



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO 116 OF 2011
GEORGE KAHURA.....APPELLANT
VERSUS
BERNARD KAMAU NJERI.....RESPONDENT

**(An Appeal arising out of the Ruling of J.K Ngeno SPM delivered on 21st July 2011
in Kangundo Senior Principal Magistrate's Court Civil Case No. 85 of 2008)**

JUDGMENT

The Appellant through a Memorandum of Appeal filed in Court dated 2nd August 2011 has appealed against the ruling of the Honourable Senior Principal Magistrate J.K. Ngeno, delivered on 21st July 2011 in **Kangundo Senior Principal Magistrate's Court Civil Case No. 85 of 2008** . The grounds of appeal are as follows:

1. The learned magistrate erred in law and in fact in narrowly construing the application of the provisions of Order 45 of the Civil Procedure Rules 2010.
2. The learned magistrate erred in law and in fact in failing to take into account the interest of justice by affording the appellant an opportunity to be heard on merit at the main hearing.
3. The learned magistrate erred in law and in fact in failing to take into consideration the supporting evidence of the appellant.
4. The learned magistrate erred in law and in fact in failing to appreciate that the plaintiff's name was not appearing in the police records and the hospital records.
5. The learned magistrate erred in law and in fact in failing to appreciate that the police abstract, P3 form and treatment notes adduced in evidence at the hearing were fraudulent documents
6. The learned magistrate erred in law and in fact in finding that the appellant's application had failed the test for review as outlined in Order 45 Rule 3.

The Appellant prays for orders that this appeal be allowed and the ruling of the learned principal magistrate be set aside. Further, that the judgment/decree entered on 19th May 2011 be reviewed.

The Facts

The brief facts of this Appeal are that the Respondent who was the original Plaintiff in the trial court filed a suit against the Appellant, the original Defendant, by way of a Plaint dated 30th May 2008. He sought damages and costs as a result of a road accident alleged to have occurred on 4th March 2008 along Nairobi – Kangundo road.

During the hearing of the suit in the trial court, the Respondent testified that he was a fare paying passenger on the Appellant's motor vehicle registration number KAS 885C, and he also submitted in evidence treatment notes, a P3 form and a police abstract issued on 28th April 2008. The trial court entered judgment on 19th May 2011 in favour of the Respondent as against the Appellant in the sum of Kshs. 103,200/= as total damages.

The Appellant subsequently moved the trial court by way of a Notice of Motion dated 20th June 2011 under the provisions of Section 3,3A, 80 and 63 (e) of the Civil Procedure Act and Order 22 Rule 22 , Order 38 Rules 1 and 2, Order 45 Rules 1, 2 and 5, and Order 51 Rules 1 and 3 of the Civil Procedure Rules. He *inter alia* sought the following orders:

1. That pending the hearing and determination of the application, there be an order of stay of execution on the judgment/decree entered against the defendant/applicant on 19th May 2011.
2. That the court be pleased to review and/or vacate the judgment/decree entered against the defendant/applicant on the 19th May 2011.
3. That the case be re-opened and be re-heard.

The Appellant's grounds for the application were that investigations carried out at Kangundo police station revealed new information, which was that the Respondent was not amongst those involved in the road accident which was the subject matter of the suit. The Respondent opposed the said application in a replying affidavit filed in the trial court dated 24th June 2011, wherein he reiterated that he was injured in the said accident as confirmed by the investigating officer who gave evidence at the trial, and that the Appellant never objected to the production of the P3 form and police abstract at the hearing in the trial court.

The learned magistrate in his ruling on the said application delivered on 21st July 2011 declined to grant the application for review, for reasons that the Appellants did not particularize the fraud that they were raising. It is this ruling that the Appellant has now appealed against.

The Issues and Determination

The issues for determination in this appeal are firstly, whether the judgment in the trial court should be reviewed and/or vacated, and if so, secondly whether the hearing in the trial court should be re-opened. This appeal was canvassed by way of written submissions. The Appellant in submissions dated 18th September 2015 argued that new and important information was not within his knowledge at the time of judgment was entered, and could not have been produced by the Appellant at the time when the decree and/or judgment was passed with the exercise of due diligence. Further, that this was because the said information had just been provided to him by the in-charge of Kangundo police station.

The Appellant contended that the investigations having revealed that the Respondent was not among the injured persons in the accident, he was not entitled to benefit from an act tainted with illegality. The Appellant relied on the decisions in **Bookpoint Limited vs Guilder International Bank Limited & Another, [2010] e KLR** and **Kavindu & Another vs Mbaya & Another, (1974) e KLR** in this regard.

