



REPUBLIC OF KENYA



**Husseni Dairy Limited v Southern Credit Banking Corporation Ltd & another (Civil Case 252 of 2008) [2025] KEHC 3027 (KLR) (Commercial and Tax) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3027 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**CIVIL CASE 252 OF 2008**  
**A MABEYA, J**  
**MARCH 17, 2025**

**BETWEEN**

**HUSSENI DAIRY LIMITED ..... PLAINTIFF**

**AND**

**SOUTHERN CREDIT BANKING CORPORATION LTD ..... 1<sup>ST</sup> DEFENDANT**

**AKBAR K. KURJI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before Court is the Motion on Notice dated 10<sup>th</sup> June 2024 by the defendant. It was brought under Section 34, 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Order 45 Rules 1 and 2 of the Civil Procedure Rules.
2. It sought the review, variation and the setting aside of the ruling dated 21<sup>st</sup> March, 2024 and to allow the submission of a parallel audit report on the recalculation of interest due on the facility.
3. The Motion was supported by the affidavit of Brian Kilonzo sworn on even date. The grounds for the application were that: a judgment had been entered on 4<sup>th</sup> September, 2020 directing the recalculation of interest at 14% per annum on the facility. That pursuant thereto an application was made on 5<sup>th</sup> June, 2023 for the appointment of a joint accountant agreed upon by the parties and in default the Audit Firm of Francis Kieti & Associates be appointed.
4. That since at the time, the defendant was undergoing a voluntary liquidation before the Central Banking Kenya, the defendant had released its entire staff including those in its legal department. As a result, the defendant did not respond to the application and the Firm of Kieti & Associates was appointed to undertake the recalculation of the interest.



5. That for the reason of the aforesaid voluntary liquidation, the defendant was not able to engage with or avail its documents to the aforesaid Kieti & Associates. The said Audit Firm therefore undertook the exercise without the input of the defendant and made a finding that a sum of Kshs.36,322,025/= had been overpaid as interest. As a result, judgment was entered against the defendant for the said amount.
6. That there was new and important evidence that had arisen. That the defendant had subsequently engaged the firm of Samson & Associates who had undertaken the Audit recalculation with the defendant's documents and found that the report by Kieti & Associates was erroneous. That it had captured wrong figures as the principal amounts on which the interest was recalculated. That a fresh recalculation based on the correct figures will show that there was no amount due to the plaintiff.
7. The application was opposed vide the replying affidavit of Mahmood Kassam Miyanji sworn on 17<sup>th</sup> June, 2024. It was contended that the defendant's advocates had conceded to the application that led to the appointment of Kieti & Associates. That in the premises Kieti & Associates had been appointed by consent. This was followed by a joint letter of consent dated 11<sup>th</sup> July, 2023.
8. That the said Firm finalized a report which was filed in court that resulted in the judgment that the Court entered on 21<sup>st</sup> April, 2024. That the application was made after inordinate delay. The submission of a subsequent audit/recalculation report would be a fishing expedition by the defendant.
9. That there was no new evidence that had been availed to warrant the review of the orders of 21<sup>st</sup> March, 2024. That the issue of the amount of loan disbursed had been determined with finality in the Judgment of 4<sup>th</sup> September, 2020 and it was res judicata. That in the premises, the application was without merit and should be dismissed.
10. The defendant filed a supplementary affidavit by Brian Kilonzo sworn on 24<sup>th</sup> June, 2024. He produced the report by Samson & Associates dated 24<sup>th</sup> June, 2024. That report made findings that the report by Kieti & Associates did not take into account the amount actually advanced to the plaintiff nor did it factor a huge interest annuity given to the plaintiff of Kshs.19,813,292.20. He urged the Court to allow the application.
11. I have considered the rival contestations. I have also carefully considered the parties' submissions dated 28<sup>th</sup> August, 2021 and 28<sup>th</sup> October, 2024 respectively. I have also considered the authority cited in the said submissions.
12. This is an application for review. The jurisdiction to review an order/ruling or decree/judgment is donated by section 80 of the *Civil Procedure Act* and procedurally perfected in Order 45 Rules 1 and 2 of the Civil Procedure Rules. The same is discretionally. But like all other discretions, the same must be exercised judiciously and not capriciously. It must be in accordance with the principles laid down in Order 45 aforesaid. These are; where there is an error apparent on the face of the record, where there is discovery of new evidence that even with diligence could not be obtained and produced by an applicant at the time the order or decree was made or passed and thirdly for any sufficient reason.
13. The present application was brought under the second principle, that there is discovery of new evidence which was not available at the time the impugned order was made.
14. In *Paul Mwaniki vs National Hospital Insurance Fund Board of Management (2020) eKLR*, the Court observed that: -

“I am clear in my mind that the reasons offered by the applicant do not qualify to be sufficient reason withing the meaning of the rules cited above nor are they analogous or ejusdem generis to the other reasons stipulated in Order Rule 1. For this holding I rely on Evan Bwire



vs Andrew Nginda where the Court held that ‘an application for review will be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh. The principals which can be culled out from the above noted authorities are: -

- i) A court can review its decision on either of the grounds enumerated in order 45 Rule 1 and not otherwise.
- ii) ...
- iii) ...
- iv) ...
- v) ...
- vi) While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii) More discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such material or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii) ...”

15. In the present case, the Court determined that interest was to be recalculated way back on 4<sup>th</sup> September, 2020. As at that time, as it is now, the defendant was represented by competent advocates. At that time, the defendant was not yet in its voluntary liquidation. If it was, that was not disclosed and neither was the court told when the process of voluntary liquidation commenced.
16. No action was taken between 4<sup>th</sup> September, 2020 until early 2023 when the plaintiff made an application to effectuate the order for interest recalculation. When the matter came up on 21<sup>st</sup> June, 2023, the defendant’s advocates sought time to seek instructions. On 10<sup>th</sup> July, 2023, the said advocates attended Court and allowed the Motion to be allowed as prayed.
17. On record is a letter by the defendant’s advocates dated 11<sup>th</sup> July, 2023 addressed to the defendant. In it, the said advocates professionally advised the defendant of the order for the recalculation of interest in terms of the Judgment of 4<sup>th</sup> September, 2020.
18. From the foregoing, it is quite clear that there was no surprise that was flashed on the defendants. They knew from way back in September, 2020, that an order for the recalculation of interest had been made. They had ample time until July 2023 to prepare all their documents ready for the recalculation. They failed to do so probably waiting to be liquidated and leave the Plaintiff’s Judgment up and dry.
19. The view the Court takes is that, the internal happenings or arrangements in the 1<sup>st</sup> defendant is not good reason to forestall a legal process. Whether it was being wound up or liquidated, that did not stop the proceedings herein from going on. The defendant’s decision to lay off its critical staff was its own internal decision made well knowing the consequences. It is not good reason to affect the plaintiff’s rights that have accrued or to turn back the clock and lead to a review of a decision made procedurally.



20. In any event, the audit report of Samson & Associates cannot be termed as new evidence that would warrant the reviewing of the order of this Court of 21<sup>st</sup> March 2024. All the material the said audit firm used were there from as early as 4<sup>th</sup> September, 2020 when the Judgment was made. Further, there was no allegation that the report of Kieti & Associates went outside the parameters set by the Judgment of Odero J of 4<sup>th</sup> September, 2020.
21. In view of the foregoing, I find no merit in the Motion dated 10<sup>th</sup> June, 2024 and hereby dismiss the same with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT KISUMU  
THIS 17<sup>TH</sup> DAY OF MARCH, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

