REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 150 OF 2012

UAP PROVICIAL INSURANCE COMPANY.....APPELLANT

VERSUS

MAURICE PHILEMON AKASA.....1ST RESPONDENT

PHOEBE ANDEBA AKASA.....2ND RESPONDENT

RULING

INTRODUCTION

1. The 1st and 2nd Respondents' Notice of Motion application dated 24th March 2017 and filed on 30th March 2017 was brought pursuant to Rule 45 (1) **(sic)** Section 80 of the Civil Procedure Rules and all other enabling provisions of the law. Prayer Nos (1) was spent. It sought the following remaining prayers:-

> **1. Spent.**
>
> **2. THAT the Honourable Court be pleased to review, vary and/or set aside the Judgment/Orders delivered by Justice C.B. Nagillah herein on the 13th day of October 2014 due to the discovery of new and important material of evidence whereby the Honourable Court in its Judgment relied on a forged report/document which has since been found to be forged through Forensic Investigations.**
>
> **3. THAT the Honourable court do grant any other appropriate orders to the extent that the Honourable Court do uphold the Lower Court's orders issued in favour of the Applicant.**
>
> **4. THAT the costs of this application be in the suit.**

THE RESPONDENTS' CASE

2. The Respondents' Notice of Motion application was supported by the Affidavit of the 1st Respondent that was sworn on 24th March 2017. Their Written Submissions were dated 8th June 2018 and filed on 12th June 2018.

3. Their case was that they discovered new and important material touching on the Report the Appellant relied upon after Judgment had been delivered by Nagillah J (as he then was) on 13th October 2014. They contended that two (2) Forensic Document Examiners had found the Report to have been forged and that the discovery could not have been earlier despite the exercise of due diligence on their part.

4. They averred that the new compelling evidence was capable of altering the Judgment and that if the Judgment herein was not reviewed, then they would suffer prejudice.

5. They therefore urged this court to allow their application as prayed.

THE APPELLANT'S CASE

6. In opposition to the said application, Joseph Mwai, the Appellant's Senior Legal Officer, swore a Replying Affidavit on 7th May 2018. It was filed on the same date. Its Written Submissions were dated 4th June 2018 and filed on 5th June 2018.

7. It averred that the Respondents did not demonstrate that they could not have secured the new compelling evidence in the lower court and even before this court determined the Appeal herein.

8. It stated that it was almost four (4) years since Judgment herein was delivered and that the Affidavit that the Respondents wished to rely upon regarding new compelling evidence was sworn on 10th August 2010, which was at least three (3) months before the lower court delivered its decision on 11th November 2010.

9. It added that on or about 20th February 2018, it wrote to the Officer- In- Charge Insurance Fraud Investigation Unit to establish the authenticity and legitimacy of the statement of Danny Mukhwana Odera that was contained in the Invespot Insurance Investigators Report dated 29th July 2005 which had been impugned by the Respondents but that the said Unit had not yet issued its Report. It was emphatic that the exercise that was now being undertaken by the Document Examiner at the behest of the Respondents was self-serving and lacking in objectivity.

10. It averred that the Respondents were seeking to set aside the Judgment of Nagillah J that had overturned the decision of the lower court and was emphatic that litigation must come to an end. It was their contention that parties ought not to be allowed to re-open decisions of courts merely because they had found new angles to attack those decisions.

11. It was its averment that there was unjustifiable and unexplained delays herein on the part of the Respondents and thus urged this court to dismiss their application.

LEGAL ANALYSIS

12. A perusal of the court record shows that on 11th November 2010, Hon P Gichohi (Mrs) SPM entered judgment in favour of the Respondents against the Appellant herein. The Learned Trial Magistrate found that the Appellant was wholly liable to compensate the Respondents.

13. Being dissatisfied with the said decision, the Appellant lodged its Appeal on 28th March 2012. In his Judgment delivered on 13th October 2014, Nagillah J (as he then was) allowed its Appeal on the ground that the Learned Trial Magistrate had drawn a wrong inference from proven facts arrived at a decision that was not borne by evidence tendered.

14. The Respondents submitted that the discovery of forgery could not have been made earlier since the expert eye, knowledge and equipment of a Forensic Document Examiner was required to identify the forged signatures. They argued that their advocate did not inform them of the Judgment herein and that they only became aware of the same on 24th March 2016. It was also their averment that they filed their present application timeously and that as matters stood, their sworn evidence remained uncontroverted.

15. On its part, the Appellant argued that the principle of finality means that litigation must come to an end. It placed reliance on the provisions of Order 45 Rule1 of Civil Procedure Rules, 2010 that was analysed in the case of **Josiah Mwangi Mutero &Another vs Rachel Wagithi Mutero Succession Cause No 76 of 2015** in which Mativo J held that the grounds for a Review are limited. It also relied on the case of **Ajik Kumar Rath vs State of Orisa** (citation not given) where it stated that it was held that the grounds for Review were similar to the ones in Order 45 Rule 1 of Civil Procedure Rules.

16. In arguing that the present application was filed after an unjustifiable and unexplained delay, it referred this court to several cases but the citations were not given. It was the view of this court that lifting the judgment of Mativo J in **Josiah Mwangi Mutero & Another vs Rachel Wagithi Mutero** (Supra) from Para 35 – Para 54 *in extenso* was rather odd as it meant that the Appellant never really submitted in respect of the Respondents application but merely reproduced the Judgment of Mativo J, almost in its entirety.

17. It was apparent to this court that whereas both the Appellant and Respondents were in agreement that new and compelling evidence can be a ground for court allowing an application for review, they did not advance legal arguments. Their Written Submissions mainly focused on the facts in the trial lower court and the proceedings before Nagillah J (as he then was).

18. The question that appeared to have really been placed before this court was whether it could review a Judgment that was rendered after an Appeal had been determined.

19. Section 78 (1) of the Civil Procedure Act provides as follows:-

> **"Subject to such conditions and limitations as may be prescribed, an appellate court shall have power**
>
> **a. to determine a case finally;**
>
> **b. to remand a case;**
>
> **c. to frame issues and refer them for trial;**
>
> **d. to take additional evidence or to require the evidence to be taken;**
>
> **e. to order a new trial."**

20. It was therefore evident that an appellate court has power to order for the taking of additional evidence or to require that the evidence to be taken. This is, however, not an order that is given as a matter of course. An applicant seeking to enjoy the benefit of Section 78 (1) (d) of the Civil Procedure Act must lay basis and demonstrate why he is entitled to such an order.

21. Notably, the Respondents did not apply to have additional evidence taken during Appeal. Indeed, if they had laid basis for the same, Nagillah J (as he then was) could have considered the merits or otherwise of having ordered for additional evidence to be taken or to order a new trial so that evidence of forgery of the Report they were contending was a forgery could be taken through the rigours of Cross-Examination.

22. As the said application was not made, the Respondents could apply a review of the judgment to the court that passed the decree or made the order provided for in Section 80 of the Civil Procedure Act. The said Section 80 stipulates 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."**

23. It is important to point out that the order for review is not also to be granted as a matter of course because Section 80 of Civil Procedure Act had to be read together with Order 45 Rule 1 of the Civil Procedure Rules. Order 45 Rule 1 of the Civil Procedure Rules states as follows:-

> **"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."**

24. For an applicant to succeed on an application for review, he must demonstrate that:-

> **"1. There was discovery of new and important matter of 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 was made; or**
>
> **1. There was an error on the face of the record; or**
>
> **2. There was a sufficient reason; and**
>
> **3. That the application had been made without undue delay."**

25. A perusal of the Affidavit that was relied upon by the Respondents shows that the same was sworn by Danny Mukhwana Odera on 12th August 2010. As was rightly pointed out by the Appellant, this Affidavit was sworn almost three (3) months before Judgment was delivered by the Learned Trial Magistrate on 11th November 2010. The Respondents did not explain if this was an affidavit they could not have presented to the trial or appellate courts before the Trial and Appellate Courts rendered their decisions.

26. In the absence of a plausible explanation as to why the said Affidavit of Danny Mukhwana Odera could not have been and was not availed well in advance dissuaded this court from agreeing with them that there was no delay in applying to court for a review.

27. In any event, the Respondents did not proffer any sufficient reason to explain why they did not submit the said Affidavit to the Directorate of Criminal Investigations before the lower and appellate courts rendered their decisions. Indeed, the 1st Respondent's letter to Mr Emmanuel Kenga Forensic Document Examiner was dated 25th July 2016 which was almost two (2) years since Nagillah J (as he then was) delivered his Judgment. The delay in making the present application for review was also not only inordinate but the same was unjustifiable and/or unexplained.

28. Accordingly, having considered the Respondents' and Appellant's affidavit evidence and the Written submissions that both parties relied upon, this court came to the firm conclusion that the Respondents had not demonstrated that they had met the threshold of being granted the order for Review as they had sought. In addition, as was correctly, pointed out by the Appellant, allowing the application at this juncture would be tantamount to re-opening litigation after the High Court had rendered itself on appeal. The Respondents lost their opportunity at the High Court when they did apply to have additional evidence taken and to that extent, this matter must now be laid to rest. The High Court is now *functus officio* and litigation must come to an end at one point or other.

DISPOSITION

29. For the foregoing reasons, the upshot of this court's decision was that the Respondents' Notice of Motion application dated 24th March 2017 and filed on 30th March 2017 was not merited and the same is hereby dismissed with costs to the Appellant.

30. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **27th** day of **September** 2018

J. KAMAU

JUDGE