



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC APPLICATION CASE NO. 187 OF 2018**

**GOLDEN REAL ESTATE LIMITED.....APPLICANT**

**-VERSUS-**

**FIRST COMMUNITY BANK LIMITED..... RESPONDENT**

**RULING**

1. This court by its Ruling of 9<sup>th</sup> May 2019, in this matter, made a finding that there did not exist an arbitration clause between the applicant, **Golden Real Estate Limited**, and the respondent, **First Community Bank Limited**.
2. The applicant has by Notice of Motion dated 24<sup>th</sup> May 2019 sought the review, by this court, of that Ruling.
3. The application is opposed by the respondent through grounds of opposition.

**ANALYSIS**

4. The court's power to review a decree or an order is to be found under Order 45 Rule 1. That order provides

*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.*

5. The review can be undertaken where the party applying would show that there has been a discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant; or on account of a mistake; or error apparent on the face of the record. In the case **Pancrast Swan v Kenya Breweries Ltd (2014) eKLR** the court considering the above rule stated:

*“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power.*

*The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of the Civil procedure. Thus re-assessing evidence and pointing out defects in the order of Court is not proper”*

6. The applicant's basis of seeking a review of the Ruling of 9<sup>th</sup> May 2019 is captured in 4 paragraphs of the applicant's affidavit in support of the application, as follows:

*(a) THAT by a ruling delivered on 9<sup>th</sup> May 2019, the court dismissed the Applicant's application on the sole ground that there was*

no arbitration agreement and therefore there could not have been an arbitral process.

(b) **THAT** the Honourable Judge erroneously concluded that there was no arbitration agreement when in fact a written agreement between the parties agreeing to submit to an arbitral process had been included in the Applicant's bundle of documents/exhibits in support of the said application at page 33 thereof.

(c) **THAT** there is therefore a fundamental error on the face of the record and it is in the interests of justice that the ruling delivered on 9<sup>th</sup> May 2019 be reviewed and the Arbitral award recognised as being enforceable as prayed in the instant application.

(d) **THAT** the Applicant will suffer great injustice and prejudice if the order for recognition and enforcement of the Arbitral Award is not made.

7. The applicant does not rely on the discovery of new important matter or evidence nor does the applicant point out an error apparent on the record. Although the applicant states there was a fundamental error on the record non is really shown to be. The court, as will be noted, considered all the documents attached to the applicants chamber summons dated 16<sup>th</sup> April 2018. There is no error apparent on the record. In this case if the applicant was aggrieved by the Ruling of 9<sup>th</sup> May 2019 the applicant should have filed an appeal.

8. In my finding the applicant's application dated 24<sup>th</sup> May 2019 is unmerited. It is dismissed with costs to the respondent.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>TH</sup> day of DECEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... **COURT ASSISTANT**

..... **FOR THE APPLICANT**

..... **FOR THE RESPONDENT**