



REPUBLIC OF KENYA



**KENYA LAW**  
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**Allen Swiss Management Limited v Serenity Swiss Investment Limited & another  
(Civil Suit E002 of 2024) [2024] KEHC 17263 (KLR) (25 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 17263 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CIVIL SUIT E002 OF 2024  
G MUTAI, J  
NOVEMBER 25, 2024**

**BETWEEN**

**ALLEN SWISS MANAGEMENT LIMITED ..... PLAINTIFF**

**AND**

**SERENITY SWISS INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JAMES JOHN KINUTHIA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a Ruling on an Application dated 25<sup>th</sup> June 2024 vide which the Applicant seeks to review the orders made by Magare, J on 18<sup>th</sup> April 2024.
2. The Application is brought under the provisions of Section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules. It is materially based on an allegation that the applicant has obtained new and important information which was not within its knowledge or control at the time the decision by my brother was made.
3. The Defendants filed Grounds of Opposition and a Replying Affidavit sworn on 1<sup>st</sup> July 2024 by James John Kinuthia. They opposed the application and reiterated the contents of the application, stating that there was no new matter or evidence that would not have been established with the exercise of due diligence by the applicant at the time of the hearing of the application that led to the impugned ruling.
4. It was deposed that the information on share capital and the number of ordinary shares was not new and was always available at the company registry and was within the knowledge of the Applicants.
5. Further, it was deposed that the applicants were not deserving of the audience of the court as they were in contempt of the ruling and order of the court.



6. The Applicant filed submissions dated 16<sup>th</sup> September 2024. It was submitted that this is a proper application for review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
7. It was also submitted that the Plaintiff herein discovered new facts in that Serenity Investment Limited, whose participation is based on shareholding in Allena Swiss Management Ltd, upon directions being issued by Kizito, J, directing this matter to be placed before the Kwale Court.
8. Counsels for the applicant further submitted that Serenity Investment Ltd became a shareholder as a result of the resolution, and the existing shareholders had denied signing the resolution.
9. Further, it was submitted that all that was deposed in the Replying Affidavit of the Defendants ought to have been in the knowledge of the Plaintiff.
10. On temporary injunction, it was submitted that the Applicant had achieved the threshold for an injunction which should issue. Reliance was placed, inter alia, on *Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR*.
11. It was urged that, as the Respondents obtained the ruling through fraudulent and illegal activities, an injunction should issue to protect the Applicants.
12. The Defendants filed submissions and contended that there was no new matter of evidence. That the CR12 dated 4.8.2024 and CR12 dated 4.2.2024 were in the knowledge of the Plaintiff, but no CR12 was produced, as observed by the Honourable Judge in the impugned Ruling.
13. It was as such submitted that the application did not satisfy the threshold for review within the meaning of Order 45 of the Civil Procedure Rules.
14. It was submitted that the issue of fraud was serious and such an issue would only be determined at the full hearing on the merits.
15. The issue for my determination is whether the Applicant has met the legal threshold for an order of review issue on account of the discovery of a new and important matter or evidence.
16. The Jurisdiction of this Court to grant review is well set out in the law.
17. Section 80 of the *Civil Procedure Act* states that: -

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

Section 63 (e) of the *Civil Procedure Act* states that:

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.”

18. Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

“(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

19. I associate myself with the reasoning of Kuloba, J in *Lakesteel Supplies v Dr Badia and Anor Kisumu*; HCCC No. 191 of 1994, where he opined that:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the ruling was made.”

20. The ground for review is said to be that there has been a discovery of new facts which were not within the knowledge of the Applicant at the time the decision was made. The Court of Appeal in *Mahinda v Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and



sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”

21. The ground of discovery of new matter or evidence is a strict one, and the applicant had the duty to prove it. The thread that runs through the judicial authorities and literary works crystalize the position that where review is sought on the discovery of new matter or evidence, the court must be satisfied that the evidence sought to be produced was not within its knowledge, or could not be adduced by it when the decree or order was passed or made. This is in line with Order 45 Rule 3 (2) of the Civil Procedure Rules which states thus: -

“Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”

22. Mativo J (as he then was) in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR considered the import of Section 80 of the *Civil Procedure Act* inter alia as follows: -

“Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter 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.”

23. Was the alleged action by the Respondents within the knowledge of the Applicant? It appears to me that the court was aware of the raised issues. At paragraph 22 of the Ruling, the court stated as follows:

“The Applicant filed an affidavit stating that the 3<sup>rd</sup> Defendant’s share capital was 1600 and not 1200. The Applicant has now gone ahead and used his signature to open a bank account No. 903XXX12 at NCBA Bank.”

At paragraph 20, the court stated: -

“The Applicant stated that the share capital was illegal, irregular and un-procedural...”

24. In my view, the alleged new facts were within the knowledge of the applicant and could have been availed, and no share capital was changed. Having so found and noting that the Applicant did not base the review application on the existence of a mistake or error apparent, I also do not see any sufficient cause upon which review may be granted. I say so because I am not persuaded that the reasons offered by the applicant amount to ‘sufficient reason’ within the meaning of the rules cited above, nor is it analogous or e*jusdem generis* to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda* (2000) eKLR where the court held that “an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.”

25. As such, the alleged discovery of new evidence was neither sufficiently proved by the applicant in accordance with Order 45 Rule 3(2), nor is it convincing enough to warrant a review.

26. Therefore, I am unable to agree with the Applicant that a case for review has been made.

27. The Applicant submitted heavily on a temporary injunction. As submitted by the Respondents, I also note the Applicant raised serious issues of fraud against the Respondents. At this point, as a case has



not been made for any interim relief and the justice of the matter lies in the expeditious disposal of the suit, which I hereby direct.

28. Prima facie, the Applicant did not substantiate any ground upon which a temporary injunction may issue in accordance with Order 40 of the Civil Procedure Rules.
29. I find no merit in the Application, and the same is dismissed.
30. The upshot of the foregoing is that I make the following Orders:
  - i. The Notice of Motion Application dated 25<sup>th</sup> June 2024 lacks merit and is dismissed.
  - ii. The matter shall be listed before the Deputy Registrar of the Kwale High Court on 6<sup>th</sup> October 2025 for the purpose of pre-trial directions.
  - iii. The Defendants are granted the costs of the Application.

**DATED AND SIGNED AT MOMBASA ON THIS 25<sup>TH</sup> DAY OF NOVEMBER 2024. RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Waziri, for the Applicant;

Mr Waliaula, for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents; and

Arthur – Court Assistant.

