



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 473 OF 2015**

**ANDERSON MAKAYA**

**CLAIMANT**

**V**

**PREMIER INDUSTRIES LIMITED**

**RESPONDENT**

**RULING NO. 2**

1. This Cause was dismissed on 8 February 2018 because the Claimant and his advocate were not in Court when it was called out for hearing. The hearing date had been fixed in the presence of the Claimant's advocate representative.
2. Upon the dismissal, the firm of *Mwaniki Njuguna & Co. Advocates* filed an application on 28 February 2018, seeking leave to come on record for the Claimant, and an order setting aside the dismissal order.
3. In a considered ruling on 19 April 2018, the Court dismissed the application of 28 February 2018 and a *Notice of Appeal* was filed on 11 April 2018.
4. Undeterred, the Claimant, now through *Gakoi Maina & Co. Advocates* on 2 July 2018 sought orders reviewing/varying the dismissal order dismissing the application of 28 February 2018.
5. The question therefore begs whether it is open to the Claimant to invoke the review jurisdiction when a *Notice of Appeal* had been lodged.
6. As it is, the Claimant is pursuing 2 parallel legal processes over the same dismissal.
7. The Court of Appeal in *Orero v Seko* (1984) KLR 238 held that the review jurisdiction is only available to a party who is not appealing. A similar position was reached in *Kisya v Attorney General* (1986) eKLR where the Court held that a party who has filed a *Notice of Appeal* cannot apply for review, but if the application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending.
8. Section 80 of the Civil Procedure Act is also in tandem with the 2 decisions.
9. It also appears that the Claimant is attempting to challenge the merits of the ruling 19 April 2018 without making a disclosure either on the face of the motion or in the supporting affidavit that he had earlier briefed a different firm of advocates after the Cause was dismissed to challenge the dismissal, unsuccessfully.
10. For the above grounds, the instant application should fail but were the Court wrong on that conclusion, the Court would still have dismissed the application on the merits as the explanations/grounds advanced by the Claimant in the review application relate to the failure to attend the hearing, and does not sufficiently explain why there should be review.
11. The Court orders that the application of 2 July 2018 be dismissed with costs to the Respondent.

**Delivered, dated and signed in Nairobi on this 9<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Ochogo instructed by Gakoi Maina & Co. Advocates

For Respondent Mr. Adoli instructed by Akoto & Akoto Advocates

Court Assistant Lindsey