Nguyo v Kimani (Civil Appeal E050 of 2024)
[2026] KEHC 1110 (KLR) (6 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1110 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E050 OF 2024

MA ODERO, J

FEBRUARY 6, 2026

BETWEEN

ESTHER WAMUYU NGUYO ..... APPELLANT

AND

JAMES MBURU KIMANI ..... RESPONDENT

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated 14th August 2024 by which the Appellant Esther Wamuyu Nguyo seeks the following orders:-

> "(1) That the appeal be allowed.
>
> (2) That the ruling of the Honourable Court delivered on 24th July 2024 be varied.
>
> (3) That the claim be reinstated and judgment be entered in favour of the Appellant as against the respondent.
>
> (4) That the Respondent does pay the costs of this Appeal and the costs in the lower court.
>
> (5) That such further relief as may appear just to the Honourable Court [be granted]

2. The Respondent James Mburu Kimani opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 12th September 2025 whilst the Respondents relied upon their written submissions dated 13th August 2025.

Background

3. The Appellant instituted a suit in the Nyeri Small Claims Court being SCCC No. E121 of 2023. In that suit the Appellant claimed damages in the amount of Kshs. 1,072,529 for damages occasioned to her Motor vehicle Registration KCZ 669 D as the result of an accident that happened on 2nd August 2020 at Giraffe Junction along the Mweiga - Nyahururu Road.

4. The Appellant claimed that the Respondents motor vehicle Registration KCX 091X was being driven negligently thus causing the accident to occur.

5. The Respondent denied the claim totally.

6. Vide a judgment delivered on 9th April 2024 the trial court found that the Appellant had failed to prove on a balance of probability that Mua Insurance Kenya Limited were the insurers of her vehicle and were trading as Saham Insurance Ltd at the material time.

7. Following that judgment the Appellant filed a Notice of Motion Application dated 29th April 2024 seeking a review of the judgment delivered on 9th April 2024.

8. In a ruling delivered on 29th July 2024, Hon. E GAITHUMA Adjudicator dismissed the application for review. Being aggrieved by this ruling the Appellant filed this Memorandum of Appeal which is premised upon the following grounds:-

> " a) That the Honourable Learned adjudicator erred in law in applying the wrong principles of law.
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> b) That the Honourable Learned Adjudicator erred in law and in failing to appreciate and properly evaluate the grounds on which the Application was premised.
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> c) That the Honourable Learned adjudicator erred in alw in failing to take judicial notice of the Gazette Notice Number 5211.
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> d) That the Honourable Learned adjudicator erred in law in failing to considering that Saham Assurance Company Kenya Limited transferred its general insurance business to MUA Insurance (Kenya) Limtied effect 1st January 2020.
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> e) That the Honourable Learned adjudicator erred in law in failing to consider lawful evidence before her contrary to the *Evidence Act* and precedents.
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> e) That the Honourable Learned adjudicator erred in law in dismissing the Application dated 29th April, 2024.
>
> f) That the learned adjudicator misdirected herself by failing to consider the submissions by the Appellant while arriving at the ruling."

Analysis And Determination

9. I have carefully considered this appeal, the record of proceedings before the Small Claims Court as well as the written submissions filed by both parties.

10. This is a first appeal and in that regard, I take cognizance of the Decision by the Court of Appeal in the case of in Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR) where it was stated that:

> 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 from a trial by the High Court is by way of 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 allowances in this respect. See Sell and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V Brown [1970] E.AL. As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters -vs- Sunday Post Ltd [1958] EA 424. In its own words:-
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> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide...."

11. In the application dated 29th April 2024 the Appellant had sought for review of the judgment delivered on 9th April 2024. The key question therefore is whether the application met the threshold required for review.

12. The courts powers of Review are set out in Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules 2010. Section 80 provides as follows:-

> " Any person who considers himself aggrieved –
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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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

13. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides 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 of 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 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

14. From the above provisions, it is clear that Section 80 of the Civil Procedure Act gives the Court the power of Review while Order 45 of the Civil Procedure Rules 2010, sets out the rules applicable thereto.

    The rules limit the grounds for Review as follows:-

    a. The 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.

    b. On account of some mistake or error apparent on the face of the record.

    c. Any other sufficient reason and that the Application has to be made without unreasonable delay.

