

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 60 OF 2016**

**PATRICK SAGWA KISIA T/A STEG CONSULTANTS.....**  
**PLAINTIFF**

**VERSUS**

**KAY CONSTRUCTION COMPANY LIMITED.....**  
**....DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed the Amended Notice of Motion dated 24<sup>th</sup> August 2023 and further amended on 25<sup>th</sup> July 2024, brought under Articles 159(2) and 165 of the Constitution, Sections 1A, 1B, 3A and 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules.
2. The Applicant seeks review of the judgment delivered on 25<sup>th</sup> March 2022 by praying that the Court awards interest at the rate of 16% per annum, compounded, in accordance with the Decree issued on 26<sup>th</sup> May 2015 in *HCMC No. 39 of 2014, Kay Construction Limited v The Attorney General*, on all unpaid sums from the dates the Respondent receives payment from the Ministry of Defence until payment in full to the Applicant.
3. The application is supported by the affidavit of Patrick Sagwa Kisia sworn on 25<sup>th</sup> July 2024. He avers that the judgment of 25<sup>th</sup> March 2022 awarded the Applicant 15% of all monies

received by the Respondent from the Government of Kenya. Following the Court's ruling of 4<sup>th</sup> July 2024, the Respondent was ordered to pay Kshs. 52,500,000/= being 15% of Kshs. 350,000,000/= already received. He states that the Respondent has since received a further Kshs. 25,000,000/=, but failed to remit the corresponding 15% to the Applicant. He therefore urges the Court to review its judgment to incorporate interest at 16% per annum compounded, as reflected in the decree in Misc. Civil 39 of 2014. He relies on paragraph 35 of the judgment wherein the Court noted that interest could only accrue once monies were received by the Respondent, and argues that the Court proceeded on the assumption that the Respondent had not received further payments. The Applicant adds that the original pleadings sought interest at commercial rates and that the ends of justice favour review.

4. The Applicant further argues that the Respondent is attempting to re-litigate issues already determined, yet the Respondent failed to remit 15% of the Kshs. 25,000,000/= paid to it. It is therefore contended that interest at 16% is justified on the sums due but unpaid.
5. Opposing the application, the Respondent, through the Replying Affidavit of Hasmita Patel sworn on 24<sup>th</sup> December 2024, contends that the application is vexatious, an abuse of process, and does not meet the threshold for review. It is argued that the alleged new discovery is not new, as the Court at paragraph 32 of its judgment acknowledged that

the Respondent's witness admitted receipt of some payments. The Respondent asserts that the application is in substance an appeal disguised as a review, aimed at revisiting the Court's refusal to award interest. It is maintained that interest would only arise upon default in paying the Applicant 15% of the arbitral sum, and that the Respondent is still yet to receive the full amount from the Government of Kenya. Further, that the application is aimed at unjust enrichment, as the Applicant was only entitled to 15% of the sums owed to the Respondent, as per the letter dated 4<sup>th</sup> August 2008, which was the basis of the judgment.

6. The sole issue is whether the Applicant has satisfied the legal threshold for review of judgment under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.

7. **Order 45 Rule 1** 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 the 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 an account of some***

***mistake or error...on the face of the record, or for any other sufficient reasons, deserves to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.”***

8. **Section 80** of the **Civil Procedure Act** is basically in all fours with orders 45, rules 1 and 2 and provides:

***“Any person who considers himself aggrieved -***

***a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred or***

***b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereof as it thinks fit.”***

9. A clear reading of the above provisions shows that Section 80 gives the power of review, while Order 45 sets out the rules. The rules restrict the grounds for review.

10. The crux of the Applicant’s case is that the Respondent received additional sums from the Government (Kshs. 25 million) after the judgment and failed to remit 15% of the sum to the applicant as per the court judgment, and therefore the Court should review the judgment to include interest at 16% per annum compounded, similar to the decree in HCMC No. 39 of 2014. The application is premised

on the discovery of new evidence in that the Applicant discovered that the Respondent received additional payment.

11. The record is unequivocal that this Court, in its judgment, expressly and substantively addressed the question of interest. At paragraph 35 of the judgment, the Court was categorical that interest would only accrue upon the Respondent receiving payments from the Ministry of Defence. The Court thereby tied the accrual of interest to a specific factual trigger, namely, actual remittances received by the Respondent from the Government.
12. In the circumstances, the alleged discovery of further payments does not, in law, constitute “new and important evidence” within the meaning of Order 45 Rule 1 of the Civil Procedure Rules. As this Court noted at paragraph 32 of the judgment, the Respondent’s own witness had already conceded receipt of payments from the Ministry. The judgment further provided that in the event that any sums had already been received, the Respondent was obligated to remit to the Plaintiff the amount due, proportionate to the funds received from the Government of Kenya.
13. The question of whether the Respondent has, subsequent to judgment, received any additional sums is a post-judgment development, and therefore a matter properly falling within the realm of execution. It is not a basis upon which the Court may reopen or review its final decision. Review cannot be invoked to address events occurring after

the delivery of judgment; its purpose is confined to errors apparent on the face of the record or to genuinely new evidence which, despite due diligence, could not have been placed before the Court at the time judgment was rendered.

14. In **Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR**, the Court of Appeal held that review is not a substitute for appeal and cannot be used to reopen issues already determined. The Applicant, by seeking to introduce interest at 16% compounded after this Court declined the same, is in effect inviting the Court to sit on appeal over its own decision, which is impermissible.
15. With respect to the decree in Misc. Civil No. 39 of 2014, the Court observes that the said decree does not bind the Applicant, nor does it alter the contractual relationship between the parties herein. The Applicant's entitlement in this dispute arises solely from the 15% contractual arrangement acknowledged and affirmed by this Court in the judgment under review. It follows that the Applicant cannot rely on an unrelated decree to vary, amend, or expand this Court's final determination.
16. The allegation that the Respondent has failed to remit 15% of Kshs. 25,000,000/= concerns compliance with the judgment, not the correctness or soundness of the judgment itself. Such questions fall within the ambit of execution, where the Applicant retains all lawful remedies to enforce satisfaction of the decree. They do not provide a basis for

the Court to reopen or reconsider its judgment under the guise of review.

17. Having considered the application, I find that the Applicant has failed to demonstrate discovery of new and important evidence that could not, with due diligence, have been produced earlier; no error apparent on the face of the record; and no sufficient reason warranting interference with the judgment.
18. It bears reiteration that review is a narrow and exceptional jurisdiction, designed to address only the clearest instances of error or newly unearthed evidence. It is not a mechanism to secure a different outcome merely because a party is dissatisfied with the Court's findings.
19. In light of the foregoing, the Court is satisfied that there is no discovery of new evidence, and no sufficient reason has been established to warrant review. The application, in substance, invites this Court to sit on appeal over its own judgment, which is impermissible.
20. In the result, the Court finds that the Applicant has not met the legal threshold for review.
21. The Amended Notice of Motion dated 24<sup>th</sup> August 2023 and further amended on 25<sup>th</sup> July 2024 is hereby dismissed with costs to the Respondent.

**RULING** delivered virtually, dated and signed at **NAIROBI**

This **11<sup>th</sup>** day of **December** 2025.

**P.M. MULWA**

**JUDGE**

**In the presence of:**

*Ms. Owuor* for Plaintiff/Applicant

*Mr. Amimo h/b for Mr. Ometo* for Defendant

Court Assistant: *Carlos*