



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 46 OF 2011

WOBURN ESTATE LIMITED.....PLAINTIFF

VERSUS

MARGARET BASHFORTH.....DEFENDANT

RULING

1. By this Notice of Motion dated 30th July 2018 and filed herein on 2nd August 2018, Worburn Estate Ltd (the Plaintiff) prays that the Judgment delivered herein on 16th April 2013 be reviewed and/or varied by removing the declaration that the accounts for the year ended 30th April 2009 are a forgery and that Mr. Esposito Franco did participate in the preparation of the same.

2. The application which is supported by an affidavit sworn by the said Esposito Franco, a director of the Plaintiff is premised on the grounds: -

i) That the Plaintiff has come across very important evidence and/or information that was not within its knowledge during the hearing of the case;

ii) That it is now clear that DW3 testified while under threat of being subjected to the disciplinary committee unless he denied the accounts and therefore had no option other than denying the same;

iii) That the Plaintiff has come across emails in respect of what took place immediately prior to DW3 testifying in Court and observing that the accounts were a forgery;

iv) That the Defendant/Respondent has been going round preaching that one of the Plaintiff's directors Mr. Eposito forged the accounts a fact that has affected the company; and

v) That it would be fair, just and reasonable that the Judgment be reviewed and have the reference to forgery removed.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 18th September 2018 Margaret Bashforth (the Defendant) avers that the Plaintiff's application is an afterthought and an abuse of the Court process. The Defendants further avers that there is no error or mistake apparent on the face of the record and or any discovery of new evidence to warrant the prayers sought herein.

4. The Defendant further avers that the Plaintiff has not given any indication why it took them five years and four months before applying for a review of the Judgment that was delivered on 16th April 2013.

5. I have perused and considered the Plaintiff's application and the Defendant's response thereto. I have similarly perused and considered the written submissions placed before me by the Learned Advocates for the parties.

6. Order 45 Rule 1 of the Civil Procedure Rules pursuant to which the application is made before me provides thus; -

"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 appellant Court the case on which he applies for the review.

7. It is the Plaintiff's case that he has come across very important evidence and or information that was not within its knowledge during the hearing of the case and hence its desire to have the Judgment reviewed. At paragraph four of the Supporting Affidavit, the Plaintiff discloses the new evidence to be some emails on what is said to have taken place.

8. However, while the Plaintiff purports to have annexed the emails as Exhibit EF-1 to the Supporting Affidavit, no such exhibit has been annexed. Indeed, none is annexed even to the Supplementary Affidavit of Franco Esposito sworn and filed herein on 19th December 2018. The Plaintiff does not also in either affidavit explain when he came across the new evidence nor why they could not be produced at the time of the trial.

9. As it were a review of a Judgment can only be allowed upon discovery of a new and important matter of evidence. In this respect, an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. This has not been shown to be the case here.

10. Indeed, as stated by the Defendants, an application for review under Order 45 Rule 1 must be made without unreasonable delay. The present application before me was filed more than five (5) years after the Judgment was rendered and the Plaintiff has not made even the slightest attempt to explain why the application was not made at any time earlier.

11. In the premises, I did not find any iota of merit in the Motion dated 30th July 2018. The same is dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 15th day of October, 2020.

J.O. OLOLA

JUDGE