



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 602 OF 1994

DORMEL GOWNS LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

PETER MBUGUA KIMANI.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 18th September 2020 brought under Section 1, 1A, 3, 3A and 80(a) of the Civil Procedure Act, and order 45 rule 1 of the Civil Procedure (Revised) Rules of 2010 Laws of Kenya and other enabling provisions of the law.
2. It seeks orders:-
 1. *That pending the hearing of this application and considering the new and compelling evidence the honourable court be pleased to review, vary or set aside its judgment delivered on 28th May 2020 and any other consequential orders.*
 2. *That this honourable court be pleased to make any order that it may deem just and expedient.*
 3. *That the costs herein be in the cause.*
3. The grounds are on the face of the application and are set out in paragraph (1) to (7).
4. The application is supported by the affidavit of Margaret Wairimu Magugu, the plaintiff/applicant herein sworn on the 18th September 2020 and a further affidavit sworn on 6th October 2020.
5. The application is opposed. There are grounds of opposition filed by the defendant/respondent on the 20th November 2020.
6. On the 25th November 2020, the court with the consent of parties directed that the application be canvassed by way of written submissions.
7. It is the plaintiff's/applicant's submissions that she has obtained very crucial evidence which evidence could not be obtained during the trial despite effort to have it. That the discovery of this new evidence, upon admission by this court will have important influence on the case and will lead this court to an entirely new decision. Further that the Agricultural Finance Corporation has confirmed vide their letter attached to the applicant's affidavit that it had received money from S.W. Waweru Advocate and released the title documents to him.
8. She has put forward the case of **Republic vs Public Procurement Administrative Review Board & 2 Others [2018] eKLR**. She also relied on order 45 rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. She submits that the main contention between the parties is that the plaintiff/applicant has failed to prove that the loan arrears were settled in full by the Advocate S. W. Waweru before his demise in 1999 (page 23 of the Judgment).
9. She states that neither herself nor her counsel had access to this information during the trial. That this new evidence could have had an important influence on the result of the case of the same was not available at the trial. She further states that this application was filed without unreasonable delay. The applicant received the letter for Agricultural Finance Corporation on 11th September 2020 and filed this application on 18th September 2020. She prays that the application be allowed.
10. The defendant/respondent on the other hand submits that the plaintiff and the defendant entered into an agreement dated 4th December

1992 for sale of the suit property for a consideration of Kshs.1,733,600.00. The completion date was 28th February 1993. Out of the purchase price, Kshs.750,000/- was to be paid to Agricultural Finance Corporation by M/S S. W. Waweru Advocate who was acting for both parties

11. He further states that the issue of payment of Kshs.750,000/- is not new evidence as the same was considered by the court. Failure to pay the purchase price before the completion date rendered the agreement a nullity. It is his further submission that the plaintiff/applicant has failed to demonstrate that she deserves the orders sought. He prays that the application be dismissed with costs.

12. I have considered the notice of motion and the affidavits in support. I have also considered the grounds of opposition and the written submissions. The issue for determination is whether this application is merited.

13. **Order 45 rule 1** of the Civil Procedure Rules provides that:-

“(1) 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 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.”

14. The plaintiff/applicant has attached to her supporting affidavit a letter dated 11th August 2020 by John Kithinji who signed for the Managing Director Agricultural Finance Corporation, the said letter reads:-

“Kariuki & Company Advocates

Golf View Office Suits

6th Floor, Office No B6 (i) (a)

Wambui Road, Muthaiga

P. O. Box 7714-00100

NAIROBI

Dear Sir/Madam

RE: PEER MBUGUA KIMANI

LOAN ACCOUNT NO 271190

We refer to the above mentioned matter and your letter dated 8th September 2020.

Please note that the above account has been fully settled and has resultantly been closed and archived. The security documents were delivered to the firm of S. W. Waweru & Co. Advocates on the strength of an undertaking on the 15th of December 1992.

Yours faithfully,

JOHN KITHINJI

FOR MANAGING DIRECTOR

Encl”.

15. The said letter does not say how much loan amount was paid nor does it confirm the amounts were paid by S. W. Waweru & Co. Advocates. The letter goes further to state the security documents were delivered to the said advocate on the strength of an undertaking on the 15th December 1992.

16. This court’s finding was that the full consideration had not been paid to the vendor Peter Mbugua Kimani. The letter above does not confirm anything. I find that it does not amount to new and important evidence to warrant this court to review its judgment. The letter alone does not meet the threshold for grant of the orders under order 45 rule 1 of the Civil Procedure Rules.

17. All in all, I find that this application is an abuse of the court process. The same lacks merit and it is dismissed with costs to the defendant/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 29TH DAY OF APRIL 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Gathoni for Mr. Kariuki for the Plaintiff/Applicant

Mr. Gitari for Mr. Mbaabu for the Defendant/Respondent

Phyllis – Court Assistant