



Great Rift Express Shuttle Services Ltd v Onywoki & another (Suing as the Legal Representative of the Estate of the late Boaz Ogoti Nyang'au) (Civil Appeal 122 of 2019) [2024] KEHC 9358 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 122 OF 2019
HM NYAGA, J
JULY 29, 2024**

BETWEEN

GREAT RIFT EXPRESS SHUTTLE SERVICES LTD APPELLANT

AND

GLADYS NYANSORA ONYWOKI 1ST RESPONDENT

GEORGE MORARA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
BOAZ OGOTI NYANG'AU**

*(Being an appeal from the Ruling of the Honourable S.Wahome,
delivered on 9th July, 2019, in Molo CMCC No. 152 of 2018)*

JUDGMENT

1. The Plaintiffs/Respondents in the lower court sued the Defendant/Appellant on behalf of the estate of Boaz Ogoti Nyang'au (Deceased) for General Damages under Fatal Accident Act and [Law Reform Act](#), Special damages and costs and interest of the suit.
2. It was alleged that on 19th November, 2017 or thereabout while the deceased was lawfully travelling aboard Motor Vehicle Registration Number KCB 824 G, registered in the name of the appellant. That the appellant by itself, servant, agent and or employee so negligently drove, managed and controlled the said motor vehicle, as a result of which it was involved in an accident and subsequently caused the death of the deceased herein.
3. The Appellant denied the entire claim by the Respondents vide its statement of defence dated 13th August, 2018. In the alternative it averred that any such occurrence as the claimants may prove was caused solely and/or substantially contributed to by the negligence of the deceased.



4. However, on 6th November, 2018, the parties recorded consent on liability at 95% against the Appellant and 5% against the deceased/ Respondents.
5. After hearing the parties on assessment of damages and factoring in the aforesaid liability, the trial magistrate entered judgement in favour of the Respondents as follows:-
 - i. Pain and suffering- Ksh. 47,500/=
 - ii. Loss of expectation of life- Ksh. 142,500/=
 - iii. Loss of Dependency – Ksh. 5,130,000/=
 - iv. Special Damages- Ksh. 754,500/=
 - v. Total – Ksh. 6,074,500/=
 - vi. Costs and interest until payment in full.
6. Thereafter, the Appellant filed an Appeal against the above Judgement being Nakuru HCCA NO. 38 of 2019 and an application dated 18th March, 2019 seeking inter alia stay of execution of the Judgement/decree pending the hearing and determination of the aforementioned Appeal. The Application was unopposed and the trial court in its ruling delivered on 14th May, 2019 allowed the Application on the following terms:-
 - a. The Applicant to pay the Respondent a sum of Ksh. 1,500,000/= within 14 days from the date of the ruling.
 - b. The Applicant to deposit another sum of Ksh. 1,500,000/= in court within 30 days from the date of the ruling.
 - c. Failure by the Applicant to comply with the first condition, execution to automatically ensue.
 - d. Costs of the Application to abide the outcome of the Appeal.
7. Subsequently, the Plaintiffs/Respondents vide the Notice of Motion dated 20th May,2018 sought for review of the ruling/ orders of the lower court made on 16th May,2019 in totality and for the court to order the Appellant to provide security for the entire judgment/costs. The main ground on which the Application was premised on was that the stay conditions set by the trial court was erroneous for it was not on the entire sum of Ksh.7,187,364.18/= being the decretal sum plus costs but only on Ksh.3,000,000/=. The Respondents thus prayed for the provisions for the remaining sum of the decretal sum.
8. The Appellant herein opposed the Application majorly on grounds that it had complied with the stay conditions, no prejudice will be experienced by the Respondents who were already enjoying part of the Judgment award and that the lower court was functus officio having delivered a ruling which it had complied with.
9. The court after considering the application delivered its ruling on 9th July, 2019. It found that it was not functus officio as there are law provisions which allowed a party to seek review before the court that made a decree or an order where there are grounds to warrant the same. The court also noted that it had delivered a judgment that was in excess of Ksh.7,000,000/= and when the Appellant/Applicant made an application for stay alluded to Ksh.3 million which was the statutory amount which an insurance was liable to pay. However, the Insurance Company, to wit, Direct line Assurance Company was not a party to the matter and that the law was that insurance company was to only pay decretal sum to



