

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMEMRCIAL COURTS
CIVIL CASE NO. 1823 OF 2000

FURNCON LIMITED PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. DEFENDANT

R U L I N G

On 13th February 2001, Hewett J. (as he was) delivered a ruling in the application dated 16th October 2000 and dismissed the application. That application was seeking injunction to restrain the Defendant Bank from enforcing its power of sale over L.R. 15941 Kasarani-Nairobi. The application dated 1st October 2001 brought under Order 39 Rules 1 (a) and (b) and Order 44 Rule 1 is seeking two main Orders and these are Orders that the Respondent herein be restrained by way of injunction from selling, interfering, disposing or in any other way dealing with the Plaintiff's property known as L.R. No. 15941 Kasarani Nairobi until the hearing and determination of this application. The second order sought is that this Honourable Court be pleased to review its order/ruling dated 4th day of June 2001 and do issue an injunction as prayed in the Plaintiff's prayer for costs. The application is supported by Affidavit and annexures.

As the application has been heard, prayer for injunction pending the determination of this application is no longer available and the only prayer to be considered is that of Review. Order 44 Rule 1 (1) of the Civil Procedure Rules states as follows:

“1 (1) Any person considering himself aggrieved –

(a) by a decree or order for which an appeal is allowed but for which no appeal has been preferred; or

(b) by a decree or order for 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 on 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”.

The order complained of was made on 13th February 2001. The first application for review was made on 28th May 2001 and was dismissed admittedly on technicalities on 30th May 2001 (not on 4th June 2001 as alleged). The technicality was a simple one and that was that the decree or order sought to be reviewed was not annexed. Leave to appeal was granted. The Applicant did not appeal, but waited for another four months to bring this application. First even the period between 3rd February 2001 and 28th May 2001 represented inordinate delay, but if this is not enough, even the period between 30th May 2001 when the first Review application was struck out in limine for absence of a decree or an order to 1st October 2001 when this application was brought is equally inordinate. Thus the application has not been made without unreasonable delay.

Secondly, the Applicant states that there is a mistake on the face of the record and that new evidence has come to light and annexes exhibit SNK 3 Losses Assessment Report as constituting the new evidence that was not available at the time the matter was heard. I think the law is clear. In order that the party may rely

on the question of new and important matter or evidence which was not within his knowledge or could not be produced by him at the time when the decree was made, the party needs to demonstrate that the party did exercise due diligence, but notwithstanding that exercise of due diligence the new evidence was not within his knowledge or could not be produced by him at the time the decree or order was made.

In this case the party had an advocate and knew or ought to have known at the very beginning of the case (for it was the one which in its Affidavit in support of the first application dated 16th October 2000; alleged at paragraph 3 several breaches committed by Respondent including charging of enormous and oppressive interests) that it was required to prove the allegations it had made with hard facts including particulars of particular calculations. He failed to do so and now realises that those were necessary after its failure. One cannot say that they requirements of proper and well researched particulars which would have included a report such as is now being produced were matters not within its knowledge or evidence that could not be produced with due diligence. One cannot say they were new matters. This part of Rule 44 was not meant to be used by a party who upon realising its failure after the suit is dismissed mends the fences and then calls that which he should have done but failed to do new evidence or evidence he could not have produced earlier with due diligence. The party must demonstrate to the satisfaction of the court that the party did indeed exercise due diligence but was not able to produce that evidence or that having exercised due diligence that evidence was not within its knowledge. The standard as to the requirement is that of a reasonable man and the court must ask itself if a reasonable litigant duly exercising its diligence could not have had the knowledge of that new evidence or could not have produced it at the time the order or decree was made. It is not enough that the omission has been alluded to by the court as was the case here.

I am not satisfied that what is being sought to be introduced now is new evidence that could not have been availed at the time the order was made, neither am I satisfied that with due diligence the Applicant could not produce it. The Applicant had relationship with the Defendant which was governed by documentary evidence. It filed the suit on 17.10.2000. Hearing of the application was on 30th January 2001. The Report should have been availed during the hearing date. It was not availed and that was one of the reasons for the dismissal of the first injunction application. All I can see is that the Applicant wants a second trite at the case as it believes it is now better prepared. That cannot be a ground for review. I do not see any mistake apparent on the record in that decision and I have not been shown one.

These were the grounds for this application for review and holding as I have held above that the same cannot succeed, this application must be and is hereby dismissed with costs to the Respondent Bank. Orders accordingly.

Dated at Nairobi this 26th day of October 2001.

ONYANGO OTIENO

JUDGE