



Sichuanh Uashi Development Coltd v Remax Realtors Limited (Civil Appeal E021 of 2020) [2022] KEHC 280 (KLR) (Commercial and Tax) (1 April 2022) (Judgment)

Neutral citation: [2022] KEHC 280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E021 OF 2020**

EC MWITA, J

APRIL 1, 2022

BETWEEN

SICHUANH UASHI DEVELOPMENT COLTD APPELLANT

AND

REMAX REALTORS LIMITED RESPONDENT

(Appeal from the Ruling and order (Hon K I Orege, SRM) dated 10th January 2020 in Miliman CMCC No 1024 of 2017 at the Chief Magistrate's Court at Nairobi)

JUDGMENT

1. This is an appeal from the ruling and order delivered on 10th January 2020 by Hon K I Orege (SRM), in respect of an application dated 22nd August 2018, in CMCC No. 1024 of 2017. In that application, the appellant had sought a review of the trial court's ruling dated 19th August 2019, upholding the respondent's preliminary objection against production of electronic mails ('emails') for non-compliance with section 106B (4) of the *Evidence Act*. The section required the documents to be accompanied with a certificate of electronic evidence before they could be admitted.
2. Aggrieved by that ruling, the appellant lodged a memorandum of appeal dated 4th February 2020, raising the following grounds, namely, that:
 - a. The Learned Magistrate erred in law and fact by failing to uphold Articles 50 and 159 (2) (b) of *the Constitution* and expunging the Defendants documents from the record on account of a curable technicality.
 - b. The Learned Magistrate erred in law and fact by failing to follow judicial precedents from superior courts that a certificate of electronic evidence under section 106 of the *Evidence Act* is not a fetter to admission of documents as it can be filed anytime.



- c. The Learned Magistrate erred in law and in fact by narrowly interpreting order 45 of the [Civil Procedure Rules](#) to only requiring new and compelling evidence and ignoring error apparent on the face of the record and sufficient cause.
 - d. The Learned Magistrate erred in law and fact by failing to find that the Appellants had followed due process of law to make an application for review.
 - e. The Learned Magistrate erred in law and fact by failing to evaluate the entire evidence on record thus arriving at an erroneous finding.
 - f. The Learned Magistrate erred in fact and law by exhibiting bias through quoting judicial authorities then making a finding that was diametrically opposed to the authorities quoted.
 - g. The Learned Magistrate erred in law by allowing an objection hitherto unraised to be raised when the defendant's witness was on the stand.
3. This appeal was disposed of through written submissions with oral highlights.

Appellant's submissions

4. The appellant's written submissions were dated 6th September 2021. Relying on Articles 50 and 159(2) of [the Constitution](#), the appellant submitted that the trial magistrate erred by expunging the documents from the record on account of a curable technicality. The appellant asserted that although it sought to remedy the technicality by filing a certificate of electronic evidence during the hearing, the trial court declined.
5. The appellant again relied on Article 159 (2) of [the Constitution](#) to argue that justice should not be delayed and should be administered without undue regard to procedural technicalities. The appellant asserted that taking those principles into consideration, the trial magistrate ought not to have hastily expunged the documents from the record. In this respect, the appellant also relied on section 1A of the [Civil Procedure Act](#) on the overriding objective.
6. The appellant also cited the decision in [Nicholas Salat v Independent Electoral and Boundaries Commission & 6 Others](#) (CA Application No. 228 of 2013), [2013] eKLR for the proposition that courts strive to sustain rather than strike out pleadings on purely technical grounds.
7. The appellant again relied on section 3A of the [Civil Procedure Act](#) to argue that nothing in the Act should limit or affect the inherent power of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court.
8. The appellant relied on [Benjob Amalgamated Ltd and another v Kenya Commercial Bank Ltd](#) [2014] eKLR, that the basic philosophy underlying the concept of review, is human fallibility that may lead to miscarriage of justice.
9. The appellant further cited [Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers](#) [2016] eKLR, to posit that sufficient reason is wide enough to include misconception of fact or law by a court or even by an advocate.
10. Regarding section 106B (4) of the [Evidence Act](#), the appellant pointed out that under section 106I, a certificate of electronic evidence is not mandatory. The appellant argued that printouts of electronic evidence are documents, and relied on the Court of Appeal decision of [John Lokitare Lodinyo v Independent Electoral and Boundaries Commission and 2 others](#) [2018] eKLR.



11. The appellant went on to argue that section 106I provides that a court may presume that an email forwarded to an addressee corresponds with the message sent by the originator. To buttress this argument, the appellant cited *Harleys Limited v Metro Pharmaceuticals Limited* [2015] eKLR where the court observed that an objection to the production of printouts must fail on the strength of the presumption allowed under section 106I, given that section 106B already declares printouts of any electronic documents as documents for purposes of the Act.
12. The appellant again relied on *Dry Associates Co Ltd & 3 others v Timothy Karungu Karanja & 7 others* [2019] eKLR; *Peter Ngethe Ngari t/a PNN Funeral Services v Standard Group Limited PLC & another* [2020] eKLR and *Nonny Gathoni Njenga & Another v Catherine Masitsa & another* [2014] eKLR to support its case.
13. The court was urged to allow the appeal with costs.

Respondent's case

14. The respondent filed written submissions dated 10th November 2021. It was contended that from the grounds of appeal, the appellant is challenging the trial court's ruling of 19th August 2019 and not that of 10th January 2020. According to the respondent, in the ruling of 10th January 2020, the trial court did not venture to interpret section 106 of the *Evidence Act*. This was done in the ruling of 19th August 2019 which is not the subject of this appeal.
15. The respondent contended that the appellant having elected to file an application for review of the ruling of 19th August 2019, it cannot now revisit the merits of that decision by way of appeal. For this proposition, the respondent cited *Serephen Nyasani Menge v Risipah Onsase* [2018] eKLR where the court observed that the options of review and appeal are not simultaneously available to an aggrieved party.
16. It was the respondent's case that the trial court was correct in dismissing the application dated 22nd August 2019, as it was effectively challenging the merits of the ruling of 19th August 2019, thus it did not meet the threshold for review under Order 45 of the Civil Procedure Rules. In this respect, the respondent relied on *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR where it was observed that a good ground for appeal is not a ground for review.
17. The respondent further contended that the trial court was right in dismissing the application because it had already dismissed the appellant's oral application for leave to file a certificate of electronic evidence immediately the preliminary objection was allowed.
18. The respondent argued, therefore, that reintroduction of the issue in the application dated 22nd August 2019 was res judicata, or the appellant was otherwise placing an appeal before the same court. It urged that this appeal be dismissed with costs.

Determination

19. I have considered this appeal, submissions and the decisions relied on. I have also perused the record of the trial court and the impugned decision. This being a first appeal, it is the duty of this court, as the first appellate court, to re-evaluate, reanalyse and reconsider the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.
20. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held that an appeal is by way of retrial and the principles upon which the Court acts in such an appeal are well settled. The court must reconsider the evidence, evaluate it itself and draw its own conclusions



though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowances in that respect.

21. In *Peters v Sunday Post Ltd* [1958] EA 424, it was stated:

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.

22. What is before this court is an interlocutory appeal arising from a ruling by the trial declining to review its own ruling dated 19th August 2019. The trial court expunged the appellant's documents because there was no electronic certificate as required by section 106B of the *Evidence Act*. In the impugned ruling, the trial court exercised its discretion under Order 45 rule 1 of the Civil Procedure Rules which grants courts power to review their own decisions.

23. It is settled law that an appellate court will not readily interfere with the trial court's exercise of discretion unless it is shown that the discretion was not properly exercised.

24. In *Deynes Muriithi & 4 others v Law Society of Kenya & Another*; (SC Application No. 12 of 2015); [2016] eKLR, the Supreme court stated, *inter alia*, that the Court may only interfere with the exercise of discretion by another Court where there is plain and clear misapplication of the law.

25. In *United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR, Madan JA stated that:

The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.

26. The appellant blamed the trial magistrate for not reviewing his ruling delivered on 19th August 2019. The respondent on the other hand contended that the trial magistrate was right. The issue here is whether the trial court wrongly exercised its discretion to call this court's interference with the decision of the trial court.

27. I have perused the record and the impugned ruling. The genesis of the appellant's grievance seems to have been triggered by the trial court's ruling of 19th August 2019, when it upheld a preliminary objection to admission of certain documents for failure to comply with section 106B (4) of the *Evidence Act*.

28. The record shows that immediately after that ruling, the appellant made an oral application for leave to file a fresh list of documents, perhaps to include the missing certificate. The trial court declined to grant leave, stating that since the respondent had already closed its case following its ruling, it was reluctant to allow the appellant the leave sought as that would amount to reviewing its earlier decision.



