



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 117 of 1996  
HOTEL ACCRA LIMITED.....APPELLANT**

**VERSUS**

**CATERING LEVY TRUSTEE.....RESPONDENT**

**RULING**

1. By a notice of motion dated 30<sup>th</sup> November, 2008, Hotel Accra Ltd the appellant herein (hereinafter referred to as the applicant), seeks an order for review and setting aside of the orders issued by this court on 24<sup>th</sup> May, 2004. The applicant further seeks an order that the court proceeds to hear the appeal without exhibit 2 being annexed to the record of appeal. The application is supported by grounds which have been stated on the body of the motion. It is also supported by an affidavit sworn by John Mwangi Kingori.
2. The gist of the grounds upon which the application is anchored, is that the applicant is not able to comply with the order issued by this court on 24<sup>th</sup> May, 2004, firstly because the exhibits required to be attached are not in the applicant's custody. Secondly, because the exhibits are too bulky being 8 registers, 66 duplicate accommodation receipt books and various kitchen duplicate receipt books. Finally that all the exhibits were verified and verification record accepted in evidence, and there was therefore no need for exhibit 2 to be annexed.
3. Mr. Chege who appeared for the applicant, reiterated the fact that the books were not in the applicant's custody, and that the respondent had failed to avail the books despite requests having been made to him. Mr. Chege further explained that there were summaries of the books which were produced in evidence as verification records. Hence the production of the exhibits was unnecessary.
4. Catering Levy Trustees who is the respondent to the appeal and the application, has objected to the application through a notice of preliminary objection on the following grounds:
  - (i) That the court orders issued on 24<sup>th</sup> May, 2004 were issued pursuant to a consent given to court by the parties and can only be reviewed or set aside by consent of the parties.
  - (ii) That the appeal is spent in lieu of the order dated 24<sup>th</sup> May, 2004 due to non-compliance by the applicant.
  - (iii) That the Hon. Court has no jurisdiction to entertain the application.
5. At the hearing of the application, it was agreed that the respondent's grounds be argued in response to the application, and not as a preliminary issue. Mr. Tolo who appeared for the respondent pointed out that the order sought to be reviewed was made by consent of the parties. Mr. Tolo denied the allegation that the documents in question were in possession of the respondent. He pointed out that the applicant had admitted that the documents were in the possession of the court. Mr. Tolo argued that the order of 24<sup>th</sup> May, 2004, was already spent and there was therefore nothing to review. He submitted that the application does not fall under Order XLIV Rule 1 of the Civil Procedure Rules, as there was no new information. He further pointed out that the application was defective as the certified copy of the order sought to be reviewed was not annexed to the application. Finally, Mr. Tolo submitted that the deponent of the supporting affidavit did not state whether he has the authority of the co-directors to swear the affidavit. He therefore urged the court to find the application incompetent and dismiss it.
6. In reply Mr. Chege argued that the court has powers to hear the application and that a consent order can be reviewed where there was sufficient reason.

7. I have carefully considered this application. I have also perused the court record. It is apparent that the order of 24<sup>th</sup> May, 2004 was made pursuant to a notice of motion dated 30<sup>th</sup> March, 2004, which was an application brought by the respondent for dismissal of the applicant's appeal for want of prosecution. The parties through their respective counsel entered into a consent which was recorded by the court as follows:

***“The appellant shall have two months from today to file a supplementary record of appeal including all exhibits failing which this appeal shall stand dismissed.”***

8. A supplementary record of appeal was filed on 20<sup>th</sup> July, 2004. However the supplementary record of appeal only had a list of contents of exhibit 2 which were indicated as follows:

- (i) 8 bars of registers
- (ii) 66 duplicate accommodation receipt books
- (iii) Various kitchen duplicate receipt books all of Accra Hotel.

9. That supplementary record of appeal did not comply with the consent order of 24<sup>th</sup> May, 2004, as it did not include all the documentary exhibits but only identified the exhibits. The applicant having been given 2 months to provide the required documents the default order took effect and there is therefore no competent appeal before this court. Further, the applicant has sought to have the order of 24<sup>th</sup> May, 2004 reviewed.

10. The applicant has not however satisfied this court that there is discovery of any new and important matter or evidence which was not within its knowledge at the time the order was made or any mistake or error apparent on the face of record or any other sufficient reason to justify the review of the order. At the time the order was made, the applicant was aware of the bulky nature of the documents and yet consented to the order. Moreover, the applicant cannot consider itself aggrieved by an order which it has voluntarily consented to.

11. Finally, the application for review was made on 11<sup>th</sup> November, 2008. This was more than 4 years from the date the order sought to be reviewed was made. The applicant has not given any explanation for the undue delay in bringing this application. For the above reasons, I find the notice of motion dated 3<sup>rd</sup> November, 2008 filed by the applicant incompetent. It is accordingly struck out.

**Dated and delivered this 10<sup>th</sup> day of February, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mrs. Otieno H/B for Chege for the appellant

Tollo for the respondent