Mutua alias Anne Mumbi Njenga v Mbau (Civil Appeal 159 of 2023) [2024] KEHC 9322 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9322 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 159 OF 2023

MA OTIENO, J

JULY 19, 2024

BETWEEN

ANNE MUMBI MUTUA ALIAS ANNE MUMBI NJENGA ..... APPELLANT

AND

FRANCIS MBAU ..... RESPONDENT

JUDGMENT

Background

1. This Appeal was initially filed at the Kiambu High Court as Kiambu HCCA No. E327 of 2022. However, after the establishment and operationalization of the High Court at Thika, this appeal was transferred to this Court and allocated the current case number.

2. The Appellant herein was involved in a road traffic accident on the 07.01.2016 along the Thika – Garissa Road when travelling as a passenger aboard motor vehicle registration number KCD 708G which collided with another motor vehicle registration number KZD 119. The appellant blamed the driver and/or owner of motor vehicle registration number KZD 119 and instituted the Thika CMCC No. 1217 of 2019: Anne Mumbi Mutua alias Anne Mumbi Njenga v Francis Mbau.

3. The hearing proceeded at the trial court with the Appellant adopting her recorded statement as well as the documents filed as per her list of documents dated 20th December 2017. The Respondent closed his case thereat without calling any witness.

4. On 28.06.2021, the magistrate delivered her judgment on the matter, finding that the Appellant had not proved ownership of motor vehicle registration number KZD 119. The magistrate stated that; -

> "However I find that the plaintiff did not prove on a balance of probability that Motor Vehicle Registration Number KZD belonged to the Defendant herein Francis Mbau,

There was no evidence on record to show the Defendant was the registered owner of suit motor vehicle, the police abstract did not indicate any form of ownership, there was no debit note for policy extension alluded by the Plaintiff counsel in the court file or copy of record".

5. Following the delivery of the Judgment, the appellant filed an application under Order 45 of the Civil Procedure Rules, 2010 for review of the Judgment on the basis that there was an error apparent on the face of the record since the document on proof of the title - debit note for policy extension, though inadvertently not attached to the list of the documents submitted to court, had been named in the list of documents and produced at trial as "P Exh. 10.".

6. The appellant also had an alternative prayer for re-opening of the case for the purposes of having the document on ownership - debit note for policy extension, "P Exh. 10.", being submitted to court the same having been adduced and admitted at trial.

7. In its ruling delivered on the 7th November 2022, the trial court dismissed the application for review on grounds among others, that the Court was already functus officio following the delivery of the judgment.

8. Dissatisfied with the decision of the learned trial magistrate, the Appellant has appealed to this court by way of the Memorandum of Appeal dated 19th December, 2022 raising the following five grounds of appeal:

    i. That the learned magistrate misdirected herself in law and in fact by failing to consider the entirety of the Appellant's application for review dated 20th July 2021.

    ii. That the learned magistrate misdirected herself in law and in fact by failing to appreciate that the document appellant sought to be availed to the court was already admitted in evidence though not submitted to court

    iii. That the learned magistrate erred in law and in fact by failing to appreciate that the appellant was not introducing new and/or fresh evidence.

    iv. That the learned magistrate erred in law and in fact by failing to consider the principle of proportionality.

    v. That the learned magistrate erred in law and in fact by failing to appreciate that the court was not functus officio in so far as it was sought to correct an error on record.

9. This appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 7th March 2024 whilst the Respondent's submissions were filed on 29th April 2024.

Appellant's Case

10. The Appellant submitted that the trial magistrate erred in failing to consider the totality of her notice of motion application. That the magistrate only dealt with the prayer for review but ignored her prayer for re-opening of the case, a prayer which she had specifically pleaded in her notice of motion application.

11. Secondly, it was the Appellant's case that the magistrate erred in failing to appreciate that the document in issue, the Debit note for policy extension, was not new evidence since the same had already been produced admitted in evidence at trial as P Exh. 10.

