

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 273 OF 2010

MOHAMED ASHIF KASSAM.....PLAINTIFF

VERSUS

MAHBUB KASSAM ABDULGANI TOBARIA.....1ST DEFENDANT

SHEINAZ MEHBOOB KASSAM TOBARIA.....2ND DEFENDANT

RULING

The 1st Defendant seeks to vary the judgement of this court delivered on 9/11/2017 on the ground that there was discovery of new material facts and evidence that was not within the Defendant's knowledge or attention which affects the judgement as delivered.

The 1st Defendant claimed that he came to learn of the judgement in this case in January 2018 when he visited the offices of his former advocate. He deponed in the supporting affidavit that some receipts evidencing some payments made in respect of the Suit Property were not produced in court. He attached copies of the receipts to the application.

The Plaintiff opposed the application. He argued that the receipts the 1st Defendant wishes to introduce were part of the documents he produced at the hearing and that he was represented by counsel at the hearing. He urged the court to dismiss the application with costs. He annexed a copy of a letter showing that the 1st Defendant wrote to the Plaintiff's advocate on 13/12/2017 proposing to settle the matter out of court.

During the highlighting of submissions, the 1st Defendant's advocate urged the court to correct what he termed as an arithmetic error to show that the 1st Defendant paid a total sum of Kshs. 2,235,809.00 in respect of the total debt of Kshs. 3,600,000.00 which he owed jointly with the Plaintiff.

The court may review an order or decree where an aggrieved party applies on the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge and which he could not produce at the time the decree was passed. The cash deposit slips the 1st Defendant wishes to introduce were produced at the hearing. The receipts issued by Farouk Adam & Company Advocates he seeks to adduce in evidence bear dates in 2008. He has not shown that these receipts are new and that with the exercise of due diligence he could not have produced them at the hearing. Reviewing the judgement to correct the judgement as sought will work an injustice to the Plaintiff who will not have an opportunity to test the credibility of the evidence as would have happened if this evidence had been properly adduced at the hearing.

The court finds no merit in the application dated 26/01/2018. It is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 30th day of August 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Athman holding brief for Mr. Khan for the Plaintiff

Mr. Owino holding brief for Mr. Owino for the 1st Defendant

Mr. V. Owuor- Court