Karanja v Murigi (Civil Appeal 68 of 2019) [2025] KECA 517 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 517 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 68 OF 2019

K M'INOTI, M NGUGI & F TUIYOTT, JJA

MARCH 21, 2025

BETWEEN

DAVID KIHIU KARANJA ..... APPELLANT

AND

PETER MAINA MURIGI ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (J. Sergon J.) dated 2nd November 2018 in CIVIL APPEAL NO.152 OF 2015)

JUDGMENT

1. This appeal arises from proceedings relating to a road traffic accident that occurred on 28th December 1995. A perusal of the record indicates that the respondent filed a claim against the appellant alleging negligence against the appellant, his driver, servant or agent who were in control of motor vehicle registration number KVB 459 along Enterprise Road in Nairobi. The said accident resulted in the respondent suffering personal injuries in respect of which he sought compensation in damages. The record of proceedings before the subordinate court (the trial court) indicates that the parties were heard and judgment entered in favour of the respondent for Kshs. 284, 895 on 26th June 2003.

2. By an application dated 31st October 2011 filed before the trial court, the appellant sought stay of execution and setting aside of the judgment. He contended that he was not the one who had entered appearance and filed a defence in the matter; and that he had not instructed the advocate who appeared for him in the matter. Upon hearing the parties, the trial court (L. Arika, PM) dismissed the application in the ruling dated 29th February 2012.

3. The applicant then filed an application dated 9th May 2012 seeking review of the ruling, setting aside of the judgment entered on 26th June 2003 in favour of the respondent, and seeking to cross-examine the process server. He contended that there was no service of summons and amended plaint on him, that he had sold the accident motor-vehicle to a third party who failed to follow up the transfer at the

Registrar of Motor Vehicles; and that allowing the prayer for review and setting aside of the judgment would give him a chance to enjoin a third party and enable the court to determine the suit.

4. It was his contention before the trial court that there was new and important evidence that was not considered in the ruling that he sought review of; that there was a mistake or error apparent on the record, including issues with service of summons; that the trail court wrongly ruled the application as res judicata; and that the decision was based on technicalities, contrary to the principles of substantive justice.

5. Upon hearing the application, the court dismissed it in the ruling dated 30th April 2014. This is the ruling that was the subject of the appeal to the High Court, which was dismissed in the judgment dated 2nd November 2018, the first appellate court finding that the trial court did not err in dismissing the application for review.

6. In the memorandum of appeal dated 13th February 2019, the appellant raises six grounds of appeal, namely that the learned judge erred in law by: dismissing the appellant's first appeal after rightly faulting the subordinate court's finding that the application for review dated 9th May 2012 was res judicata; failing to critically assess the implication of the subordinate court's finding that the application for review dated 9th May 2012 was res judicata; by dismissing the appeal in the face of overwhelming grounds for allowing the appeal; finding that the appellant had not satisfied the threshold for review at the subordinate court; failing to find that the appellant had shown sufficient cause for review at the subordinate court; and by failing to place due consideration to the appellant's written submissions.

7. The appellant asks this Court to allow his appeal, set aside the judgment of the Hight Court dated 2nd November 2018, substitute it with an order reversing the subordinate court's decision in Nairobi CMCC No. 2647 of 1998 rendered on 30th April 2014, and allow his application for review dated 9th May 2012. He also prays for the costs of the suit.

8. The appellant filed submissions dated 3rd December 2019 which were highlighted by his learned counsel, Mr. Omari, at the hearing hereof. In his submissions, the appellant goes into some detail regarding the proceedings before the subordinate court, culminating in the ruling giving rise to the appeal before the High Court. He submits that the first appellate court failed to consider the important question of his representation before the trial court, which he termed fraudulent; that this was a matter that he can raise on second appeal as the trial court and the first appellate court failed to determine a material issue-whether he had instructed the counsel who purported to act for him in the trial at the subordinate court, and whether the person who testified at the trial court did so on his instructions. We observe that these matters were not the subject of the application for review before the trial court, or the appeal before the High Court.

9. With respect to the judgment of the High Court, he submits that while the Court agreed with him that his application for review before the subordinate court was not res judicata, it erred by proceeding to dismiss his appeal. This error, the appellant submits, constitutes his principal ground of appeal before this Court.

