

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCOMMM NO. E144 OF 2021

BUUPASS KENYA LIMITED.....PLAINTIFF

-VERSUS-

BUSPASS KENYA LIMITED.....DEFENDANT

-AND-

REGISTRAR OF COMPANIES.....INTERESTED PARTY

RULING

1. The defendant/applicant filed a Notice of Motion application dated 15th August 2024 pursuant to the provisions of Sections 1A, 1B, 3, 3A & 80 of the Civil Procedure Act, Order 45 Rule 1 & Order 51 of the Civil Procedure Rules 2010, and all the enabling provisions of the law. The defendant prays for an order that the Judgment delivered on 31st July 2024 be reviewed and/or set aside in light of new and important evidence that has come to light post-judgment, specifically the dissolution of the defendant company vide Gazette Notice No. 790, Vol CXXV dated 27th January 2023.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Philip Kinisu, the former proprietor of the defendant company. Mr. Kinisu averred that Judgment was entered against the defendant on 31st July 2024, directing, among other orders, the appointment of an Accountant to examine the defendant's accounts and determine any profits made. He stated that after delivery of the Judgment, the defendant discovered that the company had already been dissolved through Gazette Notice No. 790 published on 27th January 2023.

3. He deposed that execution of the Judgment in its current form would be detrimental and highly prejudicial to the defendant in light of its dissolution. He contended that in view of the foregoing, it is just and equitable for the Court to review and set aside the said Judgment. Mr. Kinisu asserted that the defendant company never operated, made no profits, and is now dissolved, rendering the appointment of an Accountant unnecessary and likely to occasion unjustified and wasteful costs.
4. In opposition to the application herein, the plaintiff filed Grounds of Opposition dated 30th September 2024 raising the following grounds -
 - i) That the present Motion is misconceived, frivolous, scandalous, vexatious and a total abuse of this Court's process;
 - ii) That the defendant's application is bent on causing unreasonable delay to the conclusion of this matter contrary to the Overriding Objectives as provided for under Section 1A, 1B, 3A and 3B of the Civil Procedure Act, Cap 21 Laws of Kenya;
 - iii) That the defendant has not met the threshold for review set out under Order 45 of the Civil Procedure Rules which clearly outlines that discovery of new and important matter or evidence must be obtained after the exercise of due diligence;
 - iv) That both the defendant and the interested party have been participating in the proceedings herein, as such, the purported Gazette Notice dated 27th January 2023, Volume No. 790 cannot be termed as new and important evidence;
 - v) That the present Motion is a belated attempt by the defendant to deny and frustrate the plaintiff from enjoying the fruits of its Judgement contrary to the provisions of Articles 48 and 50 of the Constitution;

- vi) That the defendant/applicant is before the Court with unclean hands having readily admitted in its written submissions filed before this Honourable Court that it had no objection to its deregistration; and
 - vii) That the defendant/applicant's Advocates have no *locus standi* to move the Court by way of the application dated 15th August 2024.
5. The plaintiff also filed a replying affidavit sworn on 30th September 2024 by Mr. Wyclife Omondi, a Director/Founder of the plaintiff company. Mr. Omondi outlined the plaintiff's incorporation history, including its registration in November 2016, change of name to *Buupass* Kenya Limited in May 2017, and registration as the absolute proprietor of the Trademark "*BuuPass*" in June 2017 under Classes 9 and 39, which has since been used continuously to distinguish the plaintiff's online bus ticketing services. He averred that the Trademark derives from the slang word "*Buu*" meaning "*bus*", which has never been successfully challenged and confers exclusive rights upon the plaintiff, which has built substantial goodwill and reputation under the name, including winning the Hult Prize in 2016.
6. He stated that in January 2021, the plaintiff discovered that the defendant was using a confusingly similar name, prompting official searches that revealed the defendant was incorporated in 2020, several years after the plaintiff's incorporation and Trademark registration. That thereafter, the plaintiff issued a cease-and-desist notice in February 2021, which the defendant denied through its Advocates and refused to comply with. The plaintiff claimed that as a result of the foregoing, the plaintiff lodged a formal complaint with the interested party in January 2022, which led to a directive requiring the defendant to change its name within thirty (30) days, a directive the defendant failed to obey on the ground that the matter was pending in Court.

7. He averred that despite the alleged notice of dissolution issued in January 2023, the parties continued to participate in the proceedings. Mr. Omondi confirmed that Judgment was delivered in July 2024 in favour of the plaintiff, granting declarations of infringement and passing off, and permanent injunction restraining the defendant from using the infringing names, orders for destruction of infringing materials, change of the defendant's name, an inquiry into damages or account of profits to be undertaken by an Accountant appointed by the Institute of Certified Public Accountants of Kenya, and an award of costs and interest. He asserted that the defendant has failed to meet the threshold for review under Order 45 of the Civil Procedure Rules, as the purported Gazette Notice does not constitute new and important evidence, but merely reflects an intention to dissolve rather than an actual dissolution, and was within the defendant's knowledge during the proceedings.
8. In a rejoinder, the defendant filed a further affidavit sworn on 17th October 2024 by Mr. Philip Kinisu, the former proprietor of the defendant company. Mr. Kinisu deposed that the defendant company has since been deregistered following the Gazette Notice dated 27th January 2023. He averred that the said Gazette Notice is central to the determination of the defendant's liability, as it removed the company's legal standing.
9. He noted that references by the plaintiff to prior communication allegedly indicating settlement discussions, relate to without-prejudice negotiations undertaken in good faith before discovery of the Gazette Notice, and were intended to explore an amicable resolution rather than constitute any admission of liability, particularly, as the defendant had followed due registration procedures. He averred that the communication exchanged between May 2022 and July 2023 should not affect the Court's consideration of the new evidence

