



**Awadh (Suing as administrator of the Estate of Omar Awadh Omar - Deceased) v Awadh
(Civil Appeal E012 of 2023) [2024] KEHC 10320 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E012 OF 2023
GMA DULU, J
JULY 30, 2024**

BETWEEN

**BARIKA SALIM AWADH (SUING AS ADMINISTRATOR OF THE ESTATE OF
OMAR AWADH OMAR - DECEASED) APPELLANT**

AND

HAMID MBARAK AWADH RESPONDENT

*(From the decision in Civil Case No. E118 of 2021 delivered by Hon.
T. N. SINKIYLAN (PM) on 23rd March 2023 at Voi Law Courts)*

JUDGMENT

1. In a ruling delivered on 23rd March 2023, the learned trial Magistrate dismissed the plaintiff's application brought by way of Notice of Motion, dated 1st January 2022, seeking a review of judgment of the trial court, dismissing the plaintiff's suit.
2. Dissatisfied with the ruling, the appellant, who was the plaintiff in the trial court, has come to this court on appeal through counsel Aziz & Associates on the following grounds:-
 1. The learned trial Magistrate erred in law and fact in relying only on three (3) paragraphs of the supplementary affidavit to reach a determination without due regard to the entire application, grounds and affidavit in support thereof.
 2. The learned Magistrate erred in law and in fact in failing to appreciate that the appellant had discovered new and important evidence and/or matter that she could not have obtained during the pendency of the matter.
 3. The learned Magistrate erred in law and fact by failing to appreciate that the appellant's application was not an appeal and ought to have been treated as that contrary to the learned Magistrate's finding.



4. The learned Magistrate erred in law and fact by finding that the review application fell outside the scope of review and that there was no error apparent on the record.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Aziz & Associates Advocates for the appellant, as well as the submissions filed by S. M. Righa & Company Advocates for the respondent.
4. In determining this appeal, I have to start by listing down the prayers in the application which was dismissed by the Magistrate. It is agreed between the counsel for the parties that the prayers in the subject application were as follows:-
 - i. The Honourable Court be pleased to review and vary its judgment delivered on 14th September 2022 and any other consequential orders arising from the decision dismissing the plaintiff's suit and allow prayers 9(1), (2), (3), (4) and (5) of the plaintiff's plaint dated 19th July 2021.
 - ii. The Honourable Court review and vary its judgment dated 14th September 2022 on the award on loss of dependency.
 - iii. Any other orders that the court may deem fit and just to grant.
 - iv. Cost of the application.
5. In determining this appeal also, I have to consider the provisions of the law, which govern a trial court's power in determining such an application for review of its substantive decision, such as the judgment sought to be reviewed herein through the above application.
6. The powers of review of a decision by a trial court in civil cases, are codified under Order 45 Rule 1 of the Civil Procedure Rules, which provides as follows:-

“Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed, 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 sufficient reason, desires 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.”
7. I note that in the grounds of the application above which was dismissed by the trial court, the applicant did not point to any particular error on the face of the record, nor did he or she mention or pinpoint to the Magistrate any particular new evidence that they had come across, after judgment was delivered. Instead, the grounds of the application were brief and in the following terms:-
 1. That a judgment was delivered on 14th September 2022 dismissing the plaintiff's case dated 19th July 2021.
 2. That in the said judgment dated 14th September 2022 the Honourable Court founded the loss of dependency to be Kshs. 513,200/=
 3. That in the said judgment dated 14th September 2022 the Honourable Court (sic).
8. On appeal, the appellant's counsel has submitted that in the application for review, the Magistrate should have done an indepth analysis of the pleadings, and that the Magistrate overlooked the question of law arising from the pleadings in the application which was dismissed.



9. In my view, an error on the face of the record should be a clear error which does not require legal or evidential depth in its determination. If it was for example 1,000,000/= instead of a correct figure of Kshs. 100,000/= that would be an error on the face of the record. If it was a lorry instead of a train, that would be an error on the face of the record. If it was a glaring reference to the wrong law, it would be an error. Such are the kind of errors on the face of the record that the trial court could correct, not erroneous substantive decisions of the court, which can only be corrected on appeal.
10. On new and important evidence, that evidence should also be clear and pleaded in the application for the court to determine first whether it is evidence. Secondly, whether the applicant was not aware of it, at the time the judgment or order was issued. Thirdly, whether it would affect the ultimate determination of the case.
11. The burden was on the appellant herein and his advocate to demonstrate to the trial court, that indeed there was an obvious error or errors on the face of the record to be corrected, and also that there was discovery of new and compelling evidence, which should have been considered by the court.
12. In my view, the appellant and his counsel did not do so, and the trial Magistrate cannot be faulted for making the decision she made.
13. Even on appeal, the appellant has not demonstrated to this court, the error or errors on the face of the record of the judgment which could be corrected, or given the particulars of the new and compelling evidence which would assist this court in making its determination.
14. I thus find no merits in this appeal. I dismiss the appeal. Costs of the appeal are awarded to the respondent.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

No appearance for appellant

Ms. Wachira for respondent