The Respondents filed submissions dated 15th July 2015, in which they argued that the Appellant never

appealed the judgment of the lower court but instead chose to apply for review, and that there was nothing to review as the judgment of the lower court was elaborative, and the criteria for review as outlined in Order 45 of the Civil Procedure Rules 2010 was not met.

The Respondent further submitted that the Appellant never called any witness in defence despite the case being adjourned severally to enable them do so, and that he subsequently closed the defence case on his own motion leaving the Respondent's evidence uncontroverted. The Respondent contended that he proved during the hearing of the case that he was a genuine claimant and victim of the accident in question, and that it was incumbent upon the Appellant to call witnesses to prove otherwise which he never did. The Respondent relied on the authority of **Dominic Githae vs Susan Kanyi, Machakos HCCA No. 130 of 2008.**

The applicable law as regards this appeal is that on review and/or setting aside of a judgment or decree, which is found in section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be reviewed and/or set aside as follows:

“ (1) 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.”

The Appellant argued that he had discovered new facts since the judgment in the trial court was delivered, that showed that the Respondent was not a victim of the accident. I have perused the record of the trial court and the letter the Appellant relied on dated 11th June 2011 from the base commander of Kangundo Police station, which was annexure “JG3” to the Appellant's affidavit in support of his application in the trial court. The said affidavit was sworn by Judy Gitaari on 20th June 2011. The said letter states that the Respondent was not one of the persons involved in the accident reported in OB 6 of 4/3/2008, and that the police abstracts and p3 form issued to him was without basis.

The material time under Order 45 Rule 1 of the Civil Procedure Rules with regard to the existence of the new evidence that will necessitate a review of a judgment or decree is the time when the decree was passed or the order made, but that such evidence was not within a person's knowledge or could not be produced by him. The letter produced by the Appellant is clearly dated 20th June 2011, after the

judgment had been entered in the trial court on 19th May 2011. Therefore this knowledge has not been shown to have been in existence at the time of the said judgement, but was on the contrary procured after delivery of the same.

In addition, the Court of Appeal in its decision in **Chrispinus Lawrence Wanyama v Public Service Commission of Kenya & Another (2007) eKLR** had occasion to comment on when the ground of new evidence can apply to warrant the review of a judgment. In that appeal the appellant's main ground in his application for review was that it had since come to his knowledge that the power to delegate the powers of the authorized officer only came to effect by an amendment to the law, which was long after the applicant had been dismissed after the letter initiating the dismissal was signed by an unauthorized officer.

The Court of Appeal in considering this ground which the Appellant claimed was new evidence held as follows:

“Can it be said that the appellant had discovered new and important matter which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when he filed judicial review proceedings? We do not think so. A subsequent event or even altering the law even with retrospective effect is not a sufficient ground to warrant a review. In concluding his ruling on review application the learned Judge said:-

“There are no facts presented to the Court to show diligence on the part of the applicant to lay his finger on the alleged matter in question and to produce it at the appropriate time. There is no evidence on record to show what might have prevented the applicant from making a timeous discovery of the alleged new matter. The applicant seems to be arguing that a new rule changed the scenario under which the order sought to be reviewed was made; and he seems to be saying that the court reached an erroneous decision on the merits. These are not matters which can be canvassed on an application of a review under the cited rule.”

We are in entire agreement with that conclusion by the learned Judge.”

I am guided by this decision to also find that the Appellant herein did not provide any evidence in the trial court to show what prevented him from discovering this new evidence, if indeed it was in existence at the time of hearing and giving of judgement by the trial court. I therefore find that the said evidence does not qualify as new evidence within the meaning of Order 45 Rule 1 of the Civil Procedure Rules. The decisions relied upon by the Appellant and Respondent in this regard were also not found to be applicable, as they were not dealing with the review proceedings envisaged by Order 45 Rule 1 of the Civil Procedure Rules.

I however agree with the Appellant that the reason given by the trial magistrate in dismissing the Appellant's application in the trial court was erroneous, as the particularization of fraud allegations is neither required, nor relevant in review proceedings. The Appellant's appeal still nevertheless fails for the reasons given in the foregoing.

The Appellant's appeal herein is accordingly dismissed and the Appellant shall meet the costs of the appeal.

It is so ordered.

DATED AT MACHAKOS THIS 13TH DAY OF OCTOBER 2015.

P. NYAMWEYA

JUDGE

