



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 302, 304, 305, 306, 307, 308, 309, 310, 311, 312 & 313 of 1994 (Consolidated)

1. BENSON MULWA MULANDI

2. KIMOLI KISUNGU NZIOKA

3. PETER K. MAKAU

4. JAMES M. ITUMO

5. AGGREY W. MUNYAO

6. PETER K. KYUKILO

7. FABIAN N. KITHUKA

8. PETER M. MBITHI

9. NDUKU MUE

10 FRANCIS N. MUNYAO

11. DANIEL WAMBUA.....PLAINTIFFS/RESPONDENTS

versus

MACHAKOS RANCHING CO. LTD.....DEFENDANT/APPLICANT

RULING

1. The Application dated 29.6.2005 is premised on Order 44 Rule 1 of the Civil Procedure Rules. The Applicant/Defendant seeks orders that the judgment delivered on 2.5.2003 by Mwera J. be reviewed and all the suits as consolidated be retried. Costs are also sought.
2. Before delving into the Application itself it is necessary to set out the background thereof which is as follows:-
3. Sometimes in 1994, eleven (11) suits were instituted in this court. In each of those suits, the Plaintiff claimed damages for injuries allegedly sustained on 10.11.1992 when a tractor and its trailer registration number KXJ 206 rolled along Kaviani-Kathiani Road. The accident was blamed on the negligence of the Defendant's agent and/or servant. It was later agreed by the parties that HCCC 302/1994 should be consolidated with the other ten suits i.e HCCC 304- 313/1994 and a single judgment delivered. *Mwera,J.* did so on 2.5.2003 and awarded the Plaintiff's various sums of money in damages. The Defendant now

seeks a review of that judgment.

4. In the Application, the Defendant's case is as follows:- (from the grounds on the face of the Application, the Affidavit sworn on 29.6.2005 by Gen (Rtd) Jackson Mulinge as well as submissions by Mr. Munyasya, Advocate);

5. That after the suit had been partly heard by *Osiemo, J.* and later heard and concluded by *Mwera, J.*, the Applicant in November 2002 instructed its present advocate to go on record and replace M/S Manthi Masika & Co. Advocates then acting for it. On 14.11.2002, the said advocate managed to secure an adjournment to enable him familiarize himself with the matter and on that day the matter was fixed for mention on 13.12.2002 but on that day, the judge granted the Applicant the last adjournment although in fact there was not supposed to be any hearing slated for that particular day. That therefore that mistake on the part of the court amounted to "***an error on the face of the record***" in that a last adjournment was given to the Applicant when no such order could be made on a mention date.

6. In any event, on 13.12.2002, the "***hearing***" was adjourned to 24.12.2002 and on that day, the Applicant intended to call two (2) witnesses and summons were duly issued to them on 16.12.2002. The summons were also duly served but on 24.12.2002, none of them appeared and the Applicant at paragraph 21 of the Supporting Affidavit sworn by Gen (Rtd) Mulinge states that the two witnesses were public officials who could not be expected to attend court a day before Christmas. That the two witnesses who were said to be the Medical Officer, Kathiani Hospital and the Machakos District Criminal Investigations Officer had crucial evidence to give regarding the following issues;

(i) the time of the alleged accident- that it occurred at 11pm on

10.11.1992 and not at 2pm as alleged by the Plaintiffs.

(ii) that the Plaintiffs were received at Kathiani Hospital at 1.00am on the same night.

(iii) that the plaintiff's evidence was therefore punctuated by falsehoods because some of them did not appear in the casualty register as victims of the accident.

7. It is the Applicant's contention that the above evidence was not in its possession at the time of hearing and even after the exercise of due diligence, it was not able to get it. That all these matters should sway this court to reopen the trial and give the Defendant a chance to finalize its case.

8. Mr Munyasya in submissions before *Onyancha, J.* and later before me, urged the point that the new evidence discovered later was that some of the Plaintiffs may not have been in the accident and that evidence was only discovered later as it was not within the knowledge of the Applicant at the time of the hearing. That in any event, there has been shown a "***sufficient reason***" why the decree should be reviewed because the issue of liability is not clearly more than just a contested question.

