



**Mwaura (Suing as the legal representative of the Estate of Silas Kuria Mwangi (Deceased)) v Kenya Power & Lighting Co Ltd (Civil Appeal 427 of 2019) [2023] KEHC 19057 (KLR) (Civ) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 19057 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL APPEAL 427 OF 2019**  
**DO CHEPKWONY, J**  
**MAY 25, 2023**

**BETWEEN**

**PETER MWANGI MWAURA ..... APPELLANT**  
**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SILAS KURIA**  
**MWANGI (DECEASED)**

**AND**

**KENYA POWER & LIGHTING CO LTD ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. D.O Mbeja (SRM)  
dated 28th June. 2019 in Milimani CMCC No.1726 of 2010)*

**JUDGMENT**

**Background**

1. By a Complaint dated 25<sup>th</sup> January, 2010, the Plaintiff/Appellant sought for the following prayers;
  - a. General damages.
  - b. Kshs.64,200/= being special damages.
  - c. Costs of this suit.
  - d. Interest on (a) and (b) at court rates.
2. In his Complaint, the Appellant pleaded that the Respondent owed the general public and particularly the deceased, Silas Kuria Mwangi a duty of care from harm as a result of the electric current in its wires and not to expose him to live wires hanging from the air or stuck in the ground.



3. It was averred that on or about 28<sup>th</sup> April, 2009 and in total breach of the said duty of care, the Respondent negligently and or carelessly left a high voltage live electric wire stuck in the ground whereupon Silas Kuria Mwangi touched it and was electrocuted, a result of which he lost his life.
4. The Appellant pleaded particulars of breaches on the part of the Respondent as particularized in Paragraph 5 of his Complaint as follows:-
  - a. It allowed a high voltage electric wire to touch the ground when it knew or ought to have known that it was dangerous to do so.
  - b. It exposed the deceased to an extreme danger.
  - c. It failed to detect that the said electric wire which touched the ground was live.
  - d. It failed to exercise due care and diligence so as to ensure protection of the general members of public and the deceased in particular.
5. By reasons of the foregoing, the Appellant and the estate of the deceased have suffered damages and loss due to loss of life of the deceased who died at the age of 32 years. It is and therefore the Appellant filed the suit in his own behalf and on behalf of other beneficiaries of the deceased and on behalf of the estate to claim for damages.
6. The Appellants entered appearance vide a Memorandum of Appearance dated 26<sup>th</sup> May, 2010 and subsequently filed its statement of defence on even date. In its statement of defence, the Respondent denied occurrence of the accident as alleged and went on to state that if any accident occurred, which is denied, the same was wholly contributed to by the deceased.
7. The Respondent pleaded particulars of negligence on the part of the deceased as follows;
  - a. Carelessly and negligently going to a sealed off area without taking care of his own safety.
  - b. Failing to heed the danger warning signs thereby exposing himself to danger.
  - c. Failing to respect the set way leaves.
  - d. Going into the set way leave and exposing himself to the obvious risk when he ought to have known it was risky to do so.
8. The Respondent averred that he would rely on the doctrine of *volenti non fit injuria* and further denied that the Appellant suffered any loss and damage.
9. Later, the Appellant later filed a Notice of Motion application dated 18<sup>th</sup> April, 2018, seeking for inter alia to have the court file reconstructed, the dismissal order be set aside and for the suit to be reinstated. The application was supported by the grounds on the motion and further by the affidavit of Peter Mwangi Mwaura, the Appellant herein.
10. The application was heard and ruling was delivered on 18<sup>th</sup> July, 2018. In its said ruling, the trial court allowed the application dated 18<sup>th</sup> April, 2018 on condition that the suit is fixed for hearing within six months now that the file was available. Upon expiry of six months, the suit to stand dismissed with costs, in default of the aforesaid. Further, after the close of pleadings and all circumstances considered the parties to give full disclosure and fast-track the suit for trial at their earliest convenience.
11. On 2<sup>nd</sup> April, 2019, the Appellant moved the court with another application dated 1<sup>st</sup> April, 2019 seeking for, inter alia, to have the order made on 18<sup>th</sup> July, 2018 reviewed and or set aside and that the period of fixing the suit to be extended or enlarged. The application was anchored on the grounds on



its face and further by the affidavit of Mwangi Chege who describes himself as the advocate seized of the matter.

12. The matter was heard and ruling delivered on 28<sup>th</sup> June, 2019. In its ruling, the court stated that it appears that there was no sufficient ground for review. The application as presented is devoid of merit and was dismissed with no orders as to costs.

