



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 834 of 2006

Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate court case*

MISAPPROPRIATION OF ASSOCIATION FUNDS

- 2.1 *Association sued appellants 1,2,3 to be ordered to refund sum used without authority.*
- 2.2 *Sum used to purchase vehicle not authorized.*
- 2.3 *Defendants appellants 1,2,3 admit purchasing vehicle but deny it was rejected by shareholders.*
- 2.4 *Court held the 3 appellants liable.*
- 2.5 *3 appellants described they had not been called to give evidence in court.*
- 2.6 *Changed advocate and filed application for review and or set aside judgment on grounds that they did not participate in trial.*
- 2.7 *That suit be heard afresh.*
- 2.8 *Magistrate on hearing application dismissed the same on 10th September 2004.*
- 2.9 *Appellant filed appeal on 28th September 2004.*

3. *Appeal*

That the learned magistrate erred in law and fact.

- i) *In failing to appreciate that an error of an advocate cannot be visited on a client.*
- ii) *An error of an advocate is sufficient ground for review taking into account circumstances of suit.*
- iii) *... by filing a defense decision exposed to defendant's suit. Refusal of application amounts to condoning defendant unheard.*
- iv) *... magistrate did not exercise his discretion judiciously.*
- v) *... erred in awarding costs to the respondents.*

4. *Submissions*

By appellant

- 4.1 *Should a litigant be pushed or made to suffer owing to the conduct, mistake or negligence of advocate?*
- 4.2 *Judicial discretion not exercised judiciously and for interest of justice.*
- 4.3 *Denied an opportunity to defend.*
- 4.4 *An advocate's negligence and excusable mistake.*

5. *Submissions*

By respondent

- 5.1 *No mistake had been done by advocate.*
- 5.2 *Defendants to blame for non-appearance.*

6. *Held:*

a) *Appeal dismissed.*

7. *Case Law:*

a) *Aggrey Marugu Wakhu*
Vs

David Obuleme

(2011 eKLR)

b) *Madison Insurance Co. – Vs – Samwel Ndemo Makori*

HCCA 10/2003

c) *Murai – Vs - Wainaina*

1978 KLR 2782

d) *Pithon Maina – Vs - Mugiria*

(1982) KLR 49

e) *Shah – Vs - Mbogo*

1967 EA 116

f) *A.G. – Vs - Theuri*

(1985) KLR 240

g) *Bouchard International – Vs- Mwereria*

(1985) KLR

h) *Ahmed – Vs Highway Carriers*

(1986) LLR 258

i) *Mwangi – Vs – Lajiy*

1992 LLR 2778

j) *Ketierman – Vs – Hansel Properties*

(1988) ALL ER 38

k) *Kinuthia Mwangi*

(1996) LLR 505

l) *Muniu Giovanni*

(1997) LLR 613

m) *Gathoni Kabagu*

(1999) LLR 949

n) Ridiehalgh – Vs – Hosefield

((1994) CH 205

o) Vista Ltd – Vs) Kenya Kazi Ltd

HCC 70/80 (unreported)

p) Patriotic Guards Ltd

Vs –

Barclays Bank of Kenya Ltd

q) CMCC Holdings Ltd – Vs - Nzioki

(2004) KLR 179

r) Fursys (K) Ltd – Vs Systems Integrated Ltd

s) Daima Bank Ltd – Vs P.M. Musima

8. *Advocates* :

i) R.B. Webala instructed by M/s Mativo & Co Advocates for appellants/

Original defendants

ii) T. Okwema holding brief for Nyakundi instructed by M/s Onyancha Nyakundi & Co
Advocates for respondent/original plaintiff

GEORGE S. MUSOMBA

DAVID M NDUNDA

**PAUL MBUVI APPELLANTS/ ORIGINAL
DEFENDANTS**

VERSUS

JOSEPH KIEMA

JONATHAN NDETEI

**SIMON VINDA RESPONDENTS/ ORIGINAL
PLAINTIFFS**

(Being an appeal from the ruling and order of Hon. M. Kaikai – Resident Magistrate delivered on 10th

J U D G M E N T

I. BACKGROUND

1. The issue of this appeal is whether a magistrate hearing an application of review of a judgment of another magistrate is permitted to dismiss such review on account that there was no mistake made by the advocate for the applicant.
2. The background of this matter began when the three appellants were sued by their association on behalf of members namely,

(M/s Katani Welfare Association) on grounds that they had misappropriated the funds that had been utilized by them to purchase a vehicle without authority. In the plaint, the association had stated that the said three defendants had taken moneys without the association's permission, bought a vehicle then, the vehicle that could not start, was towed from Mombasa to Mtito Andei. It was repaired there to enable it move further.
3. The shareholders rejected this vehicle. They demanded the said funds be returned to them.
4. The defendants 1,2,3 appellants herein denied that the shareholders rejected the vehicle. They agreed that they did purchase the said vehicle.
5. Upon giving her judgment, the trial court held that the three defendants were liable to refund the sum that was said to have been misappropriated.
6. The three defendants came to learn later that their case was heard and finalized without being called. It was recorded by the magistrate that the advocate attempted to call one witness but closed his case before he could do so.
7. Upon finding this out, the three defendants appellants applied before another magistrate for orders of a review of the court's judgment. The orders issued by that court be set aside on grounds that the advocate made a mistake by not calling the defendants to court to give evidence. That the suit be heard afresh.
8. The magistrate who heard the review accordingly dismissed the application as not having been established. That a mistake had not been done. A second application was filed seeking to set aside the judgment of the court on grounds that the appellants were not called to give evidence. This too was dismissed.
9. The three defendants appealed to this High Court on 28th September 2004 against the orders of the magistrate of 10th September 2004 for refusal to review the judgment and set the same aside on grounds that they had not been called.
10. The appeal was admitted to hearing on 17th January 2012 and directions taken on 12th June 2012.
11. The grounds of appeal being:-

That the learned magistrate erred in law and fact:

- i) ... in failing to appreciate that an error of an advocate cannot be visited on a client.***
- ii) ... an error of an advocate is sufficient ground for a review taking into account circumstances of***

the suit.

iii) ... by filing a defence (thus) desiring to defend suit. Refusal of the application amount to condemning defendant unheard.

iv) ... magistrate did not exercise his discretion judiciously

v) ...erred in awarding costs to the respondent.

12. The submissions by the appellant is basically:-

12.1 Should a litigant be made to suffer owing to the conduct or mistake/negligence of an advocate?

12.2 That the magistrate failed to exercise its judicial discretion in the interest of justice.

12.3 That the magistrate denied the defendants an opportunity to defend themselves.

12.4 That an advocate negligence as opposed to an excusable mistake requires to be distinguished.

13. In reply, the respondent stated that there had been no mistakes that had been made by the advocate. It was the defendant who was to be blamed for non-appearance.

III OPINION

14. In civil matters, a defendant where at all times represented by an advocate, the advocate indeed stands in the defendant's shoes as his representative. Whereas this does not apply to a plaintiff who must appear to court and give evidence, it is trite law that a defendant need not attend court to give evidence. This is the reason why the advocate would opt to call no evidence on behalf of a defendant and proceed to the said submission of a case. See Order 18 Civil Procedure Rules 2010 rules (formerly Order 17 r 2 Civil Procedure rules)

(Hancox J – decision on the defendant not being called.)

15. I have been cited several case law that speak of the diligence of a defendant.

Aggrey Marugu Wakhu – Vs – David Otieno Obuleme
(2012) eKLR

16. The issue of an advocate being negligent.

Gathoni – Vs – Kahugi
(1999) LLR 949

“should a litigant suffer for the lack of brightness of his advocate?”

17. The issue of the court was therefore not a mistake, nor was it fraud on a party or any party. It was indeed an issue of an advocate who on behalf of the instructions of his client clearly made a decision not to call the witness.

18. Where the appellants are of the view the advocate was negligent, they were permitted to sue for professional negligence. To my mind, I do not think the advocate was negligent.

19. The law permits for an advocate to exercise his discretion subject to instruction not to call the evidence to court.

20. I would accordingly dismiss this appeal as having no merits.

21. There will be costs to the respondent/original plaintiff.

DATED THIS 16TH DAY OF OCTOBER 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

iii) *R.B. Webala instructed by M/s Mativo & Co Advocates for appellants/*

Original defendants

iv) *T. Okwema holding brief for Nyakundi instructed by M/s Onyancha Nyakundi & Co Advocates for respondent/original plaintiff*