



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO. 14 OF 2018

JULIUS NDOLO SILA.....APPELLANT/APPLICANT

VERSUS

KALPATARU POWER TRANSMISSION LTD.....RESPONDENT

RULING

1. The Appellant/Applicant herein filed a **Notice of Motion** Application dated **20th July, 2020** brought pursuant to **Order 1 Rule 15, Order 51** and **Order 45 rule 1** and **2** of the **Civil Procedure Rules 2010** and **Sections 1A, 1B** and **Section 3A**, all of the **Civil Procedure Act (Cap 21), Laws of Kenya** and all other enabling provisions of the Law. In the Application, the Applicant prays for the following orders: -

- a) THAT this Honourable Court be pleased to review its Judgment delivered on 25th February, 2020 by Lady Justice Farah S. M. Amin in terms of order 3 of the Judgment and hold the Respondent herein to be wholly liable for the accident;*
- b) THAT in the alternative to prayer b, this Honourable Court do order Civil Suit No.184 of 2014- Voi do proceed de novo;*
- c) THAT in the alternative to prayer (a) and (b) the Honourable Court does extend the time to file a fresh suit before the Chief Magistrate Court in Voi;*
- d) Any other or further order or directions that this Honourable Court deems necessary; and*
- e) THAT the costs of this application be in the cause.*

2. The Application is premised on the grounds set out therein, inter-alia that the Court delivered a Judgment on **25th February, 2020** and neither the Appellant nor his advocate on record were able to attend as they did not receive a Notice from this Honourable Court. The Appellant/Applicant avers that this court in its determination held that the trial Magistrate misdirected herself on numerous matters and the Appeal was allowed. The Appellant/Applicant further states that this court ought to have found the Respondent wholly liable for causing the industrial accident.

3. The Application is supported by an **Affidavit** sworn on **20th July, 2020** by **Julius Ndolo Sila**, the Appellant/Applicant herein.

The Response

4. The Respondent filed **Grounds of Opposition** dated the **5th November, 2020**, and averred that the instant application has no merit, is an abuse of the court process and does not meet the criteria for grant of orders for review. The Respondent states that the application is a disguised Appeal attempting to curve out and donate jurisdiction to the Magistrate Court where none exists.

5. The Respondent further averred that the application has not complied to the findings by the Supreme Court in the case of **Law Society of Kenya ..Vs.. The Attorney General and Another [2019]eKLR** on the jurisdiction of Magistrate's Court to deal with work injury claims. And finally that there is no new or important material which has been placed before this Court to warrant orders of review to be granted. In the upshot, the Respondent maintained that the application is fatally defective and should be dismissed.

Directions of the Court

6. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they would be relying on the said written submissions. The Applicant's submissions were filed on **11th December, 2020** while those of the Respondent were filed on **10th December, 2020**.

7. I have had the benefit of reading the written parties respective submissions. They replicate much on the grounds in support and opposition of the application as captured above that I need not to duplicate the same herein.

Analysis and determination

8. After perusing all the pleadings filed in this case and the written submissions by the parties herein, I have established the issues for determination as being as follows: -

- i. Whether the appellant/applicant has met the threshold for review as provided under Order 45 of the Civil Procedure Rules;***
- ii. Whether the court can order SPMC Civil Suit No.184 of 2014 proceed de novo; and***
- iii. Whether the court can extend time for the Appellant/Applicant to file a fresh suit before the Chief Magistrate Court in Voi.***

9. The grounds under which a party can move a court for review are well settled and more specifically set out under order 45 of the Civil Procedure Rules. They include discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge or could not be produced by that party at the time when the decree was passed or made or for any **“other sufficient reason”**. The application for review may also be pegged on the ground that there has been a mistake or error apparent on the face of the record. Finally, the application for review may be made without undue delay. Therefore, the court has to determine if the Appellant/Applicant has established any of the above grounds to warrant an order of review.

