REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. E021 OF 2024

JOHN KAMWAGA MUNYARARE……APPLICANT

-VERSUS-

SAMUEL MUCHAI MAINA ……RESPONDENT

RULING

1. **John Kamwaga Munyarare,** the Applicant, approached this court through a Notice of Motion dated 29th April, 2024 seeking orders thus;
    1) ***Spent.***
    2) ***That pending hearing of this application inter-parties, the Honourable Court be pleased to review and/or set aside the Judgment delivered on 11th April, 2024 and make consideration of the Applicant's submissions that were erroneously omitted.***
    3) ***That costs of this application be provided for.***
2. The application is premised on grounds that the Applicant was never granted a right to be heard as his submissions were not considered despite being filed and uploaded on the CTS. That the judgment is unenforceable as it does not state against which Defendant in the Lower Court Suit the same is to be executed; that the 2nd Defendant in the Lower Court

Suit was omitted in the appeal hence the entire proceedings are marred with irregularities which calls for granting of orders sought in the interest of justice.

3. The application is supported by an affidavit deposed by the Applicant John Kamwaga Munyarare who avers that he filed Nyahururu Chief Magistrate's Court Civil Case No. 179 of 2022 seeking judgment against the Defendants (Respondents) jointly and severally;

(a) Special damages of Kshs.348,000/-.

(b) General damages, interest,

(c) Interest on (a) and (b) above at court rates from the time of filing of suit until payment in full.

4. That after full trial, the trial court gave judgment on 27/03/2022 in the following terms;

a) Interlocutory judgment entered on 25/09/2022 is set aside.

b) Special damages of Kshs.348,000/-.

c) General damages of Kshs.100,000/-.

d) The Plaintiff is entitled to costs and interest of this suit.

5. That it is obvious that the trial court judgment departed from the pleadings evidence.

6. In a response thereto, the Respondent, Samuel Muchai Maina through a replying affidavit deposed that upon the trial court delivering the judgment he appealed and the Applicant was served with the appeal document and

appeared in court. That directions were taken in the presence of his counsel but he did not file submissions nor did she appear in court during the highlighting of submissions. That the High Court relying on submissions he filed reached a determination making orders thus;

a. ***The award on general damages of Kshs.100,000/- is set aside in entirety.***
b. ***The award of special damages of Kshs.348,000/- is upheld.***
c. ***The costs of this appeal is awarded to the Appellant.***

7. That if the Applicant is dissatisfied with the outcome of the appeal, he ought to appeal to the higher court other than seeking the same court to overturn its orders.

8. In a supplementary affidavit the Applicant John Kamwaga Munyarare denies the allegation that the appeal was undefended. That submissions were submitted through the e-filing portal on 27th February, 2024 but it appears they were not downloaded or acknowledged hence judgment delivered without his input and therefore being condemned unheard. That the judgment of the lower court is incapable of being executed.

9. The application was canvassed through written submissions. For avoidance of doubt and demonstration of the arguments filed by the Applicant to dispose off the application dated 29th

April, 2021, I have downloaded the same which form part of the ruling as well as the submissions filed on appeal;

10. ***"REPUBLIC OF KENYA***

IN THE HIGH COURT OF KENYA AT NYANDARUA

HCCA E021 OF 2024

SAMUEL MUCHAI MAINA……APPELLANT/RESPONDENT

-VERSUS-

JOHN KAMWAGA MUNYARARE……RESPONDENT/ APPLICANT

RESPONDENT'S SUBMISSIONS ON THE APPLICATION DATED 29/04/2024

(RECEIVED AT THE REGISTRY ON 14/05/2025)

The Respondent is opposed to the present appeal and wishes to submit as hereunder: -

