



Civil Procedure and Practice

- • *Order 44 Civil Procedure Rules*
- • *What the court ought to consider in an application for review*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION MILIMANI

Civil Suit 645 of 2003

ORIENTAL COMMERCIAL BANK LTD.....
.....PLAINTIFF

VERSUS

CEPHAS OSORO.....1ST
DEFENDANT

KENNEDY MONARI.....2ND
DEFENDANT

ULRICH JOHNSON3RD
DEFENDANT

ESTHER NYARENCHI OSORO.....4TH
DEFENDANT

RULING

The plaintiff's Notice of Motion is brought under Order 44 of the Civil Procedure Rules and seeks the prayer;

“That the Honourable court be pleased to review its ruling and order of 11th

March 2005 dismissing the plaintiff's application dated 27th May 2005 as against

the 1st defendant.”

The plaintiff filed an application for summary judgment against the defendants. By its ruling dated 11th March 2005, the court dismissed the application, as against the 1st defendant. The basis of that dismissal was the plaintiff's failure to annex statement of 1st defendant's accounts to prove the 1st defendant's indebtedness.

The plaintiff by the present application states that it was granted leave to file a supplementary

affidavit, to the summary judgment application. leave was granted on 19th July 2004 for that affidavit to be filed within 10 days. The plaintiff submitted that after that leave was granted the parties engaged in settlement negotiation and because plaintiff believed that the matter would be amicably settled, it did not file the supplementary affidavit.

That when those negotiation failed, the plaintiff requested by correspondence, the defendant to consent to the filing of that supplementary affidavit out of time, but the defendant failed to so consent.

Plaintiff's learned counsel, Mr. Bundotich, stated that when the summary judgment application came for hearing the **"plaintiff was forced to go on without the supplementary affidavit."** Counsel argued that consequently the pertinent statements of account were not before court and the court proceeded to dismiss the application against the 1st defendant.

The plaintiff counsel said that the plaintiff has by its present application annexed those statements of account and submitted that the plaintiff's failure to submit the statements at the hearing of the summary judgment, as explained herein, fell within the ambit of Order 44 Rule 1. That the plaintiff had explained the sufficient reason to justify the orders being granted.

The application was opposed. The defence learned counsel, Mr. Masese argued that the plaintiff had not satisfied nor had it brought itself within the ambits of Order 44 to merit a review as sought.

Defence counsel faulted the plaintiff for failing to seek an extension of time to file a supplementary affidavit under Order 49.

Defence counsel also argued, that, to seek to have judgment entered against the 1st defendant by an application for review cannot be sustained because that matter was res judicata. Defence on this point relied on the case of MBURU KINYUA VERSUS GACHINI TUTI KLR [1978] page 69.

Relying on the case of HCCC MILIMANI NUMBER 29 OF 1995. UHURU HIGHWAY DEVELOPMENT LTD – VERSUS- CENTRAL BANK OF KENYA AND 2 OTHERS the defence stated that it was clear from this authority that the plaintiff had failed to bring new or important matter for the court to grant orders sought. Order 44 (1) provides:

" 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 an 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." (Underling mine).

For the plaintiff to succeed it ought to have first shown that it discovered a new and important matter which was not within its knowledge or could not be produced; the plaintiff, by its own admission knew of the existence of the bank statements. In the alternative the plaintiff could prove that review is necessitated by mistake or error apparent of the record or any other sufficient reason to succeed to have the decree reviewed.

The plaintiff did not prove an error or mistake and the plaintiff did not also show sufficient cause. The plaintiff when arguing the summary judgment application did not indicate to the court, nor seek the leave of the court to rely on the supplementary affidavit.

A case in point is NATIONAL BANK OF KENYA LTD V NJAU [1995 – 98] 2 EA 249, where it was held:

“A review may be granted wherever the court consider 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 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 the law. Misconstruing a statute or other provisions of law cannot be a ground for review.”

The plaintiff has failed to bring itself within the provision of order 44 and the application must fail.

The application dated 15th June 2005 is dismissed with costs to the 1st defendant.

Dated and delivered this 14th November 2005.

MARY KASANGO

JUDGE