10. In the case of **Muyodi ..Vs.. Industrial and Commercial Development Corporation & Another [2006] 1EA 243**, the Court of Appeal described an error apparent on the face of the record 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...”

11. On whether any other sufficient reason for an order for review to be granted has been established, the Court of Appeal in the case of **Shanzu Investments Ltd ..Vs.. Commissioner for Lands (Civil Appeal No. 100 of 1993)** stated: -

“...any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous...”

12. With regards to discovery of new evidence and important matter which was not within the knowledge of the Applicant, the court in the case of **Republic ..Vs.. Public Procurement Administrative Review Board & 2 others [2018] eKLR**, held that:

“...The power to review a Judgment or an order can be exercised on the application of a person on 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 order was made...

13. In his application, the Appellant/Applicant has not shown this court any error apparent on the face of the record, or that he has discovered any new evidence that was not within his knowledge during trial and neither has he provided the court with any other sufficient reason that would warrant an order for review.

14. A reading of the prayers sought in the application, what the Appellant/Applicant is seeking from this court, is the substitution of Order No.3 of the court’s Judgment dated **25th February, 2020**. Order No.3 of the Judgment gives the Appellant/Applicant time to institute proceedings in the forum of his choice within 30 days, by having the same reviewed so that the Respondent is found wholly liable for his accident.

15. An application for review is not an opportunity for the Applicants to add or seek new prayers, which to him are necessary but were not sought for in the **Memorandum of Appeal**. **Order 45** of the **Civil Procedure Rules** is very clear as to when parties are to appear before court for a review. It therefore cannot be a ground for review by alleging that the court could have found otherwise other than it has. This can only be a good ground for Appeal but not review.

16. A brief look at the **Memorandum of Appeal** dated **3rd July 2018**, the Appellant/Applicant has sought the following prayers: -

- a) This Appeal be allowed.***

b) *That the Judgment and Orders of the subordinate court dated 25th June, 2018 be set aside.*

c) *The costs of the Appeal be borne by the Respondent herein.*

17. In the case of **Dakianga Distributors (K) Ltd ..Vs.. Kenya Seed Company Limited [2015]eKLR**, the Court of Appeal held that: -

“...Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu[1998] MWSO 3 states of the importance of pleadings;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves...”

18. This Court being bound by the pleadings before it, I agree with the Respondent’s submission, that this Honourable Court lacks jurisdiction to grant orders that were not sought for in the Memorandum of Appeal. The Appellant/Applicant in his Memorandum of Appeal had no prayer that required the appellate court to re-evaluate the evidence of the trial court and find the Respondent wholly liable for the accident.

19. I have carefully considered the reasons given by the Appellant for seeking an order of review. It is my considered view that the Appellant has not

satisfied the requirements for grant of the orders of review.

Whether the court can order SPMC Civil Suit No.184 of 2014 to proceed de novo.

20. The Appellant/Applicant seeks that that this court makes an order that **SPMC Civil Suit No.184 of 2014** be allowed to proceed *de novo*. The Appellant/Applicant was heard before the trial Magistrate’s court and a Judgment delivered on **25th June, 2020**. Further, the Appellant/Applicant being aggrieved by the said decision applied to appeal before this court and the Appeal has been determined and a Judgment delivered on **25th February, 2020**.

21. The trial court is in **SPMC Civil Suit No.184 of 2014** is *functus officio* for the reason that it has already pronounced itself and by a decision delivered on the **25th June, 2020**. The prayer that the court orders that **SPMC Civil Suit No.184 of 2014** proceeds *de novo* would amount to re-opening of the suit that has been heard and determined to finality. In the case of **Telkom Kenya Limited ..Vs.. John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR**, the Court of Appeal held: -

“...Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...”

22. This court, therefore cannot grant an order that **SPMC Civil Suit No. 184 of 2014** proceeds *de novo*.

Whether the court can extend time for the Appellant/Applicant to file a fresh suit before the Chief Magistrate Court in Voi.

