



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO.6 OF 2017

RUSU INVESTMENT LTD.....PLAINTIFF/RESPONDENT

VERSUS

KAISUGU LTD.....RESPONDENT

RULING

1. The Application coming for consideration is the one dated 23/2/2021 seeking the following orders;

(i) THAT this Application be certified urgent (SPENT)

(ii) THAT pending the hearing and determination of the Application, this court be pleased to order stay of execution of the judgment and decree dated 5/2/2021 and all consequential orders.

(iii) THAT this court be pleased to review and/or set aside the judgment and decree of this court dated 5/2/2021 and all consequential orders.

(iv) THAT costs of the Application be provided for.

2. The Application is based on the ground that there is an error apparent on the face of the record in the sense that the Plaintiff/Respondent's purported supplied firewood were 4,637,490 kilograms at the rate of Kshs.4 when translates to Kshs.18,849,960.20 and not Kshs.31,899,451.20 as entered in the judgment dated 5/2/2021.

3. The Application is supported by the Affidavit of PHILIP BIEGON dated 23/2/2021 in which it is deposed that very important and material evidence has been discovered relating to the firewood transaction which evidence was not available at the time when the matter proceeded and subsequently the judgment entered in favour of the Plaintiff/Respondent.

4. Further that vide letter dated 4/12/2018 whose response was received by the Respondent on 23/11/2020, the Defendant did obtain copies of payment vouchers for the alleged firewood supply by the Plaintiff/Respondent.

5. THAT together with the vouchers are copies of the sale agreements indicating the source of the firewood together with a statement of the Defendant's firewood transaction supervisor.

6. THAT from the documents and comparisons of the documents supplied by the Plaintiff/Respondent one can clearly realize that the firewood purported to have been supplied by the Plaintiff/Respondent was actually the Defendant/Applicants firewood for which the transporters thereby had been paid but the Plaintiff/Respondent has out of craft forged documents to appear like it is the supplier.

7. THAT the Defendant/Applicant had during the period in question paid a total of Kshs.47,619,813 for firewood and if at all the Plaintiff/Respondents purports to have supplied firewood, he ought to have stated the source of the firewood and why transporters were being paid by the Defendant/Applicant.

8. THAT further, there is an apparent error on the face of the record in the sense that if indeed, the Plaintiff/Respondent supplied 4,637,490 Kilograms as purported and at the rate of Kshs.4 per kilo then the judgment sum ought to have been 18,549,960 and not the sum of Kshs.31,899,451.20 as entered in the judgment.

9. The Plaintiff/Respondent filed a Replying Affidavit dated 4/3/2021 in which it is deposed that there is no error apparent on the face of the

record since the pleadings demonstrate how Kshs.31,899,451 was arrived at.

10. That the suit proceeded to full hearing and the Defendant/Applicant did not contest the tabulation during the hearing and at submission stage.
11. THAT the intention for seeking review of the judgment is to bring new evidence at execution stage.
12. THAT the cause of action arose over eight years ago and thus only fair that litigation comes to an end.
13. The parties filed written submissions which I have duly considered. The Defendant/Applicant submitted that the Defendant/Applicant submitted that the Defence dated 1/8/2017 was filed after the new Managing Director Philip Biegon had joined the Defendant and the matter proceeded to hearing without any documents to counteract the plaintiff's allegations.
14. That investigations were launched and a report obtained showing fraudulent dealings which have purported further inquiry as the vehicles appearing in the transaction listing relied on by the plaintiff were for the transporters who had already been paid and the firewood that was transported belonged to the Defendant and further that a sum of Kshs.47,619,813 had already been expended but there were no documents to support this finding.
15. The Defendant further submitted that a letter was sent dated 4/12/2018 to the Auditors and the Response was received dated 9/11/2020 way after the case had proceeded and the matter set for judgment.
16. That the documents received from Mazars Auditors show that all the transaction listings the plaintiff was replying on in respect of transporters had already been paid as shown by petty vouchers, the reconciled payment schedule and Affidavits of some transporters, the sale agreements for the purchase of firewood and the statement of Yegon Benson who was the firewood supervisor which documents are annexed to the Supporting Affidavit dated 23/2/2021.
17. The Defendant/Applicant further submitted that there is an error apparent on the face of the record in that the plaintiff's claim ought to be Kshs.18,849,960.20 and not 31,894,450.20 as indicated in the judgment.
18. Further that the court is empowered under section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules to grant review on the basis of an error apparent on the face of the record and on the discovery of a new and important matter or evidence that was not in the possession of the Application when the case was heard.
19. The Plaintiff/Respondent opposed the Application and stated in his submissions that the Managing Director PHILIP BIEGON took over the company in the year 2017 and during the defence hearing he sent one GILBERT TOO.
20. Further the Defendant/Respondent submitted that the sum of Kshs.31.899,451.20 was inclusive of interest.
21. The Defendant also submitted that the receipts serial numbers are different from the ones produced by the plaintiff and the same are meant to cause confusion and that they relate to different transactions.
22. I have considered the Affidavits filed here and also submissions by both parties. The Defendant/Applicant carried out investigations and the Report was availed when this matter had been heard and was awaiting judgment.
23. The Plaintiff/Applicant opposed the Applications for review and stated in their submissions that the purported investigation cannot be said to be new and important evidence or discovery to warrant a review.
24. Justice Kimaru, in *Baneland Enterprises versus NIC Bank Ltd & Another (2009) eKLR*, stated as follows in regards to review on grounds of discovery of new and important matter or evidence ***"For this court to favourably consider an application seeking to review a decision of this court on the grounds that the applicant had made discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge of an applicant at the time the original application was argued under Order 44 Rule 1 of the Civil Procedure Rules, it must be satisfied that such new and important matter or evidence is of such a nature that it would lead any court of law applying its mind to the facts and the law applicable to the case can reach a determination that if the court which heard the original application had the advantage of the new evidence, it would have reached a different decision other than the one that was rendered. The applicant must also establish that the new and important matter or evidence was not within its knowledge after the exercise of the normal diligence required of any conscientious litigant."***
25. I find that the Plaintiff/Respondent did not controvert the evidence by the Defendant that there are documents showing that payment has already been made.
26. The allegation of fraud on the part of the Plaintiff/Respondent is a serious issue that calls for investigations.
27. I also find that the computation of Kshs.31,894,451.20 contains a glaring error to warrant review by this court.
28. The court of appeal in *National Bank of Kenya Limited versus Ndungu Njau (1997) eKLR* stated as follows;

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

29. I allow the Application dated 23/2/2021 and set aside the judgment and decree dated 5/2/2021 and I also set aside the proceeding and direct that this case starts denovo.

Delivered, signed and dated at Kericho this 9th day of July 2021.

A. N. ONGERI

JUDGE