

REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, LAKHA, J.J.A. & BOSIRE, AG.J.A.)

CIVIL APPEAL NO. 107 OF 1995

BETWEEN

JACKSON GATERE

APPELLANT

AND

MOUNT KENYA BOTTLERS LIMITED

RESPONDENT

**(Appeal from the Ruling/Judgment of the High Court of Kenya at
Nairobi (Justice Hayanga) given on 26th May, 1995**

in

H.C.C.C. NO. 2685 OF 1993)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendant from a decision of the superior court (Hayanga, J.) given on May 26, 1995 dismissing his application for a review of the judgment entered by the learned judge on December 13, 1994 against him in favour of the plaintiff as prayed in the plaint.

The facts giving rise to this appeal, briefly stated, are as follows. By a plaint dated May 15, 1993 the respondent sued the appellant for Shs. 278,732.35 with interest and costs for goods sold and delivered by the respondent to the appellant at the latter's request. The appellant filed a defence denying owing any sum and alleged repayment of the price of goods sold and delivered. Upon an application for summary judgment filed on March 1, 1994 the learned judge entered judgment against the appellant. No appeal has been preferred by the appellant against that judgment. Instead, the appellant on March 29, 1995 applied for a review of the judgment under Order XLIV of the Civil Procedure Rules. The only ground relied upon in the supporting affidavit was that his accountants submitted an analysis or report on February 1, 1995 showing that it was the respondent who owed money to the appellant.

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Order XLIV rule 1 provides as follows:-

"1. (1) Any person considering himself aggrieved-
(a) by a decree or order from which an appeal is allowed,
but from 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."

There is nothing on the record to show when the appellant instructed his accountant to prepare the analysis or report.

The appellant had been furnished with a comprehensive statement of account by the respondent since January, 1993.

He did not have his accounts ready until February 1, 1995 after summary judgment had been entered. We are not persuaded that the appellant could not have had his accounts ready if he had acted with diligence. In the result, the review sought was not available to him.

In refusing to grant the application for review, the learned judge was exercising a discretion. It is now well settled that this Court on an appeal will not interfere with the exercise of a discretion on an application such as that in the instant case unless the exercise was wrong in principle or the judge acted perversely on the facts. Upon a careful consideration of the material before us we are satisfied that there is no fault of principle exhibited by the learned judge, nor was the exercise of his discretion perverse. Consequently there is no ground on which this Court can interfere with his discretion.

For the reasons above stated the appeal fails and is dismissed with costs.

Dated and delivered at Nairobi this 6th day of June, 1997.

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J.E. GICHERU JUDGE OF APPEAL

A.A. LAKHA

JUDGE OF APPEAL

S.E.O. BOSIRE

AG. JUDGE OF APPEAL

I certify that this is
a true copy of the original.

DEPUTY REGISTRAR

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