15. Regarding the discovery of new and important matter or evidence, the Court of Appeal in Rose Kaiza v Angelo Mpanju Kaiza [2009] KECA 422 (KLR), held that:-

> " Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the material placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it's not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

16. In her application for review of the judgment the Applicant claimed that the accident had been reported to MUA Insurance (Kenya) Limited which proceeded and repaired her vehicle. That MUA Insurance had obtained the insurance business of Saham Insurance Limited on 1st January 2020 via the gazette notice dated 28th May 2021. That upon gazettement a matter is deemed to be in the public domain effective from the date of gazettement.

17. The Appellant therefore submitted that she had proved that the doctrine of subrogation was applicable in the matter as the legal officer from MUA Insurance had given evidence that it had bought the insurance business of Saham.

18. The Respondent on her part countered that review was not a remedy to rectify weaknesses in the claimants case after judgment.

19. The Appellant did not make any claim of an error apparent on the face of the record therefore the court will not consider this ground for review. The Appellant sought review of the judgment on basis of the discovery of new and important evidence i.e the fact that MUA Insurance had taken over the Insurance business of Saham Insurance .

20. In order for this ground for review to apply it must be shown firstly that the evidence in question is 'new' and is relevant to the case.

    Secondly, it must be shown that the evidence in question was not within the knowledge of the Applicant and could not have been reasonably produced at the time the case was being heard.

21. In the case of Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR the Court pronounced itself as Follows:-

> " I am clear in my mind that the reasons offered by the applicant do not qualify to be sufficient reason' within the meaning of the rules cited above nor are they analogous or ejus dem generis to the other reasons stipulated in Order 45 Rule 1. For this holding I rely on Evan Bwire vs Andrew Nginda where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh. The principles which can be culled out from the above noted authorities are:-
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> i .....
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> ii .....
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> iii .....
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> iv .....
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> v .....
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> vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
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> viii .....
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> ix .....
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> x ..... [Own emphasis]

22. It is not in dispute that the accident in question occurred on 2nd August 2020. Based on this accident the Appellant made a claim of Kshs. 1,072,529 from MUA Insurance. The Appellant claimed that MUA Insurance had taken over the Insurance business of Saham Insurance on 1st January 2020 vide the gazette notice dated 28th May 2021.

23. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that

> " 107 (1) Whoever desires any court to give judgment as to any legal right on liability dependent on the existence of facts which he asserts must prove that those facts exist."

24. Similarly Sections 109 and 112 of the same Act provide that:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> "112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

25. It is a principle of insurance law that the insurer can only be subrogated when it has made payment. In Indemnity Insurance Co Of North America & Another -vs- Kenya Arifreight Handling Ltd and Another [2004] EA the Court held that

> " Under Insurance law principles for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former, only then can the insurer step into the shoes of the insured."

26. Therefore an insurer will only step into the shoes of the insured upon proof that it has settled the insured's risk. In this case the statement of claim to Saham Insurance was lodged by the Appellant on 31st July 2023. The gazette dated 28th May 2021 notice had by then been in existence for two (2) years.

27. In the case of Mohamed Abdi, Mahmud -vs- Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR, the Supreme Court of Kenya set out the principles governing the allowance of additional evidence as follows:-

"We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

a. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit; (

e. The evidence must be credible in the sense that it is capable of belief;

f. .....;

g. Where a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. .....

i. .....

j. .....

k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct or litigation together with any prejudice that might arise from the additional evidence on the other."

28. From the above authority the onus lay on the claimant (Appellant) to show that the relevant information was not available at the time the trial was taking place and further that said information could not have been obtained with reasonable diligence. The Appellant failed to establish either of the above.

29. The gazette notice was in the public domain for at least two (2) years before the trial took place. The appellant cannot claim that the same was not within her knowledge. The Appellant has not satisfactorily explained her failure to produce the relevant gazette notice during the

    trial.

30. The Appellant asserts that he adjudicator erred in failing to take judicial notice of the gazette notice in question and cited several cases in support of this contention. By this the appellant is alleging a misapprehension and/or misinterpretation of the law on the part of the adjudicator. This is not a matter for review but rather would amount to a ground for appeal. I do agree with the trial court that the application for review was merely an appeal in disguise. The same had no merit and was correctly dismissed.

31. Finally I find no merit in this appeal. The same is dismissed in its entirety. Costs to be met by the Appellant.

DATED IN NYERI THIS 6 TH DAY OF FEBRUARY 2026.

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MAUREEN A. ODERO

JUDGE