



**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CORAM: D.S. MAJANJA J.**

**CIVIL APPEAL NO. 74 OF 2019**

**BETWEEN**

**WAIRICU FRANCIS.....APPELLANT**

**AND**

**ROBERT GIKONYO NGIGE.....RESPONDENT**

**(Being an appeal from the Ruling and Order of Hon. S. N. Telewa, RM**

**dated 14th August 2014 at Thika Magistrates Court**

**in Civil Case No. 643 of 2011)**

**JUDGMENT**

1. The appellant, who was the defendant in the suit before the subordinate court, is aggrieved by the ruling and order of the trial magistrate allowing the plaintiff's application to review the judgment dismissing the respondent's case. For ease of reference I shall refer to the parties in their respective capacities before the trial court unless the context otherwise admits.

2. The facts leading up to the application for review are not disputed and are as follows. The plaintiff filed suit against the defendant claiming damages, being the value of the motor vehicle less salvage value, assessors fee, towing charge and police abstract fee, amounting to Kshs. 532,768/-, costs and interest. The claim arose from a road traffic accident which took place at Kenol area along Thika-Sagana Highway involving the motor vehicles registration number KBC 457Q and KAV 630T belonging to the plaintiff and defendant respectively.

3. The defendant, in his statement of defence, denied that he owned the vehicle as alleged, or that the accident took place as alleged or at or that he was liable. He also pleaded in the alternative that if the accident took place, it was caused wholly or substantially by the plaintiff's negligence. He prayed that the plaintiff's claim be dismissed.

4. At the hearing the plaintiff (PW 3) testified and called 2 witnesses; Sergeant Roslyn Githaiga (PW 1) and John Makumi Njuguna (PW 2). The defendant did not call any witness. By the judgment dated 7<sup>th</sup> June 2013, the trial magistrate dismissed the suit principally on the ground that, "*the court is not able to establish that the plaintiff, is indeed the owner of the motor vehicle no. KAV 457Q.*" The court also held that the plaintiff failed to prove the allegations of negligence on the part of the defendant on a balance of probabilities.

5. Thereafter the plaintiff moved the court by a Notice of Motion dated 11<sup>th</sup> October 2013, inter alia, under **Order 45 rules 1(1)(a)** of the **Civil Procedure Rules** seeking the following main orders:

[3] THAT this Honourable be pleased to review its order made on 7<sup>th</sup> June 2013 dismissing the plaintiff's suit.

[4] THAT this Honourable court be pleased to set aside the final judgment and the resultant decree issue in this matter and in its place enter judgment for the plaintiff in the sum of Kshs. 532,568.00

6. The main ground advanced in support of the application on the face of the motion and in the plaintiff's supporting affidavit sworn on 11<sup>th</sup> October 2013, is that he was able to obtain new and important evidence which was not within his possession and which he could not produce it when the matter was heard. The plaintiff stated as follows in the supporting affidavit:

[13] THAT he advised me that there was an error on the fact of the record in that the court did not consider the submissions that were done in response to the defendant's submissions (Annexed is a copy of the same marked "RGN 3").

[14] THAT this court is bound by decisions of the High Court and the Court of Appeal which were attached to the submissions that were made in response to the defendant's submissions on the issue of ownership of the vehicle where the transfer has not been effected.

[15] THAT following the lodging of the transfer documents earlier, the registrar of Motor vehicles effected the transfer (Annexed is a copy of the log book marked "RGN 4").

[16] THAT I also managed to trace the sale agreement which had been misplaced during the proceedings and I could not trace it despite all efforts to look for it and I did not have contact of the person who sold to me to request for a copy from him. (Annexed is a copy of the same marked "RGN 5").

[17] THAT I have been advised by my Advocate on record M/s Wanjama that the court also made an error in dismissing (sic) the case and making a finding that liability was not proven while indeed it was.

7. The defendant filed a replying affidavit sworn on 11<sup>th</sup> November 2013. He took the position that the allegation that the court did not consider the plaintiff's submissions did not constitute a new and important matter that was not within the plaintiff's knowledge despite due diligence. He also stated that there was no basis for reviewing the judgment. In response to the factual matters under para.14 and 15 of the plaintiff's supporting affidavit, the defendant noted that the logbook was procured on 1<sup>st</sup> October 2012 several months after the hearing and determination of the case and in the circumstances, the plaintiff had failed to exercise due diligence so as to procure and avail documents at the trial.

8. After considering the motion, depositions and written submissions, the trial magistrate accepted that the plaintiff had found the sale agreement and in her view, he had established a ground for review and therefore allowed the application as prayed.

9. The appellant's case is set out in the memorandum of appeal dated 6<sup>th</sup> October 2014. Both parties agreed to canvass the appeal by written submissions. Although the appeal contains 7 grounds of appeal, those grounds can be distilled into one ground and it is whether the plaintiff's application before the trial court met the threshold for review under **Order 45(1)** of the **Civil Procedure Rules**.

10. In their respective submissions, the parties reiterated what they had submitted before the trial court. They both agreed on the applicable principles to an application for review under **Order 45** of the **Civil Procedure Rules** which provides, in part, 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 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.

11. The aforesaid provisions have been elucidated by our superior courts in several cases. In **National Bank of Kenya Limited v Ndungu Njau [1996] KLR 469**, the Court of Appeal explained what constitutes an error of law apparent on the face of the record:

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. 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.

12. Again in **Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, the Court of Appeal described an error apparent on the face of the record as follows:

There is 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.*

13. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited NRB CA Civil Appeal No. 275 of 2010 [2014] eKLR** cited with approval the decision in **Francis Origo & another v. Jacob Kumali Mungala NRB HCCA No.149 of 2001 (UR)** where the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review.

14. The question then is whether the trial magistrate erred in application of the principles I have set out above in allowing the application for review. Before I turn to consider this appeal, it is important to set out the basis upon which this court may interfere in the trial court's decision. That position is set out in *Mbogo & Another v Shah* [1968] EA 93, 96, where the court stated that:

An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been misjustice.

45. The respondent's case before the trial court was that there was an error of law on the face of the record and that he had obtained documents which were not available to him despite due diligence on his part. The trial magistrate was of the view that since he had obtained the documents of sale, he could now present them at the hearing upon review of the matter.

46. At the centre of the respondent's application was the issue of ownership of the motor vehicle. The plaintiff produced the logbook and the signed transfer form in his favour to establish that he was the owner while the defendant submitted that the failure to produce the logbook in his name and his failure to call the vendor to establish that he sold the vehicle was insufficient proof of ownership.

47. The issue of ownership of the motor vehicle was contested and it was incumbent on the plaintiff to prove its case. The conclusions reached by the trial magistrate, whether right or wrong in law, were based on appreciation of the evidence and erroneous application of the law. This is not a matter that is self-evident nor one that is plain and obvious. It is therefore a matter that could only be reviewed on appeal as was held in *Abasi Belinda v Fredrick Kangwamu and Another* [1963] EA 557 where the court held that:

[A] point which may be a good ground of appeal may 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 ground of appeal.

48. The same point was emphasised by the Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited* (Supra) as follows:

[29] It seems clear to us that the appellant, in 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 functus officio and have no appellate jurisdiction.

49. The respondent submitted that the trial magistrate ignored its submission in response to the appellant's submissions on the issue of ownership. Its case was that the trial magistrate ignored the decision in *Securicor Kenya Ltd v Kyumba Holdings Ltd* [2005] eKLR where the Court of Appeal held that it was not necessary for him to call the previous owner of the vehicle when he was in actual possession of the vehicle and the signed transfer. If this is the correct position, then it would be unnecessary to produce the sale agreement or call the vendor. This goes to show that the issue of ownership is not a matter for review but one of appeal.

50. Finally, the trial magistrate did not consider the fact that the suit had been dismissed on the ground that the plaintiff had failed to prove liability. Even assuming that the plaintiff was able to show that it was the owner of the vehicle, the issue of liability was already resolved in the defendant's favour and it would be unfair to allow the plaintiff to have another bite at the cherry. The issue of proof of liability, being a matter that requires the appreciation and analysis of evidence, is a matter that could only be agitated in an appeal. In the circumstances, an order of review on the issue of ownership would not assist the plaintiff.

51. For the reasons I have stated, I allow the appeal, set aside the order of the subordinate court dated 14<sup>th</sup> August 2017 allowing the Notice of Motion dated 11<sup>th</sup> October 2013. It is substituted with an order dismissing the Notice of Motion dated 11<sup>th</sup> October 2013 with costs to the appellant. The appellant shall also have costs of this appeal.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of MAY 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Odhiambo instructed by J. K. Kibicho and Company Advocates for the appellant.

Ms Githaiga instructed by Wanjama and Company Advocates for the respondent.