



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 486 OF 2014

SILAH ENANE O MUTUTI.....APPELLANT

VERSUS

CATHERINE WANJIKU GITHIAKA.....RESPONDENT

(Appeal from the original Ruling of G.H Oduor (SRM) in Senior Principal Magistrates

Court t Limuru, Civil Case No. 279 of 2010, delivered on 31st October, 2014)

JUDGMENT

1. The Appellant, **Silah Enane Omututi** sued the Respondent **Catherine Wanjiku Githiaka**, for injuries suffered on 10th February 2010 when the Respondent or her agent allegedly drove motor vehicle registration number KAP 928T so negligently that it hit the Appellant who was walking along Limuru-Banana road. When the matter came up for hearing in the trial court, the appellant filed an application dated 15th April, 2014, where he sought orders that:

- i. This honourable Court be pleased to review and set aside its judgement and decree made on 21st November 2013.*
- ii. This honourable court be pleased to admit on record and consider the Grant of Letters of Administration issued to the defendant in High Court Succession Cause no. 61 of 2008, Estate of Stanley Mwangi Githiaka (Deceased) and thereby allow the plaintiff's claims.*
- iii. This honourable court be otherwise pleased to give such directions as will facilitate substantive determination of the plaintiff/ applicant's claim in this suit.*
- iv. Costs of this application be provided.*

The Trial Magistrate upon considering the application dismissed it with costs to the Respondent.

2. The Appellant, aggrieved by the Trial Court's decision filed this appeal on

the following grounds:

- 1. THAT the learned magistrate erred in law and in fact in dismissing the application dated 15th April 2014.*

2. ***THAT the learned magistrate erred in law and in fact in finding that the applicant did not demonstrate the fact that the Grant of Letters of Administration made to the respondent in High Court Succession Cause No. 61 of 2008, Estate of Stanley Mwangi Githiaka (deceased) was a new and important matter in the determination of the appellant's claim and thereby warranting the review of the judgement of the court dismissing the suit on grounds that the appellant had not demonstrated the respondent's capacity in the matter.***

3. ***THAT the learned magistrate erred in law and in fact in finding that the said Grant of Letters of Administration made to the respondent in High Court Succession Cause No. 61 of 2006, Estate of Stanley Mwangi Githiaka (deceased) was within the knowledge of the appellant at the time of the hearing of the suit before the lower court and further that it could have been procured within the time of the hearing despite the undisputed averments of the appellant that he was only able to procure a copy thereof after the hearing and determination of the suit before the lower court.***

4. ***THAT the learned magistrate erred in law in failing to appreciate that a review of a judgment can issue for a sufficient reason demonstrated by either party and that in the present instance the fact that the defendant is the legal representative of the Estate of Stanley Mwangi Githiaka (deceased) by dint of the Grant made in Stanley Mwangi Githiaka (deceased) constituted a sufficient reason to review the judgment herein.***

5. ***THAT the learned magistrate erred in law in failing to appreciate that the capacity of the defendant in this matter was material to its determination as to justify the review of the judgment herein upon evidence that the defendant was the administrator of the Estate of Stanley Mwangi Githiaka (Deceased) and who was the registered proprietor of the motor vehicle registration no. KAP 928T that caused the accident and injuries subject of the claim herein.***

6. ***THAT the learned magistrate erred in law and in interpreting the jurisdiction to review a judgment as provided under Section 80 of the Civil Procedure Act, Chapter 21, Laws of Kenya and Order 45 of the Civil Procedure Rules, narrowly and failing to appreciate the constitutional principle of exercise of judicial authority as provided under Article 159 of the Constitution that enjoins a court to ensure that the justice is administered without undue regard to technicalities and further that the objects and purposes of the constitution ought to be promoted by the exercise of judicial authority.***

7. ***THAT the learned magistrate erred in law and in fact in otherwise failing to consider the substance of the claim herein being a claim for damages for loss and injuries suffered as a result of a road accident caused by the defendant's motor vehicle and the fact that the only reason that the appellant's case was dismissed was for reason that at the time of the hearing, he did not have a copy of the Grant made in High Court Succession Cause No. 61 of 2008, Estate of Stanley Mwangi Githiaka (deceased) which demonstrates the capacity under which the respondent had been used.***

8. ***THAT the learned magistrate erred in law and in failing to consider and apply the principles of law enunciated by this honourable court in the various authorities relied upon by the applicant.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanor of the witnesses. In the civil appeal case of, **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court (Sir Clement Lestang, V.P) said:-

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself

and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

4. I have re-evaluated the evidence as adduced in the lower court. When the matter came before me, the parties recorded a consent to have the matter disposed of by way of written submissions which submissions I have taken into consideration.

5. The Appellant submitted that after the Judgement was delivered on 31st October 2010, he discovered new evidence, that is the Grant of Letters of Administration made to the Respondent in High Court Succession Cause. No. 61 of 2008, Estate of Stanley Mwangi Githiaka (Deceased). He claimed that the Grant had not been discovered during trial to establish the relation between the deceased and the Respondent despite frantic efforts made to find the letters of administration. He claims that due to the filing system where the files are filed at the registry in a chronological order, it was impossible to obtain the copy of the Grant letters of administration and he added that it was a not requirement that he writes to the Deputy Registrar. He averred that it was not possible to file a notice to produce document since the Respondent had denied the existence of the deceased and the motor vehicle yet the burden to prove the nexus between the Respondent and the deceased solely lay with him.

6. The Respondent on the other hand submitted that the Appellant had not satisfied the conditions for the grant of the orders of review on the ground of discovery of new and important evidence as required under Order 45 Rule 1. She argued that the Appellant had the evidence all along since the certified copy of the was obtained in 2012 but the Appellant failed to produce it in court. She further argued that the for ground of review on account of discovery of new evidence is not absolute since it cannot be granted where it is found that the petitioner had not acted with due diligence. She further asserted that the Appellant was required to produce evidence to show effort was applied in obtaining the letters of administration. She also added that the Appellant delayed in filing the application for three and a half months which was inordinate delay contrary to Order 45.

7. The history of the case according to the Court record is that, the Appellant sued the Respondent for the accident that occurred injuring him. During trial, it emerged the motor vehicle that caused the accident belonged to **Stanley Mwangi Githiaka** who is deceased. The Appellant therefore sought leave of the court to amend the Plaintiff, which he did and amended it to include that the Respondent was sued as a legal representative of the estate of the deceased. The trial Court heard the suit to its conclusion and delivered a judgement on 21st November 2013 dismissing the suit on the basis that the Appellant failed to provide evidence to show that the Respondent was an administrator of the estate of the deceased. This decision prompted the Appellant to file the contentious application which he brought under Order 42 Rules 1 and 2 herein, in the trial court citing discovery of new and important evidence, being the Grant of Letters of administration that were issued to the Respondent in High Court Succession Cause 61 of 2008, Estate of **Stanley Mwangi Githiaka**. I observe that the Trial Magistrate in his Ruling dismissed the application for reasons that the Appellant had not demonstrated that the alleged new matter or evidence was not within his knowledge or could not have been discovered in good time despite due diligence. The Magistrate went on to point out that there is no evidence of any correspondence to the registry officials where the Appellant sought a copy of the said grant.

8. Having set out the background of this appeal, I now wish to consider merits of the appeal. I will consider all the grounds of appeal together since they all relate to dismissal of the application that sought review of the Judgement to set aside the Judgement. The application was brought under Order 45 Rule 1 which provides that:

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." (emphasis mine)

9. The Rule is categorical that for an Order of Review to be granted the applicant must have either discovered new matter or evidence that was not within his knowledge or could not be produced by him at the time when the decree or order was made. The Appellant contends that he satisfied Order 45 Rule 1 of the Civil Procedure Rules since he discovered new and cogent evidence with probative value which is the Grant of Letters of Administration. He claims that he amended his Plaintiff to verify that the Respondent was the legal Representative of the Estate of Stanley Mwangi Githiaka, the Respondent did not file an amended defence to deny this allegation. The Appellant argues that he tried to obtain the Grant of Letters of Administration but failed to obtain the same due to the fact that he did not have in his possession the details of the Succession matters including the date. He claims that since the registry had filed the cases in chronological order, it proved hard to obtain the succession file and only obtained the Copy of grant of letters of administration after the matter was decided.

10. I am convinced that the grant of letters of administration is evidence that was not available to the Appellant at the time when the suit came up for hearing. If it was available, then the Appellant would have produced it in evidence. The mere fact that the Appellant failed to officially request the same to be availed to him by the Deputy Registrar or officials at the registry, does not disqualify his attempts to obtain the same. He probably sent his clerk to enquire severally without any success. I agree that a prudent step to take would have been to write a formal letter to the Deputy Registrar but then a failure to do so does not defeat the attempt to acquire the grant of letters of administration in other ways that might have failed.

11. The Appellant claims that he did not have the Succession Case Number which he would have easily used to obtain a copy of the grant, an explanation I find convincing. As much as the onus of proof lies with the Appellant, I note that the Respondent did not plead that she is not related in any way to the deceased who was the owner of the subject motor vehicle in this case.

12. Indeed the Appellant had discovered new evidence that could not be produced by him at the time when the decree was passed or the order made in the Grant of letters administration which evidence he did not have in his possession during the trial and the Respondent has not countered this evidence with any other evidence. I find his explanation satisfactory.

13. The respondent has also claimed that the application was brought with undue delay of three and a half months. I do not consider three and a half months to be undue delay. The Appellant was in the process of obtaining the new evidence that he presented in court. Undue delay is a relative term. The Court Of Appeal in the case of **Benson Mbuchu Gichuki v Evans Kamende Munjua & 2 others [2008] eKLR held that, "In our view, four years delay which was not explained was an unreasonable delay.**

14. He claims that due to the filing system where the files are filed at the registry in a chronological order, it was impossible to obtain a copy of the letters of administration. It was in the interest of justice that the Trial Court should have Reviewed its Judgement upon admitting the new evidence

15. In the end, I find merit in the appeal. The same is allowed. The order dismissing the application dated 15.4.2014 is set aside and is substituted with an order allowing the application. The suit to be heard afresh by another magistrate of competent jurisdiction other than Hon. G. H. Oduor.

Costs of this appeal and the application before the trial court is awarded to the appellant.

Dated and delivered in open court this 22nd day of April, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent