



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

Civil Appeal 31 of 2004

JOHN MUHORO MWANGIAPPELLANT

VERSUS

JAMES KAMAU MWANGI1ST RESPONDENT

ELIJAH FANSON NJENGA2ND RESPONDENT

***(AN APPEAL FROM THE RULING DELIVERED ON 11TH JUNE 2004 BY HON. P.T. NDITIKA.
AT WANGURU SENIOR RESIDENT MAGISTRATE'S COURT MISC. SUCCESSION CAUSE NO.
24 OF 1981)***

RULING

This is the Appellant/Applicant's application dated 26/10/2010 filed under Order 44 rule 1(1) (a) (Old Civil Procedure Rules) and section 79 G Civil Procedure Rules. It seeks the following orders;

- a) *That the Honourable Court be pleased to review its judgment delivered on 20/7/2010.*
- b) *That the Hon. Court be pleased to extend time in which the Applicant may file his Memorandum of Appeal.*
- c) *Costs of the application*

It's supported by the grounds in the body of the application plus a supporting affidavit and a supplementary affidavit.

The Respondent filed a replying affidavit opposing the application.

Both Counsels have filed written submissions. I have considered the submissions filed herein plus the affidavits and the Judgment the subject of this application.

In the said Judgment the Hon. Lady Justice Karanja dismissed the Appeal because the Appellant had not sought leave to file a competent Appeal out of time or ask the court to deem the Appeal as having been duly filed. The Appeal was not struck out but dismissed. This was on 20th July 2010. And on 30th July 2010 the Appellant filed a Notice of his intention to appeal against the whole Judgment. The Notice has not been withdrawn.

It's true under the old Order XLIV and the new Order 45 Civil Procedure Rules where one has a right of appeal but has not appealed he/she may apply for review. It is never both appeal and review.

Since there is notice of Appeal which has not been withdrawn the Applicant cannot again come before this court for review of the same Orders appealed from.

Secondly the Appeal having been dismissed and not struck out the Applicant can only appeal against those Orders as there is nothing new which has come up. There is no discovery of new or important matters or evidence which he is presenting before the Court. He is aggrieved by the Court's decision of dismissing his appeal. I therefore find that the Application is not deserving. Let the Applicant pursue the Appeal.

I dismiss the application with costs.

DATED, SIGNED AND DELIVERED AT EMBU THIS 9TH DAY OF MAY 2012

**H.I. ONG'UDI
JUDGE**

In the presence of:

Mr. Karanja for Mr. Muchira for Appellant/Applicant

Njue – C/c