10. The respondent did not appear at the hearing but he did file submissions dated 24th September, 2019 in opposition to the appeal. The respondent notes that after he filed suit for compensation for personal injuries sustained as a result of the road traffic accident with the appellant’s motor vehicle, the appellant filed a defence and the matter proceeded to hearing, with both parties being heard. That it was only after execution against him commenced that the appellant filed the application dated 31st October 2011 seeking stay of execution and to set aside the judgment of 26th June 2003. That the trial court heard

the application and dismissed it in the ruling dated 29th February 2012; and that it also dismissed the application dated 9th May 2012 seeking review and setting aside of the judgment.

11. The respondent submits that the issue of res judicata was properly considered by the superior court; that the appellant has not demonstrated that the superior court erred in dismissing the appeal as all issues raised in the memorandum of appeal were considered by the court, and he prays that the appeal be dismissed with costs.

12. As this is a second appeal, our mandate is limited to consideration of matters of law. In Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR this Court stated:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters, they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse." (Emphasis added).

13. The appeal before the High Court arose from a ruling of the Magistrate's Court declining to review its ruling on an application by the appellant to set aside a judgment rendered against him, after a full trial, on 26th June 2003. The power to review orders of the court is provided under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

14. Under these provisions, the court may review its orders where it is satisfied on either one of three grounds. First, that there is discovery of new and important evidence which was not available at the time of the hearing despite the exercise of due diligence. Such evidence must be credible, material to the case, and not merely confirmatory of what was already presented. (See Francis Origo & Another v Jacob Kumali Mungala [2005] eKLR). A review may also be granted where the court is satisfied that there is a mistake or error apparent on the face of the record. Such an error must be self-evident, not requiring extensive argument to establish. (See Nyamogo & Nyamogo Advocates v Kago [2001] eKLR). Lastly, a court may grant review for any other sufficient reason.

15. In the matter before us, the applicant had sought review of a ruling in which the trial court declined to set aside a judgment against him. In its decision, the first appellate court noted that the appellant impugned the ruling of the trial court on the basis that the court failed to appreciate the principles applicable in an application for review, and for finding that the application was res judicata. The court noted that the trial court had considered and found that there was no discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the appellant.

16. The first appellate court further stated that upon evaluation of the arguments made in support of the application for review and the 'draft defence and the affidavit in response to the application to set aside judgment', it noted that the facts stated in these documents were within the knowledge of the applicant, so the application did not meet the requirements for review. The court further found that though the applicant argued that there was an error apparent on the face of the record, he did not deem it fit to specify the error. The first appellate court therefore found that the trial court correctly found that the appellant had not satisfied the conditions for review.

17. We have considered the issue and we agree with the finding of the first appellate court. The appellant alleged that there was discovery of new and important evidence to warrant review, but as the first appellate court noted, the material he alleged to be new was and had been within his knowledge prior to the application. He did not also indicate the error that was apparent on the face of the record that

would justify a review, and we agree with the finding of the first appellate court that the trial magistrate correctly found that there was no error apparent on the record.

18. The appellant submits that his principal ground of appeal before us relates to the finding of the High Court that the trial court erred in finding that the application for review was res judicata, and yet proceeded to dismiss his appeal. It is indeed true that the court noted, in dismissing the appellant's appeal, that:

> " The other issue which was ably addressed by the parties to this appeal relates to the question of res judicata. It is clear from the record that the learned Senior Principal Magistrate stated that the application was res judicata to the application dated 9.5.2012. Though the respondent denied that the learned Senior Principal Magistrate made such a finding, it is on record that it is one of the grounds which was used to dismiss the motion for review. However, had this been the only ground relied upon by the learned Senior Principal Magistrate to dismiss the motion, I would have allowed the appeal but since other grounds were relied upon, then the appeal must fail."

19. We agree that there were other grounds for dismissing the appellant's application for review. He had not, as the court found, satisfied the requirements for review, and his appeal was without merit on this ground alone.

20. However, in our view, the first appellate court would have acted in error had it found the appeal merited on the issue of res judicata. In its ruling on this point, the trial court observed as follows:

> Nonetheless, I am not convinced that a case has been· made out to warrant this court to issue any order for review. The application is clearly res judicata. The Court in its ruling delivered on 29th February 2012 had already considered the issues raised in the present application. The application falls short of meeting the conditions for granting an order for review. Prayer 3 (order for review) having failed, the prayer for setting aside naturally fails". (Emphasis added).

21. The trial court found that the appellant was attempting, in the application dated 9th May 2012 for review of the ruling dated 29th February 2012, to re-litigate matters that he had raised in the earlier application, hence the Magistrate's Court's finding on res judicata.

22. We accordingly find this appeal to be devoid of merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR