



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NUMBER 53 OF 2020

PHILIP MUOKI KILONZO.....APPELLANT

-VERSUS-

SIMON MAKAU NGUI.....RESPONDENT

AND

ATTORNEY GENERAL.....INTERESTED PARTY

(Being on appeal from the ruling and orders of Honourable D.Orimba

Senior Principal Magistrate delivered on 6th May 2020

in SPM Civil case No.122 of 2013)

-BETWEEN-

SIMON MAKAU NGUI.....PLAINTIFF

-AND-

PHILIP MUOKI KILONZO.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

1. This appeal herein arises from the Ruling of **D. Orimba, SPM** at the Senior Principal Magistrates Court of Kenya at Kangundo delivered on 6th May 2020 in Civil Case No 122 of 2013. In that case, the Respondent herein was the Plaintiff while the Appellant was the first Defendant and the Interested Party was the 2nd Defendant. After hearing the suit in proceedings which the Appellant did not take part, by its decision delivered on 21st November, 2018, the court entered judgement against the Appellant for general damages for malicious prosecution and had awarded the respondent the sum of Kshs. 350, 000.00 (Three Hundred and Fifty Thousand Shillings) as Punitive damages, and Kshs. 750, 000 (Seven Hundred and Fifty Thousand Shillings) as Special damages, plus cost of the suit.

2. By an Application dated 17th June 2019, the Appellant herein sought to set aside the said Judgment and for leave to file defence on the ground that he was never served with the summons to enter appearance. After hearing the application, the learned trial magistrate vide a ruling delivered on 13th November 2019, allowed the same on condition that he deposits the sum Kshs. 500, 000.00 (Five Hundred Thousand Shillings) in a joint interest earning account held by both counsels within 28 days, failure to which execution to proceed. The Appellant however failed to comply with the said condition within the stipulated period and by an Application dated 19th December 2019 he sought orders that the Court reviews, varies or sets aside it's ruling issued on 13th November 2019 and allows him to pay the sum of Kshs. 200, 000.00.00. That application was disallowed and it is the disallowance thereof that triggered this appeal.

3. In this appeal, the Appellant has raised the following grounds;

- (1) The Learned Trial Magistrate erred in fact and in law by disallowing the appellant's application for review dated 19th December 2019.**
- (2) The Learned Trial Magistrate erred in fact and in law by imposing a condition that the appellant deposits Kshs 500,000 in a joint interest earning account held by both advocates, failure to which, execution to proceed, which condition was impeding the appellant's right to be heard, therefore a breach of Article 48 of the Constitution.**
- (3) The Learned Trial Magistrate erred in fact and in law when he failed to consider that such a course was to condemn the appellant unheard, and a violation of the right to fair hearing and right to fairness under Article 50(1) of Constitution which was unlawful and therefore a breach of Article 25(c) of the Constitution.**
- (4) The Learned Trial Magistrate misdirected himself in fact and in law by failing to consider that the appellant's intended defence raised triable issues entitling him to be heard.**
- (5) The Learned Trial magistrate erred in fact and in law in failing to appreciate that he made an error on the face of record by failing to consider the appellant's P3 Form and treatment notes as evidence that the appellant had reasonable and probable cause to institute the criminal proceedings against the respondent and as such he had a defence which raised triable issues to warrant him to be put on his defence.**
- (6) The Learned Trial Magistrate misdirected himself in fact and in law by condemning the appellant for the delay in prosecution of the case when the appellant came to learn of the case against him on 12th June 2019 upon being served with a proclamation notice.**
- (7) The Learned Trial Magistrate misdirected himself in fact and in law by failing to appreciate that the delay in prosecution of the case was occasioned by the respondent delay in prosecuting the case hence not a reason to disallow the appellant's applications to set aside the ex parte judgment.**
- (8) The Learned Trial Magistrate misdirected himself in failing to appreciate the totality of the appellant's Supporting affidavit in his application dated 19th December 2019 and all the averments therein.**
- (9) The Learned Trial Magistrate erred in fact and in law by failing to consider that a notice of delivery of Judgment was not issued to the appellant as is required.**
- (10) The Learned Trial Magistrate erred by failing to consider the evidence and the defence tendered by the appellant and the explanation put forth by the defendant.**
- (11) The Learned Trial Magistrate misdirected himself by not according the appellant an opportunity to disapprove the evidence tendered against him**
- (12) The Learned Trial Magistrate misdirected himself in fact and in law by failing to take into cognizance the significance of affording the appellant his natural justice right to be heard before being condemned.**