Background of the dispute

1. The Applicant herein as Plaintiff had filed NYAHURURU CIVIL SUIT NO. E179 OF 2022 JOHN KAMWAGA MUNYARARE V. SAMUEL MUCHAI MAINA and NTSA arising out of a sale agreement dated 16.05.2019 for the sale of motor vehicle registration number KBA 207 F for the agreed consideration of KshS.348,000/-. The Plaintiff paid the whole amount in full vide cheque. This was after the Plaintiff had done the due diligence and a search downloaded from

the 2nd Defendant revealing that indeed the 1st Defendant was the owner thereof. The Plaintiff enjoyed peaceful possession of the said motor vehicle until 2021 when he went to renew his insurance cover where it was revealed that his vehicle could not be insured since another motor vehicle bearing the same registration details had been insured and was advised to conduct a second search with NTSA which revealed that the vehicle was under the Plaintiffs name. The Plaintiff reported the matter to DCI Ol Kalou and the Plaintiffs vehicle was seized and it was discovered that the chassis number had been tampered with. Efforts to resolve the matter with the 1" Defendant proved futile and the Plaintiff filed the civil suit seeking that the court finds the 2nd Defendant liable for fraudulent sale of motor vehicle whose chassis number had been tampered with and the 2nd Defendant's failure to observe strict obligations under the Act in registering and maintaining correct and accurate records of motor vehicles and thus order a refund of the purchase price, interests and costs of completion of the sale agreement as well as costs of the suit.

2. After a full trial the court delivered a judgment which had glaring errors on the face of the same. The Judgment at page 2 paragraph 1 indicates that; the

transfer was done but the defendant never paid for the consideration. The correct position is that the plaintiff paid the whole consideration on execution of the said agreement. On page 2 paragraph 6, the trial court states that; I have perused the file and find out that indeed the Plaintiff sold the subject motor vehicle to the first defendant; it is the 1st Defendant who sold motor vehicle to the Plaintiff. That whole finding is erroneous in comparison to the evidence presented before court. 3. Although the conclusion was correct that the Plaintiff had proved his case on a balance of probability, the facts in the judgment do not match the pleadings and the evidence adduced. The Plaintiff did not

3 suffer pain rather, he suffered damages. There was never interlocutory judgment entered in the suit.

4. However, the award is correct and enforceable although it is not clear whether the same is to be enforced against the which Defendant whether jointly or severally.

The Appeal

5. The Appellant faulted the said judgment through the institution of the present appeal on the grounds laid out in the memorandum of appeal. Basically, the grounds laid out errors on the face of the judgment as opposed to wrong conclusions.

6. The Respondent wrote a letter dated 25.04.2023 to the trial court seeking to get a clarification on the judgment delivered by Hon. Larabi RM on 27.3.2023 specifically requesting the court to look at the judgment versus the pleadings and which Defendant specifically is liable since there were two Defendants.

7. The correct and proper application that would have resolve the issues raised in the memorandum of appeal would have been an application for review before the same court that delivered judgment.

8. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure summarized the circumstances/ conditions under which orders for review may be made to be:

(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

(b) on account of some mistake or error apparent on the face of the record,

(c) 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.

9. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

Section 80. Review

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 IJ Application for review of decree or order.

(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 5 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Conclusion

10. For this court sitting on appeal to make a just determination of the issues raised, it will still need to consult with the trial court for the correction of the glaring errors on the face of the judgment. This being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that

it has neither seen nor heard the witnesses and should make due allowance in this respect.

11. It is the Respondent's submission that this appeal is frivolous and devoid of merit. It is seeking to review the judgment rather than reconsider the same. This Court lacks jurisdiction to correct errors apparent on the face of judgments delivered by the lower courts. Only the same court can correct itself,

12. There is already a request for clarification lodged by the Respondent through the letter herein above referenced and the same is yet to be acted upon. That letter was copied to the Appellant's advocate but the Appellant still went ahead to lodge the current appeal without waiting for the response by the trial court.

13. Certainly, the present appeal is miscalculated, misconstrued and misconceived and the same should be dismissed with costs to the Respondent.

14. At the time of writing the judgment on the present appeal, the Judge made a wrong conclusion that the appeal was unopposed since the Applicant's submissions were not downloaded and placed in the court file. This is what gave rise to the present application seeking to have the judgment reviewed and the Applicant's submissions considered in the interest of justice and fairness.

