

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO.E001 OF 2022

SUPERFOAM LIMITED.....
.....PLAINTIFF

VERSUS

DAVID GATONYE KIMANI

T/A SINDI TEXTILE.....1ST
DEFENDANT

SINDI BIRD LIMITED.....2ND
DEFENDANT

SINDI BIRDS STORES LIMITED.....3RD
DEFENDANT

RULING

1. Superfoam Limited, the plaintiff/applicant has moved this court through an application by way of a Notice of Motion dated 28/5/2025 seeking the following reliefs namely;

(i) Spent

(ii) Spent

(iii) That this Hon. court be pleased to stay all orders of enforcement arising from the 1st

defendant's bill of costs pending the hearing and determination of this application.

(iv) That this Hon. court be pleased to vary and/or review its judgment delivered on 18/12/2024 because there has been a discovery of a new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant.

2. The grounds raised in this application are as follows;

- (a) That the plaintiff's suit was dismissed on 18/12/2024.*
- (b) That the dismissal was on the basis that there was no legal or contractual relationship between the plaintiff and 1st defendant.*
- (c) That the plaintiff has now discovered some new evidence which was not within his knowledge even after reasonable due diligence.*
- (d) That the new evidence shows that the 1st defendant is and/or was a director and shareholder of Sindi Bird Stores Limited (3rd defendant/respondent herein) during the material period.*
- (e) That the new evidence establishes a direct nexus between the 1st and 3rd defendants which was central issue during the trial and determination of the suit.*

- (f) That the new evidence could not have been obtained with reasonable diligence prior to the trial.*
- (g) That the new evidence is critical and has great likelihood to influence the outcome.*
- (h) That the ruling that was slated for 29/5/25 and unless stayed would likely prejudice the applicant.*
- (i) That it is prudent for this court to review its judgment.*
- (j) That this court has jurisdiction and unfettered discretion to review its judgment of 18/12/2024.*
- (k) That the application has been made without unreasonable delay.*

3. In a supporting affidavit sworn on 28/5/2025, Edwin Kirui, the head of Finance Department of the plaintiff/applicant avers that the official records from the Company's Registry could not be obtained prior to the filing and hearing of the suit. He relies on the affidavit of one Geoffrey Otieno the plaintiff's legal clerk.

4. That the applicant previously relied on the documents supplied to it by the defendants and was unable to access the corporate records of the 3rd defendant until recently. He has exhibited a letter dated 29/1/2025 from plaintiff's Chief Executive Officer requesting the Registrar of Companies to supply him with Certificate of Incorporation and CR12 of the 3rd defendant.

5. That the applicant has now obtained official records from the Registrar of Companies that confirm that the 1st defendant is or was a director and/or shareholder of Sindi Bird Stores Limited during the period relevant to the plaintiff's claim.
6. That the newly discovered evidence directly undermines and contradicts the 1st defendant's position and denials of affiliation with the 3rd defendant made during trial.
7. That there is sufficient cause shown to warrant this court to review its judgment.
8. That it is just and fair to review the judgment.
9. That unless the review is allowed the plaintiff/applicant will suffer prejudice by being denied opportunity to be heard in light of the newly discovered evidence.
10. In its written submissions dated 19/12/2023 done through learned counsel M/s Malinda & Maina Company Advocates, the applicant submits that this court in its judgment of 18th December 2024 dismissed the plaintiff's claim against the 1st defendant on the basis that there was no nexus between the 1st defendant and the 3rd defendant Sindi Bird Stores Limited and consequently there was no contractual relationship with the applicant.
11. It submits that it subsequently after the delivery of the judgment, obtained the Certificate of Incorporation of the 3rd defendant and CR12 from the Registrar of Companies. It contends that it is not seeking to re-litigate over the matter but seeking to have this court consider material facts that

were unavailable at the material time. It contends that despite due diligence on its part it was only able to obtain the relevant information after judgment had been delivered.

