

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.452 OF 2016

ANDREW GITHINJI MWIHURI.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA INDUSTRIAL ESTATES LTD.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on the plaintiff's Notice of Motion dated 20/1/2020. The same was brought under **Order 45 Rule 1(i) (a) (b) and Rule 2 (2) of the Civil Procedure Rules 2010**.

2. The application did not have any formal prayers. It was supported by the affidavit of **Andrew Githinji**, the applicant. Nevertheless, the Court can decipher that the applicant sought a review of the judgment of this Court (**Ochieng J**) made on 13/6/2018 by which his suit was dismissed.

3. The respondent filed grounds of objection dated 11/5/2020 in opposition thereto. It was contended that the application should be dismissed with costs because the applicant had already lodged a Notice of Appeal against the dismissal of his suit. Further, that he had not met the conditions necessary for a review to be granted. That the application was filed after unreasonable delay and there is no sufficient reason to warrant the delay.

4. **Order 45 (1)(a) and (b) of the Civil Procedure Rules** provides:-

“Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but 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.

5. The conditions for review are set out above. The court has considered the record and the supporting affidavit. The same do not disclose any of the three limbs for review of an order, decree or judgment. The matters raised in the supporting affidavit are fit for appeal and not review.

6. Further the delay in filing this application seeking review is unexplained. The applicant admits that he received the proceedings on 21/6/2019. However, the instant application was only filed on 22/1/2020, a delay of 7 months. He has not explained that delay.

7. The applicant had filed a Notice of Appeal on 22/6/2018 against the said judgment. Under the **Order 45(1) of the Civil Procedure Rules**, a person aggrieved by a decision may only apply for a review when an appeal has not been preferred. Both reliefs cannot be sought concurrently by a dissatisfied party.

8. In view of the foregoing, the application lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021.

A. MABEYA, FCIArb

JUDGE