Saghani v Nzuve & 2 others (Civil Appeal E049 of 2021)
[2023] KEHC 17302 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 17302 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E049 OF 2021

HM NYAGA, J

MARCH 16, 2023

BETWEEN

R.K. SAGHANI ..... APPELLANT

AND

EMMACULATE MUENI NZUVE ..... 1ST RESPONDENT

OMURUNGA EVALYNE ..... 2ND RESPONDENT

FRANCIS MBOYA WAMBUA ..... 3RD RESPONDENT

(Being an appeal from the ruling of Hon. B. Bartoo(SRM) in CMCC No. 360 of 2013 at Machakos delivered on 13th February 2020)

JUDGMENT

Background

1. In brief, the facts that led to this appeal are that the 1st Respondent filed CMCC No. 360 of 2013 at the Chief Magistrate's Court at Machakos where she sought general damages arising from injuries she sustained on a Road Traffic Accident that occurred on 11th February 2011. The matter proceeded to full trial and judgment was delivered on 11th July 2019. In the said judgment, the trial magistrate found the Appellant and the 2nd and 3rd Respondents 100% liable.

2. Contemporaneously with the said suit, CMCC No. 856 of 2011 was filed. The said suit arose from the same accident. From the record of appeal it appears like the said suit CMCC 856 of 2011 was selected as a test suit. At the conclusion of the trial in the test suit, the court held the Appellant 15% liable and the 2nd and 3rd Respondents 85% liable.

3. Feeling aggrieved by the decision to hold it 100% liable in CMCC No. 360 of 2013, the Appellant filed an application dated 11th November 2019, where it sought the following orders:-

1. That this application be certified urgent and heard ex-parte in the first instance.

2. That pending inter partes hearing of this application, there be a stay of execution of the judgment.

3. That this Honourable court be pleased to review, vary, set aside, discharge and/or vacate the orders on liability against the 3rd defendant/applicant in the judgment delivered on 11th July 2019.

4. That pending the hearing and determination of this application, there be a stay of execution of the judgment and decree in this matter arising from the judgment of this court delivered on 11th July 2019.

4. In the Ruling delivered on 13th February 2020, the learned magistrate dismissed the application with costs. It is this Ruling prompted the Appellant to file this appeal.

5. In its Memorandum of Appeal dated 21st April 2021 the Appellant set out the following grounds:-

1. The learned magistrate erred in law by ignoring the findings on liability of the test suit yet this matter fell in a series in which Machakos CMCC No. 856 of 2011; Bernard Nzioka Nzalu vs Nyingi Peter, Francis Mboya, R.K. Sanghani and Njoroge Zipporah had been selected as the test suit.

2. The learned magistrate erred in law and fact by reaching a fresh finding on liability while ignoring the findings of the test suit that has already determined the issue of liability.

3. The learned trial magistrate grossly misdirected herself by treating the appellant's submissions superficially thus arriving at an erroneous decision.

4. The learned magistrate erred in law by finding that this was a matter that cannot be reviewed yet there was an error apparent on the face of the record in her finding of liability.

5. The learned trial magistrate grossly misdirected herself by ignoring established precedence in review applications under Order 45 of the Civil Procedure Rules.

6. The appeal was canvassed by way of Written Submissions which are summarized as hereunder;-

Appellants Submissions

7. It is the Applicant's case that since CMCC No. 856 of 2011 was selected as a test suit, and an order to that effect made by Justice Makhandia (as he then was), then all the suits arising out of the same accident were to be bound by the finding on the question of liability. In this case, the Appellant was found to be 15% liable and thus its liability could not be more than that.

8. It is also submitted that the appellant and 1st Respondent did bring to the attention of the court the existence of the said test suit and that the only issue that was pending before it was that of determination of quantum of damages. However in total disregard of the finding on liability in the test suit, the court proceeded to hold the Appellant and the other defendants 100% liable. That even when the Appellant filed an application for review, the same was not considered.

9. It is submitted that the trial magistrate erred in law and fact in ignoring the finding on liability in the test suit.