29. Undeterred, the appellant filed the application dated 22nd August 2019 for review of the ruling delivered on 19th August 2019. That application was dismissed on 10th January 2020, giving rise to this appeal.
30. Section 80 of the *Evidence Act* and Order 45 of the Civil Procedure give courts wide discretion to review their own decisions. Order 45(1) states that a person who is aggrieved by a decision from which an appeal is allowed, but no appeal has been preferred; or by a decision from which no appeal is 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, may apply for a review of judgment or order without unreasonable delay.
31. The appellant was required to show the trial court that there was discovery of new and important evidence which it could not have had even after due diligence; an error or mistake apparent on the face of the record, or other sufficient reason. The trial magistrate considered the application before him and found that no new materials had been placed before him to warrant reviewing his earlier decision.
32. The grounds of appeal and arguments by the appellant before this court, did not show that there was discovery of new and important matter that was placed before the trial court but was ignored. There is also no complaint that the appellant pointed out an error apparent on the face of the record which the trial court again ignored. Even in the course of arguing this appeal, the appellant's counsel did not point out any error apparent on the face of the trial court's impugned ruling that this court should correct.
33. A careful reading of the appellant's grounds of appeal shows that the appeal is attacking the trial court's decision to allow the preliminary objection. In fact, ground 1 clearly attacks the decision to expunge the documents, thus the trial court failed to uphold Articles 50 and 159 of *the Constitution*. Similarly, ground 2, faults the learned magistrate for failing to follow judicial precedents that a certificate of electronic evidence under section 106B does not fetter discretion to admit documents.
34. The same can be said of ground 7, which complains that the trial magistrate was wrong in allowing an objection that had not been raised before, to be raised when its witness was in the witness stand. These grounds of appeal could only be raised to challenge the ruling delivered on 19th August 2019, but not in an appeal arising from the ruling of 10th January 2020, declining review.
35. In ground 3, the appellant faults the trial magistrate for giving Order 45 rule 1 a narrow interpretation as only requiring new and compelling evidence but ignored error apparent on the face of the record and sufficient cause.
36. As already adverted to, the appellant did not demonstrate to the trial court that there was an error apparent on the face of the record. Before this court, the appellant did not point out the error on record which the trial magistrate ignored, to enable this court intervene, in exercise of its appellate jurisdiction.
37. In *Pankras T, Swai v Kenya Breweries Limited* [2014] eKLR, the Court of Appeal stated that:

The power to review decisions on appeal is vested in appellate courts. 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." The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply



for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.

38. In *National Bank of Kenya Limited v Ndungu Njau* (Civil Appeal No. 211 of 1996), the Court of Appeal again held that:

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. (emphasis)

39. It is plain that the appellant failed to place material before the trial court to justify review, or before this court to show why the trial court's decision declining to review its decision should be interfered with. The error or omission must be plain and self-evident so that the court does not have to spend time to locate it. In the same vein, if one relies on any other sufficient reason as the basis for seeking review, the reason must be clear enough to persuade the court to review its decision.

40. A reading of the rest of the grounds of appeal and arguments presented before this court, shows that the appellant was unhappy with the merit of the decision made on 19th August 2019 allowing the preliminary objection. A point of law that could have been a ground of appeal and not a ground for review. There is a difference between a review and appeal and that is why the law gives a party an option to either apply for review, or appeal against the decision. A party must choose one of the two options.

41. As the court stated in *National Bank of Kenya Limited v Ndungu Njau* (supra), it will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.

42. Addressing the same issue in *Francis Origo & another v Jacob Kumali Mungala* (Civil Appeal No.149 of 2001) where the High Court had dismissed an application for review, the Court of Appeal again stated that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal.

43. Similarly, in *Abasi Belinda v Frederick Kangwamu and another* [1963] E.A. 557, it was held that a point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal.

44. The Court of Appeal again stated in *Pankras T, Swai v Kenya Breweries Limited* (supra) that:

[I]n basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction.

45. That is precisely what has happened in this appeal where the appellant raised issues that could at best be dealt with on appeal and not by way of review.

Conclusion



46. After a careful consideration of the appeal and the arguments presented by both parties, a perusal of the record of appeal and the impugned ruling, the inescapable conclusion I come to is that the appeal cannot succeed. The appellant failed to demonstrate that there was discovery of new and important evidence, an error or mistake apparent on the face of the record, or that it had any other sufficient reason which the trial magistrate failed to consider in exercise of his discretion under section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules, to call for this court's interference. The grounds of appeal and submissions attacked the merit of the decision made on 19th August 2019 and not the ruling of 10th January 2020 which was the basis of this appeal.

47. In the circumstances, I find no merit in this appeal. It is dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF APRIL 2022

EC MWITA

JUDGE

