



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 51 OF 2014**

**MWAJUMA MOHAMED (Suing As The Legal Representative Of The Estate**

**Of Sophia Hajera Chebai (Deceased)..... APPELLANT**

**VERSUS**

**JIMMY MWASHIGADI.....1<sup>ST</sup> RESPONDENT**

**MWANGI SAMUEL.....2<sup>ND</sup> RESPONDENT**

**(appeal from the ruling and consequent Order by the Chief Magistrate's Court at Nairobi Ms Leah W Kabaria (RM) dated 14<sup>th</sup> February, 2014 in CMCC No. 3735 of 2010)**

**J U D G M E N T**

1. Mwachuma Mohamed, the legal representative of the Estate of Sophia Hajera Chebai, deceased, the appellant herein, were lawfully walking together with the deceased along Lang'ata Road on 20<sup>th</sup> August, 2009. While waiting to cross the road, motor vehicle registration No. KAY 283A veered off the road and hit Sophia Hajera Chebai fatally injuring her.
2. At the time of the accident, the aforesaid motor vehicle was being driven by Jimmy Mwashigadi, the 1<sup>st</sup> Respondent herein.
3. The Appellant subsequently filed a compensatory suit before the Chief Magistrate's Court, Nairobi against the 1<sup>st</sup> Respondent as the driver of the motor vehicle and Mwangi Samuel, the 2<sup>nd</sup> Respondent as the registered owner of the same vehicle.
4. The duo entered appearance and filed a defence to deny the Appellant's claim. The Appellant tendered evidence but unfortunately, the Respondents failed to attend court hence the defence case was closed.
5. On 23<sup>rd</sup> April, 2013, Judgment was pronounced in favour of the Appellant and against the 1<sup>st</sup> Respondent in the sum of Ksh.885,030/- representing both general and special damages.
6. In the same judgment, Hon. L W Kabaria, learned Resident magistrate, dismissed the suit as against the 2<sup>nd</sup> Respondent on the basis that the Appellant had failed to produce evidence confirming that the 2<sup>nd</sup> Respondent was the registered owner of motor vehicle registration no. KAY 283A as at the date of the accident.
7. On 16<sup>th</sup> May, 2013, the Appellant filed the motion dated 14<sup>th</sup> May, 2013 in which she sought for *inter alia* a review of the dismissal order.
8. The learned Resident Magistrate dismissed the motion vide the ruling she delivered on 14<sup>th</sup> February, 2014. Being aggrieved by the aforesaid decision, the Appellant preferred this appeal and put forward the following grounds: -

***a) The Honourable Magistrate erred in fact and in law in dismissing the Appellant's application for review of the Honourable magistrate's judgment dated 23<sup>rd</sup> April, 2013.***

***b) The Honourable Magistrate erred in fact and in law in dismissing the Appellants case against the 2<sup>nd</sup> Respondent.***

***c) The Honourable magistrate erred in fact and in law in failing to accord due consideration to the Appellant's authorities in support of her Application for review dated 14<sup>th</sup> May, 2013.***

*d) The Honourable magistrate erred in fact and in law by refusing to acknowledge that the Honourable magistrate's judgment dated 23<sup>rd</sup> April, 2013 was delivered on account of an error apparent on the face of the record.*

*e) The Honourable Magistrate erred in fact and in law by refusing to acknowledge that the Honourable Magistrate's judgment dated 23<sup>rd</sup> April, 2013 was obtained through an inadvertent mistake of the Appellant's advocate of not attaching the copy of records for motor vehicle registration number KAY 283A (the subject motor vehicle of the accident) as per the date of the accident and the aid advocate's mistake should not prejudiced the Appellant so that the ends of justice are met.*

*f) The Honourable Magistrate erred in fact and in law in failing to accord due consideration to the Appellant's evidence of a copy of motor vehicle record for motor vehicle registration number KAY 283A (the subject motor vehicle of the accident) as being registered to the 2<sup>nd</sup> Respondent as at 2<sup>nd</sup> June, 2010 in support of her application for review dated 14<sup>th</sup> May, 2013 despite the same being uncontroverted the ownership of the said motor vehicle belonging to the 2<sup>nd</sup> Respondent as at 28<sup>th</sup> August, 2009 (date of the accident) being confirmed/affirmed in the 1<sup>st</sup> Respondent's witness statement dated 16<sup>th</sup> August, 2011.*

*g) The Honourable magistrate erred in fact and in law in failing to accord due consideration to the appellant's submissions dated 5<sup>th</sup> June, 2013.*

9. When this appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions.

10. I have re-evaluated the arguments made before the trial court. I have also considered the rival written submissions.

11. Though the Appellant put forward a total of eight grounds of appeal, those grounds may be argued together. The central issue is whether or not the application for review was properly dismissed.

