



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 502 of 2005**

**GRACE NJERI MACHARIA.....APPELLANT**

**VERSUS**

**PETER WANJOHI MWANGI.....RESPONDENT**

**T/A NJUMBI EXPRESS/NJUMBI MOTORS**

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

Grace Njeri Macharia, (hereinafter referred to as the appellant), was the plaintiff in Milimani CMCC No.4736 of 2003. She sued Peter Wanjohi Mwangi T/A Njumbi Express/Njumbi Motors (hereinafter referred to as the respondent). In her suit the appellant claimed general and special damages from the respondent arising from a road traffic accident involving motor vehicle KAL 206S (hereinafter referred to as the subject vehicle). The appellant contended that the subject vehicle belonged to the respondent. The respondent however denied ownership of the subject vehicle.

In his judgment delivered on 1<sup>st</sup> September, 2004, the trial magistrate dismissed the appellant's suit on the grounds that ownership of the subject vehicle had not been proved. The appellant thereafter moved the court under Order XLIV Rule 1 and 2 and Order L Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for a review of the judgment delivered on 1<sup>st</sup> September, 2004. The application for review was grounded on discovery of what was alleged to be new and important evidence which was not within the knowledge of the appellant at the time of the hearing of the suit. This was the fact that the respondent was the registered owner of the subject vehicle as at 7<sup>th</sup> August, 2001 when the accident occurred.

In her ruling delivered on 29<sup>th</sup> June, 2005, the trial magistrate found that the alleged evidence was not new matter at all as the appellant had been put on notice regarding the issue of ownership of the subject vehicle and that it was therefore incumbent upon the appellant to prove that the respondent was indeed the owner of the subject vehicle.

Being dissatisfied with that ruling, the appellant filed a memorandum of appeal contending that the trial magistrate erred in failing to find that there was new evidence necessitating the review of judgment, and in further failing to appreciate the circumstances surrounding the non availability of proof of the respondent's ownership of the subject vehicle.

I have carefully reconsidered and evaluated the evidence which was before the trial magistrate. I have also considered the application for review, the affidavit in support and in reply, and the submissions which were made by counsels. Under Order XLIV Rule 1 of the Civil Procedure Rules, review of a decree or order based on discovery of new and important matter or evidence, can only be allowed where the applicant has satisfied the court that notwithstanding the exercise of due diligence, the evidence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.

In this case, it was no doubt clear to both parties that the issue of ownership of the subject vehicle was

crucial. The respondent had specifically denied ownership of the subject vehicle in paragraph 2 of his defence. The burden was upon the appellant who was alleging the fact of ownership to prove it. Although the appellant contends that her advocates made efforts to obtain particulars from the Registrar of Motor Vehicle to establish ownership of the subject vehicle, there is no evidence that the letters addressed to the Registrar of Motor Vehicle which were annexed to the affidavit in support of the application were actually sent to the Registrar of Motor Vehicle. Moreover, during the hearing the appellant did not attempt to have the hearing of the suit adjourned to enable her obtain the copy of records from the Registrar of Motor Vehicles nor was the court informed of any difficulties encountered in obtaining the records. Further, no attempt was made to have the Registrar of Motor Vehicles summoned before the court to explain his failure to provide the record or to confirm the registered owner of the subject vehicle. The appellant simply relied on a police abstract and a medical report as confirming ownership of the subject vehicle. This was obviously not enough.

The appellant did not show that he exercised due diligence or exhausted all efforts in trying to obtain the certificate from the Registrar of the Motor Vehicle before the hearing of the suit. The trial magistrate was therefore right in dismissing the application for review. Accordingly I find no merit in this appeal. I uphold the ruling of the trial magistrate and dismiss the appeal with costs.

**Dated and delivered this 30<sup>th</sup> day of June, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms Mambo H/B for Nyagah for the appellant

Waiganjo for the respondent