading to the judgment sought to be reviewed and have not found any other sufficient reason to warrant review of the said Judgment.

The upshot is that the plaintiffs application dated and filed on 9.2.2007 has no merit and is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of: The plaintiff and Chelagat Ms. for the defendant.

F. AZANGALALA

JUDGE

26/10/07