



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 149 OF 2018

JM (A minor suing through his father and next friend) MM.....APPELLANT

-VERSUS-

MBITHI KIMOLO.....RESPONDENT

JUDGMENT

1. In a judgment delivered on 26th February 2018, the magistrates' court concluded that the appellant (*who was plaintiff*) did not prove the allegations in his pleadings, and dismissed the suit with costs to the respondent (*who was defendant*). In addition the court dismissed a subsequent application for review of the judgment.

2. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal on the following grounds –

1) The learned magistrate erred in law and fact by failing to consider the appellant's evidence and submissions.

2) The learned magistrate erred in law and fact by holding that the appellant's application dated 26/3/2018 did not proffer sufficient grounds to warrant a review of the judgment.

3) The learned magistrate erred in law and in fact by dismissing the appellant's application dated 26/3/2018 despite there being no substantial opposition to the same by the respondent.

3. The appeal was canvassed by way of filing written submissions. The appellant's counsel M/s Mulu & company filed their submissions on 2nd June 2021, while the respondent's counsel M/s Janet, Jackson & Susan (LLP) advocates did not file submissions, though they were served severally and documents evidencing such service filed herein.

4. Having perused and considered the submissions of counsel for the appellant, the appeal mainly hinges on the dismissal by the trial court of the application dated 26/3/2018 for review of judgment.

5. The major ground for seeking review of judgment, I note was that the motor vehicle in question was described in the police abstract as KBQ 914N instead of KBQ918H.

6. In the submissions of counsel for the appellant, a lot of reliance placed on review due to discovery of new and important matter or evidence under Order 45 Rule 1 of the Civil Procedure Rules which provides as follows –

45(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 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 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 judgment to the court which passed the decree or made the order without unreasonable delay.

7. I note that the application for review of judgment herein dated 26/3/2018 was based mainly on the reason of an error on the face of the record. The appellant claims on appeal that the application for review was not seriously opposed, and I have seen just five (5) grounds of opposition dated 1st April 2018 filed by the respondent to the said application.

8. The appellant has however, now come to this court on appeal relying mainly on discovery of new evidence, which was neither an issue at the trial nor in the dismissed application, as the two different registration numbers of the subject motor vehicle were actually in the evidence of witnesses who testified at the trial, and neither can be termed as new evidence.

9. I find in effect that, there is neither discovery of new evidence, nor an error on the face of the judgment of the trial court, and this appeal cannot succeed on the basis of review. That said, there is the main ground of appeal on the way the trial court evaluated the evidence on record.

10. I note that the appellant's advocate, in his written submissions in the trial court, dwelt so much on motor vehicle KBQ 914H which was in the police abstract, though the plaintiff and the motor vehicle official record relied upon was on motor vehicle KBQ 918H whose owner is MBITHI KIMOLO the respondent.

11. On my part, regarding the merits of the appeal under ground 1 of appeal, in my view the error of the registration number of the motor vehicle appearing in the police abstract was sufficiently explained in evidence and the magistrate should have found as such and not dismissed the suit. The appeal will thus succeed on that account, as it was established at the trial that the motor vehicle involved in the accident was KBQ 918H belonging to MBITHI KIMOLO.

12. In my view, this is a case where on allowing the appeal, it is proper and in the interests of justice to all parties involved to order a fresh – trial for the purposes of determining negligence and quantum of damages.

13. Consequently, I allow the appeal of the appellant, and set aside the judgment of the magistrate. In effect the subsequent ruling of the magistrate for review of the judgment is also spent and has no validity.

14. I order that a fresh trial be conducted before a magistrate having jurisdiction other than C. A Muchoki – Resident Magistrate, to determine liability and quantum of damages. The appellant is awarded the costs of this appeal.

DELIVERED, SIGNED & DATED THIS 30TH DAY OF NOVEMBER, 2021, IN OPEN COURT AT MAKUENI.

.....

GEORGE DULU

JUDGE