regarding the defendant company's status, since at the time the parties were unaware of the de-registration, which fundamentally alters the issue of liability.

10. The application herein was canvassed by way of written submissions which were highlighted on 3rd April 2025. The defendant's submissions were filed by the law firm of Malonza & Company Advocates on 28th October 2024 and 25th February 2025, while the plaintiff's submissions were filed on 11th February 2025 by the law firm of Oseko & Ouma Advocates LLP.
11. Ms Musa, learned Counsel for the defendant submitted that the instant application for review is grounded on the discovery of new and material evidence, namely the de-registration of the defendant company by the Registrar of Companies through Gazette Notice No. 790 Vol. CXXV dated 27th January 2023, which took effect on 27th April 2023. He stated that Judgment was nonetheless entered against the defendant on 31st July 2024 after the hearing of 29th January 2024, at a time when both parties had already closed their cases. She argued that by this time, the defendant was unaware of its de-registration status, having never traded post-registration. Counsel asserted that this de-registration fundamentally altered the legal standing of the defendant company and its capacity to be sued or held liable in the proceedings.
12. Ms Musa relied on the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010, and Section 80 of the Civil Procedure Act, the cases of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya** [2019] KEHC 6379 (KLR) and **E. Muriu Kamau & another v National Bank of Kenya Limited** [2009] KECA 111 (KLR), and submitted that the subject Gazette Notice qualifies as new and important evidence since it was not available to, or known by the defendant or the Court at the time of hearing or Judgment. She cited the Court of Appeal case of **Great Lakes Transport Co.**

(U) Ltd v Kenya Revenue Authority [2009] KECA 461 (KLR) and further submitted that upon de-registration, a company ceases to exist as a legal entity and lacks the capacity to sue or be sued.

13. Ms Musa asserted that since the defendant company ceased to exist before both the hearing and delivery of the Judgment, it could not lawfully be held liable for Trademark infringement, rendering the Judgment legally untenable. In addition, she contended that the order directing the appointment of an Accountant to examine the defendant's accounts is impractical and unenforceable, given that the company never operated, made no profits, and no longer exists. Counsel referred to the cases of **Zablon Mokuva v Solomon M. Choti & 3 others** [2016] KEHC 683 (KLR) and **Paul Mwaniki v National Hospital Insurance Fund Board of Management** [2020] KEHC 7414 (KLR), and submitted that the application herein was brought in good faith and is intended to avert injustice rather than delay or obstruct the course of justice.
14. Ms Ouma, learned Counsel for the plaintiff submitted that although Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010, empower the Court to review its Judgment, such review is strictly limited to circumstances where new and important evidence is discovered despite the exercise of due diligence, or where there is an error apparent on the face of the record or other sufficient cause. He referred to the case of **Paul Mwaniki v National Hospital Insurance Fund Board of Management** [2020] KEHC 7414 (KLR) and further submitted that although the defendant contended that it only discovered after Judgment that it had been dissolved through a Gazette Notice published on 27th January 2023, this does not constitute new and important evidence, as the Gazette Notice was published long before the hearing and Judgment, and could have been discovered with due diligence.

15. Ms. Ouma stated that the Gazette Notice relied upon by the defendant was issued pursuant to Section 897 of the Companies Act, which applies where a company itself applies to be struck off the Register. She contended that the Notice merely invited objections prior to de-registration and therefore demonstrates that the defendant was aware, or ought to have been aware, of the dissolution process during the pendency of the suit and should have disclosed the same to the Court. She asserted that the defendant cannot claim surprise or rely on the said Notice as newly discovered evidence. Counsel maintained that the application herein is intended to shield the defendant's Directors, shareholders, or managing officers from liability, contrary to Section 897(6) of the Companies Act, which preserves such liabilities notwithstanding dissolution. Ms Ouma relied on the case of **Kenya Revenue Authority v Jinsen Company Limited & 3 others** [2025] KEHC 770 (KLR), and submitted that upon delivery of Judgment, the plaintiff became a creditor of the defendant, thus dissolution cannot be used to defeat accrued liabilities.
16. In a rejoinder, Ms Musa submitted that the defendant only became aware of its de-registration after delivery of the Judgment in this suit, upon conducting a search at the Companies' Registry. She further submitted that this information could not have been discovered earlier through the exercise of due diligence. She asserted that the de-registration of the defendant constitutes new and material evidence warranting review. Counsel argued that the decision in the case of **Paul Mwaniki v National Hospital Insurance Fund Board of Management** (supra), is distinguishable since in that case, the alleged new evidence arose after Judgment, whereas in this suit the de-registration occurred earlier but was unknown to the defendant. Counsel maintained that the defendant never applied for de-registration, passed any Board resolution, or made any request to the Registrar of Companies for its de-registration. Instead,

she argued that the de-registration was undertaken *suo moto* by the Registrar of Companies, likely following the plaintiff's complaint lodged on 26th January 2022.

