REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 61 of 2003

LONDON DISTILLERS (K) LIMITED ……PLAINTIFF

VERSUS

PHILIP KIPCHIRCHIR …… 1ST DEFENDANT
SHAITANYA SEVAK …… 2ND DEFENDANT
HAIL & COTTON DISTILLERS LTD. ……..3RD DEFENDANT

RULING

1. By a ruling delivered by **Warsame J**, on 10th May 2007 the plaintiff's suit was dismissed for want of prosecution with costs to the defendants. The plaintiff has now filed a notice of motion dated the 26th January 2009, in which it is seeking for an order that judgment by **Warsame J,** delivered on 10th May 2007, be reviewed and the decree issued on 15th may 2007 pursuant to that judgment be set aside. This application is brought under the provisions of **Sections 3A, Section 80 and 34 of the Civil Procedure Act and Order 44 and 39 rule 1** of the **Civil Procedure Rules.**

2. The application is premised on the grounds that the ruling by **Warsame J** dated 10th May 2007 states that the application to dismiss the suit was heard *ex parte* because of non attendance by the plaintiff's advocate, whereas the decree issued on 15th May 2007 states that both counsel for the defendants and plaintiff were heard by the Judge. It is for this reason that the decree is said to be defective and contrary to the law. The court should therefore review the judgment under **Section 80** and make orders under O**rder 39 rule 1 of the Civil Procedure Rules**. This application is supported by the affidavit of **Mr. Stephen Musalia Mwenesi** sworn on 26th January 2009. The affidavit has explained what counsel refers to as a

discrepancy in the ruling which states the application was heard *ex parte* and the decree which states that both counsel for the defendant and the plaintiff were heard. According to counsel for the plaintiff, the way the decree is drawn would impact on the assessment of costs therefore the court should consider the validity of the decree before the bill of costs is taxed review it and set it aside.

3. This application was opposed, counsel for the defendant relied on the replying affidavit sworn by **Mr**. **M. Billing** sworn on 5th June 2009. He contended that there are no good reasons for the judgment or the decree to be reviewed. If the preamble of the decree has a problem by indicating; **"counsel for plaintiff was heard**" that does not affect the orders of the court. The court can rectify that as it is within the powers of the court to correct any errors on the face of the record. Counsel for the defendant was however opposed to any review of the judgment or setting it aside. This application is also filed after an inordinate delay of two years since the judgment was passed. It was further submitted that this was a further endeavor to delay this matter which delaying tactics the plaintiff has been engaging in. The plaintiff was also faulted to enganging a series of advocates in this matter and Mr. Mwenesi now is the seventh advocate to come in the matter.

4. This application seeks for the review of an order of this court which is an exercise of this courts discretion which is principally sought under the provisions of section **80 of The Civil Procedure Act** and more specifically under **rule 44 of the CPR** which provided as follows:-

> ***"Any person considering himself aggrieved-***
>
> ***(a) By a decree or order from which an appeal is allowed, but form 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."

5. for the applicant to succeed on an application for review, it must show there was a mistake or error apparent on the face of the record. The error must be manifest and does not require any examination for a court to review its own order. I have gone through the ruling by **Warsame J.** when the application to dismiss the suit for want of prosecution came up for hearing, on 30th April 2007 **Mr. Masinde** was holding brief for **Mrs. Rashid** for the plaintiff. He unsuccessfully applied for an adjournment. **Warsame J** declined to grant the adjournment. Counsel did not make any representations on behalf of the plaintiff after the application for adjournment was refused. This in the strict sense was not an *ex parte* proceeding. While dealing with almost a similar issue on whether a suit was heard ex parte or not, the court of appeal in the case of **Mugachia v Mwakibundu [1984**] **KLR** held as follows;

> ***1. As the appellant's advocate had, on being refused the adjournment, conducted the case when he stated he had no instructions to withdraw and elected to offer no evidence, that did not constitute ex parte proceedings for which an application for an order to set aside under order IX B rule 8 could be made.***
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> ***2. The granting of an adjournment involves the exercise of discretion by the presiding judge and the Court of appeal will not interfere with the judge's exercise of the discretion unless he ahs either acted on wrong principles or exercised his discretion injudiciously***.

6. The plaintiff was represented by counsel who held brief for Mrs. Rashid but failed to make submissions. I see no error in the decree because the plaintiffs were represented. Counsel who held brief should have gone all the way to make submissions. On the other hand l see no harm if the preamble of the decree can indicate that upon hearing counsel for the defendant/applicant and counsel for the plaintiff/respondent **"who failed to make submissions"**. This is the only correction (if it can be called so) which this court can make on the decree, there are no justifiable reasons for setting aside the judgment and the decree.

7. The applicant has not shown any justifiable reason why the judgment should be set aside. The court that dealt with the application for an adjournment exercised its inherent

discretion to refuse the adjournment. If the applicant is dissatisfied with that refusal to grant adjournment, the matter is for appeal not a review as this court cannot sit on its own judgment. I find no grounds for allowing this application except as stated above that the preamble of the decree can include the words **'failed to make submissions'**. The application is dismissed save for that addition. The defendant should be entitled to two thirds of the costs of this application.

RULING READ AND SIGNED ON 18TH JUNE 2010 AT NAIROBI.

M.K. KOOME

JUDGE