

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**COMM. CASE NO. 1 OF 2020(O.S)**

**BETWEEN**

**EAST AFRICAN DEVELOPMENT**

**BANK.....JUDGMENT CREDITOR**

**AND**

**DARI LIMITED.....1<sup>ST</sup>**

**JUDGMENT DEBTOR**

**RAPHAEL TUJU.....2<sup>ND</sup> JUDGMENT**

**DEBTOR**

**MANO TUJU.....3<sup>RD</sup> JUDGMENT**

**DEBTOR**

**ALMA TUJU.....4<sup>TH</sup> JUDGMENT**

**DEBTOR**

**YMA TUJU.....5<sup>TH</sup> JUDGMENT**

**DEBTOR**

**S.A.M COMPANY LIMITED.....6<sup>TH</sup> JUDGMENT**

**DEBTOR**

**RULING**

**INTRODUCTION AND BACKGROUND**

1. The Judgment Debtors (Applicants), through the Notice of Motion dated 16<sup>th</sup> September 2024 seek to set aside the ruling of ruling of the Court of 7<sup>th</sup> January 2020, which recognized and registered the

judgment of the **High Court of Justice - Business and Property Courts of England and Wales, Queens Bench Division**, issued against them. Through grounds set out on the face of the application and the supporting affidavit of the 2<sup>nd</sup> Applicant sworn on 16<sup>th</sup> September 2024, the Applicants depone that there is new and important evidence that emerged from the cross-examination of a key witness, DAVID ODONGO, who testified on behalf of the Judgment Creditor (Respondent).

2. The Applicants argue that the said DAVID ODONGO recanted key parts of his earlier sworn affidavits that were used to obtain the UK judgment and its registration in Kenya and he admitted that the loan agreement was part of a two-phase project; land acquisition and construction of villas, but the Facility Agreement only reflected the first phase. That the Respondent failed to disburse the second loan intended for construction, which was crucial for the Applicants to repay the first loan and the Respondent knew the Applicants' existing business couldn't repay the loan without the second phase. They add that his original affidavits were prepared without his input or review by the Respondent's advocates.
3. The Applicants contend that the Court's ruling was based on false or misleading evidence and that the new evidence was not

previously available and would have changed the Court's decision. Further, that enforcing the UK judgment would be contrary to public policy and violate their right to a fair hearing under **Article 50** of the **Constitution**.

4. The Respondent opposes the application through the replying affidavit of its Senior Legal Officer, CAROL LUWAGA, sworn on 24<sup>th</sup> September 2024. It avers that the Applicants did not participate in the original *ex-parte* proceedings for registration of the UK judgment and therefore, they lack the legal standing to seek a review or introduce new evidence at this stage. That the issues raised in their application such as the alleged two-phase project and failure to disburse Kshs. 294 million were fully litigated and decided by the English High Court and Court of Appeal and the Kenyan Courts have already upheld the English judgment and its enforcement. That re-litigating these issues is barred by the doctrine of *res judicata* and they state that a related appeal, **Supreme Court Petition No. E012 of 2023** is still pending and the application seeks to re-open issues that are directly in question before the Supreme Court, making it *sub judice* and an abuse of Court process.

5. The Respondent contends that the application does not meet the legal threshold for review under **section 80** of the ***Civil Procedure Act(Chapter 21 of the Laws of Kenya)*** and **Order 45** of the ***Civil Procedure Rules***, that the alleged "new evidence" from the cross-examination of David Odongo is not new, not material, and not admissible and that the ***Foreign Judgments (Reciprocal Enforcement) Act(Chapter 43 of the Laws of Kenya)*** provides a specific mechanism for setting aside a registered judgment, which the Applicants have already exhausted and lost. The Respondent adds that the Applicants have previously acknowledged their debt and expressed willingness to settle and that allowing the review would undermine the finality of Court decisions and violate statutory provisions. For these reasons, the Respondent urges that the application is misconceived, frivolous, and an abuse of Court process and prays that the Court dismisses the same with costs.
6. The application has also been addressed through written submissions that reflect the parties' positions outlined above. Accordingly, I will not repeat them here but will make relevant references in my analysis and determination below.

#### **ANALYSIS AND DETERMINATION**

7. As submitted by the parties, there is only one issue for the Court's determination; whether the ruling of the Court of 7<sup>th</sup> January 2020 enforcing and registering the UK judgment should be reviewed and set aside. The parties also agree that the principles governing the exercise of discretion to review a decree or order are now settled. Under **section 80** of the **Civil Procedure Act** and **Order 45** of the **Rules**, an Applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the Court to review.
8. The Applicants' application is anchored on the discovery of new information. On this, the Court of Appeal in **Rose Kaiza v Angelo Mpanju Kaiza [2009] KECA 422 (KLR)** held as follows:

*The motion before the superior Court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the*

*words of the rule itself, it is*

***“.....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.....”***

*The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:*

***“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.”***

9. Going through the application and the depositions of the parties, I am inclined to agree with the position taken by the Respondent and decline to review and/or set aside the Court’s ruling of 7<sup>th</sup>

January 2020 for a number of reasons. First, it is clear that the Applicants have previously sought to review and set aside the said orders of 7<sup>th</sup> January 2020 but that these efforts have been thwarted by this Court in the ruling of 13<sup>th</sup> February 2020 and the Court of Appeal in **Dari Limited & 5 others v East African Development Bank [2023] KECA 454 (KLR)** and that this matter of review is currently before the Supreme Court for determination in **Supreme Court Petition E012 of 2023**. Allowing this application would require this Court to make determinations on the very same issues that are awaiting adjudication by the Supreme Court. This is a classic case of *sub judice*, and it would be legally improper for this Court to make a determination on the same issue that is pending before a superior Court.

10. Second, the substance of the alleged "new evidence" pertains to the Applicants' long-standing allegation that the project was a "two-phase" project and that the Respondent failed to disburse an additional Kshs. 294 million facility. This very issue was litigated to its conclusion before the English High Court. In its judgment of 19<sup>th</sup> June 2019, the English Court made a definitive finding at paras. 20-23, holding that: *"the Bank was not under any obligation to lend this amount. No facility agreement was concluded... the evidence*

before the Court indicates that ultimately the defendants did not want the KES 294 million.” The English Court specifically referenced the Applicants’ own correspondence and board minutes where they unequivocally decided not to borrow the additional funds. This Court, in recognizing the English Judgment, adopted these findings. The Court of Appeal in **Dari Limited & 5 others v East African Development Bank(supra)** and in upholding the enforcement, further affirmed this position stating that:-

***“...the conclusion that the purpose of sections 10(2) and (3) of the Act is not to provide a backdoor through which an unsuccessful litigant in the reciprocating foreign state can re-agitate his case in Kenya. The provisions are restrictive and clearly do not require the Court to engage in elaborate analysis of the correctness of the foreign judgment. Further, under the provisions, a registered foreign judgment cannot be set aside on the mere grounds that it is erroneous on merit, which, to our minds, would constitute an appeal in disguise. Nor, in our view, do the grounds for setting aside a registered foreign judgment countenance a fresh hearing or argument or correction of an alleged erroneous view taken by the foreign Court of a reciprocating country.”***

11. Therefore, this attempt to re-litigate this issue through the purported "new" testimony of DAVID ODONGO is barred by the

doctrine of *res judicata*. The issues are the same, the parties are the same, and the matter has been finally decided by a Court of competent jurisdiction. This Court will not permit a collateral attack on a final and valid foreign judgment already recognized by this Court and the appellate Court.

12. Third, the alleged new evidence from DAVID ODONGO'S cross-examination does not meet the threshold for review. His testimony did not reveal any facts that were not already within the knowledge of the parties or formed part of the evidentiary record before the English Court. The allegations regarding the preparation of Mr. ODONGO's initial affidavits were irrelevant to the Court's ruling of 7<sup>th</sup> January 2020 which was based on the validity of the English Judgment itself, not the credibility of a single deponent in the Kenyan enforcement proceedings.

### **CONCLUSION AND DISPOSITION**

13. In summary, I find that the Judgment Debtors' Review Application is an attempt to re-fight battles they have conclusively lost. It is statutorily misplaced, barred by *res judicata*, *res sub judice*, and founded on evidence that is neither new nor capable of altering the outcome of this Court's ruling. The application is without merit and it is hereby dismissed with costs.

**DATED SIGNED and DELIVERED virtually at NAIROBI this  
7<sup>TH</sup> DAY of NOVEMBER 2025**

.....  
**J.W.W. MONGARE**  
**JUDGE**

**IN THE PRESENCE OF**

1. Ms. Macharia holding brief for Mr. Nyamodi for the Applicant/Judgment Debtors.
2. Mr. Wakhisi hold brief for Prof. Githu Muigai SC and Mr. Emmanuel Wetangula for the Decree-Holder/ Respondent.
3. Amos - Court Assistant

ORIGINAL