12. The applicant contends that it has satisfied the requirements of Order 45 Rule 1 of the Civil Procedure Rules and relies on the decision of **Evan Bwire -vs- Andrew Nginda (Civil Appeal No.103 of 2000 Kisumu)**. It further relies on the decision of **Benjoh Amalgamated Ltd & Anor vs- Kenya Commercial Bank Ltd (2014) KECA 872 (KLR)** where the Court of Appeal held that the Court of Appeal not being the final court has residential jurisdiction to review its decision where there is no appeal to correct errors that have occasioned real injustice.
13. The applicant prays that its claim against the defendants be reinstated for hearing and determination on merit.
14. The 1st respondent has opposed this application through a replying affidavit of David Gatonye Kimani.
15. The 1st respondent avers that the application before court is belated and an afterthought.
16. That the judgment was delivered on 24/12/24 while instant application was filed after 6 months which in his view was inordinately late.
17. He points out that the applicant has not demonstrated efforts made to carry out a search in the Companies Register in 2022 before filing suit. That during hearing, the applicant

stated that he had not obtained CR12 or official search and there was no mention that attempts had been made to obtain the same from Registrar of Companies.

18. The 1st respondent points out that the evidence tendered by PW1 indicated that the plaintiff's customer was Sindi Bird Limited where all the invoices were directed to.
19. He avers that he neither received an invoice or any delivery note and he did not issue any cheque to the applicant.
20. That the court in its judgment found that none of the documents tendered connected him with the plaintiff's business.
21. That the alleged new evidence has all along been available and that the Certificate of Incorporation and CR12 would not make him personally liable adding that the new evidence indicates that the Certificate of Incorporation and CR12 is for a limited liability company.
22. The 1st respondent further avers that the applicant has judgment against the 2nd and 3rd defendants and he is not personally liable for them.
23. In his written submissions dated 16th January 2026 done through learned counsel M/s Kiarie & Co Advocates, the 1st defendant anchors his opposition on the provisions of Order 45 Rule 1 and puts weight on the principle that review can only be entertained where there is a discovery of a new and important matter or evidence and which was not within the

knowledge of the applicant at the material time upon due diligence.

24. The 1st respondent relies on a Court of Appeal decision in the case of **Rose Kaiza -vs- Angelo Mpanju Kaiza (2009) KECA 422 (KLR)** where the Court of Appeal restated the requirements for a review and emphasized that it is not just the discovery of any new fact or evidence but it should be something that was not within the knowledge of the party upon exercise of due diligence. The court held that where there is absence of due diligence, it is not open to court to admit new evidence.
25. The 1st respondent submits that due diligence was not undertaken before the applicant filed its suit on 16/3/2022 to the time the suit was heard on 2/8/2023.
26. He contends that the applicant only sought for new evidence upon delivery of the judgment on 18/12/2024 and that the applicant only did so after appreciating the weakness of its case.
27. He further contends that the plaintiff's witness testified that their customer was Sindi Bird Limited (2nd defendant) and not Sindi Bird Stores Limited (3rd defendant). That the new evidence does not touch the 1st defendant's actions in his personal capacity.
28. He further contends that the application is not seeking the setting aside of judgment but seeks variations or review which in his view is a misconception.

29. This court has considered this application and the response made. The applicant in substance is seeking to vary and/or review the judgment delivered by Justice A.C Mrima on 18/12/2024 on the grounds that there has been a discovery of a new and important matter or evidence. The new evidence of facts discovered are exhibited as follows;

(a) Certificate of Incorporation of Sindi Bird Stores Limited Serial No.C.128854.

(b) CR12 from Registrar of Companies indicating the names of the Company's Secretary, a Shareholder and 2 Directors.

30. The provisions of Order 45 Rule 1 and section 80 of Civil Procedure Act gives this court discretionary power to review an order or judgment. Section 80 provides as follows;

“Any person who considers himself aggrieved—

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

The guidelines for the procedure and exercise of that discretion is provided for under Order 45 Rule 1 (b). The provisions of Order 45 Rule 1(a) and (b) states as follows;

“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.”**

31. The applicant’s main prayer is anchored on (b) above which is a discovery of a new and important matter or evidence.
32. This court has already noted above what the new matter or evidence is. The main contention in this application is that while the Certificate of Incorporation and CR12 from the Registrar of Companies can be considered as a new matter or evidence, there was no due diligence on the part of the applicant because the said documents were always available and should have been availed when the suit was filed.