10. Counsel referred me to the decision in Kubai Kithinji Kaiga (suing as the legal representative of the Estate of John Kaiga (Deceased) vs Kenya Wildlife Service [2021] eKLR where the court stated as follows;

> " The method of test suit under Order 38 (1) and (2) of the Civil Procedure Rules is described as follows:
>
> > "Staying several suits against the same defendant [Order 38, rule 1.]
> >
> > Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.
> >
> > Staying similar suits upon application by defendant [Order 38, rule 2.]
> >
> > Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1 the several defendants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed to be a real trial of the issues."
> >
> > In my respectful view, a test suit is purely a convenient method for trial of multiple suits against the same defendant (or by one plaintiff against several defendants) where the issues in the suits are the same, and it does not take away the right of the individual plaintiffs, or the defendant in any case to challenge the decision in the test suit or its relevant particular suit on appeal, review or other mode of impugning the decision, as the case may be."

11. Also cited was Joseph Murage Weru vs Stephen Kariuki Kahubi [2014] eKLR where it was held that:-

> " If a test suit was to be selected it would only be for the purposes of determining the issue of liability and this determination would as a matter of law, apply to the rest of the suits which have not been determined."

12. Also cited was the decision of Mativo J (as he then was) in Amos Muchiri vs Chinga Tea Factory and David Muthumbi Mathenge [2010] eKLR where he stated that:-

> " I have noted a serious flaw in these proceedings. As mentioned at the beginning, these were four separate suits, but the Magistrate ordered that PMCC No 23 of 2013 be selected as the test suit on the issue of liability which would bind the other cases including this one. The four cases were never consolidated, they remained separate files and three separate appeals among them this one were filed. To my mind, since they were separate files, the proper procedure was for the determination on liability to be recorded in the individual files and then depending on the outcome on liability, the cases could proceed for assessment of damages and or final determination."

13. The Appellant further states that since the defendants were all sued in the test suit, then the issue of liability was conclusively addressed in the test suit. Therefore the trial magistrate erred in finding that the Appellant needed to take out 3rd party proceedings against the 2nd and 3rd Respondents.

14. It is further submitted that the trial magistrate grossly misdirected herself by ignoring established procedure in review applications under Order 45 of the Civil Procedure Rules. That upon discovering an error in the judgment, the Appellant clearly highlighted it to the trial magistrate who went ahead to dismiss the application.

15. On what constitutes an error apparent on the face of the record, counsel cited Muyodi vs ICDC and Another [2006] IEA 243 where the court held as follows;-

> " In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

16. Also cited was Republic vs Advocates Disciplinary Tribunal Ex Apollo Mboya [2019] eKLR where it held that;

> " In Attorney General & O'rs v Boniface Byanyima,[8] the court citing Levi Outa v Uganda Transport Company,[9] held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.".

17. It is finally submitted that the fresh finding of liability by the trial magistrate was an error as there could reasonably be no two opinions.

18. Therefore, that finding was an error on the face of the record and ought to be corrected.

1st Respondent's Submissions

19. It is submitted that, first, the Appellant has not adduced any evidence to show that the current suit was related to the alleged test suit, and that there were any directions taken to the effect that CMCC 856 of 2011 was a test suit whose finding would apply to this suit amongst others.

20. It is pointed out that the trial court was clear in its Ruling that it did not apportion liability as per the alleged test suit and that the appellant did not take out 3rd party who was a party in the alleged test suit. Therefore, it is submitted,the court could not apportion liability on a party not before it.

21. The 1st Respondent further argues that on these grounds the court cannot be said to have made an error on the face of the record, as set out under Order 45 Rule 1 of the Civil Procedure Rules.

22. Counsel further argues that the alleged test suit was within the knowledge of the appellant and therefore, it could not feign ignorance and adduce it as new evidence. He referred to the decision in National Bank of Kenya vs Ndung'u Njau 1997 eKLR where the Court of Appeal held that;

> 'A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.'

23. Also cited was Republic vs Medical Practitioners and Dentists Board & Another [2021] KEHC 298 where it was held that;-

> 'The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/ tribunal on a point of fact or law. In any case, while exercising the power of review, the court/ tribunal concerned cannot sit in appeal over its judgment/decision.'

24. It is submitted that the Appellant did not satisfy the court that there were sufficient reasons for it to review its judgment. That the application for review was made after unreasonable delay of around 4 months which was not sufficiently explained I was referred to Stephen Gathua Kimani vs Nancy Wanjira Waruingi T/A Providence Auctioneers (2016)eKLR where it was held that;

> 'I am alive to the fact that the discretion donated to the court under Section 80 of the *Civil Procedure Act* is unfettered, but for the discretion to be exercise in favour of the applicant, the application for review must be based on the grounds specified under Oder 45 or on any sufficient reason but in either case the application must be made within a reasonable time.'

