



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 97 OF 2016**

**MACHARIA MWANGI TOTO.....APPELLANT**

**VERSUS**

**GEMINIA INSURANCE CO. LTD.....RESPONDENT**

*(Being an Appeal against the ruling/order of Hon. Munyi- Senior Resident Magistrate*

*dated 31<sup>st</sup> August 2016 in Nakuru CMCC NO. 382 OF 2015)*

**RULING ON APPLICATION DATED 20/6/2019**

1. Judgment in this appeal was delivered on the 13/12/2018. The Respondent Geminia Insurance Co. Ltd was dissatisfied with the ruling that directed Nakuru CMCC NO. 382 of 2015 to be re instated for hearing before the Chief Magistrates Court, having been earlier on dismissed by a ruling by the trial magistrate on the 31/8/2016, upon an application dated the 24/11/2015, with costs.

2. By the application dated 20/6/2019, the Geminia Insurance Co. Ltd under **Order 45 Rule 1,2 and 3 CPR and Section 80 of the Civil Procedure Act for Orders**

*1) That the judgment delivered on 13/12/2018 allowing the appellants appeal against the ruling delivered on the 31/8/2018 by Honourable F. Munyi (SRM) in Nakuru CMCC NO. 382 of 2015 be reviewed, varied and/or set aside.*

*2) That the Appellant's Appeal against the Ruling of Hon. F. Munyi (SRM) in CMCC NO. 382/2015 be dismissed and the said ruling be allowed to stand.*

*3) That the costs of the application and entire suit be awarded to the Respondent/Applicant.*

3. On grounds stated on the face of the application and supporting affidavit sworn by one Christopher Chengecha Advocate for the Respondent/Applicant on the 20/6/2019 and filed on even date.

4. The application is opposed by a Replying Affidavit Sworn on the 8/7/2019 by Raphael Wambua Kigamwa, Advocate for the Appellant Macharia Mwangi Toto and filed on the 10/7/2019, and submissions filed on the 18/12/2019.

5. The applicant Geminia has brought to the court's attention, by its affidavit, a ruling in **HCC NO. 299 of 2004**, delivered on the 15/5/2019 in which the court corrected what was termed as a typographical error touching on the date of the accident in respect of this matter and which error appeared in the judgment dated 8/4/2011 (Rawal J, as she then was), where the date of accident was corrected to read the 25/2/2001 – (annexed and marked CN 1 and 2).

6. In view of the correction on the date of the accident, I have been urged to review my judgment, and by setting aside and or varying the judgment and allowing the Appellant's appeal against the Ruling delivered on the 31/8/2016 by Hon. F. Munyi, SRM in Nakuru CMCC NO. 382 of 2015.

7. I have looked and considered the Ruling dated the 15/5/2019. It refers to **Nairobi HCC NO. 299 of 2004**.

The Appeal hereof emanated from the ruling dated 31/8/2016 in **Nakuru CMCC NO. 382 of 2015**, which struck out the suit.

In my judgment dated the 13/12/2018, I reinstated the suit for hearing before the Chief Magistrate's Court.

## 8. APPELLANT'S SUBMISSION (RESPONDENT IN THE APPLICATION).

It is submitted for the appellant that this court became 'functus officio' upon delivery of the judgment and lacks authority to review its judgment, citing the case **Telcom Kenya Limited Vs. John Ochanga** (suing on his behalf and on behalf of 996 Former Employees of Telkom Kenya Limited (2014) e KLR, wherein The Court of Appeal observed that

*“-----power to hear was transferred by the Judicature Acts, to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions;*

*1) Where there had been a slip in drawing it up, and*

*2) Where there was an error in expressing the manifest intention of the court-----”*

9. It was further submitted that **Order 45 CPR** cannot apply to a matter where a court is exercising its appellate jurisdiction, but only by a court exercising its original jurisdiction.

The cases, **National Bank of Kenya Limited VS. Ndungu Njau, Civil Appeal No. 211 of 1996 (unreported), and Francis Origo & another Vs. Jacob Kumali Mungala C.A Civil Appeal No. 149 of 2001** (un reported) were cited, among others.

10. It is further submitted that the Court, in allowing the appeal did not consider or base its decision on the sole question of the date of the accident, but such other issues as stated in the judgment including constitutional imperatives on fair hearing and prejudice to parties upon striking out a suit summarily.

## 11. APPLICANT'S (GEMINIA) SUBMISSIONS.

Citing **Provisions of Order 45 Rule 1 of the CPR and Section 80 of the Civil Procedure Act**, the applicant submits that there must be discovery of a new and important matter, that despite due diligence was not within the applicants knowledge at the time the decree was passed. In particular, it is submitted that the dates of the subject accident, was an error that was eventually corrected by the court, upon application but after delivery of the judgment, and thus, as a result, this court has been urged that, such error is sufficient reason to persuade this court to exercise its residue jurisdiction to review its judgment.

## 12. Analysis and determination

In the judgment delivered on the 13/12/2018, several reasons are stated, as the basis of the decision to set aside the trial court's ruling dated 31/8/2016 directing the suit to be heard on merit. These are ably tabulated by the appellant in its submissions and stated in the judgment at paragraphs 17, 18 and 19.

13. That is to say, the court based its decision, not only on the matter of the dates of the accident solely but also on other matters that arose from the pleadings and legal imperatives that underpin the matter of striking out suits summarily, the constitutional principles of fair hearing, and the hierarchy of courts and their jurisdiction.

14. The application is premised on the provisions of **Order 45 (1) CPR**, basically on discovery of new and important or evidence which after due exercise was not within its knowledge, or could not be produced by him at the time when the decree was passed.

15. I acknowledge that the error or mistake in the date of the accident was rectified by an order of the court, long after delivery of the judgment. If my judgment was based on that error alone, I would perhaps be persuaded to review and vary my judgment, but only to the extent of varying the date, and no other. That in my view would not touch on the other reasons for my decision – see above, paragraph 17-19 of my judgement.

16. As held in the case **National Bank of Kenya Ltd Vs. Ndungu Njau (Supra)**, for an order of review to be allowed, it cannot be a ground that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion, and that misconstruing a statute or other provision of law cannot be a ground for review. If that may be so, the appropriate remedy would lie in an appeal, not a review application.

17. I am not persuaded that the application meets the threshold under **Order 45 (1) (b)** of discovery of new and important matter. At all material times prior to the case and all through to the hearing, the applicant had knowledge of the date of the accident, subject of the ruling. It cannot state that the said date was a new discovery. It simply failed to exercise due diligence.

18. Judgment in the case, HCCC NO. 299 of 2004 was delivered on the 8/4/2011. Had the applicant exercised due diligence it would have discovered the error soon thereafter. The delay in approaching the court for correction by application dated 8/4/2019 cannot be said to have been reasonable – order 45 rule (1) (d). It was not made without undue delay.

19. In my considered opinion, I find no new evidence that was not within the applicant's knowledge or reach to persuade me to review my judgment. In the case **Francis Origo & another Vs. Jacob Kimali Nungala (Supra)** the court of Appeal dismissed the application for review as the applicants did not show that they had made discovery of new and important matter or evidence, and rendered that

*“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal----”*

20. The same position was held earlier in the case **Abasi Belinda Vs. Fredrick Kagwana and another (1963) E.A. 557**

Consequently, I find no good or sufficient cause for the review of the judgment dated the 13/12/2018 and reiterate the holding in **Yaya Towers Ltd Vs. Trade Bank Ltd (in liquidation) C.A. No. 35 of 2000**, that

*“a plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of----- success, unless the defendant can demonstrate shortly and conclusively that the claim is bound to fail”.*

21. The upshot is that the application by Geminia Insurance Company Ltd dated the 20/6/2019 is devoid of merit, and is dismissed with costs to the appellant.

**Delivered, Signed and Dated electronically at Nairobi this 13<sup>th</sup> Day of May, 2020.**

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**J.N. MULWA**

**HIGH COURT JUDGE.**