



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 18 OF 2018**

**JAPHETH KITILI MUTISYA.....APPELLANT**

**-VERSUS-**

**MBUKONI BUS SERVICES.....RESPONDENT**

*(Being an Appeal from the Ruling of Hon. C.A Mayamba (SRM) in the Senior Resident Magistrate's Court at Kilungu, Civil Case No. 67 of 2016, delivered on 16<sup>th</sup> February 2018)*

**JUDGEMENT**

**To apply to HCA 19 and 20 of 018**

**Introduction**

1. The appellant filed Civil Case No. 67 of 2016 at the Kilungu Senior Resident Magistrate Court on 14/04/2016. There were several other suits arising from the same cause of action *to wit*; CC 60/2016 and CC 99/2016.
2. The respondent entered appearance on 31/05/2016 and filed a statement of defence on 16/06/2016.
3. When the matter came up for pre-trial conference on 27/09/2016, the appellant indicated that he had complied and was ready to take a hearing date. The respondent applied to have the appellant re-examined by it's Doctor.
4. On 29/11/2016, the respondent indicated that it was yet to comply because the appellant had not attended the medical re-examination. The respondent also indicated that it had filed an application to compel the appellant to attend the medical re-examination. The application was subsequently allowed by consent.
5. On 18/07/2017, the Court was informed that the appellant had attended the medical re-examination on 12/07/2017 and the respondent sought leave to file the medical report. The matter was fixed for hearing on 12/09/2017.
6. On 12/09/2017, the respondent expressed its wish to have the appellant re-examined and the 2<sup>nd</sup> application which it had filed to compel the appellant was allowed. The appellant was subsequently scheduled for re-examination on 21/09/2017.
7. On 10/10/2017, the matter was mentioned to confirm whether the appellant had been re-examined and it turned out that he had not. The respondent's Counsel applied to have the suit dismissed. Mr. Hassan held brief for the appellant's Counsel and indicated that the non-attendance was due to unavoidable circumstances and that the appellant was keen on prosecuting the matter. He also indicated that the appellant had booked re-examination on 19/10/2017.
8. The Court observed that failure by the appellant to attend medical re-examination demonstrated clear reluctance to have the matter concluded. It also observed that dismissal of a suit should be an act of last resort and accordingly indulged the appellant for the last time.
9. On 24/10/2017, the matter was mentioned to confirm compliance and still, the appellant had not been re-examined. The appellant indicated that he had an appointment on 31/10/2017 and would attend. After considering the history of the suit, the trial magistrate opined that the appellant's hands were unclean and declined to exercise her discretion in the appellant's favour. Consequently, the suit and the other two in the series were dismissed.
10. By a Notice of Motion filed under certificate of urgency, dated 02/11/2017 and brought under sections 1A, 1B & 3A of the Civil Procedure Act, Orders 45 Rule 1 (2), 51 Rule 1 of the Civil Procedure Rules 2010, Articles 152 (d) and 50(1) of the Constitution, the appellant sought the following order;

*“That this honourable Court do review and set aside the Court orders made on 24/10/2017 and allow the plaintiff/applicant prosecute his case which was dismissed”*

11. In a ruling delivered on 16/02/2018 dismissing the application, the trial magistrate opined that the application raised serious issues of law and the appellant should have filed an appeal instead of review. The appellant was also condemned to pay costs of the application for using the wrong procedure.

12. Aggrieved by the ruling, the appellant filed this appeal and raised 5 grounds stating that the learned magistrate erred in law and fact;

a) *By failing to appreciate sufficiently or at all consider the replying affidavit and submissions of the appellant.*

b) *By adjudicating on matters that were not disputed in trial.*

c) *By failing to appreciate the provisions of Order 45 of the Civil Procedure Rules, 2010.*

d) *By failing to consider the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010.*

e) *By finding that the appellant was entitled to an appeal but not a review.*

13. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties filed their respective submissions.

14. Having looked at the record of appeal, the grounds of appeal and the rival submissions, the following issues arise for determination;

a) Whether the appellant used the wrong procedure to move the trial Court.

b) What redress, if any, is available to the appellant?

**Whether the appellant used the wrong procedure to move the trial Court.**

15. Order 45 of the Civil Procedure Rules 2010 provides as follows;

*(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.*

*(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 review.*

16. The appellant submits that the application before the trial Court did not raise any serious issues of law to require filing of an appeal as opposed to a review. That it was simply an application asking the learned magistrate to exercise his unfettered discretion to set aside the decision dismissing the suit.

17. He relies inter *alia* on the case of **Michael Mungai –vs- Ford Kenya Elections & Nominations Board and 2 others (2013) eKLR** where the Court stated;

*“A decree or order may also be reviewed for any sufficient reason. In our opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before the Court.”*

18. He also relies on **Kimita –vs- Wakibiru (1975) KLR 317** where **Nyarangi J.A** held that;

*“the words ‘for any other sufficient reason’ have therefore to be construed ejusdem generis with the ground of discovery to which I have referred....I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly, section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words ‘for any other sufficient reason’ need not be analogous with the other grounds specified in the order”*

19. In opposing the appeal, the respondent has analyzed the provisions of order 45 in great detail. He submits that the phrase ‘any other sufficient reason’ must be analogous to the discovery of new and important matter or evidence or some mistake or error on the face of the record.

