



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE 500 OF 2003**

OCCIDENTAL INSURANCE COMPANY LTD. PLAINTIFF

VERSUS

COME-CONS AFRICA LTD. DEFENDANT

R U L I N G

The Notice of Motion herein, dated 26/1/04 under Order 44 rule 1 of the Civil Procedure Rules, seeks orders that:

- 1. This court reviews and sets aside its ruling dated 2/12/03 and the decree thereon.**
- 2. The Plaintiff's Notice of Motion dated 24/10/03 be re-heard and determined.**
- 3. Costs be in the Cause.**

The application is supported by Affidavits by Mohamed Salaudin and Paul Mwangi dated 27/1/03, and is on the grounds that: there is new and important evidence which the Defendant was precluded by the Court from producing when the Plaintiff's Notice of Motion was heard; there is sufficient reason for reviewing the decree as it causes injustice on the Defendant and makes it liable for monies not due to the Plaintiff; the new evidence shows that the transactions between the Plaintiff and the Defendant span over a decade and the indebtedness can only be ascertained through the taking of accounts; the decree causes grave injustice against the Defendant .

In its Replying Affidavit dated 26/2/04, deponed by its General Manager, the Plaintiff/Respondent answers each and every allegation by the Defendant, one by one and attaches documentary evidence in support of its averments.

I have carefully considered and analysed the pleadings, especially the long Affidavit by both sides the submissions by counsel for both parties and have reached the following findings and conclusions.

Order 44 rule 1 of the Civil Procedure Rules under which this review application is brought states clearly what the applicant must do to obtain a Review Order. These include discovery of new and important matter or evidence which was not within the appellant's knowledge at the time when the decree or order was passed or made; some mistake or error apparent on the face of the record or any other sufficient reason."

The current application is founded on discovery of new and important matter or evidence which could not be produced when the decree was made.

I have perused the papers/documents attached to the application, and even gone through the Plaintiff and the defence and I have been unable to discover anything new which the applicant, with due diligence could not have produced before the decree complained of in this application. The Plaintiff is dated 7/7/03, the defence thereto was on 6/10/03. The documents claimed to be new evidence pre-date the foregoing events. It is difficult to Christine such documents and information as new. The documents annexed to the Supporting Affidavit in this application were within the applicant's knowledge and access way before the hearing of the Summary Judgment by this court under Order 35 of the Civil Procedure Rules.

In short, I find nothing either to warrant a Review under the Order the application is canvassed and looking at the documents annexed to the Affidavit by the Defendant/Applicant.

Counsel for the Defendant/Applicant, Mr. Owino, on 4/5/04, submitted that the applicant's evidence – new evidence – was not admitted by this Court. He submitted it was precluded, rendering the Summary Judgment application **ex parte**.

I find the counsel's submissions a distortion of the truth and the facts and the law. On 2/12/03, the application for summary judgment came up for hearing. Defendant's counsel applied for adjournment saying **"We are not ready. We need time to file Replying Affidavit."** That application for adjournment was not granted by this court because the Defendant had been served one month before the hearing date. I need not state the trite law that adjournments are at this court's discretion, and apart from that there was no reason for me to grant such an adjournment under the circumstances herein above stated.

However, if counsel for the Defendant felt aggrieved by this court's rejection of his adjournment application, he had the right to appeal. He did not and he knew and knows why he did not take that option.

Despite the above, the very Replying Affidavit, and probably the annexures thereto, are the same that I have already held that they were within the knowledge and access of the applicant even then, and hence nothing new therein.

Further, the gist of the so called new evidence seems to be the accounts. But in reply to a demand letter from the Plaintiff, the Defendant wrote on 1/4/03 that they were in the process of checking on their accounts, and promising to get back to the Plaintiff to confirm the same. Up to the date of the hearing of the Summary Judgment of which they had been served a month earlier, there had been no response from the applicant. The Plaintiff waited till October, 2003, and nothing was forthcoming. Despite rejection of their adjournment application, the Defendant fully participated in the proceedings.

Needless to observe the Review application raises no other reason, sufficient or otherwise, upon which this court can grant a review or a fresh hearing of the case. There is no error or mistake on the face of the record.

All in all therefore, and on the basis of the foregoing findings and conclusions, this application for Review fails. Accordingly, I dismiss the same with costs against the Defendant/applicant and in favour of the Plaintiff/Respondent.

DATED and delivered in Nairobi this 22nd day of April, 2005.

O.K. MUTUNGI

JUDGE