9. The response to the Application is contained in grounds of opposition filed on 5.7.2005. In her submissions thereon, Mrs Mwangangi who has consistently appeared for the Plaintiffs in the case urged the point that the Application should not be allowed because;

10. Firstly, the Applicant has failed to satisfy the mandatory provisions of Order XLIV of the Civil Procedure Rules since "***no new matter has been discovered***" and there has been "***no exercise of due diligence***" in attempting to show that the accident occurred at night or that the Plaintiffs were not all in the accident, subject of the suit. That following the decision in National Bank of Kenya Ltd vs Samson Kariuki Njenga & Another HCCC 835/1998, the allegedly new matter must be strictly proved by the Applicant if a review order has to be given.

11. Regarding the argument that there has been "***an error on the face of the record***", Mrs Mwangangi relied on the decision in National Bank of Kenya Ltd vs Ndun'gu Njau, C.A. 211/1996 to make the point that since it was only raised in submissions and not in the body of the Application, then it cannot be

addressed by the court and that it should be ignored. In any event, there was no error on the face of the record as the decision to grant a last adjournment to the Defendant was made after the judge took into account previous adjournments granted at the instance of the Defendant.

12. Secondly, that a review of a decree cannot be granted merely because the Applicant is unhappy with the ultimate decision or that the decision is in fact unfair to one party.

13. Thirdly, that the Application was brought forth late in the day and the Applicant is acting dishonestly and in bad faith because although the court had extended due indulgence to it, the Defendant was always intent on delaying the hearing and dragging the suit incessantly.

14. For my part, I should start by going back to the record in this matter. I note as follows:-

15. On 5.10.1995, *Osiemo, J.* commenced the hearing of this suit after

consolidation with ten (10) others the same day. After numerous appearances before the Deputy Registrar and *Mwera, J.* over all manner of issues, the learned judge took the evidence on behalf of the Defendant on 20.11.2000. After DW1, Gen (rtd) Mulinge testified, Mr. Masika, advocate for the Defendant stated as follows:-

“My DW1’s evidence go for other suits (sic). May have time to get the driver’s witness not present today due to illness to come and testify(sic) .”

16. *Mwera, J.* noted as follows:-

“By consent last witness on 3.5.2001”

17. On 3.5.2001 and on 12.7.2001 the hearing could not proceed because the advocate for the Plaintiff was bereaved and in the Court of Appeal respectively. The hearing could also not proceed on 14.3.2002 and on 6.11.2002 but on 10.1.2002, Mr. Nyakeri appeared for the Defendant and admitted that he had not contacted any witness for the Defendant and sought an adjournment. After hearing the parties, *Mwera, J.* ordered as follows:-

“In the circumstances hearing of the defence put off. Today’s costs to the Plaintiff. Last hearing on 28.2.2002”.

18. On 28.2.2002, the court was not sitting and parties fixed the hearing for 28.3.2002 and on that day, Mr. Masika for the Defendant stated as follows:-

“ Ready with 2 witnesses”.

19. Mr Ngolya, advocate sought an adjournment on behalf of Mrs. Mwangangi who was in Nakuru attending to HCCC 530/1996. Since Mr. Masika did not object, *Mwera, J.* fixed the hearing for 18.4.2002 at Milimani Commercial court, but the file was only placed before the judge on 20.9.2002 when the judge was unable to reach the matter and he adjourned it by consent to 14.11.2002. On that day, Mr Munyasya appeared and stated that he had only been instructed the previous week and needed time to ***“get organized over this on-going matter i.e linking up with witnesses.”*** There being no objection, the learned judge made the following order:-

“Part heard put off to allow Mr. Munyasya to finally take over the defence case. Deputy Registrar to show put (sic) this hearing in the cause list before year end.”