### **The Appeal**

13. Being aggrieved by the Trial court's ruling delivered on 28<sup>th</sup> June, 2019, the Appellant preferred an appeal before this court vide a Memorandum of Appeal dated 26<sup>th</sup> July, 2019, setting out the following grounds:-
  - a. That the trial Magistrate erred in law and in fact in that he dismissed the Appellant's application dated 1<sup>st</sup> April, 2019 and filed in court on 2<sup>nd</sup> April, 2019 without any or any cogent reason.
  - b. That the trial Magistrate erred in law and in fact in that he failed to extend or enlarge the time for hearing the suit when he had earlier ruled that there were triable issues that required the suit to be heard and consequently exercised his discretion on wrong principles.
  - c. That the trial Magistrate focused on prayer No.(a) relating to review of court orders of 18<sup>th</sup> July, 2018 only and failed to consider prayer No.(b) of the application dated 1<sup>st</sup> April, 2019 and filed in court on 2<sup>nd</sup> April, 2019 and consequently arrived at wrong conclusions.
  - d. That the trial Magistrate erred in law and in fact in that he failed to consider the efforts made by the Appellant to fix the suit for hearing and the obstacles and challenges or road blocks laid before him by the Court Registry and other prayers which obstacles and challenges were not of his own making.
  - e. That the trial Magistrate erred in law in that he made an order that the suit should be heard within six months failing which the suit would stand dismissed and fixed his mind to that order without leaving a room for flexibility upon good reasons being shown and consequently failed to exercise his discretion judiciously and acted contrary to the letter and spirit of Article 159 of *the Constitution*.
14. The Appellant has urged this Court to grant the following prayers:-
  - a. This appeal be allowed.
  - b. The decree and the ruling of the lower court dated 28<sup>th</sup> June 2019 be set aside.
  - c. Civil Suit No.1726 of 2010 in Milimani Commercial Courts be heard by a different Magistrate.
  - d. The Respondent be condemned to pay costs of this appeal and lower court.
15. This appeal was canvassed by way of written submissions. The Appellant's submissions are dated 14<sup>th</sup> July, 2022. There are no submissions on record by the respondent. I have read through the grounds of appeal and the submissions which will be considered in the analysis and determination.

### **Analysis and Determination**

16. Having considered the Grounds of Appeal and the written submissions by the Appellant, this Court finds the sole issue relevant for determination before this court is whether this appeal is merited.



17. It is trite law that this being a first appeal, this court has a duty to re-evaluate and re-consider the evidence adduced before the trial court afresh before drawing its own inference. In the case of *Abok James Odera T/A A.J Odera & Associates -vs- John Patrick Machira T/A Machira & Co. Advocates* [2013]eKLR, the Court of Appeal held as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

18. It should be noted that an Appellate Court will only interfere with trial’s Court Judgment if the same is proved to have been founded on wrong legal principles or wrong interpretation of the law. That was the position by the Court of Appeal in the case of *Bashir Ahmed Butt -vs- Uwais Ahmed Khan* [1982-88] KAR, where it held that:-

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...” emphasis added.

19. From the record, this instant appeal is as a result of the ruling delivered on 28<sup>th</sup> June, 2019 in respect of the Notice of Motion application dated 1<sup>st</sup> April, 2019 seeking, to inter alia, have the order made on 18<sup>th</sup> July, 2018 reviewed and or set aside and that the period of fixing the suit to be extended or enlarged.

20. The law on applications for review of court orders is provided for under order 45 (1) of the *Civil Procedure Rules*, 2010. It provides that:-

“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 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 a review of Judgment to the court which passed the decree or made the order without unreasonable delay.

21. In this Court’s understanding of the said provision of the law is that an application seeking for orders of review should be based on discovery of new evidence which was not available after exercise of due diligence, or mistake or error apparent on the face of the record and any other sufficient reason. From the evidence in support of the application for review dated 1<sup>st</sup> April, 2019, the Appellant through his advocate on record deposed that he invited the Respondent’s counsel to take a hearing date for pre-trial on 23<sup>rd</sup> July, 2018 but no date was taken as the court file was not traced and hence could not be retrieved by the Registry.



22. The matter was later fixed for mention on 9<sup>th</sup> October, 2018 for pre-trial. On that day the trial court certified the matter ready for hearing and directed that a hearing date be taken at the registry on priority basis.
23. I have thoroughly read through the record and the evidence in support of the application for review and find no compelling reasons to warrant any review of the orders of the court issued on 18<sup>th</sup> July, 2018. In short, the appellant did not meet the threshold for review envisioned under Order 45 of the Civil Procedure Rules.
24. It is well settled that an application for review is granted on proof of the principles of discovery of new and important evidence or an error apparent on the face of record or any other sufficient reason. This Court is guided by the decision in the case of *Muyodi –vs- Industrial & Commercial Development Corporation & Another* [2006]1 EA 243, where the Court held that:-
- “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”.
25. Again the orders of review under order 45 of the *Civil Procedure Rules* are discretionary in nature to be granted judiciously based on the material presented before court. In the case of *Pancras T. Swai – vs- Kenya Breweries Limited* [2014]eKLR, the Court of Appeal held that:-
- “Order 44 rule 1 (now order 45 rule 1 in the 2010 *Civil Procedure Rules*) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason....”
26. This court will only interfere with the discretion of a court if it is established that in exercising such discretion, the court caused injustice to the affected party. In this instant case, the orders of the court granted the Appellant the opportunity to prosecute his case which he failed to do.
27. The record clearly shows that in his application for review, the Appellant sought to challenge orders issued on 18<sup>th</sup> July, 2018 and the application seeking to review and or set aside was made on 1<sup>st</sup> April 2019. In the court’s considered view, the application was brought before the trial court late in the day and the suit had been dismissed since six months had already lapsed.
28. It is also worth-noting that the orders given were conditional in nature and failure to comply by the Appellant rendered the suit dismissed.
29. In the end, this appeal is found devoid of merit and the court proceeds to dismiss it with costs to the Respondent.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**



M/S Wanjiru counsel holding brief for Mr. Mwangi Chege for Appellant

No appearance for and by Respondent

Court Assistant - Martin

