

**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**MILIMANI COMMERCIAL & TAX DIVISION**

**COMMERCIAL CASE NO. E141 OF 2023**

**MOYEZ SHADRUDIN BHANJI.....**

**PLAINTIFF**

**-VS-**

**MARCUS BERNSTROM &**

**OTHERS.....DEFENDANTS**

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**RULING**

1. The Plaintiff in the Notice of Motion dated 30.6.2025 seeks amongst other things: -

**This Honourable Court be pleased to vary and review the judgment delivered by Honourable Justice Sifuna on the 19<sup>th</sup> of December, 2024 by allowing the Plaintiff suit as prayed in the amended plaint dated 6<sup>th</sup> December, 2022.**

2. I have perused the record and obtained the uploaded judgment in the CTS. The court dismissed the plaintiff's suit for it was not proved.

3. Bringing me to my understanding of prayer 3 of the application reproduced above to mean that the variation sought of the judgment is to allow the plaintiff's suit as prayed in the amended plaint dated 6<sup>th</sup> December, 2022.
4. If that be the correct understanding of the said prayer, then the request to vary and review the judgment delivered on 19<sup>th</sup> December, 2024 by this court **(Sifuna J)** which dismissed the plaintiff's suit invites the court to reverse the decision.
5. The other orders sought are review of the order made in the judgment holding that the plaintiff's exhibits were in the form of photocopies and therefore inadmissible. Thus, prayer 1 of the application to admit the documents appearing at page 86-1575 of the applicant's list of documents dated 6<sup>th</sup> December, 2022, which were expunged by the court on its own motion on the basis that they were inadmissible for being in the form of photocopies.
6. The application is expressed to be brought under **section 1A, 1B, 3A, 80 & 100 of**

**the Civil Procedure Act, and Order 45 of the Civil Procedure Rules.**

7. The application is premised upon grounds set out in the application and supporting affidavit sworn by **MOYEZ SADRUDIN BHANJI**.
8. The application was not opposed. However, the duty of the court is to consider it on merit.

#### **Review dismissal of a suit following trial**

9. Review is provided under **section 80 of the Civil Procedure Act**, and grounds thereof under **Order 45 of the Civil Procedure Rules**.

10. The applicant has cited error apparent on the face of the record as the ground on which review has been sought. Such error should be patent and obvious requiring not copious explanation to discern.

11. According to the applicant, the error lies in the court 'making a conclusion that the Applicant produced photocopies of the documents without considering the fact that the court stood down the applicant on the

26<sup>th</sup> of February, 2024 and directed the Applicant to produce a physical bundle of documents of which the applicant duly produced on 22<sup>nd</sup> of April 2024'. **Ground 2 in the application.**

**12.** Admission of documents in a trial involves a process of evidentiary appraisal and evaluation guided by the law of evidence. The decision thereto, is not, therefore, a flash of event which can easily be folded into an error apparent on the face of the record. Thus, scarcely will the decision by the court on admissibility of evidence be a ground for review unless it relates to obvious mistake, say, a mistake in marking exhibits or referring to one exhibit whilst intending the other. It is, however, a potent ground for appeal.

**13.** Secondly, in the circumstance of this case, the review application is an invitation for the court to sit on appeal over and reverse its decision (**Sifuna J**) in which, after formal proof, dismissed the plaintiff's suit for it was not proved.

**14.** Let me disabuse an erroneous notion that, where a suit or application has not been defended, it is ipso facto proved and should be granted as a matter of course. A person making a claim must prove it to the required standard whether the matter is defended or not.

**15.** In the upshot, the applicant has not shown that there is an error apparent on the face of the record. Thus, the application dated 30.6.2025 is dismissed with no orders as to costs because it was not defended.

**Dated, signed and delivered at Nairobi through Microsoft Teams online application this 19<sup>th</sup> day of February, 2026**

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**F. Gikonyo M**

**Judge**

**In the presence of: -**

**Sundwa for Okulo for Applicant**

**CA - Ivan/Aggrey**