20. On 14.11.2002, the record reads as follows:-

“Mr. F. Kioko of F.Mwangangi for the Plaintiff Advocate for the other party called. Defendant but not present ex-parte/hearing mention date for 13.2.2003. Notice to issue.”

21. I have reproduced the above statement from the original record which is a stamp that is standardized and I will shortly address the meaning I attribute to the above words. In any event on 13.12.2002, one Miss Kilonzo applied for an adjournment on behalf of Mr. Munyasya because there were not witnesses present. Mrs Mwangangi for the Defendant is recorded as having said:-

“Surprise with this adjournment application. My learned friend had assured me of proceeding. It does not appear that witness summons ever issued. Old matter part heard anxious to go on (sic). Last adjournment was sought and granted sometime back on 10.1.2002. May we go on.”

Miss Kilonzo replied as follows:-

“True. I had intimated that we expected to go on. I had in mind going on with a director of the defendant company. But he had already testified. We were always not representing defence. New lawyers (sic)”

22. The judge then ordered as follows:-

“In this case LAST and truly last date to hear this matter is 24.12.2002. Costs of today to Plaintiff. Witness summons to issue and details to be given by defendant. In default defence case will be closed.”

23. On 24.12.2002, the record reads as follows:-

“Coram

Mwera, J.

CC-Mutel

Miss Mwangangi for plaintiff

Miss Kilonzo for defendant

Part heard

Kilonzo:

Defence hearing today. We got witness summons served on our witnesses as per affidavit of service. Dr Musyimi is the only doctor at Kathiani District Hospital. Cannot come to court. DCIO too was served. He declined to sign copy of witness summons. He is not available. David Mbalu was also served. We too did not sign the process. I cannot go on without interests (sic). The court gave this as the last adjournment.

Mwangangi

Do not accept further adjournment. On 13.12.2002 again defence witnesses did not avail the plaintiff's side resisted but the court gave the last adjournment. First defence witness was here in September 2001. No other has been provided. Defence should close its case. Noted that some witnesses were served but nothing in writing by the doctor or DCIO.

Kilonzo:

I will only reply that the witness (doctor) noted on the summons that he was the only doctor at Kathiani. Leave it to court.

Court

The first defence witness was heard last on 20.11.2001. A year has since in this 1994 case whose trial commenced before Osiemo Judge on 5.10.1995 or thereabout. The defence for over a year has not been able to avail the rest of its witnesses. LAST time to hear it has been given twice! So even the indulgence of the court to endeavour to give the defendant an opportunity to put its case is exhausted. A trial must come to an end. This one has gone on for 6 years. It is declared closed. Parties to submit on 28.1.2003.

J.Mwera

Judge

24.12.2002”

24. On 28.1.2003, 27.2.2003, 4.3.2003, 18.3.2003, and on 24.3.2003, the matter was placed for mention before the learned judge to ensure that all the eleven (11) files were before him. On 24.3.2003, the record reads as follows:-

“Coram

J. Mwera,J.

CC-Mutel

Mrs Mwangangi for plaintiff

Munyasya for defendant

Mention

Mwangangi

We now have all the files. But history of the cases maybe a little confusing but the record will help. We have had to files consolidated and some proceedings are in different some documents have fallen out. Day for judgment.

Munyasya

That is so. But the main hearing went on her and submissions are here.

Court

In this case judgment on 2.5.2003.

J.Mwera

Judge

24.3.2003”

25. I have deliberately reproduced the record because one of the main arguments made on behalf of the Applicant is that *Mwera,J.* erred when he decided that 24.12.2002 would be the last day of hearing of the suit and his orders of 13.12.2002 would show an error on the face of the record. I am not sitting on appeal and I have no jurisdiction to do so but all I can say is that contrary to Mr. Munyasya’s submissions, the suit was not listed for mention on 13.12.2002 but for hearing. I say so because the record of 14.11.2002 was clear that the suit should be listed for hearing and not mention and when the advocates for the plaintiffs took that date, it was for hearing and they served the advocates for the

Defendant with a hearing notice and not a mention notice. I have reproduced what Miss Kilonzo said on 13.1.2.2002 and clearly she too came prepared as was the court, for hearing of the Defendant's case and not for mention. I note that the typed record relied on by Mr. Munyasya may not give that picture but the original record is otherwise clear. The standardized stamp is inelegantly made but the record is clear and no error appears on the face of it.

