



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

Civil Suit 886 of 2003

HOTSUN TRANSPORT SERVICES LTD. & 44 OTHERS....PLAINTIFFS/APPLICANT

VERSUS

KENYA BREWERIESDEFENDANT/RESPONDENT

RULING

1. This ruling concerns the Plaintiffs'/Applicants' application dated 26/05/2008 brought by way of Notice of Motion under the provisions of Order XLIV Rules 1(1)(a), (2) and (4), Order L Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. By the said application, the Applicant seeks ORDERS:-

1. ***THAT this Honourable Court be pleased to review its ruling and the orders issued therein on the 9th day of November 2006.***
2. ***THAT this Honourable Court be pleased to reinstate the Plaintiff's suit.***
3. ***THAT the cost of this application be in the cause.***

2. The application is supported by the sworn affidavit of Joseph Odiala Keya, a Director of the 1st Plaintiff/Applicant and the 35th Plaintiff/Applicant and on a number of grounds set out on the face of the application. One of the major grounds in support of the application is that the Plaintiff's suit was dismissed for want of prosecution on the 9th November 2006 due to the fact that the Plaintiff's former advocates, M/s Gitobu Imanyara & Co. Advocates failed to file a Replying Affidavit and/or grounds of opposition in reply to the Defendant's application (seeking the dismissal of the Plaintiff's suit for want of prosecution) dated 23/08/2005 and filed on the 30/09/2005. The Applicants contend that if M/s Gitobu Imanyara & Co. Advocates had informed them of the Defendants application dated 25/08/2005, the Applicants would have made arrangements to attend at the hearing thereof. The Applicants also say that this honourable court should not victimize them for the delay in bringing this application because their former advocates, M/s Gitobu Imanyara & Co. Advocates failed to inform them (Applicants) that the suit herein had been dismissed. The Applicants also say that further delay was caused by the fact that their new advocates, M/s Miller & Company Advocates lost time in filing an application to the Court of Appeal seeking leave to extend time within which to file the Plaintiff's/Applicant's appeal. The Applicants also aver that a further change of advocates from M/s Miller & Co. Advocates to the firm of Githinji Victor & Co. advocates caused more delay in bringing this application for review. The Applicants urge this honourable court to allow the application for the reason they believe no prejudice will be suffered by the Respondents/Defendants.

3. The application is also premised on the sworn affidavit of **Joseph Odiala Keya** dated 25/05/2008 together with the annexures thereto. Mr. Keya reiterates the contents of the grounds on the face of the application. He also says that the Applicant's former advocates, M/s Gitobu Imanyara & Co. Advocates are to blame for the predicament in which the Applicants find themselves and that the negligence of the advocates should not be visited upon the Applicants. The deponent says that the Applicants never received copies of the Defendants' application which gave rise to the orders of 9/11/2006. The deponent also says that they even had to change advocates without the original file from the firm of M/s Gitobu Imanyara & Co. Advocates. Annexed to Mr. Keya's affidavit is the order, the subject matter of this application (annexture "JOKI 1"), copies of correspondence between Applicants' former advocates and the Defendants plus a copy

of Court of Appeal Misc Application No. NAI 50 of 2007 (UR 36/2007), which has since been withdrawn.

4. The application is opposed. The Defendant filed Grounds of Opposition dated 23/06/2008 on the 24/06/2008. These grounds, which are brief in nature are; that:-

(1) the said motion as taken out, drawn and filed is bad in law, incompetent and unsustainable as against the Defendant.

(2) The requirements of order XLIV relating to review have not been satisfied or at all in that;

(a) Applicants are guilty of unexplained unreasonable delay; the order sought to be reviewed was made nearly 1½ years ago.

(b) The action belonged to the Applicants and not its previous Advocates M/s Gitobu Imanyara. No evidence has been exhibited to show that they made any efforts whatsoever to find out the status of their case. Their attempts to hide behind their previous advocates are mischievous.

(c) In view of (a) and (b) above no sufficient cause has been shown.

(3) The Defendant will be highly prejudiced if the orders sought herein are granted.

5. At the hearing of this application, the Applicants were represented by learned counsel Mr. Githinji Victor duly instructed by M/s Githinji Victor & Co. Advocates while the Respondents were represented by learned counsel Dennis Muriithi who was duly instructed by M/s Waruhiu Kowade & Nganga Advocates. The two learned counsels reiterated the averments contained in their respective pleadings.

6. The applicable principles in a case of this nature are found in Order XLIV of the Civil Procedure Rules and in particular rules 1 and 4 thereof. For the Plaintiffs/Applicants to succeed in this case, they must show that

- **there is discovery of new and important matter or evidence**

- **that despite the exercise of due diligence, such new matter or evidence was not within their knowledge or could not be produced by them at the time when the decree was passed or the order made**

- **there was some mistake or error apparent on the face of the record**

- **there is some other sufficient reason for the grant of the order sought.**

7. In the instant case, the Applicants say that their former advocates, M/s Gitobu Imanyara & Co. advocates' are the ones who drove them into the current stalemate. The Applicants also contend that since they were not made aware of the application that gave rise to the dismissal orders, there is sufficient cause and or reason to warrant a review in their favour of the orders made on 9/11/2006. On their part, the Respondents contend that the reasons advanced by the Applicants in support of their application are not sufficient to explain the inordinate delay in bringing this application before the court. They argue that a delay of one and a half years is inordinate delay by any standards. Learned counsel for the Respondent also urged the court not to take into account the alleged mistake of counsel on the grounds that this suit belongs to the Applicants and not the said counsel and therefore that it was incumbent upon the Applicants to pursue the same with their advocates instead of sitting on their laurels and waiting for the advocates to contact them. Learned counsel for the Respondents cited **Civil Appeal No. 67 of 2004 – John Francis Muyodi –vs- ICDC & Another (Court of Appeal Unreported)**.

8. In the **Muyodi** case above the Court of Appeal found that a delay of eight months was inordinate in the circumstances of the case. The court found the Appellant guilty of laches. In the instant case, there was a delay of one and a half years. In my view, this delay was inordinate in the circumstances. It would appear to me that the Applicants were not interested in pursuing this matter at all. First there was the issue of changing firms of advocates and secondly there was the issue of spending time on unnecessary applications at the Court of Appeal. I would agree with learned counsel for the Respondents that this application must fall flat on its face on grounds of undue delays.

9. The next issue to consider is whether there was any other sufficient cause to warrant the exercise of discretion in the Applicants' favour. The ground cited by the Applicants is that they were not kept updated by their former advocates, M/s Gitobu Imanyara and Company Advocates. My own considered view is that the Applicants expected too much from their advocates. They slept alongside their advocates and they cannot blame anyone for what has befallen them. In brief, the Applicants were indolent. The exercise of judicial discretion is for the vigilant and not the indolent. In the

result, there is no sufficient reason put forward by the Applicants to warrant the exercise of my judicial discretion in their favour.

10. The upshot of what I have said above is that the Applicants' application dated 26/05/2008 lacks merit. The same is hereby dismissed with costs to the Respondents.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of July 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... For the Plaintiffs/Applicants

..... For the Defendant/Respondent

..... Court clerk