



**Wasike & another & another (Suing as the legal representatives and administrators to the Estate of Harrison Simiyu Misiko - Dcd) v Kenya Power & Lighting Co Ltd & another (Civil Appeal E77 of 2022) [2024] KEHC 10402 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10402 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E77 OF 2022  
DK KEMEL, J  
AUGUST 23, 2024**

**BETWEEN**

**JOSEPH WABOMBA WASIKE ..... 1<sup>ST</sup> APPELLANT**

**AGNES KHALAHI ODHALO ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS TO  
THE ESTATE OF HARRISON SIMIYU MISIKO - DCD**

**AND**

**KENYA POWER & LIGHTING CO LTD ..... 1<sup>ST</sup> RESPONDENT**

**MBURU NYAMBURA ALICE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This appeal arises from the ruling of Hon. N.N. Barasa, Principal Magistrate Webuye law courts in PMCC No. 122 of 2016 involving an application for orders inter alia; a review and setting aside of the judgement delivered on 26<sup>th</sup> March 2019; the amendment of a Plaintiff on record to reflect the correct suit motor vehicle as Motor Vehicle Registration No. KBJ 522U instead of Motor Vehicle Registration No. KBT 522U; reflection of correct parties in dispute.
2. Being aggrieved by the decision of the Honourable magistrate, the Appellant lodged this appeal citing thirteen (13) grounds of appeal which may be summarized thus: -
  - i. That the learned magistrate erred in law and fact in finding that the Appellant's application dated 22<sup>nd</sup> April 2021 was without merit and an abuse of the Court process.
  - ii. That the learned magistrate erred in law and fact in failing to find that the 1<sup>st</sup> Respondent's replying affidavit in response to the application dated 22<sup>nd</sup> April 2021 was irregular and fatally defective as it was not sworn under seal.



- iii. That the learned magistrate erred in law and fact in failing to invoke Section 3A, 1A & 1B of the Civil Procedure Act in favour of the Appellant's application dated 22<sup>nd</sup> April 2021.
  - iv. That the learned magistrate erred in law and fact in finding that there was nothing tangible before the Court that rightly connected KBJ 522U to the accident and not any other if not KBT 522.
  - v. That the learned magistrate erred in law and fact in finding that the Appellant ought to have called a police officer to give details of the motor vehicle involved in the accident which could only be done once the Appellant's application had been allowed.
  - vi. That the learned magistrate erred in law and fact in finding that discovery of motor vehicle involved in the accident being KBJ 522U instead of KBT 522 U did not constitute discovery of new and important matter.
  - vii. That the learned magistrate erred in law and fact in finding that no police record, police file or OB extract was filed to demonstrate that indeed an error was committed by the police traffic department that issued the police abstract.
  - viii. That the learned magistrate erred in law and fact in finding that no police officer had sworn any affidavit explaining the details that were erroneous and/or sworn vide an affidavit and thus ignoring the contents of paragraph 7 of the Appellant's supporting affidavit in support of the application dated 22<sup>nd</sup> April 2021.
  - ix. That the learned magistrate erred in law and fact in failing to consider the submissions made on behalf of the Appellant in arriving at her decision.
  - x. That the learned magistrate erred in law and fact in applying the wrong principles of law in arriving at her decision on the Appellant's application dated 22<sup>nd</sup> April 2021.
  - xi. That the learned magistrate erred in law and fact in predisposing her mind to a position favourable to the 1<sup>st</sup> Respondent against the Appellant.
  - xii. That the learned magistrate erred in law and fact in failing to evaluate the law and in particular Order 45 Rule 1 & 2 and Order 8 Rule 3 & 5 of the Civil Procedure Rules 2010.
3. The Appellant prayed that the appeal be allowed; the ruling of the lower Court be set aside and substituted with an order allowing the Appellant's application dated 22<sup>nd</sup> April 2021.
  4. This appeal was disposed of by way of written submissions.
  5. The Appellant submits that the deceased, Harrison Simiyu Misiko, was involved in a fatal accident on 3<sup>rd</sup> December 2014 and that the same was reported at Kitale Traffic Base vide OB No. 2/04/2014. The accident involved motor vehicle registration No. KBJ 522U land cruiser belonging to the 1<sup>st</sup> Respondent and driven by Daniel Nyikuri an employee of the 1<sup>st</sup> Respondent. The lower Court delivered its judgement on 26<sup>th</sup> March 2019 in favour of the Appellant as against the 2<sup>nd</sup> Respondent and that the same is yet to be executed.
  6. According to the Appellant, there is an error on the face of the record and/or police abstract and in particular entries in the police abstract on the Court record. Counsel submits that it emerged later on after judgement that the motor vehicle that caused the death of the deceased was erroneously captured by Kitale Traffic Base officers as Motor Vehicle Registration No. KBT 522U instead of Motor Vehicle Registration No. KBJ 522U and that the police abstract dated 23<sup>rd</sup> March 2015 depicting the



- error was later duly stamped on 16<sup>th</sup> March 2021 capturing the correct information by the issuing institution. Counsel submits that the issuing officer could only testify to the duly stamped police abstract elaborating further if the learned magistrate allowed the Appellant's application dated 22<sup>nd</sup> April 2021. Counsel relied on the case of *Republic v Advocates Disciplinary Tribunal Ex-Parte Apollo Mboya* (2019) eKLR.
7. Counsel submits that the judgement delivered on 26<sup>th</sup> March 2019 was made on an account of some mistake or an error apparent on the face of the police abstract on the Court record as the Motor Vehicle Registration No. KBT 522 U belongs to the 2<sup>nd</sup> Respondent while KBJ 522 U belongs to the 1<sup>st</sup> Respondent.
  8. Counsel submits that the learned magistrate erred in law and fact in failing to rely on the dictates of Sections 3A, 1A & 1B of the *Civil Procedure Act* in favour of the Appellant's application dated 22<sup>nd</sup> April 2021 and that the discovery of the error was only after a warrant of arrest was issued against the 2<sup>nd</sup> Respondent, owner of KBT 522 U and not KBJ 522 U. Counsel argued that this information was not available to them after due diligence and only emerged during the execution process.
  9. Counsel submitted that the police officer who corrected the police abstract did not testify as to the source of his information as the same was only produced as an exhibit by consent of the parties who were not aware that the same had erroneous information. Counsel further submits that the elaboration on the entries in the police abstract could only have been clarified once the Appellant's application dated 22<sup>nd</sup> April 2021 was allowed and the police officer called forth to give evidence.
  10. Counsel submits that the application dated 22<sup>nd</sup> April 2021 was not likely to prejudice the defence and defeat the dictates of the Limitations of Actions Act as the matter was concluded to judgement. Counsel further submits that where a party discovers new evidence or matter which was not within their knowledge when the decision was made then the doctrine of *functus officio* fails. Counsel relied on the decisions of *Raila Odinga v IEBC & 3 Others* and *Khalif Sheikh Adan v Attorney General* (2019) eKLR.
  11. The 1<sup>st</sup> Respondent opposing the appeal, submits that the appeal before this Court was filed contrary to the dictates of Section 79G and 95 of the *Civil Procedure Act*. Counsel argued that the memorandum of appeal dated 22<sup>nd</sup> February 2022 was filed in September 2023 challenging the contentious ruling which was delivered on 22<sup>nd</sup> February 2022. Counsel submits that no leave was sought to seek leave or extension of time to file the instant appeal out of time as required under law. Counsel relied on the decisions of *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* (2019) eKLR.
  12. On the issue of review, Counsel relying on the dictates of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, submits that the trial Court properly applied the law when it held that the judgement delivered on 26<sup>th</sup> March 2019 was properly based on the pleadings before the Court and that the Appellant failed to prove how and when they knew of the alleged new evidence. Counsel argued that as per the provisions of Order 3 Rule 4 of the *Civil Procedure Rules*, any claim omitted is deemed to have been waived or relinquished by a party required to make such a pleading and to buttress the same position, Counsel relied on the case of *Evans Bwire v Andrew Ngida* HCCA No. 103/2000 (Kisumu)
  13. Counsel submits that under Section 4 (2) of the *Limitations of Actions Act*, CAP 22 the appeal before the Court is without merit and should be dismissed with costs to the 1<sup>st</sup> Respondent. Counsel argued that the application for review was only brought after a long delay upon discovery of alleged fresh evidence and important matter but no reasons were availed for their delay. Counsel argues that the rectified police abstract was stamped on 16<sup>th</sup> March 2021 while the application before the lower Court



was made on 22<sup>nd</sup> April 2021 then served upon the 1<sup>st</sup> Respondent on 9<sup>th</sup> September 2021, over seven months thereafter.

