Wachira v Safaricom Company Limited (Civil Suit E005 of 2022)
[2025] KEHC 4697 (KLR) (11 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4697 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E005 OF 2022

RN NYAKUNDI, J

APRIL 11, 2025

BETWEEN

BONFACE WANGAI WACHIRA ..... PLAINTIFF

AND

SAFARICOM COMPANY LIMITED ..... DEFENDANT

RULING

1. What is pending before this court is the applicants' Notice of Motion dated 03/02/2025 expressed under the provisions of section 80 of the *Civil Procedure Act*, Order 45 and 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

    a. That this Honourable Court be pleased to review or vary its Judgment delivered on 23rd December 2024.

    b. That this Court considers the newly discovered evidence, namely Safaricom cautionary notice warning subscribers about unauthorized SIM card registrations using their national identity details and registration of mobile numbers without subscriber's consents.

    c. That the matter be reopened for reconsideration in light of the new evidence which was in possession of the Defendant and which has total bearing in the case and

    d. That the court he pleased be make any other order it deems fit in the interest of justice.

2. The application is premised on the grounds on the face of it and the averments in the supporting affidavit sworn by the applicant. The applicant deponed that on 23rd December 2024, this court delivered judgment in this suit. Since then, his advocates on record have since come across new evidence, namely a public notice issued by Safaricom, cautioning its customers about fraudulent SIM card registrations using their IDs without consent. He further deponed that this evidence was not available at the time of trial despite his due diligence. He stated that the statement by the respondent was

undated and he did not know when the Defendant issued it. He stated that if he had possession of this cautionary statement it would have been adduced as it goes to the core of the case as it is about registration of number without consent.

3. The deponent additionally stated that this new evidence is material and would have significantly influenced the Court's findings had it been presented earlier. He urged that it is in the interest of justice that this Court reviews its judgment to ensure a fair and just outcome.

Respondents' replying Affidavit

4. The respondent opposed the application vide a replying affidavit dated 26/03/2025, sworn by one Cerere Kihoro, legal counsel for the defendant. She urged that in its judgment, this Honourable Court dismissed the Plaintiffs claim, holding that the Plaintiff failed to provide evidence proving that the SIM card registration process was conducted negligently. Further, that it found that no direct causal link was established between the Defendant's actions and the alleged damages suffered by the Plaintiff. It was also determined that the Plaintiff did not demonstrate that the adverse credit listing was directly attributable to the Defendant, especially considering that the Defendant neither provides loans nor reports to the Credit Reference Bureau. Additionally, that the Plaintiff failed to meet the heightened standard of proof required to establish the alleged fraud in the registration of mobile phone number 079764xxxx.

5. The deponent averred that based on the history of these proceedings, the Plaintiffs application is made in bad faith. Its true purpose is to reopen the case and re-litigate issues that have already been conclusively determined, under the guise of "discovery of new evidence" allegedly capable of materially influencing the Court's decision. She stated that the Plaintiff claims that the newly discovered evidence is an article published on the Defendant's website titled "Introducing New Subscriber Registration Consent." She further stated that she wished to clarify that the article in question was published by the Defendant in 2020, following internal deliberations aimed at keeping subscribers informed on the registration process due to numerous customer queries. This suit was filed in 2022, yet the article was published in 2020, two years before the case was initiated. The article has been publicly available on the Defendant's website since its publication in 2020. It is, therefore, inaccurate for the Plaintiff to claim that the article could not have been presented as evidence earlier.

6. The deponent urged that the applicant has not demonstrated how this article would have altered the Court's findings, particularly in relation to the issues determined in the judgment. She further stated that a review is not intended for a reconsideration of the Court's decision, as that falls within the jurisdiction of a superior court. She urged the court to dismiss the application with costs.

Analysis & Determination

7. The issues that arise for determination are;

I. Whether the court should review or vary its judgement delivered on 23rd December 2024

8. It goes without saying that every decision, order or opinion pronounced by the court should be at the very least in conformity with *the Constitution*, the applicable statute upon which the claim or cause of action is based in which the rules of the court require as minimum standards for the parties and the litigants to recognize as valid and binding in the adjudication of their rights and obligations. This is dependent on whether the subject matter due for trial and adjudication of the issues falls within the scope of commercial law, civil law, insurance law, land law etc. the standard and burden of proof as contemplated in section 107(1), 108 and 109 of the *Evidence Act* is always vested with the Plaintiff and it never shifts to the defendant. It follows therefore that at the end of the trial, a decision generated by

the court must state the essential ultimate facts upon which the court's conclusion is drawn. A court of justice properly constituted under Art. 50(1) of *the Constitution* as read with the enabling statutes which confer jurisdiction is not hidebound to write in its decision every bit and piece of evidence presented by one party against the other upon the issues raised, neither is it to be burdened with the obligation to specify in the verdict some findings of facts which the party had not pleaded and forming part of the considerations in granting the final remedies.

9. In Kenya's legal system, the admission of new evidence during a review of a judgment is governed by specific legal principles long established in case law. It is trite law that this motion for it to succeed must be brought within the legal framework on admission of new evidence. Generally, new evidence can be admitted if it was not within the applicant's knowledge during the original trial and it could not have been discovered even with due diligence so that it will form part of the statement in the pleading or one to be adduced by a particular witness within the provisions of the *Evidence Act*. The evidence in question stated to be new evidence to influence the impugned verdict of the court must also be credible and potentially capable of influencing the judicial discretion of the court with a view to review the final decision and have it substituted with a fresh outcome. It is also the law in Kenya that the admission of new evidence should not be used to create a new case or patch up weak points in the original case. The reason I find is that a review court exercising jurisdiction to admit new evidence must be guided primarily by the Supreme Court decision of Mohammed Abdi Mohamud v. Ahmed Abulahi Mohamad (2018) eKLR. The guidelines that follow are well articulated by the Court of Appeal in Safe Cargo Limited v. Embakasi Properties Ltd. (2019) eKLR. I appreciate that the provisions governing admission of fresh evidence differ depending on whether the court is being asked to rule on the same subject matter on the very same evidence which can be plainly described as cosmetic and not one which can influence the review of a decision. The criteria set in the above authorities and the ones which will follow thereafter in analysing the facts of this case must remain on point for one to succeed in reviewing a final decision of the court. It is desirable that due diligence remain only one factor on admission of new evidence on an already concluded subject matter on the merits and its absence should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted, then the failure to meet the test should yield to permit this admission. The interests of justice referred in the various case laws, setting out the criteria of admission of evidence encompasses not only an applicant's interests in having his/her case determined fairly under Art. 50 of *the Constitution* upon all of the available evidence but also it is meant to secure the integrity of a justice system. Finality and orders on the merits of any given dispute are some of the essentials to that integrity of the process. Were it otherwise, the finality of the trial process would be lost and cases will remain in limbo if the right of appeal and review was not provided in law. For this reason, the exceptional nature of admission of new evidence on appeal or review has been stressed in the various cases cited in this ruling.

10. A party who has appeared before a court of law secured judgment on the merits based on the primary facts and wishes to tender evidence in response to that discovered new material evidence which could not have been available even with due diligence must have that evidence subjected to cross examination by the deponent of the affidavit or the expert. It is not sufficient as occurred in this case during the arguments and submissions on the merits of the motion to annex some extracts of statements or publication by the Respondent as having satisfied the criteria of admission of new evidence which would not have been available even with the aspect of due diligence.

11. Review is governed by Section 80 of the *Civil Procedure Act* and Order 45 rule 1(b) of the Civil Procedure Rules. Section 80 provides as follows;

> " Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

12. Order 45 rule 1(b) of the Civil Procedure Rules, provides as follows:

"(1) 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

13. The present application is majorly premised on the discovery of new and important evidence, according to the applicant. The alleged new and important evidence is a public notice issued by the defendant introducing subscriber consent. Notably, the applicant does not know when the notice was issued which begs the question as to the certainty of the availability of the evidence at the time the applicant filed the suit. That notwithstanding, the respondent provided the court with copies of email threads which indicate that the notice was published in the year 2020. As this was a public notice, the applicant would have been able to produce it during the pendency of the suit.

14. In the case of Rose Kaiza –vs- Angelo Mpanjuiza [2009] eKLR, the Court of Appeal considered an application for review on the ground of new evidence and held that: -

"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new

and important matter which was not within the knowledge of the party when the decree was made.

