



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCC NO. 619 OF 2015**

DR. TARA CHAND.....PLAINTIFF

VERSUS

FAHARI TRADING KENYA (LTD).....1<sup>ST</sup> DEFENDANT

SHAHAZAD YOUSUF PIRWANI.....2<sup>ND</sup> DEFENDANT

ASHOK DAS KUMAR.....3<sup>RD</sup> DEFENDANT

JAVED ALLI.....4<sup>TH</sup> DEFENDANT

ANWAR MUHAMMED.....5<sup>TH</sup> DEFENDANT

ARAFAT MUHAMMED.....6<sup>TH</sup> DEFENDANT

BURLY TRADING KENYA LTD.....7<sup>TH</sup> DEFENDANT

**RULING**

1. Through the application dated 15<sup>th</sup> August 2019, the 5<sup>th</sup> and 6<sup>th</sup> defendants/applicants seek orders to review, revoke and/or set aside the interim orders of 18<sup>th</sup> May 2016 and the conservatory orders issued on 4<sup>th</sup> August 2016.

2. The application is supported by the 5<sup>th</sup> applicant's affidavits and is premised on the grounds that:

*1) The defendant/applicant was contracted as an agent of the plaintiff/respondent to collect money on behalf of the plaintiff/respondent from the 1<sup>st</sup> defendant/respondent.*

*2) Pursuant to the orders made on 18<sup>th</sup> May 2016 and the conservatory orders issued on 4<sup>th</sup> August 2016 this honourable court ordered the applicants herein to deposit into court US DOLLARS, ONE HUNDRED AND TWENTY THOUSAND (USD 120,000/=) ONLY.*

*3) A very exorbitant amount that is beyond the means and financial capacity of the 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's and is in any event not due to the plaintiff/respondent since the 5<sup>th</sup> defendant/applicant has settled his agency accounts with the plaintiff/respondent.*

*4) The orders were granted by the court without the benefit of having the full facts and evidence regarding the matters at hand.*

*5) The 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's herein had informed their lawyers on record then when the matter was live in court, Eliakim Owala and Company Advocates, of previous payments made to the plaintiff/applicant which instructions, to the dismay of the 5<sup>th</sup> and 6<sup>th</sup> defendant's, were not filed in the previous pleadings in this honourable court thus denying the court the benefit of considering the full facts before the adverse ruling was made.*

6) Due to the inadequate representation, the 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's were effectively not heard or given a fair hearing due to the aforementioned omission by their counsels on record at that time.

7) The 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's have new, crucial and very important evidence of bounced cheques issued by the 1<sup>st</sup> defendant/respondent, which monies were for onward transmission the plaintiff/defendant that were not available before the court before arriving at its decision on 18<sup>th</sup> May 2016.

8) The crucial information and evidence, has now been availed after the 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's conducted forensic audit and reconciliation of bank statements as from 2<sup>nd</sup> January 2016 to 31<sup>st</sup> December 2017.

9) Nonetheless, the 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's have already made substantial payments to the plaintiff/defendant which amounts have been fully acknowledged and admitted by the plaintiff/respondent.

10) The 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's are extremely prejudiced and adversely affected by the order that requires them to deposit monies that they do not have or owe to the plaintiff/respondent.

11) The 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's are in danger/jeopardy of being committed to civil jail and their properties seized if orders made on 18<sup>th</sup> May 2016 are not set aside/revoked.

12) The plaintiff/respondent has been too economical and mean with the truth by not making disclosure of monies received from the applicants.

13) The honourable court in exercise of its unfettered discretion has unlimited jurisdiction to review its own orders in the interest of justice.

14) The plaintiff/respondent shall not suffer prejudice if the orders sought are granted while the 5<sup>th</sup> and 6<sup>th</sup> defendant's/applicant's are in danger/jeopardy of being committed to civil jail on the basis of untrue allegations.

3. The plaintiff/respondent opposed the application through the grounds of opposition dated 30<sup>th</sup> September 2019 wherein he sets out the following grounds:

1. That the application is mala fide and an abuse of the court process and is brought in bad faith 5 years after the suit was filed merely to take advantage of deep memory forgetfulness.

2. That the application is bad in law and practice as similar application was filed in this court on 15<sup>th</sup> August 2015 which the honourable court Justice Amin dismissed.

3. That the application is an abuse of the court process as the applicant seeks to defeat justice due to his failure to purge the contempt acts committed before this court.

4. That the application offends the law on contempt as the applicant has not demonstrated attempts to appear before the court as previously ordered nor made deposits to court.

5. That the orders made on 18<sup>th</sup> May 2016 are not payments to be made to the respondent/plaintiff but a deposit to court on admission of the 5<sup>th</sup> and 6<sup>th</sup> defendants for preservation of the suit property.

6. That the application in its nature offends the provisions of Section 40 of the Civil Procedure Code with respect of the preservation of the suit property.

7. That this honourable court has previously considered the documents filed in court accordingly issued directions as the applicant made a similar application on 16<sup>th</sup> December 2015 to strike out case against 6<sup>th</sup> defendant/applicant but same was denied.

