



REPUBLIC OF KENYA



**Muthinga v Odhiambo (Civil Appeal E355 of 2024)  
[2024] KEHC 13022 (KLR) (Civ) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13022 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E355 OF 2024**

**TW OUYA, J**

**OCTOBER 17, 2024**

**BETWEEN**

**LINUS KINYUA MUTHINGA ..... APPELLANT**

**AND**

**EDWIN ODHIAMBO ..... RESPONDENT**

*(Being an Appeal from the Ruling and orders of the Resident Magistrate/  
Adjudicator, Hon. Koech C. Patricia, delivered on 29th February, 2024 dismissing  
the Appellant's Notice of Motion Application dated 8th February, 2024)*

**RULING**

**Background**

1. The Appellant seeks that the Ruling and orders of the Resident Magistrate/Adjudicator delivered on 29<sup>th</sup> February 2024 dismissing the Appellant's Application dated 8<sup>th</sup> February 2024 be struck out and substituted with a ruling allowing the said notice of motion and further orders that the matter be set down fresh hearing before a different Magistrate other than the Honorable Trial Adjudicator.
2. By Statement of Claim dated 11<sup>th</sup> October, 2023, Respondent claims that on the 8<sup>th</sup> of September, 2023 he was a lawful passenger in the Motor Vehicle registration No KBK 946C along Kangundo Road near the Kayole Junction when the Appellant's and /or his authorized driver, servant, agent and/or employee drove motor vehicle KCT 239J at a high speed that he caused or permitted it to hit Motor Vehicle KBK 946C from behind, thereby causing a road traffic accident and the consequences of which he suffered serious bodily injuries.
3. By a Response to Statement of Claim dated 16<sup>th</sup> October, 2023, the Appellant admitted the occurrence of the accident but denied the manner in which the Claimant claimed that the accident occurred and



- negligence on the part of the Respondent. He further stated that the said accident was caused by sole and contributory negligence owner and driver of the Third – Party Motor vehicle KBK 946C.
4. The matter proceeded for hearing and judgement delivered on 8<sup>th</sup> December 2024. Consequently, the Appellant filed and served the Application dated 8<sup>th</sup> December 2024 seeking for stay of execution of the judgement and any decree arising out of it and stay of proceedings under section 30 of the [Small Claims Court Act](#).
  5. The said Application was canvassed by way of oral submissions and the trial magistrate delivered a ruling dismissing the application. In exercising the discretionary power of the court, the trial magistrate made a finding that the Appellant had not satisfied the grounds for review or retrial.
  6. The decision led to the instant appeal and application for stay of execution pending hearing and determination of the appeal. The memorandum of appeal is based on the following grounds:
    - i. That the learned magistrate erred in law and applied the wrong principles in arriving at the conclusion that the Appellant had not demonstrated a reasonable excuse for review and that the evidence set to be introduced was within the knowledge of the Appellant.
    - ii. That the learned magistrate erred in law and principle in arriving at a conclusion that the Appellant had not demonstrated sufficient grounds to warrant orders sought.
    - iii. That the learned magistrate erred in law and principle in finding out that the Appellant's discovery of fraud did not raise any triable issues.
    - iv. That the learned magistrate erred in law in failing to uphold the doctrine of precedent.
    - v. That the entire proceedings and ruling by the trial Court on the Notice of Motion by the Appellant dated 8<sup>th</sup> February, 2024 reflects an erroneous departure from the rules of natural justice and established principles of common law.
    - vi. That the learned Magistrate misapprehended the facts and submissions presented before her by the Respondents and completely disregarded the grounds of application, affidavit, evidence and submissions of the Appellant's hence arriving at an unreasonable finding.
  7. The Appellant prays that:
    - i. This appeal be allowed.
    - ii. The learned Magistrate's ruling dated 29<sup>th</sup> February, 2024 dismissing the Appellant's Notice of motion Application dated 8<sup>th</sup> February 2024 be struck off.
    - iii. The learned Magistrate's Ruling dated 11<sup>th</sup> February, 2024 be substituted with a ruling granting the Appellant orders and leave be granted to the Appellants to file additional documents and witness statements out of time.
    - iv. The suit Milimani SCCC No. E5204 of 2023 be placed for retrial with the participation of the Appellant before a different Court other than the learned Trial Small Claims Court.
    - v. Costs of Appeal be awarded to the Appellants.
  8. The Appellant has canvassed this appeal by way of written submissions while the Respondent is conspicuously non-participative in this appeal. The Appellant raises two arguable issues namely:
    - a. Whether the discovery of new and important matter or evidence after trial should be allowed.



