



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**HIGH COURT CIVIL APPEAL NO. 24 OF 2017**

**BONIFACE KINYUA KATHURI.....APPELLANT**

**VERSUS**

**DAVID MUNYOKI .....RESPONDENT**

***An Appeal from the Judgment of Hon.R. Ombata (R.M) delivered on 12/09/2017 in Civil Suit No. 354***

***of 2012 at the CM's Court -Kitui***

**RULING**

1. Before me, is an application for review dated 3<sup>rd</sup> November 2020 wherein the Applicant has invoked **Order 45 (1) of the Civil Procedure Rule** and **Sections 1A & 3A of Civil Procedure Act** in seeking the following reliefs namely:-

***(i) Spent.***

***(ii) That this court does review its judgment dated 19<sup>th</sup> October 2020 dismissing the appeal filed herein.***

***(iii) Costs of this application.***

2. The grounds upon which this application has been launched are listed as follows namely:-

***(i) That this court dismissed the Applicant's appeal on grounds that the Applicant had failed to specially plead the actual extent and the nature of injuries suffered.***

***(ii) That the Applicant had pleaded the injuries suffered and tendered medical documents in proof.***

***(iii) That this court did not consider the doctors' evidence and exhibits tendered during trial.***

***(iv) That failure of this court to consider the same constitutes a mistake and/or error on the record and hence the basis for review.***

***(v) That there is new and important evidence to be considered.***

3. In his supporting affidavit sworn on 3<sup>rd</sup> November 2020, the Applicant avers that the suit filed in the lower court to wit **Kitui Chief Magistrate Civil Case No. 354 of 2012** was filed in a series of other similar matters which he claims were filed and heard on the same day. According to him the medical evidence in respect to injuries he suffered were tendered in Kitui **Kitui Chief Magistrate Civil Case No. 355 of 2012**. He has exhibited proceedings in **Kitui Chief Magistrate Civil Case No. 355 of 2012** to support his contention.

4. He contends that the doctor's evidence in **Kitui Chief Magistrate Civil Case No. 355 of 2012** was not considered. He insists that the injuries he sustained during the accident were as pleaded and further proved by the P3 and medical report tendered.

5. The Applicant further avers that the Respondent stands to suffer no prejudice if the judgment of this court is reviewed because the issue of liability was agreed upon.

6. In his written submissions through Counsel, the Applicant contends that the application before the court is for purpose of correcting what he terms as **"error on the face of the record"** and has relied on the decision of **Republic versus Advocates Disciplinary Tribunal Ex Parte**

**Apollo Mboya [2019] eKLR.**

7. He submits that he has confined himself to matters within the scope of **Order 45 of the Civil Procedure Rules**. He argues that his application has revealed the following:-

(i) *That there was a mistake or error on the face of the record.*

(ii) *That there were other sufficient reasons.*

(iii) *That he brought this application without delay.*

He relies on the following two authorities:-

(i) **Mwangi S. Kimenyi versus Attorney General & Another [2014]eKLR.**

(ii) **Sadar Mohamed versus Chavan Singh & Another (Citation not given).**

He urges this court to exercise its discretion and review the judgment delivered on 19<sup>th</sup> October 2020 adding that he filed this application timely on 3<sup>rd</sup> November 2020.

8. The Respondent has opposed this application and contends that it is an abuse of the court process. In his view, the medical reports tendered by the Applicant were considered by this court. He submits that there was a marked difference between the injuries pleaded and the nature of injuries described by the medical evidence tendered. He faults the Applicant for not utilizing the window he got through leave to amend his plaint, to indicate the injuries shown in the medical evidence tendered.

9. The Respondent further submits that parties must be bound by their pleadings and that the Applicant only has himself to blame because of failing to his pleadings reflected the injuries he suffered.

10. This court has considered this application and the response made. This court notes that the replying affidavit filed by the Respondent does not indicate when it was commissioned on its jurat contrary to **Section 5 of Oaths and Statutory Declaration Act**.

However, despite the defect, this court is inclined to disregard the irregularity because of the provisions of **Order 19 Rule 7 of the Civil Procedure Rules** and **Article 159 (2) (d) of conviction** which provide that mere technicalities can be overlooked in favour of substance. This application shall therefore be considered on merits rather than mere technicalities.

