REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 245 OF 2012

1. FRANCIS MGHANGA

2. AGNESS MGHOI MGHANGA.....APPEALLANTS

VERSUS

1. JOSEPH GAKUNGU

2. JOSEPHAT MUIGAI MBURU.....RESPONDENTS

J U D G M E N T

1. This appeal challenges the decision of the trial court dated 11/5/2019 in which the court dismissed an application seeking orders of review of the courts orders of 7/3/2012 by which the court dismissed the Appellants suit for non-attendance by the plaintiff.

2. The Application dated 15/3/2012 even though expressed to have been brought pursuant to Section 3, 3A and 63(e) was, strictly speaking, one seeking review having sought the specific order for review and also brought pursuant to Section 80 and Order 45 Rule 1 & 2 of the Rules.

3. The reasons advanced to premise the application were that the trial court misconceived the plaintiff's failure to attend court as evidence of failure of interest in pursuing the case rather than the fact that counsel had advised him not to attend.

4. The application then sought to discount the reasons advanced to court on the date the suit was dismissed with an assertion that the advocate who attended court was not privy to the fact that the appellant had been advised not to attend court by counsel, with a wrap up that the Appellant was always willing to prosecute his case. Those very facts were reiterated in the Affidavit of the Applicant sworn and filed in support of the application which reitered that the dismissal of the suit was out of misconception of his lack of interest in the suit but with an introduction of a new fact that the advocates offices had been burned down and all his documents were destroyed in the fire and that he was in the process of getting other documents hence counsel advised him not to attend because the counsel had another case to attend to in Kitui Law Courts'.

5. The Application was opposed by the Respondent who filed a Replying Affidavit sworn by counsel which asserted that the reasons advanced in the Application are the same reasons the court had been given on the date the suit was dismissed. He asserted that the application for adjournment was properly refused and when the matter was called out a second time there was a second application for an adjournment this time round alleging that the advocate's offices had been razed by fire but that the plaintiff was aware of the court date but did not attend court. The counsel then supported the decision to dismiss the suit for having been properly taken by the court taking into account all it was bond to take into account including age of the case and therefore there was no basis to interfere with the dismissal order.

6. The matter before the trial court was canvassed by submissions and the Appellants submissions are at page 28 of the Record of Appeal while these by the Respondent are at pages 35 – 37. In those submissions both sides proceeded from the stand-poitthat the application for review was on the grounds of a new and important matter not within the knowledge of the advocate who held the Appellant's brief. For the Appellant, it was contended that the reason the plaintiff did not attend court was a new and important matter that invited the courts discretion on review it being added that those facts were not within the knowledge of the counsel who held brief.

7. In the submissions, the Appellant cited and reproduced to court the provisions of Section 80 and Order 45 Rule 1 & 2 ***in extension*** then cited to court the decision in ***Invesco Assurance Co. Ltd vs Bodal Okasiba [2006] eKLR*** on what constitutes a new and important matter of evidence.

5. For the Respondent the issue was narrowed down to the ground of discovery of new and important matter of evidence and it was then submitted that the facts availed do not reveal any new and important matter of evidence which could not be availed due diligence notwithstanding. The decision in ***Mulembe Farm Ltd vs John Masika*** was then cited on the threshold of discovery of new and important matter of evidence discovered after the suit was dismissed.

6. On error apparent on the face of the record and refusal to grant an adjournment, there was submission made that an adjournment is at the discretion of the court and the same was properly considered and refused hence that cannot be seen as an error apparent on the face of the record. On those grounds the Respondent urged that the application be dismissed for want of merits. In that the pre-requisites for an order on review had not been met.

7. After the court considered the submissions and papers filed by parties, the court in a reserved judgement dismissed the application on grounds expressed as follows:-

> **"I find that the explanation by Plaintiff is an afterthought and it rejected. The fire is alleged to have occurred sometimes around February 2010. The hearing date in this suit was taken exparte by Plaintiffs advocates on 23/11/11. The matter came up for hearing on 7/3/12 which was two years from the date of the alleged fire. Plaintiff has not told court what effort he made in a period of two years to reconstruct his file if it is true it was destroyed.**
>
> **And though he claims to have been able to get some document which his advocate said were not adequate the same were not attached to his affidavit.**
>
> **From the foregoing, I find that the Plaintiff has not laid evidence upon which court can exercise its discretion in their favour".**

8. That is the decision sought to be impugned in this Appeal. Being a first appeal the court is duty bound and mandated to re-appraise and re-examine the entire record and come to own conclusions.

9. In undertaking that mandate, I am reminded that to grant an order on review is essentially a discretionary matter upon the court. When an appellate court would interfere with a trial court's decision made pursuant to exercise of discretion is now well settled.[1]

10. In this matter looking at the record at trial, there was to be begin with no discovery of new and important matter of evidence disclosed. Whether the fact of lost documents or otherwise that was a matter within the Appellant knowledge well before the date, in fact two years before the material date. For an applicant to succeed on the ground of discovery of a new and important matter of evidence the threshold is that the discovery must be of the kind he could not have accessed due diligence notwithstanding[2]. The fact that the reason advanced for review is the same reason used to grand the application for adjournment hopelessly bound the application to failure.

11. But even, then parties are expected to be candid and make adequate and full disclosure so as not to appear evasive of contradictory. On the 7/3/2012 Mr. Kimani addressed the court as follows:

> **"The plaintiff were in the office on 5/3/2012. They are aware of today's date. I do not know why they are absent. I ask for an adjournment because this is a fatal case".**

12. Having so said, could it be expected to come from the same party that he was advised not to attend court. That Mr. Kimani was not privity to that fact is not a matter for the court to investigate. When counsel appears in court addresses the court and says he is holding a brief, as an officer of the court the court believes him and the court has no business to imagine that he is addressing the court from the view-point of ignorance or lack of facts.

13. In totality, there being no error disclosed in the manner the trial court handled the application for review and there having been no basis for review, I do find that this appeal lack merit and the same is thus dismissed with costs.

Dated, Signed and delivered at Nairobi this 1st day of July, 2019.

P.J.O. OTIENO

JUDGE

---

[1] Mbogo Vs Shah [1968] EZ 93

[2] Pancras T. Swai Vs Kenya Breweries ltd [2014] eKLR