8. That the learned judge considered all applications identical to this one and submissions thereof including list of issues as directed and the court arrived at a finding that the 5<sup>th</sup> and 6<sup>th</sup> defendant/applicant owed the plaintiff on their own admission and condemned them to deposit the amounts owed by their own acknowledgement in court.

9. That the applicants have not shown any just and fair reasons why they cannot make a deposit ordered especially after confirming that indeed they received the funds belonging to the plaintiff the subject of this suit.

10. That the ruling made by Justice Amin was succinct and was based on the applicant's own admission that he received cash from the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents and gave to his son 6<sup>th</sup> respondent to run a vehicle import business at Parklands within Nairobi. It would be a disservice to justice and fairness to have discharged the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents from liability only to come back after the said defendants have closed down to claim that indeed the said defendants had not made payments to him/them.

11. *That by agreeing to carry the burden of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants through an affidavit sworn on 16<sup>th</sup> December 2015 and 28<sup>th</sup> January 2019 the 5<sup>th</sup> and 6<sup>th</sup> defendants bonded themselves to court for the realization of the claim herein in favour of the plaintiff.*

12. *That it is incorrect and scandalous to say that the applicant was not heard. All parties were given chance and duly notified and a ruling delivered.*

13. *That the allegation that the 5<sup>th</sup> respondent now has new material evidence annexed as AM1 and AM2 is false as evidence by court record see exhibit SY 6(c) annexed to the affidavit of Shazad Yousuf Pirwani on 14<sup>th</sup> December 2015 and filed in this court on same day.*

14. *That the application dated 15<sup>th</sup> August 2019 has previously been extensively and conclusively been considered by this court twice and the court rejected the applicant's averments whereupon the applicant then filed a notice of but did not proceed with the appeal.*

15. *That the applicants have come to this court with unclean hands and material no-disclosure of the above facts which can be found on the face of the record by the court merely to delay and deny the applicants enjoyment of the fruits of the court decisions. This is after they failed to deposit to court the demanded amounts and appear in court in person.*

16. *That by the applicant's admission that they had received the plaintiff's monies 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 7<sup>th</sup> defendants, the 5<sup>th</sup> and 6<sup>th</sup> respondents whisked away the said defendants and effectively exonerated them from the application herein and took full responsibility to refund the full amounts of USD 120, 000.00. The averments that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 7<sup>th</sup> defendants have not responded to the application dated 15<sup>th</sup> August in mala fide and treachery meant to interfere with the court process.*

4. At the hearing of the application, **Mr. Onyango**, learned counsel for the applicants submitted that the review sought was on account of discovery of new and material facts that were not available at the time the impugned orders were made.

5. On his part, **Mr. Nyaribo** learned counsel for the respondent submitted that there is no new material in the case as the court record shows that the cheques exhibited in the applicants further affidavit as the new evidence are the same cheques that were presented in court in 2015.

6. I have considered the instant application, the respondents grounds of opposition and the submissions by the parties respective counsel. The main issue for determination is whether the applicants have made out a case for the setting aside, review and/or variation of the orders issued by court (differently constituted) on 18<sup>th</sup> May 2016. The said orders were as follows:

*1. The plaintiff's application is dismissed.*

*2. The application of 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> defendants is dismissed.*

*3. The application of 5<sup>th</sup> and 6<sup>th</sup> defendants is dismissed.*

*4. The 5<sup>th</sup> and 6<sup>th</sup> defendants are ordered to make a payment into court US\$ 120,000. That order is made under Civil Procedure Rule Order 40 and the courts inherent jurisdiction to preserve funds held on trust by admission of the defendants. Penal notice attached.*

*5. Each party to pay its own costs.*

*6. List for further directions after 28 days where the court will hear further submissions on the hearing of the suit.*

7. Order 45 of the Civil procedure Rules stipulates as follows on review

[Order 45, rule 1.] Application for review of decree or order.

1. (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 the present case, I note that the 'new' and 'important' matters that have been presented to this court as having been discovered are cheques issued between 24<sup>th</sup> August 2015 and 4<sup>th</sup> July 2015. The impugned orders were issued following an application dated 10<sup>th</sup> December 2015. It therefore means that the said cheques were already in the custody of the applicants as at the time the application that gave rise to the impugned orders was heard. I therefore find that the said cheques cannot form a basis for the suggestion that there is discovery of new and important facts that were not in the custody of the applicants at the time the impugned orders were issued.

9. Even if the court was to buy the applicants' theory of discovery of new material, I note that the applicants have not disclosed when the new material was discovered and why it took the applicants more than 3 years to initiate the instant application.

10. I also note that the applicants have, during the several mentions before this court prior to the filing of the instant application made numerous but unfulfilled promises to comply with the impugned orders. To my mind, the instant application to set aside, vary or review the orders that they have all along undertaken to comply with is an afterthought and an act of bad faith that does not favour a party seeking the discretionary orders of this court.

11. In a nutshell, I find that the instant application is not merited and I therefore dismiss it with costs to the respondent.

**Dated, signed and delivered in open court at Nairobi this 20<sup>th</sup> day of February 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Nyaribo for the plaintiff/respondent

No appearance for the applicant

Court Assistant: Sylvia