REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
Civil Appeal 582 of 2002

JAMES MUHIA KIARIE ……..…….. APPELLANT

VERSUS

JAMES KANGEI MWERU ……...…… 1ST RESPONDENT

MUCHIRI KANGEI ……...…… 2ND RESPONDENT

FRANCIS MUCHAI KARERA ……. 3RD RESPONDENT

MUCHAI GEORGE KARERA …….…… 4TH RESPONDENT

STEPHEN KIMETHU NGANGA ……. 5TH RESPONDENT

KAMAU GACHAU ……. 6TH RESPONDENT

PETER KIBUE NDUNGU ……. 7TH RESPONDENT

(An Appeal from the Ruling of Shem Kebongo, RM inGatundu Civil Suit No. 65 of 1999 delivered on 19th September, 2002).

JUDGMENT

On 19th September, 1998, the Appellant, James Muhia Kiarie, suffered personal injuries in a motor vehicle accident involving three vehicles when he was a passenger in one of them. He sued the owners of all the three, and after a full trial in the lower court, obtained Judgment against all three. That Judgment was delivered on 29th November, 2001.

The lower court apportioned liability in the ration of 40:30:30 against the three owners/defendants. The Appellant then sought to execute the Judgment against the three defendants. When this happened, one of those three owners, James K Mweru the 1st Defendant, and the 1st Respondent in this appeal, rushed back to the lower court with an application for "review" of the Judgment under Order 44 Rules 1 and 2 of the Civil Procedure Rules on the following four grounds:

1. ***That the Applicant was unfairly blamed in this suit.***

2. ***That the Applicant was not properly represented.***

3. ***That the applicant's motor vehicle was not part of the accident that gave rise to the current cause of action.***

4. That if the orders are not granted the Applicant stands to suffer irreparable damage.

In his supporting affidavit to that application, he deponed that his motor vehicle "did not get into contact with the other motor vehicles"; that he had been wrongly blamed for the accident; and that he had never been served with the Summons to Enter Appearance.

In his Reply, the Appellant annexed proof that the 1st Respondent had indeed been served, and was actually represented by an Advocate appointed by his insurers. Despite all this, the lower court, in a brief, and completely unreasoned three-line Ruling allowed his application for review, and permitted him to adduce his evidence.

It is against that Ruling that this appeal has been preferred. It is based on the following four grounds appeal:

"1. The learned trial Magistrate erred and misdirected himself both in law and facts in ordering a review when no grounds as provided by Order XLIV had been advanced by the 3rd and 4th respondents in the application.

2. The learned trial Magistrate erred and misdirected himself by holding that additional evidence of the 3rd respondent be taken when there was absolutely no reason shown as to why the said evidences (sic) as not availed during the hearing thereby arriving at an erroneous outcome of the application for review.

3. The learned trial Magistrate erred and misdirected himself by ordering that new evidence be taken when the 3rd and 4th respondents had not involved the other five (5) respondents in the application for review.

4. The learned trial Magistrate erred and misdirected himself by permitting a review when there was inordinate delay in filing the application."

Ms Ndegwa, Counsel for the Appellant submitted before this Court, that Order 44 had no application to the facts of this case, and should not have been invoked; that in any event, the application for review had not been made without unreasonable delay.

The 1st, 2nd, 3rd and 4th Respondents were not represented at the hearing, although this date was taken by consent. Mr Kinuthia for the 5th and 6th Respondents submitted simply that his clients were not a party to the Review application, and should not have been joined to this appeal, and prayed for costs.

The 5th and 6th Respondents are parties to the Suit, and any orders made by this court will affect them. Accordingly, it was proper to join them.

Now, let me go to the merits of this appeal.

The power of this court to review its judgment is provided for under Order XLIV Rule

1(1) of the Civil Procedure Rules. That rule provides as follows:

"Order XLIV 1 (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed 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."

Therefore, in order to obtain a review the applicant must show to the satisfaction of the court that there has been discovery of 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. The applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. None of that has been shown. It would appear that the 1st Respondent, having lost his case, wanted a second bite of the cherry.

***In Brown vs Dean* (1910) A.C. 373, at p.374,** *Lord Loreburn, L.C. said:*

"When a litigant has obtained a Judgment in a Court of Justice … he is in law entitled not to be deprived of that judgment without very solid grounds; and where the ground is the alleged discovery of new evidence, it (new evidence) must at least be such as is presumably to be believed, and if believed would be conclusive."

Applications on this ground must be treated with great caution. Review cannot be sought to **supplement** the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial.

The Learned Authors of A. I. R. Commentaries, The Code of Civil Procedure (1951) Edition Vol. 111 on pp. 3534 state as follows:

"It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that part and put a different complexion upon that part of the case must be very strong. The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations and the party asking for a new trial must show that there was no remissness on his part in adducing all possible evidence at the trial …"

I will apply the above reasoning to this case, and say that there was absolutely no justification to review the Judgment already delivered. I also note that the 1st Respondent's application for review was made three months after Judgment, and only when a proclamation against him was issued. This delay was not explained. In my view it was inordinate, and on that ground alone, the application should have been disallowed.

Accordingly, and for reasons cited, this appeal is allowed, with costs. The Ruling of the lower court is set aside, and the Chamber Summons application dated 21st March, 2002 is dismissed with costs to the Appellant.

Dated and delivered at Nairobi this 20th day of September, 2005.

ALNASHIR VISRAM

JUDGE