33. Going by the above provisions an applicant invoking revisionary powers of a court is required to demonstrate the following issues;

(a) A discovery of a new and important matter or evidence which exercise which exercise of due diligence was not within the knowledge of the applicant or could not be produced or procured at the material time.

(b) Existence of some mistake or error on the face of record.

(c) Any other sufficient course.

34. This court has looked at the pleadings filed together with plaintiff's list of documents filed on 16/3/2022. The Certificate of Incorporation and CR12 with respect to the 3rd defendant were missing.

35. The applicant through the affidavit of Edwin Kirui avers that it was unable to access the said documents **"until recently"**. The deponent is a bit guarded on the reasons for its inability to access the corporate records of the 3rd defendant which for all practical purposes are public documents freely available from the Registrar of Companies.

36. This court notes from the applicant's supporting affidavit that the application to be supplied with the said documents was made on 29/1/2025 vide a letter by Meeraj Shah, the plaintiff's Chief Executive Officer. The judgment the subject of the application was delivered on 18/12/2024. From the judgment, it is apparent that part of the reasons given by Justice Mrima why the plaintiff's suit failed was that

the plaintiff had failed to provide evidence that linked the 1st defendant with 2nd and 3rd defendants and that no evidence was found to show that there is a binding contract or agreement between the plaintiff and the 1st defendant.

37. It is clear from the above decision that the plaintiff/applicant was jolted by the judgment to look for new evidence to give weight to its claim.

38. The big question is whether the power to review under section 80 Civil Procedure Act or Order 45 Civil Procedure Rules gives latitude or room for a plaintiff having lost a case or failed to prove his case to the required standard to go look for evidence and come back to court armed with new evidence or facts. My short answer to that question leans on the negative and the reason is provided by the provisions of Order 45 Rule 1. The provisions do not just speak about discovery of a new matter or evidence. That discovery as basis for review is qualified by a very crucial point. The exercise of due diligence. The law provides that an applicant should demonstrate that the new fact or matter/evidence was not within his knowledge or available at the material time upon exercise of due diligence.

39. In the case of **Chepkaitany -vs- Kaimugu (2025) KEELC 677 (KLR)** the court inter alia made the following observations;

“A mere discovery of new or important matter or evidence is not sufficient ground for review. The

party seeking review has also to show that such matter or evidence was not within his knowledge and even after exercise of due diligence, the same could not be produced before the court/tribunal.”

40. In this matter the question of whether the plaintiff/applicant acted with due diligence when filing this suit is rather obvious. This is because the record shows he only applied to the Companies Registrar to be supplied with the impugned new evidence 3 years after filing suit and a month after the dismissal of its claim against the 1st defendant/respondent.

41. The other question to be asked is has he given any reason(s) for the inaction so that he can invoke the discretion of this court. The answer to that question is a no. As was well illustrated in the Court of Appeal decision in the case of **Rose Kaiza -vs- Angelo Mpanju Kaiza (200() KECA 422 (KLR)** it is not open to court to admit new evidence under Order 45 Rule 1 unless the applicant shows good cause and that the discovery of new evidence upon exercise of due diligence was not within his knowledge. In my considered view a party duly represented by an advocate should really know the evidence required to prove his case particularly when the adverse party has filed a defence. In that event, a plaintiff should be in a position to know what is

expected of him/her to prove his claim and the standard applicable in law.

42. Secondly, as correctly pointed out by the 1st respondent, the applicant in his substantive prayer (4) has not sought to set aside the judgment delivered on 18/12/2024. He seeks for variation and/or review but does not state to what extent it wants the variation to be done. The prayer as framed therefore is a bit vague and unclear on what the applicant really seeks from this court.

In summary, this court finds that the application dated 23/12/2025 simply cannot be sustained. It lacks in merit for the afforested reasons and the same is dismissed with costs.

DELIVERED, DATED and SIGNED at KITALE this25th day ofFEBRUARY....., 2026.

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Ruling delivered in open court

In the presence of

Kinyanjui for the Applicant

No appearance for the Respondents

Duke/Chemosop - Court assistants