23. The Appellant/Applicant seeks that time be extended and he be allowed to file a fresh suit before the Chief Magistrate’s Court. The Respondent contends that this court cannot extend time allowing the Appellant/ Applicant to file a fresh suit before the Chief Magistrate’s Court as it lacks Jurisdiction. **Section 16 of the Work Injuries and Benefit Act No.13 of 2007** deals with work injury claims. The Respondents relied on the Supreme Court case of **Law Society of Kenya ..Vs.. Attorney General & Another [2019] eKLR**. The Appellant/Applicant on the other hand contends that the Magistrate Courts have jurisdiction to hear and determine work injury claims and relied on the case of the **Law Society of Kenya ..Vs.. Attorney General & Another [2009] eKLR**.

24. It is now well settled in law that the Magistrate’s Courts can hear claims arising from **Employment and Labour Relations and Work Injury Benefit Act** and all other claims that fall under that category. The Magistrate’s Court’s jurisdiction to hear **Employment and Labour Relations** claims is provided for under **Section 9(b) of the Magistrate’s Act No.26 of 2015 as read with Section 29 of the Employment & Labour Relations Act No.20 of 2011**. **Section 29 of the Employment & Labour Relations Act No.20 of 2011** provides that the Magistrate’s must be appointed by the Chief Justice vide a Gazette Notice.

25. It is therefore this court’s finding that the Magistrate Court has jurisdiction to deal with Employment and Labour Relation claims. My understanding of the Supreme Court case of the **Law Society of Kenya ..Vs.. Attorney General & Another[supra] at paragraphs 69 – 71, Section 16 as read with Section 23 and 52 of Work Injuries and Benefit Act No.13 of 2007** does not hinder the parties from legal redress before the subordinate court. The Supreme Court states that **Section 16 as read with Section 23 and 52 of Work Injuries and Benefit Act No.13 of 2007** allows parties the use of alternative dispute resolution mechanisms before they can approach the court. This finding of the Supreme Court does not negate the jurisdiction of the Magistrate’s Court as provided for **Section (b) of the Magistrate’s Act No.26 of 2015 as read with Section 29 of the Employment & Labour Relations Act No. 20 of 2011**.

26. The finding of the Court that the Magistrate’s Court has jurisdiction to hear Employment and Labour Relations matters does not amount to choosing the right forum for the Appellant/Applicant but as a litigant he is under a duty to choose the right forum to litigate his case.

27. On whether the Court should extend time for the Appellant/Applicant to file a fresh suit before the Chief Magistrate's Court, this court needs to be satisfied that the application herein was made without undue delay and that the applicant has provided sufficient reasons, for such a delay.

28. The Appellant/Applicant filed the instant application for review on **20th July, 2020**, which is almost 5 months after the delivery of Judgment on the **25th February, 2020**. The Appellant/Applicant states that the reason for the delay is that the Judgment of his appeal was to be delivered on notice, which his appointed advocates **M/s. S.M Righa & Co. Advocates** stationed at Nairobi, did not receive.

29. On the record of the Court there is present a Notice for Judgment dated the **21st February, 2020**, which was sent to the Advocates herein for the delivery of Judgment on **25th February, 2020**. The Notice for Judgment was sent from Voi via the Postal Corporation of Kenya, EMS service on the **21st February, 2020**.

30. This Court finds it plausible that the Appellant/Applicant might not have received the Notice for Judgment in time or received any at all since the receipt from **Postal Corporation of Kenya, EMS service** does not indicate if the Notice was delivered and when the same was sent. Furthermore, the notice was too short a period for the court to be sure that the Appellant/Applicant received the Notice for Judgment.

31. In view of the above, the application dated **20th July, 2020** lacks merit

and is hereby dismissed in terms of **prayers (a) and (b)**. This Court grants **prayer No.(c)** with directions that the Appellant/Applicant institutes proceedings before a forum of his choice within 21 days of the date hereof.

32. Costs shall be borne by the Appellant/Applicant.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA THIS 9TH DAY OF MARCH, 2021.

D. O. CHEPKWONY

JUDGE

9/3/2021