



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 394 OF 2017**

**FLORENCE KERUBO BOSIRE.....APPELLANT**

**- V E R S U S -**

**RAPHAEL CHASINA.....1<sup>ST</sup> RESPONDENT**

**HOT SHOT INVESTMENTS LIMITED.....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the ruling of Hon. Ms. I. Gichobi, Senior Resident Magistrate***

***at Nairobi in CMCC No. 516 of 2016 delivered on 21<sup>st</sup> July 2017))***

**JUDGEMENT**

1) Florence Kerubo Bosire, the appellant herein, filed a compensatory suit against Raphael Chasina and Hot Shot Investments Ltd, the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein respectively, for the injuries she sustained as a fare paying passenger in a road traffic accident involving motor vehicle registration no. KBL 703W along James Gichuru Road on 7.12.2011.

2) The appellant successfully obtained judgement in default of appearance against the respondents. The suit therefore proceeded for hearing as a formal proof before Hon. Gichobi, learned Senior Resident Magistrate.

3) In the end, the Senior Resident Magistrate proceeded to dismiss the appellant's suit for the reason that the same was statute barred. Being aggrieved, the appellant applied for the dismissal order to be set aside by way of review. The application for review was heard and dismissed.

4) The appellant was dissatisfied with the dismissal order hence this appeal. On appeal the appellant put forward the following grounds:

***i. THAT the learned magistrate erred in law and in fact in failing to appreciate that she had dismissed the matter for being statute barred and yet leave to file suit out of time had been granted in Miscellaneous Civil Suit no. 251 of 2015 on 2<sup>nd</sup> April 2015 by Hon. M. Chesang, RM.***

***ii. THAT the learned magistrate erred in law and in fact in failing to find that there was error on the face of the record in her judgement since she had dismissed the suit for being statute barred and yet it was vides the application for review demonstrated that the appellant had sought and been granted leave to file suit out of time on 2<sup>nd</sup> April 2015, prior to filing of the suit.***

***iii. THAT further the learned magistrate erred in law and in fact in failing to appreciate that she had discretion under Order 45 Rule 1 to review her judgment if any sufficient reason was shown.***

***iv. THAT the learned magistrate erred in law and fact by failing to find that sufficient reason for review of her judgment had been shown by the appellant.***

***v. THAT the learned magistrate erred in law and fact by failing to make a ruling on whether or not sufficient reason had been shown to warrant review of her judgment dismissing the matter for being statute barred.***

***vi. THAT the learned magistrate erred in law and fact by failing to excuse in the interest of justice and fairness, the inadvertent error or omission that led to the leaving out from the court order dated 2<sup>nd</sup> April 2015 from the appellant's list of documents and***

*failing to appreciate the legal principle that mistakes of an advocate ought not to be visited on the client.*

*vii. THAT the learned magistrate erred in law and fact in failing to consider the grounds adduced in support of the application for review as well as the supporting affidavit sworn by the appellant in support of the application.*

*viii. THAT the learned magistrate erred in law and fact in failing to have sufficient regard to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Article 159 of Constitution of Kenya, 2010.*

5) When the appeal came up for hearing this court gave directions to the effect that the appeal be disposed of by written submissions.

I have re-evaluated the arguments that were made before the trial court and the written submissions filed in support of the appeal. Though the appellant put forward a total of eight grounds of appeal, it is apparent that the main ground which commends itself for consideration is the question as to whether or not the application for review was properly dismissed.

6) It is the submission of the appellant that the trial magistrate ought to have allowed the application for review because it was self-evident that there was an apparent error on the face of the court record. It was pointed out that the appellant had pleaded in paragraph 9 of the plaint that the plaintiff was granted leave to file the suit out of time vide C.M.C.C no. 251 of 2015.

7) It is unfortunate that the respondents failed to file their submissions in response to the appeal. In her ruling delivered on 31.3.2017, Hon. Gichobi proceeded to dismiss the appellant's suit on the basis that the same was statute barred because the appellant had not tendered evidence showing that leave to file an action out of time had been obtained prior to the filing of suit.

8) The learned Senior Resident Magistrate stated that the aforesaid information or evidence was within the appellant's knowledge hence it could not be said that to be a discovery of a new and important matter or evidence. The learned Senior Resident Magistrate also stated that there was no error apparent on the face of record.

9) The record shows that the appellant had argued before the trial magistrate that due to inadvertent mistake or error, a copy of the order of leave to file an action out of time was not annexed to the appellant's bundle of documents while filing the suit.

10) The appellant further pointed out that the mistake was that of an advocate and therefore the same ought not be visited upon the appellant.

11) The question is whether or not the appellant's motion met the requisite conditions for an application for review. The appellant expressly stated that there was an error apparent on the face of record. She went ahead to pinpoint that her advocate had failed to file the order granting her leave to file an action out of time. The trial magistrate was not convinced by this argument.

12) With respect, I think the learned Senior Resident Magistrate misapprehended the point. The record is clear that the appellant obtained judgment in default of appearance, therefore there was not contest as to the averment in paragraph 9 of the plaint which is to the effect that leave to file an action out of time had been obtained. It was not a contested issue at the hearing of the suit. Had it been a contested issue the appellant's attention could be drawn and probably further evidence could have been supplied to establish that fact.

13) I am persuaded by the appellant's argument that the appellant had presented sufficient reasons to support the application for review.

14) In the end, this appeal is found to be with merit. It is allowed. Consequently, the order dismissing the motion dated 19.4.2017 is set aside and is substituted with an order allowing the motion with no order as to costs.

15) For the avoidance of doubt, judgement is entered in favour of the appellant and against the respondent as proposed by the learned Senior Resident Magistrate.

**Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of November, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondents