



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1253 of 1997**

**CHUDHA INTERNATIONAL.....1<sup>ST</sup> PLAINTIFF**  
**HAROLD H. WEBB & PARTNERS.....2<sup>ND</sup> PLAINTIFF**  
**B.S. UBEROI ASSOCIATES .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**UHURU HIGHWAY DEVELOPMENT LTD.....1<sup>ST</sup> DEFENDANT**

**CENTRAL BANK OF**

**KENYA**

**.....2<sup>ND</sup> DEFENDANT**

**JOSEPH KITTONY (Receiver**

**Grand Regency Hotel).....3<sup>rd</sup> DEFENDANT**

**RULING**

On 30<sup>th</sup> January 2002 the plaintiff's suit was dismissed for want of prosecution by Kuloba J. By Notice of Motion dated 13<sup>th</sup> September 2004 and filed on 14<sup>th</sup> September 2004, the plaintiffs sought orders to review and set aside that

order which was issued by Kuloba J on 30<sup>th</sup> January 2002. The application was based on the grounds that there is sufficient reason to review the said order in that the said judge has now resigned due to matters related to his handling of matters relating to the first Defendant; that there is evidence of actual or perceived bias on the part of Justice Kuloba and that in violation of Section 77 of the Constitution of the Republic of Kenya, the applicant was not given fair hearing before an independent and impartial court and the application for dismissal for want of prosecution should be heard de novo; that at the time of the hearing of the application, the parties were not aware of the special relationship between Justice Kuloba and the first defendant and it was until his forced resignation that this matter came to light and that the Ruling and Order of the said Judge is openly biased thereby falling under the purview of review for sufficient reason.

On 20<sup>th</sup> April 2005 the 2<sup>nd</sup> Defendant through the firm of Murgor & Murgor Advocates filed a Notice of Preliminary Objection on a point of fact and law on the grounds that the application offends the express mandatory and unambiguous provisions of Order XLIV Rule I of the Civil Procedure Rules; that the application is grounded on inadmissible evidence and that the application is incompetent and the same should be struck out.

Mrs. Murgor who appeared for the firm of Murgor & Murgor Advocates submitted that the Preliminary Objection is grounded on a point of law in that the application was made under XLIV Rule 1 of the Civil Procedure Rules. In their application the applicants are seeking an order for review of an order made by Kuloba J. On 30<sup>th</sup> January 2002 in which their suit was struck out. When their suit was struck out the applicants filed a Notice of Appeal. By filing a Notice of Appeal the applicants opted to appeal against that order and for review.

That Notice of Appeal having been filed, the applicants forfeited the remedy of review. The appeal has since been struck out.

Order XLIV Rule 1 (a) of the Civil Procedure provides that any person who considers himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred may apply for a review of the judgment or order to the court which passed the decree or made the order. The applicants ought to have filed review application before they proceeded to file Notice of appeal. The Notice of Appeal is deemed as filed and properly before the court.

Review of application should be filed before the appeal is lodged. If it is presented before the appeal is

preferred, the court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition an appeal is filed by any party. An appeal may be filed after an application for review but once the appeal is heard the review cannot be proceeded with.

See AFRICAN AIRLINES INTERNATIONAL LTD VS. EASTERN AND SOUTHERN AFRICA TRADE BANK LTD [2003] 1 EA 1 (CAK). The fact that the matter has since been dismissed by the Court of Appeal, a review of the matter cannot be entertained by this court.

After appeal is preferred, review of application does not lie. See A. KAMALAKSHI AMMA VS. A. KARTHAYANI [2001] AIHC 2264.

Mr. Imanyara and Mr. Nyakundi counsel for the 2<sup>nd</sup> and

3<sup>rd</sup> defendants respectively also supported the Preliminary Objections and quoting the case of KARANI & 47 OTHERS VS. KIJANA & 2 OTHERS [1987] KLR 557 submitted that once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.

Mr. Kingara counsel for the applicant in opposition to the Preliminary Objection submitted that the Preliminary Objection is misconceived and that the only bar is if the appeal has been filed and not Notice of Appeal. All that was filed was Notice of appeal which was struck out. He submitted that in the cited authorities the appeals had been filed but not in the instant case. Notice of Appeal merely shows the desire to appeal. With due respect to counsel, this is not the position of the law. Appeal includes intended Appeal. See Section 2 (2) of the Court of appeal Rules.

The applicant having preferred to appeal against the order, there can be no place for review once the appeal has been filed. The applicant's application for review is therefore incompetent and the same is struck out with costs to the respondents.

Dated and delivered at Nairobi this 14<sup>th</sup> day of September 2006.

**J.L.A. OSIEMO**

**JUDGE**