



REPUBLIC OF KENYA



**KENYA LAW**

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**Youth Enterprise Development Fund Board v Rafiki Microfinance Bank Limited (Commercial Civil Case 384 of 2016) [2021] KEHC 228 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 228 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL CIVIL CASE 384 OF 2016**  
**DAS MAJANJA, J**  
**NOVEMBER 11, 2021**

**BETWEEN**

**YOUTH ENTERPRISE DEVELOPMENT FUND BOARD ..... PLAINTIFF**

**AND**

**RAFIKI MICROFINANCE BANK LIMITED ..... DEFENDANT**

**RULING**

1. The application for consideration in this ruling is the Defendant's Notice of Motion dated 17<sup>th</sup> March 2021 made under section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 rule 1 and 2 of the *Civil Procedure Rules* beseeching the court to review the judgment dated 5<sup>th</sup> October 2020 and direct that the suit be dismissed.
2. The application is supported by the affidavit of the Defendant's Managing Director, Ken Obimbo, sworn on 16<sup>th</sup> March 2021. The Plaintiff opposes the application through the replying affidavit of its Acting Chief Executive, Benson Muthendi, sworn on 7<sup>th</sup> May 2021. Both parties have filed written submissions in support of their respective positions and which their advocates supplemented by oral arguments.
3. Since the Defendant seeks to review the judgment of the court, it is necessary to set out the background of the matter which can be gleaned from the pleadings and judgment. Under a Deed of Guarantee dated 26<sup>th</sup> November 2012 ("the Deed of Guarantee"), the Plaintiff advanced the Defendant a loan of KES. 100,000,000.00 for onward lending to persons and institutions in accordance with the Policies and Procedures which formed part of the Deed. Under the Deed of Guarantee, the Defendant provided a Bank Guarantee equivalent to KES. 100,000,000.00 from Chase Bank Limited ("Chase



- Bank”). Unfortunately, when Chase Bank was placed under receivership, the Plaintiff demanded a fresh guarantee from the Defendant. The Plaintiff alleged that the Defendant ignored the demand.
4. The Plaintiff also alleged the Defendant was in breach of the other covenants under the Deed of Guarantee including failing to provide support and cooperation during evaluation of the utilization fee and claim verification, granting loans to persons above the age provided for under the Credit Guarantee Scheme Operational Policies and Procedures and making very little disbursements so that only 40% (KES. 40,000,000.00) of the amount granted to it had been utilized.
  5. On 30<sup>th</sup> June 2016, the Plaintiff issued a notice of termination of the Deed of Guarantee and recalled the entire loan of KES. 100,000,000.00 and utilization fee. Thereafter it filed this suit seeking judgment for KES. 100,342,693.00, interest on the amount above at the rate of 6% p.a above the prevailing Central Bank of Kenya Prime Lending Rate as at 8<sup>th</sup> August 2016 till payment in full and costs.
  6. The Defendant denied the claim and stated in its defence that the guarantee issued by Chase Bank remained valid and legal despite the status of Chase Bank. It admitted that while it was undergoing operational constraints at the time of evaluation, it resolved the problems alleged by the Plaintiff. That it advised the Plaintiff of its willingness to comply with evaluation procedures but the Plaintiff failed to respond to its proposals and proceeded to terminate the agreement. It denied the allegation of dismal performance and stated that it had utilized more than 90% of the funds invested by the Plaintiff, both in loans and guarantees. It also contended that the termination of the Deed of Guarantee was premature and even if the same was found valid, the Plaintiff was not entitled to the amount claimed in the Plaintiff.
  7. The parties agreed that the case be heard on the basis of the witness statements, documents and submissions whereupon the learned judge reserved judgment on three issues for determination. First, whether the Defendant breached the terms and conditions of the loan granted to it by the Plaintiff. Second, whether the Defendant was liable to repay the loan sum of KES. 100,000,000.00 together with accrued interest and last, which party was liable to the costs of the suit.
  8. On the alleged breaches, the court found that the guarantee issued by Chase Bank was proper despite it being under receivership. It held that the Plaintiff notified the Defendant of the breaches pleaded but the Defendant failed to remedy those breaches hence it was liable to the Plaintiff for the amount claimed.
  9. Turning back to the application, the Defendant’s case is that it has discovered new evidence in its systems and records showing that it had actually offered support and cooperation after the Plaintiff issued to it the demand letter dated 30<sup>th</sup> June 2016, that it severally engaged the Plaintiff in the accounts reconciliation, which automatically negates the averment that it breached the terms of the Deed of Guarantee. To support this claim, the Defendant in its deposition referred to a trail of email exchanges between the parties which it states demonstrates that the parties were engaged in deliberations to ascertain how the KES. 100,000,000.00 was spent. The Defendant also stated the it was involved in a claim verification process until 27<sup>th</sup> November 2017 when the Plaintiff wrongfully terminated the relationship.
  10. The Defendant states that in the judgment, the learned judge ruled in favour of the Plaintiff primarily because the Defendant had admitted that it did not provide sufficient support to the Plaintiff for the claim verification process. It avers that from the new evidence, it is clear that the Defendant positively responded to the Plaintiff’s demand and that both parties willingly engaged in a claim verification process which information was not adduced before the court.
  11. The Defendant further depones that it could not access this new material and evidence which was not available or accessible to it before or during the trial. Thus, it urges the court to correct the notion that



