

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Appli 1041 of 2005

PANCRAS NDUNGU KIRORI.....PLAINTIFF

VERSUS

FRANCIS MUTUA T/A MUTUA MBOYA & NZISSI ADVOCATES.....DEFENDANT

R U L I N G

This is an application by way of Notice of Motion brought under Order XLIV Rule 1 of the Civil Procedure Rules seeking review of this court's order of 17th July 2007 in which the Applicant had been ordered to pay Shs. 800,000/= to his former client. The Applicant was aggrieved by that order and preferred an appeal against the said order. He filed Notice of Appeal on 24th July 2007 and served the same on the Respondent on 31st July 2007. The main attack by the Respondent is that the Applicant having preferred Appeal he cannot again seek review orders.

Mr. Machira submitted that on that point alone the application before the court is incompetent and an abuse of the process of court. While Mr. Mutua maintained that the provisions of the Civil Procedure Act do allow one to apply for review even when he has preferred an appeal relied on the provisions of Section 80 of the Civil Procedure Act to support that submission.

But my understanding is that from the nature of Section 80 and Order XLIV both procedures cannot be adopted at once. Hence supposing that an appeal is allowed by the Act but has not been preferred, review may be taken if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in appeal. Review only lies if no appeal has been taken. If an appeal has been taken at all, that is the major process, and it must be prosecuted as far as it can go. There can be no place of review once the appeal has been filed. In the case of **KARANI & 47 OTHERS [1987] KLR 557** the Court of Appeal faced with a similar situation stated thus:-

“Section 80 of the Civil Procedure Act and the Civil Procedure Rules Order XLIV do not permit for both the procedures of appeal and review to be adopted at the same time. Once the appeal is taken, review is ousted and the matter that is to be reviewed must merge in the appeal”

For the reasons stated above both the appeal and review are struck out for want of election with costs to the Respondent.

Dated and delivered at Nairobi this 26th of June 2008.

J. L. A. OSIEMO

JUDGE