9. The appellant requested for review orders based on newly discovered information and facts that were not present at the time of trial. The Appellant discovered fraud and thus sought for review and re-trial of the matter. He argues that the Small Claims Court was established with a degree of innovation that allows it to disregard the rigorous adherence to procedure and Rules of evidence in order to deliver justice. He adds that that he met the threshold for a re-trial for the court to review the award or orders with of the court with reference to section 41(1) of the Small Claims Court which provides that:
- i. The order was made ex-parte without notice to the applicant.
  - ii. The claim or order was outside the jurisdiction of the court.
  - iii. The order was obtained fraudulently
  - iv. There was an error of law on the face of the record or,
  - v. New facts previously not before the Court have discovered by either of the parties.
10. Provision No. v above supports the Appellants position that an aggrieved party may move the court for a review of any order of the court on the ground that “new facts previously not before the court have been discovered by either of the parties”. The Appellant buttressed his argument with the provision of Order 45 of the Civil Procedure Rules on applications for review of an order.
11. The Appellant relies on the authorities of: Turbo Highway Eldoret Limited v. Synergy Industrial Credited and Rose Kazia v. Angelo Mpanjuiza (2009) eKLR where the court emphasized the need to handle such applications with great caution, ensuring that they satisfy the requirements of r. 4(2) and that the existence of the alleged facts is proved; Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another (2019) eKLR where the court in dismissing an objection by a plaintiff against a defendant’s witness statement pronounced itself that:
- “...there is no greater duty of the court than to deliver substantive justice as provided under article 159 (2) of *the Constitution*”
- b. Whether a retrial is merited
12. It is the Appellant’s prayer that if fresh evidence sought herein is allowed then the court may be invited to consider a trial de novo. He relies on the case of Hussein Khalid and 16 others v Attorney General & 2 Others (2020) eKLR which cited in appreciation the Indian Supreme Court Case of Ajay Kumar Ghoshal etc. v State of Bihar& Another Criminal Appeal Nos.119-122 of 2017 that:
- “a de novo trial or retrial is not the second trial; it is continuation of the same prosecution.  
The guiding factor for trial must always be demand for justice”
13. Based on the above arguments the Appellant seeks to re-open the lower court case for retrial so that the ends of justice can be met. He submits further that that no prejudice will be suffered by the Respondent if the orders sought for are granted.
14. This being a first appeal, and in line with section 78 of the *Civil Procedure Act*, this court is under a duty to re-evaluate and assess the evidence adduced before the trial court and reach its own independent conclusions. The Court must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In the



case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

15. In addition, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.

16. This court notes that the trial court entered judgement on 14<sup>th</sup> December 2023 while the Appellant filed an application for stay dated 8<sup>th</sup> February 2024. The Adjudicator made a ruling dismissing the Application for stay on the basis that it was filed out of the prescribed time in accordance with the provisions of section 41(2) of the *small claims court Act* 2016. It is stipulated under this section that:

The application under section 4 (1) must be made within 30 days of the award sought to be reviewed or such other period as the court may allow.

The trial court also took into consideration that despite being out of time, the Appellant did not seek leave for extension of time and that the evidence sought to be introduced ought to have been adduced during the pendency of the trial.

17. Upon perusal of the pleadings leading to the impugned ruling of the trial court, this court notes that the Application dated 8<sup>th</sup> February 2024 did not attach supporting affidavit, witness statements and documents intended to be introduced at the intended retrial. The application does not also indicate the date or time when the evidence sought to be adduced became apparent to the Appellant.
18. This court also notes that the Appellant’s Application in the trial court was based fraud which was not substantiated or demonstrated by way of Affidavit and supporting documents.
19. This court holds that whereas the Appellant has a legal basis under the law to apply for a review or retrial, the same ought to be brought in a proper manner and within the provisions of the law. While it is notable that the respondent did not oppose the application at the trial court nor participated in this appeal, it is still the duty of the courts to administer justice by upholding the rule of law.
20. This court concurs with the trial court finding that the Application before it lacked merit and ought to be dismissed.
21. Likewise, this court finds that the Appeal herein lacks merit and is hereby dismissed with no orders as to costs.

### **The Determination**

- i. This Appeal dismissed.
- ii. The Ruling in *Milimani* SCCC No.5204 OF 2023 delivered on 29<sup>th</sup> February, 2024 is hereby upheld.
- iii. No orders as to costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**ROA 14 days.**

**HON. T. W. Ouya**

**JUDGE**

For Appellant Ms Njenga holding brief for Diru

For Respondent Tendwa holding brief for Mr. Andego

Court Assistant Ms. Amina

