REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

CIVIL SUIT NO. E068 OF 2021

BETWEEN

ERDERMANN PROPERTY LIMITED ..... 1ST APPLICANT

ERDERMANN COMPANY KENYA LIMITED ..... 2ND APPLICANT

VERSUS

CREDIT BANK LIMITED ..... RESPONDENT

RULING

Background and Introduction

1. This Court is seized of the Notice of Motion dated 13th August 2025, brought pursuant to ***Sections 1A, 1B, 3, 3A, 63(e) and 80 of the Civil Procedure Act,*** together with ***Order 45 and Order 51 Rule 1 of the Civil Procedure Rules and Articles 50(1) and 159(2)(d) & (e) of the Constitution***. The applicants, who were the plaintiffs in the primary suit, seek one substantive

relief, that this Honourable Court be pleased to review and vary its judgment delivered on 18th July 2025 (the Judgment), specifically to the extent of incorporating an order allowing the applicants' claim for special damages as pleaded and, in their view, duly proved by the evidence annexed to the present application.

2. The application is grounded upon and supported by the affidavits of **Mr. Zeyun Yang**, the Managing Director of the applicants, sworn on 13th August 2025 and 15th January 2026. The applicants acknowledge that in its judgment of 18th July 2025, this Court declined to grant the prayer for special damages amounting to Kshs 1,679,646,269/=, on the basis that no sufficient evidence had been tendered to substantiate that head of claim.

3. The applicants now contend that subsequent to the delivery of the said judgment, they have retrieved and secured new, material, and additional evidence which, despite the exercise of reasonable diligence, could not have been procured or availed at the time of the hearing. This evidence, they contend, comprises proof of payment of

professional and legal fees incurred in the course of defending claims brought by purchasers of the 1st plaintiff's stalled projects. They aver that these fees have since been settled, and accordingly urge this Court to review its judgment and award the sums claimed.

4. The applicants further depose that the payments made by the 1st applicant to its professional service providers in or about February 2025 arose directly from services rendered in connection with claims occasioned by the respondent's refusal to honour the applicants' instructions. They emphasize that such expenses had not accrued, nor had they been incurred, at the time of the hearing of the suit, and therefore could not have been adduced to corroborate the special damages claim pleaded in the plaint dated 11th July 2018.

5. It is their position that the additional evidence now sought to be introduced is not intended to fill evidentiary gaps or to patch deficiencies previously considered by this Court, but rather constitutes material that is directly relevant, probative, and indispensable to the just and holistic determination

of the real issues in controversy. The applicants therefore beseech this Honourable Court to exercise its discretion in favour of review, so as to ensure that substantive justice is attained in accordance with the dictates of ***Article 159 of the Constitution***.

6. The application is opposed through a Replying Affidavit sworn on 10th September 2025 by **Mr. Wainaina Francis Ngaruiya**, the Head of Legal Services of the respondent. In that affidavit, the respondent raises a preliminary objection to the competence of the application, contending that the applicants have failed to annex or produce a copy of the decree or order sought to be reviewed, thereby rendering the application fatally defective.

7. The respondent further asserts that the documents now introduced by the applicants, and which they purport to be new evidence, do not meet the threshold contemplated under ***Order 45 of the Civil Procedure Rules***. It is argued that the said documents, having been authored between January and February 2025, were available and could, with reasonable diligence, have been

produced prior to the delivery of the judgment and decree of this Court. To seek their admission at this stage, the respondent contends, amounts to an abuse of the court process.

8. In addition, the respondent avers that the payment vouchers exhibited by the applicants are not attributable to the respondent's alleged failure to honour instructions, but rather relate to legal fees incurred in respect of transfers undertaken which had already been the subject of the Court's determination on special damages. The respondent maintains that such expenses are extraneous to the issues adjudicated upon and cannot form a proper basis for review.

9. The respondent also points out that the loss adjustment report sought to be introduced by the applicants had previously been struck out by this Court in its directions issued on 6th February 2025. To attempt to reintroduce the same report through the present application is, in the respondent's view, a clear abuse of process and an impermissible attempt to circumvent the Court's earlier ruling. For all the foregoing reasons, the

respondent prays that the application be dismissed with costs.

Analysis and Determination

10. I have carefully considered the application, the Replying Affidavit filed in opposition thereto, and the written submissions of learned counsel for both parties. The first issue that arises for determination is the preliminary objection raised by the respondent. Learned counsel for the respondent has urged that the application is fatally defective on account of the applicants' failure to annex a copy of the decree or order sought to be reviewed.

11. Upon a careful reading of ***Order 45***, I find no express provision mandating that an applicant must annex the decree or order complained of to the application for review. The rule merely provides that any person aggrieved by a decree or order may apply for review. It does not stipulate that the absence of such annexure renders the application incompetent.

12. The jurisprudence of the Court of Appeal is clear on this point. In ***Sheikh Ali Taib VGeorge Ellam***

Wekesa & Another [2017] eKLR the Court held that:

> ***"A reading of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules which confer the review jurisdiction of the High Court does not have any requirement that in an application for review, an applicant must attach to the application an order that he or she seeks the court to review. In saying this, we are not stating anything new. In*** *Sadrudin Kurji & Another v. Shalimar Ltd & 2 Others, CA No 64 of 2006* ***this Court noted that there was no legal provision requiring inclusion of the order in an application for review".***

13. The Court also reiterated its earlier pronouncement in ***Peter Kirika Githaiga & Another V Betty Rashid, CA No. 210 of 2014***, where it held:

> ***"As already stated Order 45 (1) does not expressly provide that***

an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective."

14. Guided by these binding authorities, I am satisfied that the preliminary objection raised by the respondent is devoid of merit. Having disposed of the preliminary issue, I now turn to the substantive question which is whether the applicants' motion for review meets the threshold prescribed under

Section 80 of the Civil Procedure Act and ***Order 45 of the Civil Procedure Rules***. This requires an examination of whether the applicants have demonstrated discovery of new and important matter or evidence which, despite the exercise of due diligence, was not within their reach at the time of the hearing, or whether there exists any other sufficient reason to warrant the exercise of this Court's review jurisdiction.

15. The applicants' motion is predicated upon the ground of discovery of new and important evidence. I am guided on the parameters of this ground by the pronouncements of the Court of Appeal in ***Benjoh Amalgamated Limited V Kenya Commercial Bank Limited & Another, [2024] KECA 593 (KLR).*** In that case, the Court emphasized the principle that review jurisdiction is not intended to afford a losing party a second bite at the cherry by way of rehearing or re-litigation. The doctrine of finality of judicial decisions is a cardinal tenet of the law, and departure therefrom is permissible only in circumstances of a substantial and compelling nature. The Court stated as follows:

"It is clear from decided cases that a party is not entitled to seek a review of a judgment delivered by a Court of Appeal merely for the purpose of a rehearing and obtaining a fresh decision in the case. Departure from the general principle of finality of court decisions is justified only when circumstances of a substantial and compelling character make it necessary to do so…To qualify as new evidence, an applicant must demonstrate that the evidence was not adduced in the proceedings in question; and it could not have been procured despite exercise of reasonable diligence. Evidence is "compelling" if the Court considers it to be reliable and substantial and, when considered in the context of the outstanding

issues, the evidence appears to be of high probative value."

16. This principle is consistent with the earlier decision in ***Rose Kaiza V Angelo Mpanjuiza [2009] eKLR***. The Court cited Mulla's commentary on the Indian Civil Procedure Code (15th Edition, p. 2726), on the ground of discovery of new and important evidence:

"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; …"

17. Equally instructive is the decision in ***D.J. Lowe & Company Ltd v Banque Indosuez Civil Appl. Nai. 217/98 (UR)*****,** which was quoted with approval by the Court of Appeal in the ***Rose Kaiza case (supra)*** that:

"Where such a review application is based on fact of the discovery of fresh evidence the court must

exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

18. Guided by these authorities, the task before me is to interrogate whether the applicants have satisfied the twin requirements of diligence and novelty, and whether the evidence now sought to be introduced is of such probative value as to warrant a departure from the principle of finality of judgments. It is only upon such demonstration that the Court may properly exercise its discretion in favour of review.

19. The applicants principally rely on the assertion that the payments for professional and legal services

had not crystallized at the time of hearing, and therefore evidence of such payments could not have been presented before this Court. They have annexed correspondence exchanged between themselves and the firm of Simba & Simba Advocates dated 28th January 2025 and 11th February 2025, together with payment vouchers evidencing settlement of the said fees.

20. I have carefully scrutinized these documents. It is not lost on me that there was a period of approximately one year between the conclusion of the hearing and the delivery of judgment in July 2025. Some of the payment vouchers and cheques relied upon by the applicants as well as the correspondence, were issued prior to the delivery of judgment. This raises a legitimate question as to why the applicants did not place the documents before Court during that intervening period. The inference that arises is that the applicants elected to await the pronouncement of judgment, and upon finding their claim for special damages disallowed, sought to conveniently introduce the evidence thereafter. Such conduct undermines the

requirement of diligence and casts doubt on the bona fides of the application.

21. With respect to the loss adjustment report dated 4th June 2018, even if one were to assume arguendo that the report was not expunged from the record, the applicants have not explained why it was not produced during the hearing, given that it was addressed to the directors of the 1st applicant and was therefore within their possession and knowledge since 2018. Moreover, as this Court observed in its judgment, particularly at paragraph 44, the report is deficient in material particulars. It lacks schedules, audited accounts, construction progress reports, sales projections, or documented complaints to substantiate the figures relied upon in computing the alleged loss of profits. In the absence of such corroborative material, the probative value of the report is severely diminished.

22. On the question of relevance, I note that the correspondence and payments to Simba & Simba Advocates relate to legal fees for transfers and release of titles for various units. There is no

demonstrated nexus between these payments and the respondent's alleged failure to honour instructions in relation to the funds in question. The lapse of time between the letters and the filing of this suit further weakens the applicants' contention of any nexus.

23. On the face of the documents, the payments appear to have been made in the ordinary course of the applicants' business dealings, rather than being directly attributable to the dispute before this Court. The law requires that new evidence must not only be fresh but also relevant to the issues in controversy.

24. In light of the foregoing, I find that the evidence sought to be introduced does not meet the threshold of "new and compelling" evidence as contemplated under ***Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules***.

Disposition

25. Accordingly, the application dated 13th August 2025 seeking orders of review is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *23RD* DAY OF *MARCH* *2026*.

F. MUGAMBI
JUDGE

Delivered in presence of:
Ms Kioko for Mr Lusi for the plaintiff/applicant
Mr Kibet HB for Mr Owino for the defendant
Court Assistant: Lillian