



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Appeal 62 of 2001**

**TRANS-NATIONAL BANK LTD.....PLAINTIFF**

**VERSUS**

**CHARLES KIMITA WILLY.....1<sup>ST</sup> DEFENDANT**

**CHARLES M. KARIUKI t/a APPLE CROSS SURVEYORS....2<sup>ND</sup> DEFENDANT**

**RULING**

On the 27<sup>th</sup> of June, 2006 this court entered judgment against the defendants jointly and severally in favour of the plaintiff as prayed in the plaint. On the 19<sup>th</sup> of September, 2006 the 1<sup>st</sup> defendant filed an application under the provisions of **Order XLIV Rule 1,2 &3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking an order of this court to review its judgment and decree on the grounds that the 1<sup>st</sup> defendant had discovered new and important evidence which he could not obtain during the trial even after he had exercised due diligence because the said documents had been misplaced. The application is supported by the grounds stated on the face of the application and the affidavit sworn by the 1<sup>st</sup> defendant. The application is opposed. Philip K. Komen the branch manager of the Nakuru Branch of the plaintiff has sworn a replying affidavit in opposition to the application. In essence, the plaintiff swears that even if the court were to consider the documents that the 1<sup>st</sup> defendant states that he desires to have produced in evidence, it would not substantially affect the judgment which was delivered by court. The plaintiff urged this court to dismiss the application for review with costs.

At the hearing of the application, I heard the submissions made by Mr. Chuma Mburu on behalf of the 1<sup>st</sup> defendant and by Mr. Musangi for the plaintiff. The issue for determination by this court is whether the 1<sup>st</sup> defendant has established a case to enable this court review its judgment delivered on the 27<sup>th</sup> of June 2006. **Section 80 of the Civil Procedure Act and Order XLIV rule 1 of the Civil Procedure Rules** provide instances under which an aggrieved party may apply to review a judgment or an order of the court. Such an applicant must establish that he had discovered a 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 the decree was passed. Such an applicant may also plead that there was a mistake or an error apparent on the face of the record. Finally an aggrieved party may apply to review a judgment for any sufficient reason.

In the instant application, the 1<sup>st</sup> defendant has applied to review the judgment of this court on the grounds that he had discovered new evidence which was not within his reach at the time the suit was heard by this court. The new evidence that the 1<sup>st</sup> defendant has discovered are the statements of accounts issued by the 1<sup>st</sup> plaintiff and some cash deposit slips which established that the plaintiff had paid to the

plaintiff a total sum of Ksh.300,000/=. This court had ruled in its judgment that there was no evidence that the 1<sup>st</sup> defendant had made any payment to the plaintiff on account of the loan which had been advanced to him. In its replying affidavit, the plaintiff has sworn that even if this court were to consider and take into account the “*new evidence*” it would still have arrived at the same decision putting into consideration the issues in dispute and the totality of the evidence adduced.

What were the issues in dispute in this case as between the plaintiff and the defendant? At page 12 of its said judgment, this court identified the issues for determination to be as follows;

- “(i) *Whether or not the plaintiff instructed the 2<sup>nd</sup> defendant to undertake a valuation of the suit land.*
- (ii) *Whether or not the 2<sup>nd</sup> defendant undertook a valuation of the suit land and prepared a valuation report.*
- (iii) *Whether or not the plaintiff relied on the said valuation report and advanced a sum of Ksh.1,2 million to the 1<sup>st</sup> defendant on security of the said property.*
- (iv) *Whether or not the 1<sup>st</sup> defendant defaulted in repaying the said sum thus necessitating the plaintiff to realize the security charge.*
- (v) *Whether the 2<sup>nd</sup> defendant was professionally negligent when he failed to establish the particulars of the suit property before valuing it.*
- (vi) *Whether the plaintiff is entitled to be paid damages on account of the said alleged professional misconduct.*
- (vii) *What orders should be made as regard to the issues in this case.”*

It is clear from the above issues, that the issues that were placed before this court for determination related to whether or not the 2<sup>nd</sup> defendant had professionally misconducted himself by preparing a false valuation report which made the plaintiff make a decision to advance a loan of Ksh.1.2 million to the 1<sup>st</sup> defendant based on the security of the suit property. The issue for determination by this court was not whether or not the 1<sup>st</sup> defendant paid the sum which was advanced to him as a loan by the plaintiff. In the circumstances of this case, the fact that the 1<sup>st</sup> defendant has discovered documents which established that he had repaid part of the loan advanced to him by the plaintiff will not substantially change the thrust of the judgment of this court on the issue of professional negligence by the 2<sup>nd</sup> defendant.

This court therefore agrees with the submission made by Mr. Musangi that the fact that the 1<sup>st</sup> defendant now has statements of accounts and deposit slips which establish that he paid a sum Ksh.300,000/= towards the repayment of the said loan advanced to him (*and which the plaintiff does not deny receiving*), it would not substantially change the said judgment of this court. In the premises therefore, I do hold that there is nothing that has been placed before me by the 1<sup>st</sup> defendant that would make this court review its judgment on account of the discovery of new matters or evidence. The said evidence which has been discovered is immaterial to the reasons which this court based its judgment.

The upshot of the above reasons is that the application for review by the 1<sup>st</sup> defendant must fail. It is hereby dismissed with costs to the plaintiff.

**DATED at NAKURU this 10<sup>th</sup> day of November, 2006**

**L. KIMARU**

**JUDGE**