

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.219 OF 2013

BENSON MUGO KINYUA.....APPLICANT

VERSUS

PETER MURIUKI KINYUA.....RESPONDENT

RULING

The Notice of Motion dated 20th March 2014 is brought pursuant to **Order 45 (1) (a) Civil Procedure Rules and section 80 (a), 1A and 1B Civil Procedure Act** and seeks that the court reviews the orders given on 14th February 2014, and allows the applicant to file the appeal out of time. This is because, the applicant had filed an application dated 12th July 2013, seeking leave to file appeal out of time. That application was dismissed on 14/02/2014 on grounds that the applicant had not provided the proceedings from the lower court, to demonstrate that the judgment was indeed read in the absence of parties and/ or their advocates, and that no notice of delivery of the judgment was ever given. There was also no draft memo of appeal, so the court could not determine whether there was an arguable appeal, and the former counsel for the applicant had not sworn any affidavit to confirm the claims made by the applicant.

It is now argued that the applicant has since filed a draft memorandum of appeal and the former advocate closed shop in Nakuru and cannot be traced to swear an affidavit.

The applicant explains that the delay in filing the appeal was due to the missing court file which was a fact beyond his control and the court is urged to be guided by the overriding objectives as provided under the Civil Procedure Act section 1A and 1B, so as to achieve and ensure the just, expeditious and proportionate resolution of the dispute.

The application is opposed on grounds that there are no new grounds to warrant review, and these are just delaying tactics aimed at stalling execution.

Mr. Mureithi argues that under Order 45, Civil Procedure Rules, the purpose of review is that if there were material facts or evidence not availed to the court at the time the matter was heard and the matters came to the attention of the court after the decision has been made, then conditions for granting review exists.

The provisions of Order 45 Rule 1(1) states:-

"1 (1) Any person considering himself aggrieved

(a)

(b)

and whom from discovering of new and important 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 order made..... desires to obtain a review may apply for review

of without unreasonable delay." (Emphasis mine)

Whereas the issues raised revoke a lot of sympathy for the applicant, in my view they are issues which with just a little bit of diligence, the applicant could have raised at the initial submissions when the first application was heard. What the applicant has done now is to fill the gaps pointed out by the court in its ruling. This amounts to patching up the applicant's cause so as to fit in with the omission noted in the court's ruling. I am certain this is not the kind of scenario contemplated by Order 45 Rule 1(1). In fact what is sought to be obtained is a setting aside of the earlier orders in what is akin to an appeal. I find no merit in the prayers and the application is dismissed with costs to the respondent.

Delivered and dated this 13th day of August 2014 at Nakuru.

H.A. OMONDI

JUDGE