REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 43 OF 2011

PETER MUINDE.....APPELLANT

VERSUS

SALOME THAMBI PETER.....RESPONDENT

(An Appeal arising out of the Ruling of H. Nyakweba PM delivered on 16th March 2011 in Kilungu Senior Resident Magistrate's Court Civil Case No. 34 of 2007)

JUDGMENT

The Appellant through a Memorandum of Appeal filed in Court on 6th April 2011 and dated 1st April 2011 has appealed against the ruling of the Honourable Principal Magistrate H. Nyakweba, delivered on 16th March 2011 in Kilungu Senior Resident Magistrate's Court Civil Case No. 34 of 2007. The learned trial magistrate in the said ruling dismissed an application brought by the Appellant in the lower court dated 14th January 2011, that was seeking a review and setting aside of the judgment entered therein on 24th November 2010.

The grounds of appeal are as follows:

1. The learned trial magistrate erred in law and fact by dismissing the Appellant's application dated 14/1/ 2011 whilst it was clear from the evidence before him important issues had arisen to warrant reviewing the orders in question.

2. The learned trial magistrate erred in law and fact, and against general principles and spirit of the Civil Procedure rules in expunging averments of supporting affidavit, thus reaching at a wrong decision .

3. The learned magistrate erred in law and in fact in holding that the deponent to the affidavit had no *locus standi*, whilst it is clear from record that he was best suited and having the information on new evidence.

4. The learned trial magistrate erred in law when he failed to follow established principles of law, an error that made him dismiss the applicants' application with costs when he ought to have allowed the same with costs to the appellants.

The Appellant prays for orders that this appeal be allowed with costs to him, and that the lower court's ruling dated 16th March 2011 be quashed and/ or set aside and substituted with a ruling in favour of the defendant as prayed in the application dated 14th January 2011.

The Facts

The brief facts of this Appeal are that the Appellant was the Original Defendant in the trial Court and the Respondent the original Plaintiff. The Respondent filed a suit against the Appellant in the trial Court by way of a Plaint dated 4th July 2007. He sought damages and costs as a result of a road accident alleged to have occurred on 1st June 2007 along the Salama –Nunguni road, involving motor vehicle registration number KAX 395L of which the Appellant was the registered owner.

The trial court found the Appellant liable with contributory negligence by the Respondent of 5%, and entered judgment on 24th November 2010 in favour of the Respondent as against the Appellant in the sum of Kshs. 80,000/= as general damages less 5% contribution. The findings as to liability also applied to a number of other cases filed in the same trial court, arising from the same accident, namely civil cases numbers 36, 38, 40, 41 and 42 of 2007.

The Appellant subsequently moved the trial court by way of a Notice of Motion dated 14th January 2011 under the provisions of Sections 3A and 80 of the Civil Procedure Act, and Order 45 Rule 1 of the Civil Procedure Rules. He sought the following orders:

1. A stay of execution of the trial Court's judgment/decree entered against pending the hearing and determination of the application.

2. That the judgment entered on 24th November 2010 by Hon. SRM Nyakweba be reviewed and set aside.

The Appellant's grounds for the application were that the claimant in the suit in the trial court did not appear in the hospital records of Machakos District Hospital where she alleged to have been treated and obtained medical documents in support of her claim. A supporting affidavit was filed in support of the application by one Paul Gichuhi, who stated that he was claims manager of Invesco Assurance Co. Ltd which was the insurer. He also stated that the claimant did not appear in the police records in Salama Sub-base where the accident was reported. Further, that these facts were not in the knowledge of the Defendant when the matter proceeded. The deponent attached a letter dated 10th November 2010 from the Medical Superintendent of the Machakos District Hospital, and a letter dated 15th October 2010 from the Salama Traffic Sub-base in support of his averments.

The Respondent opposed the said application in a replying affidavit filed in the trial court dated 21st February 2011, wherein she reiterated that she was injured in the said accident as confirmed by the treatment cards which she attached, and the testimony of a Dr. Wachira at the trial. She also attached the P3 form and police abstract issued to her after the accident, and averred that one Mr. Mureithi who was attached to Salama Base also gave testimony in the trial court on oath about the accident.

The learned magistrate in his ruling on the said application delivered on 16th March 2011 declined to grant the application for review, for reasons that there was no discovery of any new matter or evidence which after the exercise of due diligence could not have been produced at the time judgment was entered. The trial magistrate in his ruling also expunged paragraphs 2 to 7 of the supporting affidavit by Paul Gichuhi, on the grounds that he was a foreigner to the proceedings not being the defendant therein, and that he had not disclosed the source of the information deponed to. It is this ruling that the Appellant has now appealed against.

The Issues and Determination

The issues for determination in this appeal are firstly, whether the affidavit and averments therein by Paul Gichuhi were properly on record; secondly, whether the judgment in the trial court should be reviewed and/or vacated; and if so, lastly, whether the hearing in the trial court should be re-opened. This appeal was canvassed by way of written submissions. The Appellant learned counsel, J.M. Mutua & Co

Advocates, filed submissions dated 15th February 2016. It was argued therein that the new evidence could not be discovered before judgment was delivered, because the Appellants insurers were placed under statutory management around 2007 and it was impossible to carry out intensive investigations at the time.

The Appellant contended that the deponent to the supporting affidavit was the claims manager of the Appellant's insurer, which is the one that carried the investigations that revealed that the Respondent was not among the injured persons in the accident, and he was the person therefore in possession of that information and best suited to have sworn the affidavit.

