



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISC CIV SUIT 693 OF 2002**

**JAMES M. KINGARU & 17 OTHERS ..... APPLICANTS**

**VERSUS**

**J. M. KANGARI & MUHU HOLDINGS LTD**

**NAIROBI CITY COUNCIL, PUBLIC HEALTH**

**THE ATTORNEY GENERAL ..... RESPONDENTS**

**RULING**

This is an application for review under Order 41 on the grounds that there is discovery of new and important evidence.

By a Ruling dated the 4<sup>th</sup> December, 2003, this Court dismissed the applicant's application for leave to bring contempt of court proceedings against two directors of the respondent company, on the grounds that the Court Order was neither served, nor clear in its wording or effect.

Now, in the application presently before the Court, the Applicant says that the Order had indeed been served, but that the affidavit of service had inadvertently not been filed. That to the applicant is the "discovery of new evidence" envisaged by Order 44.

The power of this court to review its judgment is provided for under Order XLIV Rule 1(1) of the Civil Procedure Rules. That rule provides as follows:

***"Order XLIV 1 (1) Any person considering himself aggrieved –***

***(a) by a decree or order from which an appeal is allowed 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.”*

Therefore, in order to obtain a review the applicant must show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. The applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. None of that has been shown. It would appear that the Applicants, having lost their case, wanted a second bite of the cherry.

Applications on this ground must be treated with great caution. Review cannot be sought to **supplement** the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial.

The affidavit of service clearly existed. It just was not filed. That is not discovery of new evidence. Secondly, the earlier application for contempt was disallowed on two grounds – lack of service and the fact that it was not clear in its language and effect. Finally, I would also note that this application for review was made some four months after the Ruling sought to be reviewed. This delay is inordinate, and not explained.

Accordingly, for the reasons cited, this application for review is dismissed with costs.

Dated and delivered at Nairobi this 5<sup>th</sup> day of October, 2005.

**ALNASHIR VISRAM**

**JUDGE**