12. It is the submission of the Appellant that her application was premised on the ground of discovery of new and important matter or evidence. She argued that she did her due diligence through her counsel on record to prove that the 2<sup>nd</sup> Respondent was the owner of motor vehicle registration No. KAY 283A before the trial court by producing the official search records of the aforesaid motor vehicle.

13. It was also argued that the 1<sup>st</sup> Respondent had confirmed that as at the time of the accident the motor vehicle was owned by the 2<sup>nd</sup> Respondent.

14. The Appellant further pointed out that the 2<sup>nd</sup> Respondent failed to attend court for the hearing of the suit to controvert her evidence, therefore, her evidence should have been left intact.

15. The Appellant further submitted that the copy of records she produced in the absence of any other records or documents or evidence to the contrary by the 2<sup>nd</sup> Respondent meant that the trial court should have taken it that the person named therein was the owner thereof.

16. The Respondents' are of the submission that the Appellants new and important matter of evidence tabled by the Appellant did not meet the threshold for this limb of review because the said copy of records is not evidence that could not be obtained when it was needed, therefore the trial court did not fall into error when it dismissed the application for review.

17. The Respondents further argued that the Appellant has not sufficiently explained her inadvertence to warrant the interference by this court.

18. After a careful re-evaluation of the arguments and material placed before the trial court and after considering the rival submissions and the authorities cited, I have come to the following conclusions in this appeal.

19. **First**, that the suit before the trial court proceeded for hearing in the absence of the Respondents having failed to attend court. At the trial, the Appellant tendered records showing that as of 20<sup>th</sup> June, 2010 the registered owner of KAY 283A was the 2<sup>nd</sup> Respondent. It is, therefore, correct that there was no evidence to show that as of 20<sup>th</sup> August, 2009, the 2<sup>nd</sup> Respondent was the owner of the aforesaid motor vehicle.

20. The Appellant admitted in her application for review before the trial court that it was the mistake of her counsel not to supply such crucial evidence.

21. The decision to dismiss the Appellant's suit against the 2<sup>nd</sup> Respondent actually prompted the Appellant to do a further search at the Registrar of Motor Vehicles as of the date of the accident.

22. This court takes judicial notice of the fact that advocates are involved in conducting searches on behalf of their clients and in the process they may make mistakes like in this case.

23. In my view, I am convinced that the Appellant and her counsel made a genuine mistake in failing to supply the crucial evidence.

24. In my humble view, on that ground alone, the Appellant should have been granted the order for review.

25. **Secondly**, there is no dispute that the 2<sup>nd</sup> Respondent in his defence merely denied ownership of the accident motor vehicle. However, he

failed to attend court at the time of hearing to tender evidence to controvert the Appellant's assertion that indeed he was the registered owner of motor vehicle Registration No. KAY 283A.

26. The Appellant proceeded with hearing ex-parte believing that the record she had established on a balance of probabilities that the 2<sup>nd</sup> Respondent was the registered owner.

27. The other aspect is the admission made in the pleadings by the 1<sup>st</sup> Respondent is to the effect that the 2<sup>nd</sup> Respondent was the owner of the accident motor vehicle. With respect, I am convinced that the above factors misled the Appellant believing that she had credible evidence proving ownership of the motor vehicles

28. I think, this is a sufficient cause, which should have convinced the trial magistrate to allow the application for review.

29. In the end, I find this appeal to be with merits. It is allowed. Consequently, the order made on 14<sup>th</sup> February, 2014 dismissing the Appellant's application dated 14<sup>th</sup> May, 2013 is set aside and is substituted with an order allowing the same.

30. In the circumstances of this case, a fair order on costs is that each party should bear its own costs.

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of September, 2018.**

.....

**J K SERGON**

**JUDGE**

*In the presence of*

..... *for the appellant*

..... *for the 1<sup>st</sup> Respondent.*

..... *for the 2<sup>nd</sup> Respondent.*