Anne M. Kiusya Advocate, the Respondent's learned counsel, filed submissions in Court on 5th May 2016, in which the evidence that was brought in the trial court on the occurrence of the subject accident, and that the Respondent was a victim thereof, was detailed out. It was further urged that Paul Gichuhi was not competent to swear the supporting affidavit, and that there was no new evidence shown by the Appellant to warrant a review of the judgment.

I will first consider the arguments about the competence of Paul Gichuhi to swear the supporting affidavit, and whether the said affidavit was properly on record. Rule 3 of Order 19 of the Civil Procedure Rules provides as follows in this regard:

> **"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."**

Likewise, in **Kenya Horticultural Exporters (1977) Ltd vs Pape (1986) KLR 705** it was held that an affidavit should contain such facts as the deponent is able of his or her own knowledge able to prove.

The above stated are the only limitations and requirements as regards the person who can depone to facts in an affidavit, and therefore the fact that Paul Gichuhi (the deponent) was alleged to be a foreigner to the proceedings did not preclude him from filing an affidavit in an application before the trial court, so long as the information he was deponing to was within his knowledge. The trial magistrate therefore erred in the finding that the said deponent had no *locus standi* to swear and file an affidavit.

I have also perused the paragraphs of the impugned affidavit that were expunged by the trial magistrate. The said paragraphs state as follows:

> **2. "THAT the claimant herein, in his testimony stated that he had reported the accident at Salama Sub- base and was treated at the Machakos District Hospital and adduced before the honourable court documentary evidence in support of the same.**
>
> **3. THAT the said documents were obtained fraudulently as established by the Ministry of Medical Services. *(Annexed and marked 'PG 1' is a certified copy of the report from the Machakos District Hospital)***
>
> **4. THAT the medical report prepared on the basis of the said medical documents is irregular, erroneous and unfounded.**
>
> **5. THAT the claimant does not appear in the police records at Salama Sub-base where the accident was allegedly reported. *(Annexed and marked 'PG 2' is a letter from Salama Sub-base).***
>
> **6. THAT the foregoing facts were not in the knowledge of the Defendant before the matter proceeded.**
>
> **7. THAT the judgement on record is therefore irregular on the face of record."**

The deponent attached the report and letter he relied on for his information, and therefore was able to

state the source and able to prove his statements in paragraphs 2 to 6 of his affidavit. To this extent the trial magistrate erred in holding that the source of the said information was not indicated. However, as regards paragraph 6, I find that the deponent could not depone as to what was or was not within the knowledge of the Defendant, and it was necessary for the Defendant/Appellant himself to depone to this fact. This fact is also what was relevant in the application, and the trial magistrate therefore did not err in expunging paragraph 6 of the said affidavit.

On the remaining issues, the applicable law as regards review and/or setting aside of a judgment or decree is found in section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides 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."**

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be reviewed and/or set aside 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."**

The Appellant argued that he had discovered new facts since the judgment in the trial court was delivered, that showed that the Respondent was not a victim of the accident. The material time under Order 45 Rule 1 of the Civil Procedure Rules with regard to the existence of the new evidence that will necessitate a review of a judgment or decree is the time when the decree was passed or the order made, but that such evidence was not within a person's knowledge or could not be produced by him.

In addition, the Court of Appeal in its decision in **Chrispinus Lawrence Wanyama v Public Service Commission of Kenya & Another (2007) eKLR** had occasion to comment on when the ground of new evidence can apply to warrant the review of a judgment. In that appeal the appellant's main ground in his application for review was that it had since come to his knowledge that the power to delegate the powers of the authorized officer only came to effect by an amendment to the law, which was long after the applicant had been dismissed after the letter initiating the dismissal was signed by an unauthorized officer.

The Court of Appeal in considering this ground which the Appellant claimed was new evidence held as follows:

> **"Can it be said that the appellant had discovered new and important matter which, after the**

exercise of due diligence was not within his knowledge or could not be produced by him at the time when he filed judicial review proceedings? We do not think so. A subsequent event or even altering the law even with retrospective effect is not a sufficient ground to warrant a review. In concluding his ruling on review application the learned Judge said:-

> ***"There are no facts presented to the Court to show diligence on the part of the applicant to lay his finger on the alleged matter in question and to produce it at the appropriate time. There is no evidence on record to show what might have prevented the applicant from making a timeous discovery of the alleged new matter. The applicant seems to be arguing that a new rule changed the scenario under which the order sought to be reviewed was made; and he seems to be saying that the court reached an erroneous decision on the merits. These are not matters which can be canvassed on an application of a review under the cited rule."***

We are in entire agreement with that conclusion by the learned Judge."

The letters relied upon by the Appellant as new evidence is a letter dated 10th November 2010 from the Medical Superintendent of the Machakos District Hospital, and a letter dated 15th October 2010 from the Salama Traffic Sub-base, which were attached as annexures "PGI" and "PG2" respectively to the supporting affidavit by Paul Gichuhi.

This knowledge was clearly available to the Appellant's insurers before delivery of the judgment in the trial Court on 24th November 2010, and their mere existence is at variance with the explanation given by the Appellant that the insurers were not able to investigate and discover this new evidence at the time of judgment. Furthermore, no evidence was brought of any attempts to bring the said information to the attention of the trial Court before delivery of judgment.

I therefore find that the said evidence does not qualify as new evidence within the meaning of Order 45 Rule 1 of the Civil Procedure Rules and uphold the trial magistrate's finding in this regard. The Appellant's appeal therefore fails for the reasons given in the foregoing.

The Appellant's appeal herein is accordingly dismissed and the Appellant shall meet the costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 19TH DAY OF SEPTEMBER 2016.

P. NYAMWEYA

JUDGE