



**Mwenda v Thambu (Civil Appeal 208 of 2020)
[2024] KEHC 11991 (KLR) (Civ) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11991 (KLR)

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

CIVIL

CIVIL APPEAL 208 OF 2020

JM NANG'EA, J

OCTOBER 7, 2024

BETWEEN

KEVIN JIM MWENDA APPELLANT

AND

PENNINA KAMEME THAMBU RESPONDENT

*(Being an Appeal from the ruling of the Chief magistrate's Court
at Nairobi Milimani Commercial Courts Hon. E. Wanjala (Miss) -
SRM in CMCC. NO. 7600 of 2013 delivered on 31.10.2019)*

RULING

1. The appeal before me is from the above trial court's ruling by which the appellant's Notice of Motion dated 20th June 2019 seeking review of the same court's judgement delivered on 11th April 2019 was dismissed with costs. A brief background to the appeal is that the appellant had leased his motor vehicle registration number KBB 888M to the respondent for use in transportation of charcoal on terms and conditions vide a lease agreement dated 1st January 2013. The appellant later gave notice of termination of the agreement but the respondent allegedly refused to release the vehicle to him thereby provoking the suit before the lower court. In the suit the appellant *inter alia* prayed for release of the vehicle ; a permanent injunction restraining the respondent from in any manner interfering with the vehicle and an order for taking of accounts in respect of the lease transaction. The respondent filed defence admitting existence of the lease agreement but denied breaching the agreement.
2. The learned trial magistrate heard the suit in full and rendered judgement dated 11th April 2019 granting the appellant some of the reliefs he sought but declined to compel the respondent to release the vehicle. The appellant then brought the application dated 20th June 2019 for review of the judgement and grant of reliefs as hereunder;



- a. That the respondent be compelled to release the subject vehicle.
 - b. That a permanent injunction order be issued restraining the respondent from using, hiring, selling, alienating, transferring wasting damaging and/or in any manner interfering with the vehicle. (*sic*)
 - c. An order for taking of accounts between the parties.
 - d. Payment of a sum of Ksh. 369, 500.
and
 - e. That the costs of the application be borne by the respondent.
3. By the impugned ruling, the learned trial magistrate dismissed the review application with costs. In particular the court observed that the appellant had not sought release of the vehicle in his amended plaint. Regarding the other prayers in the application , the trial court ruled that the same were finally settled in the judgement and could not be re-visited.
4. Aggrieved by the ruling, the Appellant filed a Memorandum of Appeal dated 27th May 2020 upon grounds that may be condensed into three as hereunder:-
1. That the Learned Trial Magistrate erred in law and fact by holding that the appellant did not seek an order for release of the subject vehicle.
 2. That the trial magistrate erred in law and in fact by failing to consider the evidence and submissions of the appellant thus arriving at a wrong conclusion.
and
 3. That the learned trial magistrate misdirected herself in exercise of her discretion in the review application.
5. It is proposed to ask the court for the following orders that:-
- a. That this appeal be allowed.
 - b. That the said ruling of 31st October 2019 be set aside and substituted with an order for release of the vehicle in question.
6. The court directed the appeal to be disposed of by witten submissions but it would appear that only the learned Counsel for the appellant filed their submissions. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified {see *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123}. The Court of Appeal for East Africa in *Peters v. Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and



- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
7. I have perused the record of this appeal which includes the appellant’s plaint dated 3rd December 2013 and amended on 24th March 2014. Indeed, the appellant sought release of the suit motor vehicle to him as per prayer (a) of the amended plaint. The trial court was apparently alive to this fact since in its judgement it found thus; “ the plaintiff (read, the appellant) was entitled to get his motor vehicle back as per clause 8 of the agreement since the defendant (read, the respondent) was only entitled to have possession of the vehicle during the contract period meaning that after termination as done by the plaintiff (read, appellant) and/or after the 30.6.2014 when she was to release the vehicle.....”
8. Order 45 of the *Civil Procedure Rules* 2010 allows for review of a decree or order not appealed from or where no appeal is allowed , on the ground of discovery of new and important matter or evidence , or on account of a mistake or error apparent on the face of the record , or for any other sufficient reason. From the record, no appeal has been preferred against the trial court’s impugned ruling and/or judgement. The Court of Appeal in Civil Appeal No. 2111 of 1996 (*National Bank of Kenya v. Ndung’u Njau*) laid down that where an order or decree is sought to be reviewed on account of an error on the face of the record, “the error must be self evident and should not require an elaborate argument to be established”. The court also held that review cannot also be ordered on the ground that a different judge could have taken a different view of the matter, or on the basis that the court has made an incorrect exposition of the law.
9. Learned Counsel for appellant rely *inter alia* on the judicial determination in the case of *Manchester Outfitters Ltd v. Kenya Electricity Generating Company Ltd* (2005) eKLR where a similar appeal challenging a lower court’s order declining to consider and grant relief specifically prayed for was allowed.
10. The respondent does not seem to have put in submissions.
11. This appeal is clearly merited. The appellant had in fact pleaded for release of the vehicle in issue . The trial court therefore erred in declining to review its judgement in the manner desired. From the appeal , it would appear that the appellant is only seeking an order for release of the vehicle in question. In the result, the appeal is allowed and the respondent is ordered to release motor vehicle registration number KBB 888 M to the respondent within 7 days from the date hereof. The parties will bear their own costs of the appeal while the order as to the costs of the proceedings in the lower court will remain as directed by that court.
12. Ruling accordingly.

J. M. NANG’EA,

JUDGE.

RULING DELIVERED VIRTUALLY THIS 7TH DAY OF OCTOBER 2024 IN THE PRESENCE OF:

The appellant’s Advocate,

The respondent’s Advocate,

The Court Assistant, Amina

J. M. NANG’EA,

JUDGE.