11. The application before me has invoked the provisions of **Order 45 Civil Procedure Rules** which provide as follows:-

**“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 judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.”**

12. It is important to note that the salient conditions spelled out in the above provisions which are:-

(i) *Discovery of a new and important matter which was not within the knowledge of the Applicant upon exercise of due diligence at the time the decree or order was made.*

(ii) *That the order/decreed was made on account of a mistake apparent on the face of the record.*

(iii) *Any other sufficient cause.*

13. The law also places the burden of proof on the Applicant **Order 45 Rule 3(2)** which provides:-

**“Where the court thinks that the application for review should be granted, it shall grant the same:**

**Provided that no such application shall be granted on the ground of discovery of a new matter or evidence which the Applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.” (Emphasis added).**

14. Having set out the law regarding when a party can successfully invoke the revisionary powers of this court, let me set my attention to the facts of this matter as presented to this court.

15. The Applicant’s main grounds as seen above are pecked on the claim that his medical evidence at the lower court was tendered to vide

another related file to wit **Kitui CMCC Civil Case No. 355 of 2012** and that owing to that this court in its judgment missed the evidence and hence the basis of the dismissal of the appeal. He has cited the exact page of the judgment of this where this court found that

***“the medical report was however not tendered in evidence....”***

16. However, a closer look at the judgment of this court reveals that the Applicant took out the last 3 lines of paragraph 19 of the judgment from this court out of the context. This is because the preceding lines of the same paragraph 19 of the judgment aptly captured what the Applicant told the trial court. Which is that he ***“sustained injuries to my left hand, left leg and hip joint and left side of the head (sic).”*** The judgment then goes on to capture what was tendered to prove the said injuries which were:-

The P3 form Pex 2 and treatment sheet PEx3. The medical evidence tendered were in tandem with the injuries the Applicant stated in his evidence but what was pleaded was markedly different and this court found as much in its decision. Now to go back to what the Applicant quoted out of context is that he still had difficulty in walking and lifting heavy objects due to the injustices suffered. He clearly stated that as a result of the said difficulty he saw one Dr. Kamulu who prepared a medical report. It is that medical report. This court found that the report by Dr. Kamulu had not been tendered to prove further complications suffered.

17. The Medical report produced at the ***Trial Court in Kitui CMCC No. 355 of 2012*** had no mention of difficulty in walking or lifting heavy objects and was not prepared by a Dr. Kamulu but by Dr. Judith Kamuyu who stated that the Applicant has ***“suffered soft tissue injuries and had satisfactorily recovered.”***

18. It is clear as day therefore that there was no error of fact on the face of the record at all to warrant a review. I do not find any sufficient reason advanced by the Applicant to invoke my revisionary powers. The Applicant may be aggrieved by the finding of this court and he has every right to feel that way but the avenue to address any grievance regarding the finding of this court is through an appeal. This is because this court rendered itself fully on what the Applicant raised in his grounds of appeal which hinged on the trial court’s finding on what was adduced and proved during trial.

This court re-evaluated the evidence tendered and perused through the pleadings of the Applicant and this court found that the trial court was correct in its findings. What was specifically pleaded was not in tandem with what was adduced and proved at the trial. That was it. This court specifically pointed out that the Applicant ought to have resorted to amending his pleadings if he realized that there was some inconsistency like he did when he realized that the motorcycle described in his plaint was not the one he was riding in. The basis for that is that a party is bound by his pleading as clearly provided under ***Order 2 Rules 3 and 4 of the Civil Procedure Rule***. This is further illustrated in the case of ***DARE VS PULHAM [1982] 148, C.L.R. 658*** where a ***High Court in Australia*** described the purpose of pleadings as follows:-

***“Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity, they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a Plaintiff’s claim in aid of the defendant’s right to make a payment into court...”***

19. This court finds that there is no discovery of any new evidence. The medical evidence on Page 85 of the Record of Appeal was duly considered by this court. There is no sufficient cause demonstrated for review.

20. From the foregoing, it is evident that this court fully rendered itself on the issues posed by the appeal placed before me. I am not persuaded that there is an error apparent on the face of the record. If there is any error then maybe the Applicant can only grieve that there was an error of judgment rather than an error on the face of the record and where a party feels there is an error of judgment he can only appeal because once a court has rendered itself fully on a given issue or subject that has been adjudicated upon it becomes *functus officio*.

In the premises, this court finds no merit in the Notice of Motion dated 3<sup>rd</sup> May 2020. The same is dismissed with costs to the Respondent.

**DATED, SIGNED, AND DELIVERED AT KITUI THIS 18TH DAY OF OCTOBER 2021.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**