25. Also cited was Kenfreight EA Ltd. vs Star East Africa Co. Ltd (2000)eKLR which quoted the decision in Stephen Gathua's case (supra).

26. Finally the 1st Respondent argues that it is clear that Appellant was aggrieved by the decision of the trial court to hold the defendants 100% liable and the application for review was in essence an appeal against the finding in the judgment. That nothing prevented the Appellant from filing an appeal to the High Court in respect to the Judgment itself. That this court cannot review the judgment of the trial court, but can sit as an appellate court against the said decision.

Determination

27. The Advocates have aptly summarized the issues to be determined herein. These are:-

a. Whether the trial magistrate was bound by the judgment in CMCC 856 of 2011 when she delivered her judgment.

b. Whether there was sufficient grounds to warrant a review of the decision of trial court.

c. Whether the appellant ought to have filed an appeal against the judgment itself.

28. On the first issue, it is clear that CMCC 856 of 2011 was selected as a test suit in all the related matters. That fact is acknowledged by the parties in their respective submissions before the trial court. In the test suit the Appellant was found 15% liable. The Appellant did address the issue in its submissions before the trial court dated 15/5/2019. While the 1st Respondent did also acknowledge the outcome of the test suit, she prayed that the defendants, including the appellant herein, be held 100% liable.

29. So what is the purpose and effect of selection of a test suit? I will first look at the legal provisions. Order 38 Rules 1 and 2 of the Civil Procedure Rules (CPR) provides as follows;-

> Order 38 – Selection of Test Suit
>
> 1. Staying several suits against the same defendant [Order 38, rule 1.]
>
> Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order I could have been joined as co-plaintiffs in one suit, upon the application of any of the parties with notice to all affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.
>
> 2. Staying similar suits upon application by defendant [Order 38, rule 2.]
>
> Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1 the several dependants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have been determined or shall have failed to be a real trial of the issues.

30. A test suit is thus a convenient mode of treatment of multiple suits between the same parties where similar issues of law and fact arise.

31. In Samwel Kariuki Nyangishi vs John Disilberger [2002] eKLR the court explained the reasons for selecting a test suit as follows;

> The reasons why we have a test suit is because the said case would not be an embarrassment to the court and parties where several courts decide on liability arriving at a different proportion from that of the first court trying the matter."

32. Therefore, having selected CMCC No. 856 of 2011 as the test suit, once liability was determined, the parties ought to have adopted that finding on liability. Unfortunately despite knowledge of the outcome of the test suit, the trial court went ahead to give its own opinion on liability. In the end, that

decision rendered the outcome of the test suit useless. In her judgment, the trial magistrate stated as follows;

> The Hon. Court was informed that the defendants had been apportioned 85%to 15% against the 3rd party. In this case the defendant did not take out 3rd party proceedings and as such have to bear the liability."

33. In CMCC 856 of 2011 the defendants were;-

a. Nyingi Peter ..... 1st Defendant

b. Francis Mboya ..... 2nd Defendant

c. R. K. Shanghani ..... 3rd Defendant

d. Njoroge Zipporah ..... 4th Defendant

In CMCC 360 of 2013, the defendants were;

a. Omurunga Evalyne .... 1st Defendant

b. Francis Mboya ..... 2nd Defendant

c. R. K. Shangani ..... 3rd Defendant

34. The issue of liability was fully determined as between the 2nd and 3rd defendants in the suit in question. They were the owners of the respective motor vehicles involved in the road traffic accident. I therefore don't think that the appellant needed to join a 3rd party as pronounced by the trial court. Their respective liability under the test suit was already determined. Any 3rd party to be joined would have been the respective drivers of the motor vehicles. This would not have in any way affected the liability determined between the 2nd and 3rd defendants in the subsequent suit.

35. Having determined the issue of liability in the test suit, the trial court only needed to adopt the same or if it was to depart from the findings give reasons for doing so.

36. In Amos Muchiri Ndung'u v Chinga Tea Factory & David Muthumbi Mathenge [supra], the court explained the purpose, the process and the result of an outcome of a test suit. It held as follows;

> 'A test case is a suit brought specifically for the establishment of an important legal right or principle. It can also be a term that describes a case that tests the validity of a particular law. Test cases are useful because they establish legal rights or principles and thereby serve as precedent for future similar cases. Test cases save the judicial system time and expenses of conducting proceedings for each and every case that involves the same issue or issues.
>
> In my view, the learned magistrate was to determine liability in the test case on the basis evidence adduced in the said case because admittedly the accident arose from the same accident, same facts, same evidence and same witnesses were to be used to determine liability and in was not necessary for the plaintiffs in all the suits to testify to determine liability. For this reason, I find that liability having been established in favour of the plaintiff in the test case, the same applied and was binding in the other suits. It was not necessary for each and every plaintiff to testify in the test case.' (Emphasis mine)

37. To me the reasons given by the trial court are not sufficient to warrant a departure from the finding of the test suit. All the parties affected by the finding on liability in the test suit were before the trial court. All that the trial court needed to do was to adopt the finding on liability in the test suit then proceed to assess the damages.

38. It is thus my finding that the decision to hold the Appellant 100% liable whilst a finding on liability existed was wrong. Such a decision would lead to embarrassing findings, where different courts would be free to ignore the test suit and arrive at different decisions. This would negate the reason for having the test suit in the first place.

37. It is thus my finding that the appellant's liability was already determined at 15% and no more. I uphold that finding in the test suit.

38. The next question to be addressed is whether the Appellant, upon learning of the judgment, was right to file an application for review instead of filing an appeal.

39. The Appellant seemed to treat the decision in the judgment as an error on the face of the record and thus sought a review of the same under Section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules.

40. The Respondent's view is that the Appellant ought to have filed an appeal against the judgment itself and not apply for a review whose Ruling led to this appeal.

41. Section 80 of the *Civil Procedure Act* lays the basis for a court to review its decision. It provides as follows;

> 'Review 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.'

42. Order 45 of the Civil Procedure Rules provides for the procedure, as follows;-

> Application for review of decree or order [Order 45, rule 1.]
>
> (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.

43. In her Ruling the trial magistrate was of the view that she had entered judgment after evaluating all the evidence presented in court and that her decision could only be appealed against, and not reviewed.

44. The avenue for a party to seek review of a decision of a court is restricted to the grounds set out under order 45(1) of the Civil Procedure Rules.

45. In National Bank of Kenya Ltd vs Ndungu Njau [supra] the Court of Appeal had this to say about the application for review;-

> 'In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."
>
> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

46. Similarly in Abasi Belinda vs Fredrick Kangwamu [1963] EA 557 it was held that;

> A point which may be a good ground of appeal may not be a good ground of review and an erroneous view of evidence is not a ground for review though it may be a good ground of appeal."

47. In my opinion, the decision by the trial magistrate, in her ruling was correct. Her decision to apportion liability as she did in her judgment, was after considering all the facts, including the existence of the test suit. If she arrived at a wrong decision, that was the subject of an appeal, not a review.

48. To this extent, I agree with the Respondent that the appeal against the ruling of the trial magistrate ought to be dismissed for lack of merit.

49. Having stated the above, I still think that it is appropriate that the court, applying its inherent jurisdiction, gives orders that propagate substantive justice. This court has a duty to correct a wrong if it sees one. This is in line with the principles set out in Article 159(2) of *the Constitution* to the effect that;

> Justice shall be administered without undue regard to procedural technicalities."

50. The effect of a dismissal of this appeal would be to leave the appellant exposed to an execution of a judgment which the court has already found to be erroneous. Of course the appellant has the option of fling a substantive appeal against the judgment itself, and this may take a while to be determined. This delay may not be fair to either party.

51. Having considered all the factors, I come to the following conclusion that there is need to make the following orders;

    a. The Appeal is lacking in merits and is dismissed with costs.

    b. In the interest of substantive justice, the judgment on liability in CMCC 360 of 2013 shall be as decided in the test suit being CMCC No. 856 of 2011.

    c. The Appellant shall pay its 15% portion on liability and be refunded any excess amount deposited in the joint names of the advocates.

    d. The Respondent is at liberty to execute the decree in the lower court against the other defendants in line with the finding on liability.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY FROM NAKURU THIS 16TH DAY OF MARCH, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Immanuel

N/A for parties