ANALYSIS AND DETERMINATION.

17. I have considered the instant application, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit and the Grounds of Opposition by the plaintiff, and the written submissions by Counsel for the parties. The issue that arises for determination is whether the Judgment delivered by this Court on 31st July 2024 should be reviewed and/or set aside.
18. This Court's jurisdiction to review its own decisions does not operate in a vacuum. It has to be exercised within the provisions of Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 45 Rule 1 of the Civil Procedure Rules, 2010, which provide as follows-

Section 80 -

Any person who considers himself aggrieved-

by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

19. The Court in the case of **Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others** [2021] KEHC 4068 (KLR), in dismissing an application for review held that -

...section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of the power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:

- a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;*
- b) On account of some mistake or error apparent on the face of the record, or*

c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

20. Upon perusal of the averments made, the instant application is anchored on the alleged dissolution of the defendant Company through Gazette Notice No. 790, Vol. CXXV dated 27th January 2023, which is said to have come to the defendant's attention only after delivery of Judgment. This Court however notes that the said Gazette Notice is dated more than one year before the hearing of the suit and approximately eighteen (18) months prior to the delivery of Judgment sought to be reviewed and/or set aside. A Gazette Notice is a public document, therefore this Court is of the view that its existence was ascertainable through reasonable diligence. Accordingly, the fact that the defendant only became subjectively aware of it after Judgment does not, in itself, elevate it to new and important evidence within the meaning of Order 45 Rule 1 of the Civil Procedure Rules. The test is objective and turns on whether the evidence could have been discovered with due diligence, not when a party eventually discovered it.
21. Upon perusal of the subject Gazette Notice, it is noted that it was published pursuant to the provisions of Section 897(3) of the Companies Act, which applies where striking off is initiated upon an application by the company. The said provisions state as follows-

The Registrar may not strike the name of a company off the register under this section until after three months from the date of the publication by the Registrar in the Gazette of a notice -

a) stating that the Registrar may exercise the power under this section in relation to the company; and

b) inviting any person to show cause why the name of the company should not be struck off.

22. Additionally, upon examination of the Gazette Notice, it is evident that it is a Notice for the intended dissolution of the defendant company and not a notification for the dissolution of the defendant company under Section 894 of the Companies Act. In the premise, this Court is persuaded by the plaintiff's argument that the Gazette Notice does not conclusively demonstrate completed dissolution of the defendant company, but rather signals the administrative process towards striking it off. Further, although the defendant claims that the plaintiff did not adduce evidence demonstrating that it instituted its own de-registration, I am of the considered view that no such evidence was necessary as the Gazette Notice which the defendant heavily relied on speaks for itself.
23. This Court further notes that the record shows that notwithstanding the publication of the Gazette Notice in January 2023, the defendant continued to actively participate in the proceedings herein, was represented by Counsel, filed pleadings and submissions, and submitted to the jurisdiction of this Court until Judgment was rendered. At no point before Judgment did the defendant raise the issue of intended dissolution, dissolution or lack of legal capacity. This Court therefore finds that having fully participated in the proceedings herein, the defendant cannot, after an adverse outcome, turn around and impeach the Judgment on the basis of an alleged lack of legal existence that could and should have been raised earlier.
24. In any event, even assuming that dissolution of the defendant company had actually occurred, such dissolution would not automatically extinguish liabilities arising from acts committed while the company was still in existence. This Court in its Judgment addressed claims of Trademark infringement and

passing off arising from conduct that allegedly occurred prior to the purported dissolution of the defendant company. Accordingly, the mere fact of de-registration does not render such claims legally irrelevant or the Judgment a nullity.

25. On the defendant's contention that it never operated, made no profits, and that the appointment of an Accountant would therefore be unnecessary, this Court finds that this argument goes to the merits of the case rather than to the limited grounds for review. The order directing an inquiry into damages or an account of profits was intended precisely to determine whether profits were made or not.
26. A review application cannot be used as a substitute for an appeal or as a forum to re-open issues that ought to have been canvassed at the trial. In the circumstances, this Court finds that the defendant has failed to demonstrate discovery of new and important evidence that was not available with due diligence before the Judgment of 31st July 2024 was delivered, any error apparent on the face of the record, or any other sufficient reason warranting the exercise of this Court's review jurisdiction. Therefore, I am persuaded that to grant the orders being sought herein would amount to undermining the finality of the said Judgment and unjustly depriving the plaintiff of the fruits of its decree.
27. The upshot is that the application herein is not merited. It is dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 23rd day of January 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Musa for the defendant/applicant

Ms Ouma for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

ORIGINAL