12. Thirdly, the appellant argued that the magistrate was wrong in its holding that the court was functus officio, and could not therefore deal with her application for review of the judgment

13. Finally, the appellant submitted that in any event, the magistrate erred in failing to consider the principle of proportionality.

Respondent's case

14. The Respondent on the other hand submitted that the magistrate was right in her ruling since the failure to attach the subject document, P Exh. 10, to the list of the documents was an error not on the part of the court but a mistake on the part of the appellant's counsel which is not a ground for review under Order 45 of the Civil Procedure Rules. 2010. The Respondent further argued that the prayer for re-opening of the case was addressed by the trial court in its ruling and therefore the position taken by the appellant on the same is incorrect.

15. According to the Respondent, the court having rendered itself on the issue of ownership of the subject motor vehicle in its judgment in the main suit, the magistrate became functus officio and could not therefore revisit the matter by entertaining the Appellant's application for re-opening the case.

Analysis and determination

16. This being a first appeal, I am required to reconsider the evidence tendered at the trial court, reevaluate the same and draw my own conclusions, but bearing in mind that as opposed to the court below, this court did not hear the witnesses testify neither did it have the advantage of seeing the demeanour of the witnesses. See the holding in Selle vs. Associated Motor Boat Co. [1968] EA 123 where it was held that-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. I have carefully considered the record of appeal, the grounds of appeal and the written submissions filed by both Counsel. The issues for determination by this court in this appeal are as follows; -

    i. Whether the trial court failed to consider the totality of the Appellant's application dated 20th July 2022, particularly that relating to re-opening of the case.

    ii. Whether the trial court was functus officio after the delivery of its judgment of and could therefore not deal with the Appellant's application dated 20th July 2022.

    iii. Whether the court erred by failing to consider the principle of proportionality in determining the Appellant's notice of motion application dated 20th July 2022.

    iv. Whether the trial court erred in dismissing the Appellant's application under Order 45 rule 1(1) of the Civil Procedure Rules 2010 for review of its judgment of 28th June 2021.

Whether the trial court failed to consider the totality of the Appellant's application dated 20th July 2022, particularly that relating to re-opening of the case.

18. The first ground taken up by the appellant in this appeal is that the magistrate failed to consider and/ or pronounce herself on the alternative payer in her notice of motion dated 20.07.2022 for re-opening of the case for the for the purposes of having the document on ownership, to wit, Debit note for policy extension, being submitted to court, the same having been adduced and admitted at trial as "P Exh 10".

19. It was the appellant's position that in her notice of motion dated 20th July 2022, she had sought two substantive orders, that is, an order for review of the judgment and an alternative prayer for re-opening the case for the purposes of having the P Exh. 10, Debit note for policy extension document submitted to court. That the magistrate in her ruling of 7th November 2022 only addressed the prayer for review while totally ignoring that for re-opening of the case.

20. According to the Appellant, the court ought to have considered and rendered itself on the prayer for re-opening the case. That the failure to address the issue occasioned injustice to the Appellant. On this point, the Appellant cited the Court of Appeal decision in Julius Lekakeny Ole Sunkuli –Vs- Gideon Sitelu Konchellah & 2 Others [2018] eKLR where the court allowed an appeal after it was established some claims, though pleaded and evidenced adduced at the hearing, had not been addressed by the trial court in its Judgment.

21. The Respondent on the other hand argued that the prayer for re-opening of the Appellant's case was appropriately considered and addressed by the trial court in in its ruling the subject of this appeal.

22. I have considered the submissions by both parties on this issue, I have also perused the trial court's ruling of 7th November 2022. From the ruling, I note that the court did not pronounce itself clearly on the prayer for re-opening of the case. All that the court did was to put out a statement on the effect of re-penning the case, without making any express and substantive orders on the prayer. In the second last paragraph of the ruling, the trial court remarked that; -

> " For the Court to grant the prayers sought by the Applicant, it means that the defendant has to come in and submit on the said document being sought to be produced and either object to its production or not of which they are objecting by stating that the document

23. Based on the above, I find that the trial failed to render itself definitively on the prayer for re-opening of the case. Having found that the court did not make any conclusive finding on the Appellant's prayer for re-opening of the case, I will, for the sake of expediency, proceed, in this appeal, to consider the same and make a finding whether, in the circumstances of the case, the prayer was merited.

24. In the Appellant's notice of motion application dated 20th July 2022, the appellant pleaded for orders that; -

> "(3) In the alternative to prayers 1 and 2 above, the court be pleased to re-open the Plaintiff Applicant's and Defendant Respondent's case to receive evidence adduced and admitted but not submitted to the court...."

25. The document the Appellant was referring in that application is the Debit note for policy extension listed as number 10 in the Appellant's list of documents dated 20th December 2017. A copy of this document has been attached at page 183 of the record of appeal.

26. A perusal of the proceedings at the lower court indicates that when the suit came up for hearing on 19th October 2020, the Appellant produced in evidence documents as her list of documents dated 20th December 2017 as Exhibits No. 1 to 10 respectively. The Appellant testified that; -

> " I filed list of documents dated 20/12/2017. I wish to produce the documents as per the list as Exhibits No. 1 to 10 – respectively."

27. A further perusal of the proceedings reveals that the Respondent herein, being the then defendant, did not object or challenge the production of the documents. Consequently, it is clear that the document listed as number 10 on that list and named as Debit note for policy extension was already produced and admitted in evidence. The document had therefore formed part of the court record and was henceforth deemed to be in the custody of the court. If for any reason the document was subsequently found to be missing therefrom, then, it was incumbent upon the court to enquire from the parties and ensure that the same is submitted to court for consideration before a judgment could be rendered in the matter.

28. The Court of Appeal in Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR clarified on when a document can be deemed to have formed part of the court record. The Court at Paragraph 18 of the Judgement stated in part that; -

> " 18. ..... First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

29. I have looked at the Appellant's notice of motion application dated 20th July 2022 and established that the document, Debit note for policy extension was annexed as "JM 1" to the supporting affidavit of Jonathan Mutua of the same date. It is therefore clear that this was not new evidence but one which had been named, adduced and even admitted in court as an exhibit, without any opposition from the defence. It is also instructive to note that the Respondents herein did not call any witness neither did they adduce any evidence at the hearing of the suit.

30. The guiding principle in applications for re-opening is that it is a discretionary remedy. Being discretionary, it therefore means that it must be judiciously exercised and with a view of doing justice between parties. The interest of the parties must be balanced and it should only be declined where granting the order is likely to unduly prejudice the other party.

31. Further, it is imperative that before granting an order for re-opening of a case, an enquiry must be made by the court on why the evidence was not adduced prior to the hearing of the case being sought to be re-opened. That re-opening of the case should ordinarily be refused where the failure was deliberate or where there has been an ordinate delay in making the application. In Nakuru Automobile House Ltd v Lawrence Maina Mwangi & another [2017] eKLR while considering a similar application, the court cited with approval the decision by Retired Lady Justice M. Kasango in Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR where the Judge stated that; -

> 17. Uganda High Court, Commercial Division in the case Simba Telecom –v- Karuhanga & Anor (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of

submitting fresh evidence. That court referred to an Australian case Smith –versus- New South Wales [1992] HCA 36; (1992) 176 CLR 256 where it was held:

> "If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

32. Applying the principles enunciated in Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR to the present case and bearing my findings above, I am convinced that this is a case where the interest of justice would be best served by allowing the Appellant's application for re-opening the case. I therefore so hold.

On Application for review and whether the court was functus officio.

33. Having established that the aforesaid document, Debit note for policy extension had already been produced and admitted in court as P. Exh. 10, the trial court was not entirely out of blame by proceeding to write its judgment in the absence of the document, which was already part of the judicial record. This is however not to take away blame from the Appellant's counsel who committed the initial error of failing to attach and/or submit the document to court.

34. The document having formed part of the judicial record, the magistrate was duty bound, and in the interest of justice, expected and indeed required to have established the whereabouts of the document immediately it was realized that the same was not on record. The court was naturally expected to reach out to parties prior to writing of the judgment, with a view of establishing why the document was in the court file.

35. Consequently, to the extent that the trial court proceeded to write its judgment without first establishing the whereabouts of a document which was expected to be in its custody, then I find that there was an error on the part of the court which was amenable for review.

36. In David Githuu Kuria –Vs- Equity Bank (Kenya) Limited & 2 Others [2019] eKLR where Aburili J. was faced with an appeal substantially similar to the instant case, the judge in allowing the appeal had this to say; -

> " 98. In my humble view, therefore the trial Court should have inquired on the whereabouts of the Medical Report admitted in evidence by consent before writing the judgment, and therefore the application for review was in my view, merited as there was sufficient reason to warrant a review..."

37. Under Order 45 Rule 1(1)(b), the court has the power to review its decision where, among others, there is 'a mistake or error apparent in the face of the record, or for any other sufficient reason'. Where an application for review is based on the existence of 'error apparent on the face of the record' as was the case herein, then the error must be one that is self-evident and which does not require elaborate reasoning and argument to be established. See the case of Nancy Wanjeri & 5 others v Michael Mungai [2014] eKLR.

38. It is clear that the error in this case was one that was so glaring that needed no elaborate reasoning to establish. The court wrote its judgment without considering P. Exh. 10, a document which had been produced and admitted in court and therefore formed part of the court record. This, in my view, is a matter that merited a review of the court's judgment under Section 80 of the *Civil Procedure Act* as read together with Order 45 of the Civil Procedure Rules, 2010.

39. It is settled that the power of court to review its decisions under Order 45 of the Civil Procedure Rules is one of the exceptions to the functus officio rule. See Moyale Liner Bus Services –Vs- Gachu Ibrahim [2021] eKLR where Muriithi J. stated that '[T]he only exception is if the Applicant is seeking review in accordance with the parameters set under Order 45 of the Civil Procedure Rules...'.

40. In the circumstances, I find that this is a case where the trial court had power to review its judgment and that the court was therefore not functus officio as held by the trial court in its ruling of 7th November 2022.

On the principle of proportionality

41. It is trite that the principle of proportionality is one of the principles that guides courts while exercising their discretionary powers. The principle requires a judicial officer, when exercising discretion in deciding a matter, to balance and weigh the parties' competing interests and settle for a decision that will result in a lower risk of injustice to either of the parties. The Court of Appeal in Abdirahman Abdi –Vs- Safi Petroleum Products Ltd & 6 Others [2011] eKLR stated the following regarding this principle; -

> "…..the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document.

42. I have perused the proceedings in this case, particularly, the trial court's ruling of 7th December 2022 and noted that the failure by the trial court to allow the appellant's application and have the subject document submitted to court occasioned a miscarriage of justice. A greater sense of justice, and indeed Article 159 (2) (d) of *the Constitution* requires that disputes be resolved substantively.

43. In the instant appeal, balancing the competing rights of the parties, I am convinced the interest of justice will be best served if the Appellant's notice of motion application dated 20th July 2021 seeking for review of the court's Judgment of 28th June 2021 is allowed and Court's Judgment dismissing the Appellant's suit be set set aside.

Disposition

44. For the reasons set out above, the appeal herein succeeds. Consequently, I make the following orders; -

    i. The Appellant's notice of motion application dated 20th July 2021 for review of the judgment of the trial court dismissing the plaintiff's suit is hereby allowed.

    ii. The trial court's ruling of 7th December 2022 and the consequent order dismissing the Appellant's application for review is hereby set aside and substituted with an order of this court allowing the application for review of the judgment.

iii. The Debit note for policy extension appearing at page 183 of the Record of appeal is hereby admitted. The Appellant is granted leave of Court to file the said Original Debit note for policy extension within 14 days of this judgment.

iv. The matter is hereby remitted back to the trial Court for re-consideration of the issue of liability, taking into account the subject document is already admitted and is on record.

45. The Respondent shall bear the cost of this appeal.

46. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Mr. Mutua for the Appellant.

Ms. Wambui for the Respondent.