- the tune of Ksh. 3 million but the balance must be paid by the Appellant unless the Appellate court overturned its judgment.
10. In light of the above, the court held that there was an error on the face of the record and reviewed its orders made on 16th May,2019 as follows:-
 - i. Conditions 1 and 2 requiring the Defendant to pay the plaintiff Ksh.1, 500,000/= and deposit Ksh. 1,500,000/= shall remain in force and in any event the Defendant has already complied with them.
 - ii. The Defendant shall deposit the remaining balance of the decretal sum in court within 30 days from the date of this ruling or in the alternative a security of equal or larger value to be approved by the court.
 - iii. The costs shall abide the outcome of the Appeal in the High Court.
 11. The Appellant was aggrieved by the above ruling and filed the instant appeal raising the following grounds:-
 - a. The Learned Magistrate erred in Law and fact in failing to accord due regard to the law in relations to matters for review.
 - b. The Learned Magistrate erred in Law and fact in allowing the Application for review.
 - c. The Learned Magistrate erred in Law and fact in failing to accord due regard to the Appellants' Replying Affidavit and submissions in arriving at its ruling.
 - d. The Learned Magistrate erred in Law and fact by failing to consider authorities relied on by the Appellants in their submissions in arriving at its ruling.
 12. The Appellant thus prayed that the Appeal be allowed, ruling delivered on 9th July, 2019 on review be set aside and the Respondents to pay the costs of this Appeal.
 13. The court directed that the Appeal be canvassed through written submissions. Only the Respondents filed their submissions by the time I was writing this ruling.

Respondents' Submissions

14. Citing the Provisions of Order 45 of the Civil Procedure Rules and the case of Pancras T.swai vs Kenya Breweries Limited [2014]eKLR quoted in the case of Simba Couch Limited vs Kiriuyu Merchants Auctioneers [2019] eKLR which set out the conditions to be satisfied before review application is allowed, the Respondents submitted that they met the threshold for review as was rightly held by the lower court and prayed that the instant appeal be dismissed.
15. The Respondents also argued that this Appeal has been overtaken by events and that it is important to note that the main appeal HCCA NO.38 of 2019 was already dismissed for want of prosecution on 20th April, 2023.
16. The Respondent prayed for costs of this appeal in accordance with Section 27 of the [Civil Procedure Act](#).

Analysis & Determination

17. The only issue for determination is whether the Appellants' Appeal has merit.



18. It is clear from the memorandum of the Appeal that the Appellant is challenging the ruling of the lower court delivered on 9th July, 2019 reviewing its orders of 16th May, 2019.
19. Section 80 of the *Civil Procedure Act* is the substantive law relating to review. It provides as follows:
- “ 80 Any person who considers himself aggrieved 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 order therein as it thinks fit”
20. To operationalize Section 80 above, the procedural provisions of Order 45 (1) of the Civil Procedure Rules provide that:
- “ 45 (1) 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
- (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 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.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies to the review”.
21. An application for review of a judgment, ruling order or decree is guided by the principle of discovery of a new and important matter, an error apparent in the face of record or any other reason analogous to the first two. In *Muyodi vs. Industrial & Commercial Development Corporation & Anor.*, (2006) 1 EA 243), the Court of Appeal stated:
- “For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.



22. In the Indian case of *Aribam Tuleshwar Sharma vs Ariban Pishak Sharma* (1979) 45CC 389, 1979(11) UJ 300 SC, it was held that:

“The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits that would be province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.”

23. Applying the said provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules to this appeal, I note that the lower court had delivered a judgement in excess of 3 million. When the Appellant filed an application seeking stay of execution of the judgement/decreed delivered on 19.2.2019, it did not inform the court that the judgment was in excess of 7 million. It only alluded to the sum of Ksh.3, 000,000/= which is the maximum statutory amount which the insurance company must pay. The court rightly found that its stay orders were only in respect of the sum of 3 million and the remainder of 4 million was left out. The trial court found that this is a sum which the defendant was to pay.

24. Looking at the judgement of the court vis a vis the ruling on stay, it is clear the court omitted a substantial portion of the decretal sum when it gave the initial orders. That was an error on the face of the record and on finding that the respondent herein had met the threshold for review on grounds of an error apparent on the face of record, the court was correct to have reviewed the said order. I find no error on the part of the learned magistrate.

25. Therefore, I find that the Appeal herein lacks merit.

26. Even if I was to allow the instant appeal, there would be nothing to litigate upon considering that the main appeal was indisputably dismissed for want of prosecution on 20th April, 2023. I would still have found that this appeal is founded on very unstable grounds and there is nothing to hold it afloat.

27. In the end, I find that this Appeal fails in its entirety and is hereby dismissed with costs to the respondent.

28. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer

Mr. Gekonga for Respondent

No appearance for Appellant

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