15. In the case of D. J. Lowe & Company Ltd –vs- Bonquo Indosuez, Nairobi Civil Application No.217 of 1998, the Court of Appeal sounded a caution in such applications and stated that: -

> " Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

16. I have considered the pleadings and the application and it is my considered view that the applicant has failed to meet the threshold for orders of review. The applicant conveniently did not know the date of the notice which was clarified to have been in 2020. As the same was in the public domain, the court is not convinced that the same was not reasonably within his knowledge or available to him.

17. It is the law in my view that on substantial evidence review the court's jurisdiction encompasses the assessment of the evidence in the record and its application of that evidence in reaching a decision. The focus is on the claimant or plaintiffs evidence to proof the facts in issue as pleaded in the claim or plaint and the justification of the court's decision and whether that impugned decision can be logically reasoned from the body of evidence. In each of a litigation particularly in an adversarial system like ours, the trial court is faced with a number of decisions in the course of the proceedings which demand of his/her exercise of discretion. In making these decisions be either at the interlocutory stage or at the finality of the claim on the merits, a judge or magistrate must consider many different factors and often it must be clear how heavily any of these factors have been weighed in the balancing process to come up with the final decision. Unfortunately, my experience in exercising both the review and appeals jurisdiction, many issues are not easily labelled as questions of law, fact or discretionary rulings. It cannot be gainsaid that courts and advocates alike have struggled over the years with defining the appropriate standard of review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 for issues that present mixed questions of law and fact. Despite that difficulty, these issues provide a terrific opportunity for courts and advocates when invoking review jurisdiction to characterize the claim in such a way as to bring the questionable issues within the most favourable standard of review provided for under Order 45 Rule 1 of the Civil Procedure Rules.

18. I have taken the liberty to weight the alleged new evidence and its veracity within the confines of section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. This court is being invited to revisit the entire judgment based on one primary ground under Order 45; discovery of new evidence which even with due diligence was not available to the court at the time of the trial.

19. The question I have for the applicant is what is new evidence for purposes of these provisions? In my considered view, first, evidence is something comprising of oral testimonies, documentary, electronic and tangible physical objects that tends to prove or disapprove the existence of an alleged fact. In the initial suit, the applicant sued the respondent seeking: A declaration that the registration of mobile number 079764xxxx was unlawfully and illegally done; A declaration that the defendant is under obligation to pay any loans that may have been taken by the number 079764xxxx which was unlawfully and illegally registered under the Plaintiff national identity card; A declaration that the defendant is obliged to clear the Plaintiff from any credit reference Bureau including Transunion Credit reference Bureau arising to any transaction involving the mobile number 079764xxxx which was unlawfully and illegally registered under the Plaintiff national identity card; A declaration that the Plaintiff will not

be criminally liable from any acts done by use of mobile number 079764xxxx which was unlawfully and illegally registered under his identity card; Special damages of Kshs. 52,395.84/=; General damages for personal data breach, mental anguish and illegally registering a mobile number under the Plaintiff National Identity Card and damaging plaintiff's reputation as credit worthy citizen; General damages for illegally registering a mobile number under the Plaintiff National identity card and damaging Plaintiff reputation as credit worthy citizen and Costs of this suit and interest be awarded to the Plaintiff.

20. In turn, he has annexed a public notice issued by Safaricom, cautioning its customers about fraudulent SIM card registrations using their IDs without consent. The respondent on the other hand annexed copies of email threads which indicate that the notice was published in the year 2020. For purposes of this piece of evidence, the public was being forewarned to secure their registration documents like identity cards or passports from falling into wrong hands and without a consent which then can be at risk of exposing the legitimate bearers of the documents to promote illegal registration of sim cards. This is an aspect of reality of what was happening on the part of the Respondent. This focus therefore, does not exclude information regarding facts that may have been exchanged in the period between filing of the claim and the trial court's judgment. This is not new evidence on appeal or review. This publication came to the knowledge of the applicant long before the commencement of the trial. The Plaint by the applicant went beyond the scope of this publication by the respondent. There is therefore no specific ground upon which this court can rely in considering new evidence regarding the existence and non-existence of facts in issue in which the court exercise discretion to determine the dispute between the two parties to the litigation. The tension between the regular evidence in the scheme of facts considered in the original judgment and the procedural limitation associated with admission of new evidence is precisely echoed in the various superior decisions referred to elsewhere in this ruling with that grounding in the underlying principles on admissibility of new evidence. The motion is lost without merits with no orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF APRIL 2025

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R. NYAKUNDI

JUDGE