



Fahari Building & Civil Engineering Limited v Attorney General (Commercial Case 005 of 2020) [2024] KEHC 16957 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16957 (KLR)

FORMERLY MILIMANI HIGH COURT COMMERCIAL CASE NO. 151/2016

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE 005 OF 2020
F WANGARI, J
DECEMBER 6, 2024**

BETWEEN

FAHARI BUILDING & CIVIL ENGINEERING LIMITED PLAINTIFF

AND

THE HON ATTORNEY GENERAL DEFENDANT

RULING

1. This is a Ruling on an Application dated 29/11/2023 and filed by the Defendant/ Applicant seeking for stay of execution and the review of the Judgment of this Court dated 17/11/2023. The Application is brought under the provisions inter alia Order 10 Rule 11 and Order 50 Rule 1 of the [Civil Procedure Rules](#) and order for the reopening of the defence case.
2. The application is materially based on the ground that during the hearing of the suit, the defence closed its case due to non-availability of evidence and non-compliance. New and important evidence has been discovered, which after the exercise of due diligence, it could not be produced by the Defendant then.
3. The Respondent filed their Grounds of Opposition dated 03/01/2024 stating that the application is fatally defective as it is omnibus in nature. Further, it was deponed that the Defendant is asking this court to review its final orders and seeking to re-litigate a matter that was determined on merits. The Defendant is expected to show that the new evidence was not within its knowledge even after exercising due diligence.
4. The application was disposed of by way of written submissions, and both parties complied by filing their rival submissions.



Analysis and Determination

5. I have perused the Application and the response thereto. I have also considered the filed submissions. The issues for determination are;
- i. Whether the Applicant has met the legal threshold for an order of review on discovery of new and important evidence that was not within the knowledge of the Applicant.
 - ii. If the (i) above is merited, whether stay orders should issue and defence case reopened.
6. The Applicant made no reference to the provisions of the law relating to review of court orders. The Jurisdiction of this Court to grant review is well set out in the law. 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”.
7. Order 45 Rule 1 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”
8. In reference to the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 he stated as follows;
- “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.”

9. From the provisions of Order 45 (1) (b) of the *Civil Procedure Rules*, it must be shown that there was an error or omission on the part of the court that needs correction. If there was a discovery of new and important matter discovered after the order sought to be reviewed. From the application and the supporting affidavit, it is stated that new evidence was discovered after the judgment of the court.
10. From the Supporting Affidavit dated 29/11/2023, the Acting Director of Kenya School of Government, Matuga Campus in acknowledging that the Defendant had only filed the Statement of Defence and closed its case on the date of hearing, it was deponed that the institution discovered new and important evidence that was not within their knowledge.
11. I have perused through the documents annexed to the application and the Witness Statement by the former Director of School of Government, Matuga Campus. The evidence alleged to be ‘new’ is evidence that if due diligence was carried out, the information ought to have been with the Defendant as the documents involved are public documents as the works involved was the construction of a conference facility, whose instructing authority was the Ministry of Public Works, and the client was a Government Institution.
12. I find that the Defendant indolent in preparation for the defence, which includes gathering documentary evidence. Equity aids the vigilant not the indolent. From the above, I find that the application has not met the threshold for review under Order 45 (1) (b) of the *Civil Procedure Rules*.
13. The application for review having failed, the prayer for stay of execution of judgment and the reopening of the defence case fails. The application having been dismissed, costs are awarded to the Respondent.
14. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. That the Notice of Motion dated 29/11/2023 has no merits and is hereby dismissed.
 - b. Costs of the application to the Respondent.
 - c. File is hereby closed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA, ON THIS 6TH DAY OF DECEMBER, 2024.

F. WANGARI

JUDGE



In the presence of;

N/A by the Applicant

Mr. Masore Advocate for the Respondent

Brian, Court Assistant