14. Counsel submits that the Appellant's application for review failed to meet the threshold for review of orders and that the Appellants failure to establish that after exercise of due diligence the new discovered evidence was not within their knowledge and could not present the same before judgement was passed.
15. I have given due consideration to the record of appeal, supplementary record of appeal herein as well as the written submission by the Appellants and 1<sup>st</sup> Respondent. I find the only issue for determination to be;
  - i. Whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the judgment herein.
16. Under section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules*, the Court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
17. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See *Paul Mwaniki v NHIF Board of Management* [2020] eKLR;
18. Is there any such mistake or error on the face of the record as alleged by the Appellant herein?
19. The judgment in question was delivered on 26<sup>th</sup> March 2019. The subject of the review application is on details of the correct motor vehicle registration number and the correct party in the suit. According to the Appellants, the correct motor vehicle registration number is KBJ 522 U and not KBT 522 U as captured in the lower Court pleadings. Further, the capture of motor vehicle registration number KBT 522 U meant that an innocent party was prosecuted and judgement against them delivered.
20. A review could be granted to correct an error or an omission on the part of the Court. That error or omission has to be self-evident and should not require elaborate argument to be established. (see the supreme court of Uganda in *Edison Kanyabwera v Pastori Tumwebaze* (2005) UGSC 1). The mistake relating to the contents on the motor vehicle that caused the accident and subsequent death of the deceased as was filed before the learned magistrate was not a mistake apparent on the face of the record. Upon perusal of the lower Court record, it is elaborate that the pleadings as filed by the Appellant indicated the suit motor vehicle registration number as KBT 522U and that the trial Court's judgement is manifestly in tandem with the details as provided in the pleadings. The Appellant did not avail the issuing officer of the Police Abstract to testify in Court to the ownership of the motor vehicle, cause of accident, insurance details or details of the motor vehicle that caused the accident. (see *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR - Civil Appeal 60 & 62 of 2017)
21. On the aspect of discovery of new evidence that would not have been established even after exercising due diligence, this Court concurs with the learned magistrate that the issuing officer of the contentious police abstract should have been called to Court to render evidence with regard to the motor vehicle details and its ownership as the same was a matter of procedure. This simply means that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since, in so doing, the party fails to substantiate its pleadings. No evidence was availed to connect KBJ 522 U to the accident that occurred.



22. On the aspect of the amended Plaintiff capturing the right party as the 2<sup>nd</sup> Respondent, Order 8 Rule 5 of the [Civil Procedure Rules](#) on amendment of pleadings provides:
- “(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.
- (2) This rule shall not have effect in relation to a judgment or order.”
23. The power of the Court to allow or refuse a party to amend pleadings is discretionary as was held in the case of [Andrew Wabuyeke Biketi v. Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others](#) [2015] eKLR, where the Court in disallowing an application for amendment stated as follows;
- “...the court has discretion to order amendment at any stage before judgment. And amendment should be freely allowed provided it is not done mala fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs”.
24. The foregoing position speaks the same language as in the case of [Ochieng & Others v First National Bank of Chicago](#) Civil Appeal No. 147 of 1991 (unreported) as cited with approval in [St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd](#) [2018] eKLR in which the Court of Appeal set out the principles governing amendment of pleadings as follows: -
- “a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.
- b) The amendments should be timeously applied for;
- c) Power to amend can be exercised by the court at any stage of the proceedings.
- d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.
- e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on [limitations Act](#) subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.”
25. I concur with the trial Court that the application for review by the Appellant was brought with delay which is almost three years after rendering its judgement and that no sufficient reasons were availed by the Appellant and that the prayer for amendment of Plaintiff which is brought forth after the trial Court rendered its judgement does occasion prejudice or injustice to the 1<sup>st</sup> Respondent which cannot be compensated by award of costs.
26. In light of the foregoing, the Appellants in this case did not demonstrate that there was discovery of new and important matter or evidence or that there was an error apparent on the face of the record, which in my view does not amount to sufficient reason to warrant this Court to exercise its discretion in their favour. Indeed, the Appellants woke up from slumber after realizing that the suit vehicle that they had targeted did not belong to the party sued and this arose during execution of the judgement. It



was already late in the day and rather ingenious on the part of the Appellants to purport that this was a new matter that was not within their knowledge. The Appellants were under obligation to conduct due diligence by getting a search certificate from the Registrar of motor vehicles which could then indicate the registered owner of the subject vehicle. They cannot wait for three years and then attempt to come under the guise of a review instead of admitting that their evidence before the trial court was not proved as against the 1<sup>st</sup> Respondent. It is clear that the Appellants were thus clutching at straws and trying their luck vide the said application for review which was rightly rejected by the trial court. I agree with the 1<sup>st</sup> Respondent that the present appeal lacks merit and is an abuse of the Court process.

27. The net result is that the appeal is devoid of merit and is dismissed with costs to the 1<sup>st</sup> Respondent.  
It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 23<sup>RD</sup> DAY OF AUGUST 2024.**

**D. KEMEI**

**JUDGE**

In the presence of:-

Kigunza for Appellant

Miss Tussiime for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

Kizito Court Assistant

