REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 103 & 104 OF 2011

IKILO HOLDING COMPANY LTD. …….. APPELLANT

VERSUS

J M (MINOR) Suing through her next friend **I L M ....……. RESPONDENT**

(Being an appeal from the ruling of the Resident Magistrate's Court at Tawa of Hon J.W. Gichimu in Resident Magistrate Civil Case No. 231 & 232 of 2009 dated 15th June 2011)

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(Before B. Thuranira Jaden J)

J U D G M E N T

1. The ruling that is the subject of this appeal was delivered by the lower court on 15/6/2011. The said ruling dismissed the amended application dated 4/4/11 which sought a review of the decree and the setting aside of judgment.

2. The Appeal is premised on the grounds that:

1. **"The learned magistrate erred in fact and in law in failing to take into consideration the submissions of the Applicant.**

2. **The learned magistrate erred in law and in fact in narrowly construing the application of the provisions of** Order 45 **of the** Civil Procedure Rules**.**

3. **The learned magistrate erred in law and in fact in consolidating this suit and** RMCC No. 232 of 2009 **in giving ruling on the basis that the issues to be determined are the same, while the issues in the two suits were different.**

4. **The learned magistrate erred in law and in fact in failing to consider the evidence adduced in court in the form of the CID letter annexed to the supporting affidavit.**

5. **The learned magistrate erred in law and in fact in failing to take into account the interest of justice by affording the applicant an opportunity to be heard on merit at the main hearing.**

6. **The learned magistrate erred in law and in fact in failing to take into consideration the supporting evidence of the Applicant.**

7. **The learned magistrate erred in law and in fact in failing to appreciate that the Plaintiff's name was not appearing in the police records.**
8. **The learned magistrate erred in law and in fact in failing to appreciate that the Police Abstract and P3 form adduced in evidence at the hearing were fraudulent documents.**

9. **The learned magistrate erred in law and in fact in finding that the Defendants had failed the test for review as outlined in** Order 45 rule 3**."**

3. The appeal was canvassed by way of written submissions. I have perused the record of appeal and considered the rival submissions made by the counsel on behalf of their respective clients.
4. The background to this appeal is a suit filed at the **SRMCC Tawa No. 231 of 2009** wherein the Respondent who was the Plaintiff sought damages for injuries alleged to have been sustained on 3/10/09 while the Plaintiff was a lawful passenger in motor vehicle **KBH 723 Q** owned by the Defendant/Appellant. A defence was filed denying liability. During the trial before the lower court, the Respondent called two witnesses. By the consent of the parties, liability was apportioned at 90% against the Defendant and 10% against the Plaintiff. Subsequently on 20/5/10, the case was marked as closed. Written submissions were filed and the court proceeded to craft the judgment. Subject to apportionment of liability, the Plaintiff was awarded Kshs.100,000/= as General Damages and Special Damages of Kshs.3,200/= plus interests and costs. Subsequently, the application dated 4/4/11 that is the subject matter of this appeal was filed.
5. The application dated 4/4/11 sought the following substantive orders:-

    - **That the decree passed on 7/3/2011 be reviewed.**
    - **That the consent judgment on liability entered on 23/6/2010 be reviewed and set aside.**
    - **That the court be pleased to review the judgment entered on 23/6/10.**
    - **That this honourable court do set down the suit for hearing.**

6. In a nutshell, the complaints that lead to the filing of the said application is that investigations carried out by the Criminal Investigations Department (CID) unit of the Kenya Police carried out subsequent to the delivery of the judgment revealed that the Plaintiff/Respondent was not amongst the persons involved in the Road Traffic Accident the subject matter of the suit. That the Plaintiff's/Respondent's name does not appear in the official hospital records at Machakos Level 5 Hospital or in the official police records (OB 15/03/10/2009) which information was not within the Appellant's knowledge until after the case had been closed. A certified copy of the decree dated 7/3/2011 was exhibited.
7. The application was opposed. According to the replying affidavit filed, the Respondent's position is that the application was made in bad faith to deny her of the fruits of her judgment. That the Appellant had the opportunity to avail any evidence in his possession during the trial and therefore the application was an afterthought. The Respondent averred that the application was brought after inordinate and unexplained delay and that the application does not satisfy the grounds for review.
8. Under **Order 45 rule 1** are 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."

9. It is clear from the record that there is a decree or order in existence. A copy of the same was exhibited by the Appellant. It is also clear that no appeal has been preferred against the said decree. The judgment of the lower court was delivered on 23/6/2010 and the application for review dated 8/3/11 and filed in court on 9/3/2011. The delay was attributed to the petition filed in the High Court which stayed several matters among them the suit at hand. The trial magistrate arrived at the conclusion that the lack of adherence to technicalities of procedure in amending the application was not fatal. Although the Respondent's counsel has raised some issues regarding the procedure adopted in effecting the amendments, the trial magistrate arrived at the correct finding on that issue.
10. It is clear from the Appellant's case that the application for review was based on the first limb of **Order 45 rule 1** of the **Civil Procedure Rules** that there was discovery of new and important matter or evidence which after the exercise of due diligence, was not within the Appellant's knowledge or could not be produced by him at the time when the decree was passed or made. The new and important evidence is said to be the investigations carried out by the CID which allegedly disclosed that the Respondent's name did not appear in the official hospital documents or in the police records (OB).
11. The accident in question occurred on 3/10/09. The Respondent filed the suit herein on 4/12/09. The Appellant entered appearance and contemporaneously filed the defence on 11/1/2010. The Plaintiff's case proceeded to the hearing of the evidence of two witnesses on 24/3/10 and the case marked as closed on 20/5/10. The consent on liability appears not to have been minuted and I have not been able to trace it on the record. Both parties are however in agreement that they entered into such a consent.
12. From the foregoing, it is crystal clear that the Appellants had sufficient time to carry out any investigations that they wished to and incorporate the same in their case by that time. The OB was in existence and so were the treatment notes from the hospital. There was no exercise of due diligence on the Appellant's side. The Appellants cannot in the circumstances seek to have a second bite of the cherry.
13. The law on the setting aside of consent orders is settled. It can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation (*see* for example **Flora N. Wasike –vs- Destino Wambuko (1982-88) 1 KAR**.
14. I understand the Appellant to be making allegations of fraud when he talks about the police and the hospital records. These are allegations that have been denied in the replying affidavit and the annexed letter from the Base Commander which reflects that it was confirmed that the Respondent was amongst those injured in the accident and was issued with a P3 form and a police abstract although her name was missing in the OB. There are no reasons why this court would prefer the evidence in any one of the two rival affidavits to the other. Non of the deponents of the said affidavits was cross-examined. However, the burden of proof is on the one who alleges. As stated by the Court of Appeal in **Harit Seth T/A Harit Sheth Advocates v Shamas Charania (2014) e KLR – C.A NBI 252/08** while quoting from the former Court of Appeal for **Eastern Africa in R.G. Patel v Lalji Makanji (1957) E.A. 314**:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

In my view the Appellants have failed to discharge the burden of proof.

15. On the question of consolidation of **SRMCC 231 of 2009** - J M (Minor *suing through her next friend* **I L M**) vs- **Ikilo Holding Company Limited** and **SRMCC 232 of 2009** – **I L M** -vs- **Ikilo Holding Company Limited** the ruling by the trial court delivered on 15/6/2011 clearly states that the consolidation is for the purpose of the ruling only in that the applications are similar in both files and the issues to be determined are the same. I have considered both files. The issues in both files are similar and arose from the same transaction/accident. It is abundantly clear from the

ruling that the same applies to both files. The overriding objective of the **Civil Procedure Act** is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The "consolidation" was therefore warranted and occasioned no prejudice to any of the parties. Consequently, this ruling will also apply to **HCCA 104/11 Ikilo Holding –vs- I L M**.

16. With the foregoing, I find no merits in the appeal and dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **22nd** day of **May** 20**14**.

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B. THURANIRA JADEN

JUDGE