Powermax General Electrical Merchant Limited v Ouma (Civil Appeal 436 of 2018) [2024] KEHC 8584 (KLR) (Civ) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8584 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 436 OF 2018

DKN MAGARE, J

JULY 15, 2024

BETWEEN

POWERMAX GENERAL ELECTRICAL MERCHANT LIMITED .. APPELLANT

AND

JULIUS OUMA ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Ruling and Order of Hon. D.W. Mburu Principal Magistrate delivered on 7/9/2018 in Milimani CMCC No. 7521 of 2015.

2. The Ruling arose from the application dated 5/4/2018. In the Application, the Appellant sought to review the Judgement of court dated 16/3/2018 on the ground of a new and important matter of evidence.

3. The application also sought to set aside the Judgement. The application was supported by the affidavit of Erastus Mbaka said to be the Legal Officer of CIC General Insurance Limited who were the insurers of the Appellant and was grounded on the following reasons:

    a. The new evidence was not on the knowledge of the defendant and could not be availed at the time of the hearing.

    b. The Plaintiff's suit was tainted with fraud as the Plaintiff had filed the same subject matter in Kiambu CMCC Court suing a different defendant.

    c. The application was timeously filed.

4. In their response, the Respondent filed Grounds of Opposition dated 12/4/2018 in which it was contended as doth:

a. That the application was vexatious and an abuse of the court process.

b. The Applicant had not demonstrated that the information was not in his knowledge all along.

c. The prayers sought ought to have been sought in Kiambu CMCC No. 367 of 2017.

5. The trial court considered the application, and response thereto and rendered its Ruling on 7/9/2018. In its ruling, the court dismissed the application with costs for being speculative and unmerited.

6. Aggrieved, the Appellant lodged the Memorandum of Appeal dated 17/9/2018 raising grounds thus:

a. The trial magistrate erred in law and fact in finding no sufficient grounds for review.

b. The trial magistrate erred in law and fact in misapprehending the guiding principles of review.

c. The trial magistrate erred in law and fact in finding that the facts in Kiambu CMCC No. 367 of 2017 were yet to be subjected to proof.

d. The learned magistrate erred in addressing the merits of the case in an application for review.

Submissions

7. The Appellant filed submissions dated 6/2/2024 and stated that the application for review met the threshold in Section 80 of the *Civil Procedure Act* as read together with Order 45 of the Civil Procure Rules and the lower court erred in dismissing it.

8. The Appellant also relied on IEBC & Another v Stephen Mutinda Mule & 3 Others (2014) eKLR to submit that the learned magistrate erred in disregarding pleadings filed by the Respondent in Kiambu CMCC No. 367 of 2017 as the Respondent was bound by the said pleadings.

9. On the part of the Respondent, submissions dated 5/3/2024 were filed wherein it was submitted that the Appellant did not satisfy the conditions for grant of review as espoused in Section 80 of the *Civil Procedure Act* as read together with Order 45 of the Civil Procure Rules.

10. Reliance was placed on the case of Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya (2019) eKLR that review would only be granted on the grounds in Order 45 of the Civil Procedure Rules and which the Appellant had not been met.

Analysis

11. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

12. However, where the court relied on affidavits, the court's latitude is wider. In In the case of *Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018)* [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

13. The issue is whether the lower court erred in law and fact in dismissing the Applicant's application for review. The review was based on the fact that the Respondent filed suit against the Appellant and another company for similar injuries on the same day involving different circumstances. This was not a case where the suit was filed against one party twice. The question that is in the court's mind, is what will happen if the Respondent succeeds in both suits.

14. The court appeared to suggest that the applicant should have made the application in the other suit or known beforehand. There were no mechanisms for parties cross checking such facts.

15. The jurisdiction to review is underpinned in Section 80 of the *Civil Procedure Act* which states thus:

> "Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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".
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> Section 63 (e) of the *Civil Procedure Act* states that:
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> > "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient."

16. Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

> "(1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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"

17. I also associate myself with the reasoning of Kuloba J (as he then was) in Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

18. Flowing from the authorities, the jurisdiction to review is limited. It is founded on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within a party's 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.

19. The Appellant contended that the judgement ought to have been reviewed and set aside on account of new matter of evidence now available but which was not available or in the knowledge of the Appellant at the time the Judgement was passed.

20. The new matter is said to be the existence of Kiambu CMCC No. 367 of 2017 that the Respondent alleged to have suffered similar injuries as including skeletal bone fracture in both cases. That the judgement was as such obtained by fraud.

21. I also note that the suit in Kiambu CMCC No. 367 of 2017 was between the Respondent herein and a company described as Planlink Company Limited. It was the reasoning of the lower court that the suit in Kiambu CMCC No. 367 of 2017 was yet to be determined and the claim in the suit was thus not proved.

22. This was erroneous. The Respondent sued two separate companies. The injuries may have arisen from the two companies or from a different company or circumstances. In *Wepukhulu t/a Gati Cleaning Agency Limited v Oduor (Civil Appeal 82 of 2019)* [2024] KEHC 5737 (KLR) (14 May 2024) (Judgment), I stated as follows: -

> " 33. As observed at the beginning, this is a peculiar appeal that turns on new evidence. This court has the power to scrutinize new evidence. In addressing the question when additional evidence may be taken on appeal, the Supreme Court gave the general principles in the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR as doth;
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> > "We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
> >
> > (a) The additional evidence must be relevant to the matter before the court and be in the interest of justice;
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> > (b) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
> >
> > (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
> >
> > (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
> >
> > (e) The evidence must be credible in the sense that it is capable of belief;
> >
> > (f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
> >
> > (g) Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
> >
> > (h) Where the additional evidence discloses a strong prima facie case of wilful deception of the Court;
> >
> > (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing

lacunae and filling gaps in evidence. The Court must find the further evidence needful.

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence.

This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

23. In the above suit, *Wepukhulu t/a Gati Cleaning Agency Limited v Oduor (Civil Appeal 82 of 2019)* [Supra] I concluded as doth; -

> " In my analysis, the 1st Respondent filed a multiplicity of suits while concealing the prior suits. In each he pleaded similar injuries. He managed to get away with this illegality and in fact obtained the Judgement that is subject to this Appeal. It is not in the ability of this court to aid a party in wrong doing. Courts frown at parties who conceal facts. In any event, a party cannot benefit from an illegality.
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> As was held in *Kenya Wildlife Service v Awuor (Civil Appeal E013 of 2022)* [2023] KEHC 3721 (KLR) (26 April 2023) (Judgment):
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> > "Under common law there cannot be a wrong without a remedy - or in other words,' Equity will not suffer a wrong to be without a remedy (ubi jus ibi remedium).

24. From a perusal of the Record of Appeal, this court notes that the Respondent's suit before the learned magistrate was filed on 1/4/2016 while the suit in Kiambu CMCC No. 367 of 2017 was filed on 2/8/2017.

25. The Appellant had the burden of demonstrating that the existence of Kiambu CMCC No. 367 of 2017 was not in its knowledge up and until the time the Judgement of Court was delivered on 18/3/2018.

26. The application was thus a proper one. The matters complained of were outside the knowledge of the Appellant. There needs to be a hearing for both suits in one court to enable the court get rid of the fraud perpetuated by the Respondent that it had no knowledge of the existence of Kiambu CMCC No. 367 of 2017. The Court of Appeal in Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 expressed itself as follows:

> " The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

27. This was not one such case. It was on a solid foundation. In the case of Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party) [2019] eKLR it was therefore held that: -

> " In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay."

28. The application for review was made within a reasonable period of getting the knowledge of the matter. The question of knowledge is relative. In The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

29. In this case the Appellant was not appealing on merit of the appeal but on discovery of a fraudulent scheme to sue two companies for the same injuries in different circumstances on the same day.

30. The appeal is consequently allowed with costs of Kshs. 55,000/=. Parties are at liberty to apply to have the two matters heard by the same court.

Determination

20. In the upshot, I make the following orders: -

    a. The Appeal is allowed. The judgment and decree in the lower court is hereby set aside. It is substituted with an order that the lower court suit be heard *de novo* having regard to the evidence in the duplicated suit.

    b. The parties to have the matters transferred to the same court. Should one suit be withdrawn, the other shall stand struck out with costs.

    c. The Appellant shall have costs of the appeal of Kshs. 55,000/-.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF JULY, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

Miss. Bosire for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah