



**Monarch Insurance Company Limited v Mbugua (Civil Case
19 of 2017) [2023] KEHC 17914 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE 19 OF 2017
F GIKONYO, J
MAY 31, 2023**

BETWEEN

MONARCH INSURANCE COMPANY LIMITED PLAINTIFF

AND

BETHUEL MBUGUA DEFENDANT

RULING

1. The court dismissed this suit in the judgment delivered on February 23, 2023.
2. The Notice of Motion dated 3/3/2023 now seeks the said judgment to be set aside and a fresh judgment be entered accordingly.
3. The Notice is expressed to be brought under Article 25, and 159(2) of the *Constitution*, Section 1A, 1B, 100 of the *Civil Procedure Act*, Order 40 Rule 1, 45 Rules 1 & 2, and Order 51 Rule 1 of the *Civil Procedure Rules 2010*.
4. The application is premised on the grounds set out in the application and the supporting affidavit of Dorry Wamugo, Advocate sworn on 23/3/2023. I note however that the supporting affidavit is sworn on March 23, 2023, and the notice of motion is dated 3/3/2023 and the documents are filed in court on 6/3/2023.
5. The major ground cited is that there is discovery of new and important evidence which was not within the applicant's possession at the time of the hearing of the suit; that the applicant has since discovered from their archives the policy schedule for the motor vehicle registration number KBR 522H issued to the defendant for the period of June 9, 2015 to July 8, 2016; that the policy schedule that had earlier been attached was for the current period of insurance at the time of filing of the suit and the applicant believed it was just a prove of insurance since existence of the policy was not in question; that no party will be prejudiced by the orders sought by the applicant since the review will help the court arrive at a just and conclusive end to put this matter to rest; that there has been no unreasonable delay in filing



the application; and that the application has been lodged in good faith and therefore the court should exercise its discretion and allow the application.

6. The defendant/respondent was served with the application herein together with the directions of this court of 7/03/2023. I have perused the affidavit of Erick Kirimi Muriuki sworn on March 17, 2023. I find that the defendant/respondent was duly served but failed to file any response/replies to the application. The application herein is therefore unopposed.
7. The counsel for the applicant, Mr Kirimi, on 28/3/2023, urged this court to allow the motion and chose to rely on the affidavits filed.

Analysis and Determination

8. I have given due consideration to the application filed herein, and the supporting affidavit attached thereto. I should determine;
 - a. Whether this court should review, vary or set aside its judgement of 23/2/2023.
9. The power to review own decisions is provided in Section 80 of *Civil Procedure Act* and the reasons for review are provided in Order 45 Rule 1 of the Civil Procedure Rules.
10. Section 80 of the *Civil Procedure Act* provides: -
 80. "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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
11. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows: -

"45 Rule 1 (1) 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 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 other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."
12. The Court of Appeal in the case of *Pancras T Swai -vs- Kenya Breweries Limited* (2014) eKLR reiterated the conditions set by Order 45.



13. The application herein is premised on the ground of discovery of new and important evidence. This ground is specific: -

‘...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’.

14. The applicant must therefore show; _

- i. Discovery of new and important matter or evidence; and
- ii. 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’.

15. In this case, the policy document was with the applicant or was within its premises and therefore, was within its knowledge. It being the insurer which issued the policies, it cannot claim that, after due diligence, the policy was not within its knowledge or could not have produced it at the time when the judgment was delivered. The applicant had not filed the policy document in court, and when it was asked to file it, they filed the wrong policy document. This is sheer negligence on the part of the applicant.

16. Some courts hold the view that once a party fails the test for discovery of new and important matter or evidence, the court should not allow the application on sufficient ground. See the case of [*Turbo Highway Eldoret Limited –vs- Synergy Industrial Credit Limited*](#) [2016] eKLR Sewe J citing the case of [*Rose Kaiza –vs- Angelo Mpanjuiza*](#) [2009]eKLR, where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

“...where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause...”

17. The rationale for the said position is explained in the case of [*D J Lowe & Company Ltd –vs- Bonquo Indosuez*](#), Nairobi Civil Application No 217 of 1998, by the Court of Appeal that: -

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

18. But, despite the fact that the applicant exhibited sheer negligence in not filing a document which was within their knowledge, the need to serve substantive justice still rings loud in the ears of the court especially given that the suit is not defended. Accordingly, I set aside judgment herein and reinstate the suit for hearing and disposal.

Conclusion and Orders

19. In the upshot, the judgment delivered on February 23, 2023 dismissing the suit is set aside, and the suit is reinstated.

20. The applicant shall file the proper documents in compliance with the [*Civil Procedure Rules*](#) within 30 days of today which failing the suit will automatically stand dismissed.



21. No order as to costs as the application was not opposed.

22. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
31ST DAY OF MAY, 2023.**

F. GIKONYO M.

JUDGE

IN THE PRESENCE OF:

1. Mr. Makori– CA

2. Gaya for plaintiff

3. Lawrence Mwangi for defendant - absent

