

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.410 OF 2002

TOP DEK TRAVEL & TOURS LTD :::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

JOE M. MUTAMBU :::::::::::::::::::::::::::::::1ST DEFENDANT

DAVID KYALO MUTAMBU :::::::::::::::::::::::2nd DEFENDANT

JOSEPH KAMAU MUCHINA :::::::::::::::3rd DEFENDANT

RULING

This is application expressed to be brought under the provisions of Order L Rule 1, Order XXXIX Rules 1 and 2 Order XLIV Rules 1 and 2 and Order IXA Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 of Laws of Kenya. The 1st Defendant is the applicant and seeks two main orders. These are that this Honourable Court reviews its orders dated 26th March 2004 and that the interlocutory judgment entered against the applicant be set aside. The Application is sought on the following main grounds: that in the previous application dated 30th January 2004 the Applicant omitted to annex a draft defence and that the Applicant has a good defence.

In support of the application Counsel for the applicant argued that the Applicant's previous application dated 30th January, 2004 was dismissed on the basis that a draft defence was not annexed to the said application. A draft defence has now been annexed to this application which demonstrates a good defence. Responding to the Applicant's application Counsel for the Plaintiff submitted that the Applicant has not brought himself within the parameters of Order XLIV. In Counsel's view the proposed defence is not a new discovery. Failure to annex a draft defence was in fact canvassed. It is not a new and important matter either. Counsel further argued that the Applicant had not given any other sufficient reason to warrant review of the Order of 26th March 2004.

The above are the rival submissions. I have considered them. I have also considered the application itself, the affidavit in support of the application together with the annexures thereto. I have also considered the replying affidavit and the grounds of opposition. I take the following view of the matter. The Applicant's application is based primarily on the fact that a draft defence that was missing from his earlier application dated 30th January 2004 is now annexed to the present application and therefore my decision should be reviewed. With respect this is not a "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 order made" The annexed defence does not rely on any new material. It relies on material that has always been in the possession of the Applicant. The Applicant indeed does not pretend to have made any new or important discovery. He is satisfied with the averment that he has now annexed a defence which was not annexed to his earlier application of 30th January, 2004. With respect this is not what is envisaged by Order XLIV Rule 1. In any event failure to show a good defence was raised by the Plaintiff when the earlier application was made. Indeed the issue was canvassed and I made a finding on it. A complaint against this finding can only be made in an appeal and not by way of review.

The Applicant has not established any other sufficient reason to warrant a review of my order of 26th March 2004.

In the result the Applicant's application, dated 8th April, 2004 is without merit. It is accordingly

dismissed with costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of :