20. The respondent relies *inter alia* on **Sadar Mohamed –vs- Charan Signh & Anor (1963) EA 557** where it was held that;

*“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example, error on the face of the record and discovery of new matter).”*

*Akiwumi & Okubasu JJA in the case of the official Receiver and Liquidator –vs- Freight Forwarders Kenya Limited Civil Appeal No. 235 of 1997 (1997) LLR 7356 added that “ these words can only mean that the reason must be one that is sufficient to the Court to which the application for review is made and they cannot without at times running counter to the interests of justice ‘ be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record”*

21. It also relies on **The Registered Trustees of the Archdiocese of Dar es Salaam –vs- The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006** where the Court of Appeal of Tanzania stated as follows;

*“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (emphasis added).*

22. The respondent maintains that the appellant used the wrong procedure by seeking a review instead of appeal.

23. The application before the trial Court was simply for reinstatement of the suit. All that was required from the trial magistrate was judicious exercise of discretion according to the circumstances of the case. We have a myriad of precedents where suits which have been dismissed are reinstated by the same Court which had dismissed them. Such reinstatement is obviously a review of the dismissal orders.

24. My interpretation of Order 45 is that the conditions set therein are disjunctive due to the use of the word ‘or’. Applying it to our case, it is obvious that the appellant was aggrieved by the order dismissing his suit. He had a right of appeal but chose to follow the review avenue and was relying on ‘sufficient reason’ to convince the trial Court to exercise its discretion in his favour. I also see no reason why ‘any other sufficient reason’ need be analogous with the other grounds in the order. Even the authorities cited by the respondent agree that the phrase should receive a liberal construction in order to advance substantial justice.

25. The upshot is that there was nothing wrong with the procedure used by the appellant. Clearly, the learned trial magistrate failed to appreciate the provisions of Order 45. The appellant had the option of appealing or applying for review of the decision, commonly referred to as ‘application for reinstatement of suit’.

#### **What redress, if any, is available to the appellant?**

26. The question which begs at this juncture is, was the appellant deserving of a favorable exercise of discretion by the trial Court?

27. In **Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another (2014) e KLR**, the court held that:

*“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”*

28. From the proceedings, the appellant appears to have deliberately refused to attend the medical re-examination hence stalling the matter. I have however looked at the appellant’s affidavit in support of the application for review. He deposed that he attended the respondent’s Doctor for medical re-examination on 05/07/2016, 12/07/2017 and 19/10/2017 but the Doctor refused to examine him for failure to produce the treatment notes from Machakos level 5 hospital. The appellant also deposed that he had never been treated at the said hospital and the only thing he obtained from the facility was a P3 form. He blamed the respondent’s Doctor for expecting him to produce that which he did not have.

29. There is some semblance of truth in the appellant’s deposition because from the proceedings, the trial Court was on 18/07/2017 informed by the respondent that indeed the appellant had attended medical re-examination on 12/07/2017. Secondly, it is evident that the appellant had complied with the pre-trial requirements very early in the process and was ready to proceed with the matter. Thirdly, the fact that the first application to compel the appellant to attend medical re-examination was allowed by consent shows that he (appellant) was actually not averse to being re-examined.

30. I however note that the difficulty which the appellant was experiencing was not properly articulated and brought to the attention of the trial Court. At some point, all what the appellant’s Counsel told the trial Court was that the delay was due to unavoidable circumstances. In my view, there was nothing ‘unavoidable’ about that kind of situation.

31. The appellant’s Counsel should have at least tried to formally correspond with the respondent in a bid to break the impasse. If the said treatment notes do not exist, then surely, they would never do no matter how many times the appellant submitted himself for the re examination. It was therefore foolhardy to continue booking appointments for the appellant and expecting different results.

32. The circumstances of this case are such that, it would not be in the interests of justice to deny the appellant his day in Court due to casual

conduct of the matter. In **Shah -vs- Mbogo & Another (1967) EA 1116**, the court stated on the matter of its discretion, that;

***“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”***

33. The reason given for the delay was sufficient to convince the trial Court to exercise it’s discretion in it’s favour.

34. **Conclusion**

35. The appeal has merit. The application for review filed in the trial Court would therefore be allowed. In my view, the parties should also be directed to resolve the issue of the treatment notes to pave way for medical re-examination of the appellant. This will be done within set timelines with default clause.

36. The orders herein shall apply to HCA 19 and 20 of 2018. This is because the dispute in all 3 appeals arises from a road traffic accident where all the appellant were passengers and claim to have injured.

37. They are all sued the respondent and were all subjected to order of compulsory re-examination by the respondent doctor and it is failure to comply with same directions which attracted the dismissal of their suits. The circumstances and issues raised are similar.

Thus the court makes the following orders;

- i. -The appeals no 18/018, 19/018 and 20/018 are allowed.**
- ii. -Matters to be tried in Makueni spms court by any other magistrate save Ho C A mayamba SRM.**
- iii. -Parties to resolve matters of re-examination by respondent doctor within 30 days after matter is first mentioned for directions by the trial court.**
- iv. -failure to resolve same, the trial court to proceed with trial and make verdict on facts and law before the court.**
- v. \_parties to bear their own costs.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31<sup>ST</sup> DAY OF MAY, 2019.**

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**C. KARIUKI**

**JUDGE**