4. The appellant therefore seeks for the following orders:

- a) This appeal be allowed.
- b) The ruling and order of the Senior Principal Magistrate Hon. D Orimba delivered on 6th May 2020 be set aside.
- c) The ruling of the Senior Principal Magistrate Hon. D Orimba delivered on 13th November 2019 be varied and/or set aside to enable the appellant file defence unconditionally and the matter does proceed for hearing.
- d) The ex-parte Judgment of the Senior Principal Magistrate Hon. D Orimba delivered on **21st November 2018** be set aside.
- e) Cost of the suit and appeal.

5. As can be clearly discerned from the foregoing most of the grounds relied upon, as well as the submissions made in support of the appeal, attack the exercise of the trial court's discretion in the application seeking to set aside the judgement. However, the appeal before me is against the decision made on the application for review. The conditions for grant of the two applications are not the same.

6. In this appeal, it is submitted that the trial court's failure to consider and dismissing the appellant's application for review drove the appellant from the judgment seat empty handed contrary to rules of natural justice and the spirit in Article 50 of the constitution of Kenya which accords every citizen a right to a fair hearing and **Article 159(2) (d)** of the Constitution which enshrines the principle against rendering justice on technicalities and reliance was placed on the case of **Patriotic Guards Ltd vs. James Kipchirchir Sambu, Civil Appeal No. 20 of 2016, [2018] eKLR** where the Court of Appeal observed that in the interests of justice, a party should not be locked out of pursuing its Defence. It was submitted that instead of imposing a punitive condition which hindered the right to fair trial, the trial court could

have remedied the position by ordering the appellant to pay reasonable thrown away costs based on the decision in the case of **Michael Muriuki Ngubuini vs. East African Building Society Limited [2015] eKLR.**

7. According to the Appellant, his case was that he was not served with summons to enter appearance or any pleadings regarding SPM Civil Case 122 of 2013 to enable him put in his defence and was not given notice of the ongoing case against him until he was served with a proclamation notice on 12th June 2019 by Mutrix auctioneers. However, the process server was not summoned to court to verify the service of summons on the appellant by cross examination. It was submitted that where judgment is entered without service of summons, it is set aside as a matter of right and despite the length of time that has elapsed based on **James Kanyiita Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR.**

8. It was submitted that the Appellant's statement of defence raised triable issues which entitled him to unconditional leave to defend the suit.

9. In support of the submissions, the Appellant cited the case of **D. Chandulal K. Vora & Co. Ltd vs. Kenya Revenue Authority Civil Appeal No. 283 of 2012 [2017] eKLR.**

10. In opposing the appeal, the Respondent similarly fell into the same trap of submitting on the application for setting aside and the appeal against the main judgement rather than concentrating on the application for review.

11. It was submitted on behalf of the Respondent that the application for review was filed outside the 28 days period which was given by the court for depositing the mount in question hence was filed out of time. It was submitted that the Appellant did not seek extension of time to comply with the conditions. According to the Respondent, there was unreasonable delay in making the application and that the court was functus officio.

12. It was submitted that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 of the *Civil Procedure Rules* and reliance was placed on the case of **Nasibwa Wakenya Moses vs. University of Nairobi & Another [2019] eKLR.**

Determination

13. I have considered the submissions made in this appeal.

14. The application which gave rise to the ruling, the subject of this appeal was expressed to be brought under Order 12 rule 7, Order 51 rule 1 and 14(15) of the *Civil Procedure Rules*, Section 1A, 1B and 3A of the *Civil Procedure Act* and any other enabling provisions of the law. As stated above the substantive prayer was that the ruling of the court dated 13th November, 2019 allowing the Appellant's application on condition that he deposits Kshs 500,000.00 in a joint interest earning account by both counsel within 28 days and all other consequential orders be reviewed, varied and/or set aside and the applicant be allowed to deposit a sum of Kshs 200,000 instead pending the hearing and determination of the suit. Though clearly the provisions cited do not directly deal with review, a consideration of the grounds relied upon, the submissions made and the ruling therefrom reveal that the application was for review.

15. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the *Civil Procedure Rules*, certain requirements must be met. The said provision states as follows:

(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 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 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 for the review."

16. *The Code of Civil Procedure*, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

17. In this case, the trial court after considering the application rendered itself as hereunder:

“The applicant submitted that there is an error apparent on record on the basis that the court failed to apportion the liability between the 1st and the 2nd defendant. In my understanding when two or more parties are jointly and severally liable for tortious act, each party is independent (sic) liable for the full extent of injuries stemming from the tortious act. Thus if a plaintiff wins a money judgement against the parties collectively, the plaintiff may collect the full value of the judgement from any one of them. That party may seek contribution from the other wrong doers. There is therefore no error apparent on record to be reviewed. The ruling of this court giving rise to the application was delivered on 13/11/2019. The application was filed on the 19/12/2019 more than one month later. The application (sic) was given 28 days to deposit Kshs 200,000/= which he did not. The matter had proceeded to full hearing and judgement delivered in favour of the plaintiff. The court has also considered the age of the case having been filed way back in 2013 which is 7 years. Litigation must come to an end. The defendant had all the right (sic) appeal against the court decision which he did not. Having considered the application, having read the pleadings, perused the court record, I find that the application lack (sic) merit. The principal (sic) as set down for review is not met. I will decline to grant the orders sought.”

18. I agree with the Learned Trial Magistrate that the issue of apportionment of liability could not be an error on the face of the record. That was the Court of Appeal’s decision in Court of Appeal case of Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR which quoted with approval the judgment of the High Court in Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation, by stating:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible.”

19. The Court of Appeal in Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 expressed itself as follows:

“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”

20. The decision whether or not to review a court’s decision was well captured by the Court of Appeal in Mumby’s Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002, where it was 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 however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

21. I agree with **Warsame, J** (as he then was) in Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia Kisumu HCCC No. 114 of 2004 that the essence of a review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the judgement intended to be reviewed, otherwise parties would lose direction as to the finality of a decision made by a particular court as on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in Atilio vs. Mbowe (1969) THCD where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

22. In this case, it is clear that the applicant was urging it to review its decision in order to find that the Defendants were severally liable as opposed to being jointly and severally liable. Had the court acceded to that position, it would have arrived at a decision diametrically opposed to its earlier decision.

23. That is however not permissible under review jurisdiction. In Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006 cited in the case of Stephen Githua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR the Court of Appeal held as follows:

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

24. In Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC No. 532 of 2004, Okwengu, J (as she then was) expressed herself as hereunder:

“In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff’s reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant’s fee policy was illegal and *contra statute* which was the basis of the Defendant’s application for striking out the plaint. It is the defendant’s contention that the plaintiff is bound by his pleadings and could not therefore depart from the same...It is my considered opinion that the pleadings went beyond the reply to the

amended defence and to understand the matters which were in issue one has to look at the plaint *vis-à-vis* the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of Section 36 and 45 of the Advocates Act as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff's suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of Order 44 of the Civil Procedure Rules."

25. The trial court also found that the application for review having been made more than one month after the decision which was sought to be reviewed, the delay was in the circumstances unreasonable. In this appeal, the appellant has not attempted to challenge this finding. It is trite that an application for review must be brought without unreasonable delay. What amounts to unreasonable delay must depend on the facts of each case particularly where the application is based in discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant. In this case the Appellant's financial status was a matter which was uniquely within the knowledge of the Appellant and he ought to have known right from the time the decision was delivered that he was not going to comply with the conditions imposed. Instead of returning to the court immediately he waited till the arrival of the auctioneers. In my view the learned trial magistrate cannot be faulted in his finding that the Appellant was guilty of inordinate delay.

26. It was also the finding of the Court that the Appellant ought to have appealed instead of seeking review. As stated hereinabove grounds of appeal are not necessarily grounds for review. In Iddi Faraj vs. Sheikh Amin Bin Musellem [1960] EA 917 it was held that:

"The ground of review of a decree on the discovery of new and important matter and evidence, which was not within the applicant's knowledge, or could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, must at any rate be something which existed at the date of the decree, and the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event."

27. As appreciated by the Court of Appeal in Kaiza vs. Kaiza Civil Appeal No. 225 of 2008 [2009] KLR 499:

"An application for review under Order 44 rule 1 must be clear and specific on the basis upon which it is made. The motion before the Superior Court was based on the discovery of new facts. However, it is not every new fact which will qualify for interference with the judgement or decree sought to be reviewed. In the words of the rule itself, it is "...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...". Applications on this ground must be treated with great caution and as required by rule 4(2)(b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of discovery of new evidence, it must be proved that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge; 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. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made. Where such a review is based on the 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."

28. As to whether the Appellant's financial status constituted discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, I have not been addressed on when the Appellant discovered that he was not able to comply with the conditions imposed. I associate myself with the decision of Kuloba, J in Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994 where he opined that:

"The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

29. Similarly, in Tiwi Beach Hotel Ltd vs. Brown Nairobi HCCC No. 136 of 1982 [1993] KLR 595, Owuor, J (as she then was) found that:

“...there is nothing in the affidavits which brings the application within the ambit of the rule. All the documents now attached to the affidavits are such that were in existence at the date when the judgement was entered or could have been available after the exercise of due diligence. There is no material before the Court that were not within the applicant’s knowledge or could not be produced by her at the time when the decree was passed.”

30. Even then, in **Baneland Enterprises vs. NIC Bank Limited & Another Nairobi (Milimani) HCCS No. 251 of 2007, Kimaru, J** expressed himself as follows:

“For the court to favourably consider an application to review a decision of the court on the grounds that the applicant has made discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant at the time the original application was argued under Order 44 rule 1 of the Civil Procedure Rules, it must be satisfied that such new and important matter or evidence is of such nature that it would lead any court of law applying its mind to the facts and the law applicable to the case reach a determination that if the court which heard the original application had the advantage of the new evidence, it would have reached a different decision other than the one that was rendered. The applicant must also establish that the new and important matter or evidence was not within its knowledge after the exercise of the normal diligence required of any conscientious litigant.”

31. That was the position in **Touring Cars Ltd. & Another vs. Ashok K Makanji Civil Appeal No. 78 of 1998 [2000] 1 EA 261** where the Court of Appeal held that a party who relies on discovery of a new and important matter for the purposes of review must plead the same and that in an application for review on ground of a new and important factor the said new factor must be one which was not within the knowledge of the applicant after the exercise of due diligence.

32. In this Court’s judgement, it is clear that the Appellant, in an appeal against the decision on his review application, is attacking the earlier decision which allowed his application for setting aside conditionally. The issues such as whether the conditions ought to have been imposed in the circumstances of the case and whether the imposition amounted to a denial of the right to be heard cannot be the subject of an appeal against the subsequent ruling declining to review the earlier decision. As rightly pointed out by the learned trial magistrate, the Appellant might well have been in a better position had he opted to appeal rather than to apply for review. He took a gamble and the gamble did not pay off. He cannot now turn round and purport to appeal against the conditional setting aside of the judgement under the guise of appealing against the decision on review.

33. He decided to take a shortcut and as the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** cautioned, short cuts are fine, as long as you are absolutely sure they won’t land you in a ditch.

34. In the result, I find no merit in this appeal which fails and is dismissed with costs.

35. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th day of January, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Miss Wangechi for Mr Nzaku for the Respondent

Miss Ngulucho for the Appellant

CA Geoffrey