



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 291 OF 1997**

**JOSEPH ODHIAMBO APONDI .....APPELLANT**

**VERSUS**

**CMB PACKAGING (K) LTD. ....RESPONDENT**

**JUDGMENT**

Under Order 44 rule 1 of the Civil Procedure Rules an application for review can be made on account of new or important matter or evidence not within the applicants knowledge at the time the decree was passed or order made; some mistake or error apparent on the face of the record or for any other sufficient reason.

The sole reason given for the application for review before the Learned Senior Principal Magistrate was that the file should not have been placed before a magistrate who lacked jurisdiction to award more than Kshs.200,000/=.

The jurisdiction of the Senior Resident Magistrate who heard the original suit was a matter within the knowledge of the parties.

In fact this is why an application was made to have the case transferred to the High Court but it was withdrawn in the hope that the case would be allocated to a magistrate with enhanced monetary jurisdiction.

But how was the appellant sure of this being done with the limited number of magistrates and backlog of cases?

And when the case proceeded before the Senior Resident Magistrate with the limited jurisdiction the appellant must have taken a known risk of being awarded damages inaccordance with the monetary jurisdiction of that magistrate, and there was no good reason for going against the accepted risk by making an application for review for the reason that a lesser award had been made in his favour than what was expected?

This was not an error on the face of the record nor was it new and important matter or the evidence not within the knowledge of the appellant before the decree was passed or order made.

The learned Senior Principal Magistrate's ruling was based on the inordinate delay in making the application and absence of jurisdiction as a ground for review of a court order.

On the first ground, the judgment subject to the application was given on 14th October 1994 and the application for review filed in court on 6th December 1996; a period of more than 2 years.

By this time the decretal amount had already been paid over to the respondent.

Given that the application under order 44 should be made without unreasonable delay, there is no way one can say over 2 years before filing the application subject to this appeal was not unreasonable.

That there were a number of intervening applications is not good reasons for the delay when most of them infact related to the release of the decretal amount already deposited into court.

As regards the second ground, there is no ground under order 44 of the Rules that lack of jurisdiction is a ground for making an application for review of a court's order.

And being a point of law, notice of which all litigants to cases, particularly those represented by advocates, must have, it could not constitute "any other sufficient reason" to warrant the Learned Magistrate make the order sought in the application in favour of the appellant.

It was unfortunate for the appellant to withdraw the application lodged in the High Court for the transfer of the case subject to this appeal to it; otherwise that was the proper course to take.

I dismiss this appeal with costs.

Delivered this 10th day of July, 2002.

**D.K.S. AGANYANYA**

**JUDGE**