the Defendant declined or failed to comply with the Plaintiff's demand letter dated 30<sup>th</sup> June 2016. It states that unless the review is effected, it will be subjected to execution.

12. In its response, the Plaintiff depones that all the material allegedly discovered by the Defendant's was in its possession as admitted the supporting affidavit of Ken Obimbo. It states that the Defendant has not shown that the information was not in its knowledge at that time of filing or hearing of the suit and that despite the exercise of due diligence it could not adduce it at the hearing or prior to delivery of the judgment. It avers that the Defendant had all the time to adduce the alleged newly discovered material since the matter was filed on 22<sup>nd</sup> September 2016 until the judgment was delivered on 5<sup>th</sup> October 2020, a period of more than 4 years.
13. The Plaintiff further adds that the alleged newly discovered evidence is immaterial to the Defendant's defence as there was an initial breach of the Deed of Guarantee as admitted by the Defendant in its letter dated 22<sup>nd</sup> July 2016. The Plaintiff urges the court to dismiss the application as the Defendant has not made out a case for review.
14. The application before the court is one for review of the judgment and decree under section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 Rule 1 of the Civil Procedure Rules which provides, in part, as follows;

45 (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. [Emphasis mine]

15. The Defendant's application is grounded on the discovery of new and important evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced at the time of the when the decree was passed. In *Rose Kaiza v Angelo Mpanju Kaiza* [2009] eKLR cited by the Plaintiff, the Court of Appeal considered the scope of review based on the ground of discovery of new and important evidence and cited, with approval, the following passage by Mulla on the *Indian Civil Procedure Code (15<sup>th</sup> Ed.)* at P. 2726:

Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new



and important matter which was not within the knowledge of the party when the decree was made.

16. The Court of Appeal echoed the same caution in *D.J. Lowe & Company Ltd v Banque Indosuez* CA NRB Civil Appl. Nai. 217 of 98 [1998] eKLR it observed as follows:

Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.

17. Based on the rule and decisions I have cited, an applicant must demonstrate that the facts constitute new and fresh evidence which was not available or within the its knowledge despite exercising due diligence. From the facts I have outlined above, the issue whether the Defendant failed to provide support and cooperation during the evaluation exercise as ground for breach of the Deed of Guarantee was material to the Plaintiff's case and was indeed pleaded in para. 6(a) of the Plaintiff. The Defendant specifically responded to this allegation at para. 4 and 5 of the Statement of Defence and in particular, it stated that in response to the termination notice, "[I]t further provided evidence of proper disbursement of the loan, in accordance with the terms and conditions provided by the Plaintiff. The said accounts are attached to the Defendant's list of documents. A further request was made to the Plaintiff, to reconsider its decision to terminate the agreement."
18. The reason I have harkened to the pleadings is to demonstrate that the Defendant knew that the allegations of breach were a material issue. As such it was obliged to produce all the evidence it intended to rely on to rebut the Plaintiff's case and support its defence. The trail of emails relied on by the Defendant and the copy of final account were at least available to it between 2016 and 2017 during the pendency of the suit hence the question is whether the Defendant exercised due diligence. At para. 6 of his deposition, Mr Obimbo states, "THAT the instant application has been filed timeously as the Defendant could access the new material and evidence, which material was not available or accessible to it before and during the trial."
19. The Defendant does not state or show how it exercised due diligence. It does not state where these newly discovered emails and reconciliation report were at the time of the hearing or state the reasons it could not produce them in support of its defence when it knew that the evidence was an essential part of its defence. I find and hold that the Defendant has not demonstrated that it exercised due diligence in regard to the material it now seeks to produce as new and important material.
20. I have read the Defendant's submissions and they appear to be an attempt to litigate the suit afresh. I reject this entreaty and for the reasons I have stated, I find that the Defendant has not met the threshold for review of the judgment dated 5<sup>th</sup> October 2020.
21. The Defendant's application dated 17<sup>th</sup> March 2021 is dismissed with costs to the Plaintiff.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Morara instructed by Morara Apiemi and Nyangito Advocates for the Plaintiff.

Mr Omamo instructed by Prof. Tom Ojienda and Associates Advocates for the Defendant.

