



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 3263 OF 1984**

HONGERA DISTRIBUTORS (NRB) LTD.....PLAINTIFF

VERSUS

COCA COLA BOTTLING COMPANY OF NAIROBI.....1ST DEFENDANT

NAIROBI BOTTLERS LIMITED .....2ND DEFENDANT

**RULING**

The plaintiff applies to review the court orders of April 30, 1993 which dismissed the suit for want of prosecution under order 16 Rule 5 of the Civil Procedure Rules.

It is disclosed that the plaintiff disagreed with his advocates. It is that disagreement that is blamed for want of prosecution which is not disputed. Even the plaintiff's 2nd advocate died in 1987. the 3rd advocates are not free from blame either.

It is submitted these were circumstances beyond the plaintiff's control as the first advocate refused to release the file. The 3rd advocates came on record on December 12, 1992. In **YUSUF VS NOKRACH (1971) EA 104** it was held that the respondent was a person aggrieved as he had not consented to the order for attachment and any other sufficient reason in order 42 of the Uganda Civil Rules means sufficient reason of a kind analogous to those set out in the Rule. In the commentaries to the Indian Code of Civil Procedure "any person aggrieved is said to be a person who has suffered a legal grievance".

It was also stated that the expression "any other sufficient reason", does not give a discretion to the court to consider generally the merits of an application for review. It is stated that if such a contention were to prevail every decree or order could be re-opened for review on any ground, whatsoever as if the application were an appeal. A review is not the same thing as, or even a substitute for an appeal. There are definite limits within which an appeal is permitted.

The application is opposed. The application for dismissal was not objected to by the filing of the Grounds of Opposition or Replying affidavit. the application came for hearing on April, 30, 1993. The plaintiff's counsel attended court that day and accorded an opportunity to address the court after which the suit was dismissed.

Although this application for review was filed on March 19, 1994 it was not for hearing until it was 11 months later. There is no new and important matter discovered which could not have been discovered by exercise of the diligence on the part of the plaintiff. All the matters presently complained of were always within the plaintiff's knowledge and all these should have been placed before the court on April, 30, 1993 when the application under Order 16 Rule 5 was for hearing. Here I agree with the defendant that all the matters now complained of were all matters within the plaintiff's knowledge at the time when the suit was dismissed. I also agree with the defendant that there has been delay in prosecuting the application.

The matters the plaintiff complains about have nothing to do with the defendant and I agree that the plaintiff can pursue its remedy against its advocates. This is also an old case and its restoration would be prejudicial to the defendant as there will be the attendant difficulties of the lapse of memory and lack of evidence.

I accordingly dismiss the review application with costs to the respondent.

Delivered this 20th day of July, 1995 in the presence of

N/A for the plaintiff

Wanjau for the defendant

M. OLE KEIWUA

JUDGE