26. Turning now to the only other important issue raised, it is prayed that the judgment delivered on 2.5.2003 be reviewed because new and important matters has arisen and elsewhere above, I have summarized those matters. For avoidance of doubt, it is argued that the new matters relate to the time of the accident and whether all Plaintiffs were involved in that accident. I have carefully read the record in this matter. The issue of the time when the accident happened is not a new matter. In his evidence, General (rtd) Mulinge stated as follows:-

“The following day in the evening I got a report from my wife that there had been a bad accident the night before involving one person [who had] died. This had taken place near home. I was told that the tractor was heading to Kaviani market.... I visited the scene of the accident. The tractor had been towed to my home.”

27. Two things come out of this evidence; the accident occurred at night and it was a bad accident. What then is new? That the accident may have occurred at 2pm? It does not matter and to change it would only add an inconsistency to the Defendant's evidence.

28. What of the persons involved in the accident? In each of the Plaintiffs, each of the Plaintiffs claimed to have been involved in the accident and suffered varied injuries. In the statement of Defence in the lead file, at paragraphs 3 and 4, the accident was admitted but as I have stated elsewhere above, ***“the time and place of the accident”*** are denied. I have said that that issue therefore cannot be a new issue and at paragraph 4, thereof, the Defendant pleads that it is ***“not aware of any injury, loss or damage occasioned to the Plaintiff hence the same is denied totally.”*** It is now argued that the issue of the involvement of some of the Plaintiffs is contested. It is unclear to me what this means because the statement above applied to all Plaintiffs. Apart from the fact that no names of Plaintiffs who were in the accident and those who were not in it are given, why should the Defendant say that by shifting its position from its pleading, a new matter has arisen? If it is true that at the time of filing its Defence, no Plaintiff was involved in the accident, how can it be that eleven (11) years later, it dawned on it that not all but some may have been involved in the accident. I am aware of course that the Defendant has exhibited a Police Abstract dated 27.6.2005 in which the names of persons allegedly involved in the accident is attached. Surely in 1994 when the accident happened, a Police Abstract could have been obtained if the Defendant was diligent. As was stated by the Court of Appeal in Tokesi Mambili vs Simeon Sabwa, C.A. 90/2001 where a party is unable to show that ***“there has been discovery of a new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made”***, it is not entitled to an order for review. A Police Abstract is the commonest of documents in road traffic accident cases and it has not been explained why it could not be produced at the time of the accident. For that reason alone, the Defendant cannot benefit from an order of review.

29. Before I dismiss the Application before me, I should add this; *Mwera, J.* on 24.12.2002 explained precisely why he was not going to grant an adjournment of the hearing on that day. He had been transferred to Milimani Commercial Court and was hearing this case as a part-heard that followed him there. The learned judge had been more than patient and yet the Defendant was clearly not keen to conclude its case. Like in the Tokesi Mambili Case (supra), ***“after numerous mentions of the case, the learned judge was of the view that he had to bring the case to an end.”*** Like in this case, no one could fault the judge, least of all, the Defendant.

30. In the end therefore, I would agree with the advocate for the Respondent that this Application is frivolous and without merit. It is hereby dismissed with costs to the Respondents/Plaintiffs in all the eleven (11) cases as consolidated.

31. Orders accordingly.

Dated and delivered at Machakos this **23rd** day of **June 2008**.

Isaac Lenaola

Judge

In the presence of: Mrs Mwangangi for Plaintiffs/Respondents

Mr.Ndungi h/b for Mr.Munyasya for Defendant/Applicant

Isaac Lenaola

Judge