



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO. 75 OF 2019**

**BETWEEN**

**ALICE ODHIAMBO.....APPELLANT**

**AND**

**JANE ATIENO ODHIAMBO.....1<sup>ST</sup> RESPONDENT**

**CHARLES OTIENO OJWANG.....2<sup>ND</sup> RESPONDENT**

**DANIEL NDIMBA CHERO.....3<sup>RD</sup> RESPONDENT**

**CHOUNDRY MOTORS LTD.....4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the ruling in Oyugis Principal Magistrate's PMCC No. 189 of 2016 by Hon. J.P Nandi –Principal Magistrate)*

**JUDGMENT**

1. The learned trial magistrate delivered a ruling on 2<sup>nd</sup> August 2019 in respect of an application dated 15<sup>th</sup> March, 2019.
2. The appellant was aggrieved by the said ruling and filed this appeal. She was represented by the firm of Ataka Kimori & Okoth Advocates. She raised five grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and in fact in finding that the appellant's application dated 15<sup>th</sup> March, 2019 was not opposed.
  - b. That the learned trial magistrate erred in law and in fact in considering and relying on evidence that was not before him.
  - c. That the learned trial magistrate erred in law and in fact by completely misconstruing the consent of 3<sup>rd</sup> May, 2019.
  - d. That the learned trial magistrate erred in law and in fact in dismissing the evidence of fraud before him when no evidence was called upon to controvert by the same by the respondents.
  - e. That the learned trial magistrate erred in law by dismissing the applicant's application dated 15<sup>th</sup> March, 2019.
3. The appeal was opposed by the 1<sup>st</sup> respondent through the firm of Nyatundo & Company Advocates. The 1<sup>st</sup> respondent contended that the learned trial magistrate proceeded on the basis of the evidence before him and that there was no evidence of fraud that was tendered in court.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. The application dated 15<sup>th</sup> March, 2019 was mainly seeking to have the court review or set aside the consent judgment and decree entered on 16<sup>th</sup> October, 2017 by the parties. The learned trial magistrate dismissed the application.

6. On 16<sup>th</sup> October, 2017 Mr. Omondi for the defendant and Mr. Nyatundo for the plaintiff, the appellant herein, recorded the following consent:

**By consent:-**

**i. Liability 100%**

**ii) General damages Kshs. 380,000/=**

**iii) Costs Kshs. 100,000/=**

**iv) 30 days stay of execution.**

The main complaint in the application is that the counsel for the plaintiff did not have the instructions of all the plaintiffs.

7. Review of a judgment may be applied for if a party satisfies the provisions of Order 45 Rule 1 of the Civil Procedure Rules. It provides:

**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.**

8. In the case of **Nyamongo and Nyamongo vs. Kogo [2001] EA 174**, the Court of Appeal defined what an error apparent on the face of the record is and stated:

**An error 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 a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a long drawn out 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.**

In the instant case, the appellant did not satisfy the court that there was an apparent error on record.

9. When parties enter into a consent, the same can be set aside if fraud or collusion are proved. The Court of Appeal in **Abdul Rehman vs. Fredrich Delfer & Anor. C. A. No. 112 of 1992** stated that the burden of proving fraud especially against an advocate is very heavy and fraud must also be specifically pleaded and proved strictly. No fraud or collusion was proved and the learned trial magistrate cannot be faulted for dismissing the application. Consequently, I find that this application has no merit. The same is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 14<sup>TH</sup> DAY OF JULY, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**