15. We invite this Honourable Court to go through the comprehensive supporting affidavit sworn by John Kamwaga Munyarare on 29.04,2024 together with these submissions and proceed to review the judgment accordingly.

Most obliged.

DATED at NYAHURURU this 23rd day of February...2024

WANGECHI WANGARE & ASSOCIATES……"

11. ***"REPUBLIC OF KENYA***

IN THE HIGH CORT OF KENYA AT NYANDARUA

CIVIL APPEAL NO. 89 OF 2023

FORMERLY NYAHURURU HCCA 2023

SAMUEL MUCHAI MAINA……..APPELLANT

-VERSUS-

JOHN KAMWAGA MUNYARARE……RESPONDENT

RESPONDENT'S SUBMISSIONS OF THE APPEAL

May it please your Lordship,

The Respondent is opposed to the present appeal and wishes to submit as hereunder: -

Background of the dispute

1. The Respondent herein had filed NYAHURURU CIVIL SUIT NO. E179 OF 2022 JOHN KAMWAGA MUNYARARE V. SAMUEL MUCHAI MAINA and NTSA arising out of a sale agreement dated 16.05.2019 for the sale of

motor vehicle registration number KBA 207F for the agreed consideration of Kshs.348,000/-. The Plaintiff paid the whole amount in full vide cheque. This was after the Plaintiff had done the due diligence and a search downloaded from the 2nd Defendant revealing that indeed the 1st Defendant was the owner thereof. The Plaintiff enjoyed peaceful possession of the said motor vehicle until 2021 when he went to renew his insurance cover where it was revealed that his z vehicle could not be insured since another motor vehicle bearing the same registration details had been insured and was advised to conduct a second search with NTSA which revealed that the vehicle was under the Plaintiff's name. The Plaintiff reported the matter to DCI Ol Kalou and the Plaintiff's vehicle was seized and it was discovered that the chassis number had been tampered with. Efforts to resolve the matter with the 1st Defendant proved futile and the Plaintiff filed the civil suit seeking that the court finds the 2nd Defendant liable for fraudulent sale of motor vehicle whose chassis number had been tampered with and the 2nd Defendant's failure to observe strict obligations under the Act in registering and maintaining correct and accurate records of motor vehicles and thus order a refund of the purchase

price, interests and costs of completion of the sale agreement as well as costs of the suit.

2. After a full trial the court delivered a judgment which had glaring errors on the face of the same. The Judgment at page 2 paragraph 1 indicates that; the transfer was done but the defendant never paid for the consideration; The correct position is that the plaintiff paid the whole consideration on execution of the said agreement. On page 2 paragraph 6, the trial court states that I have perused the me and find out that indeed the Plaintiff sold the subject motor vehicle to the first defendant. It is the 1 st Defendant who sold the motor vehicle to the Plaintiff. That whole finding is erroneous in comparison to the evidence presented before court.

3. Although the conclusion was correct that the Plaintiff had proved his case on a balance of probability, the facts in the judgment do not match the pleadings and the evidence adduced. The Plaintiff did not suffer pain rather, he suffered damages. There was never interlocutory judgment entered in the suit.

4. However, the award is correct and enforceable although it is not clear whether the same is to be enforced against the which Defendant whether jointly or severally.

<u>The Appeal</u>

5. The Appellant now wishes to fault the said judgment through the institution of the present O appeal on the grounds laid out in the memorandum of appeal. Basically, the grounds laid out errors on the face of the judgment as opposed to wrong conclusions.

6. The Respondent wrote a letter dated 25.04.2023 to the trial court seeking to get a clarification on the judgment delivered by Hon Larabi RM on 27.3.2023 specifically requesting the court to look at the judgment versus the pleadings and which Defendant specifically is liable since there were two Defendants.

7. The correct and proper application that would have resolve the issues raised in the memorandum of appeal would have been an application for review before the same court that delivered judgment.

8. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure summarized the circumstances/ conditions under which orders for review may be made to be:

(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

(b) on account of some mistake or error apparent on the face of the record,

(c) 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.

9. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

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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.] Application for review of decree or order.

(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, z 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review;

Conclusion

10. For this court sitting on appeal to make a just determination of the issues raised, it will still need to consult with the trial court for the correction of the glaring errors on face of the judgment. This being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court

below and that an appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

11. It is the Respondent's submission that this appeal is frivolous and devoid of merit. It is seeking to review the judgment rather than reconsider the same- This Court lacks o jurisdiction to correct errors apparent on the face of judgments delivered by the lower courts. Only the same court can correct itself.

12. There is already a request for clarification lodged by the Respondent through the letter z herein above referenced and the same is yet to be acted upon. That letter was copied to the Appellant's advocate but the Appellant still went ahead to lodge the current appeal without waiting for the response by the trial court.

13. Certainly, the present appeal is miscalculated, misconstrued and misconceived and the same should be dismissed with costs to the Respondent.

Most obliged.

DATED at NYAHURURU this 23rd .....day of February....2024

WANGECHI WANGARE & ASSOCIATES

ADVOCATES FOR THE RESPONDENT ……”

12. On his part the Respondent submitted that the Applicant (Respondent) did not file submissions despite being in court and taking direction on filing submissions. That the Applicant wants the court to make another determination of the same subject matter having failed to file submissions and noting that the appeal was allowed.

13. Further, that Section 80 of the Civil Procedure Act which outlines the circumstantial condition under which review apply do not arise to this current appeal.

14. The submissions above by the Applicant herein are a replica of what was purported to have been filed as submissions at the appellate stage, which is confusing and leaving a query whether the submissions were intended to have been filed and there having been an omission.

15. That notwithstanding, this court has been asked to review and set aside the judgment delivered on 11/04/2024 so as to consider submissions omitted. It is urged that submissions were erroneously omitted.

16. Notably, the Respondent was granted the opportunity to file submissions, twice. Which were however not forthcoming hence the Honourable Judge seized of the matter proceeded to draft the judgment that was delivered. This therefore brings us to the question as to under what

circumstances a court can review a judgment of a court of concurrent jurisdiction?

17. This can be done under certain circumstances. Such power can be exercised to prevent abuse of process; to consider a new matter that may have been discovered; and, or correct errors apparent on record and for any other sufficient cause.

18. **Section 80 of the Civil Procedure Act** which is in respect of Review provides 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.***

19. **Order 45 Rule 1 of the Civil Procedure Rules** provides that an ***application for review is restricted to:***

> ***1. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced at the time when the decree was passed or order made;***

2. ***On account of some mistake or error apparent on the face of the record;***
3. ***For any other sufficient reason; and,***
4. ***The application must then be filed without un-reasonable delay.***

There are contradictions in submissions filed by the Applicant (Appellant) but what can be discerned is the argument that the trial Judge made a wrong conclusion having not downloaded submissions placed on the file which this court should review in the interest of justice.

20. It is not argued that there has been discovery of new evidence which was not produced before court or there was an error apparent on the face of the record warranting review; and, as to whether there is other sufficient evidence which is not emphasized. A first Appellate court is required to reconsider evidence adduced at trial, address all issues of both fact and law and come to its own conclusion.

21. Submissions are arguments or statements made to court by advocates or parties that support evidence adduced. However, they are not themselves evidence. The evidence adduced would ordinarily comprise of facts/documents/testimonies and other materials presented to the court which reaches a reasoned decision. Needless to add that the evidence must be admissible.

22. From the foregoing, if indeed the Applicant believes that the court did not base its decision on evidence adduced

which was reinforced by submissions, the proper court to determine the issue should have been the appellate court as this court being a court of concurrent jurisdiction cannot re-write its decision.

23. In the upshot, the application fails and is accordingly dismissed with costs to the Respondent.

24. It is so ordered.

Dated, signed and delivered virtually this 21st day of October, 2025.

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L.N. MUTENDE

JUDGE