IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & KANTAI, JJ.A.)

KISUMU CIVIL APPEAL NO. 15 OF 2018

BETWEEN

KENYA POWER & LIGHTING & CO. LTD.....APPELLANT

AND

BRIGADIER (RTD) PETER NYANGWESO RAMOYA

(Suing on behalf of JALATH RAMOYA.....1ST RESPONDENT

& EUSEBIUS BARASA RAMOYA..... 2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Busia (Tuiyott, J.) dated 9th December, 2015

in

HCCA No. 45 of 2013)

****

JUDGMENT OF THE COURT

The genesis of this appeal is a suit filed by the Respondents against the appellant in Chief Magistrate's Court at Busia. They claimed the appellant's negligence for the fire that was ignited by the emission of sparks from its transformer on or about 28th February 2011 destroying their crops and fodder. At the conclusion of the case, the Principal Magistrate entered judgment on 10th July 2013 in favour of the respondents and awarded them a sum of **Kshs. 5,534,000** in damages, as was assessed by the Forester and Agricultural officer.

Subsequent to the judgment, the appellant filed a Notice of Motion dated 6th August 2013 under **Order 45 Rule 1** of the **Civil Procedure Rules**. The application besought the trial court to review its judgment based on the fact that the appellant had found new and additional evidence that could not be produced at the time of the hearing. The application was supported by the affidavits of Mitchell Menezes and Caroline Warui but that court found it to be unmeritorious and dismissed it by a ruling delivered on 9th October 2013.

Aggrieved by that ruling, the appellant filed an appeal at the High Court containing seven (7) grounds of appeal. The complaints can be condensed as that the trial Magistrate misdirected himself on the law and facts by dismissing the application for review and failing to appreciate that the investigation report from McLarens Young International contained new and important evidence, which, even after due diligence, was not within the knowledge of the appellant and as such could not be produced at the trial.

That appeal was canvassed by way of written submissions, which were considered by Tuiyott, J. By the judgment dated 9th

December 2015, the learned judge held that the Appellant did not act diligently and that the trial Magistrate was justified in declining the application for review.

Further aggrieved, the appellant filed the instant appeal containing four (4) grounds, which, condensed, are that the learned judge erred in law and in fact by;

> a) Failing to appreciate that investigation report from McLarens Young International which contained new and important evidence, which after due diligence, was not within the knowledge of the appellant and could not be produced during the hearing.
>
> b) Failing to examine the documentary evidence contained in the investigation report and not appreciating that it constituted new and important matters that warranted the grant of the order sought.

When the appeal came up for hearing, learned counsel **Mr. Maganga** was on record for the appellant, while his learned colleague **Mr. Obwatinya** was on record for the 1st respondent.

There was no representation for the 2nd respondent even though the firm of Ashioya & Company Advocates, on record for the 2nd respondent, were served. The appellant and the 1st respondent had filed their written submissions as well as list of authorities.

Mr Maganga submitted that the appellant had sufficiently demonstrated to the High Court that the new evidence could not have been obtained even with due diligence as was deposed by Mitchell Menezes, its advocate and Caroline Warui, its Insurance Officer. The evidence was to the effect that the appellant's insurer, M/s APA Insurance, had instructed M/s Mclarens Young International to conduct investigations into the circumstances under which the fire occurred. The said report was delayed after by a quirk of fate, a fire occurred at the investigator's office. The insurer received the report on 20th May 2013, some five days after the appellant had rested its case and the matter had already been set down for mention for submissions. Therefore, the appellant could only rely on the report by Synergy Risk Solution Limited which had been presented to the court. Since the appellant knew it had no way of producing the report before the judgment was delivered, it opted to make the application for review on 7th August 2013, and as such, counsel contended, there was no delay.

Counsel faulted the learned judge for introducing the concept of "arresting" a judgment which is hardly known in our civil jurisprudence and blaming the appellant for not making use of it. The learned judge restricted himself to only one limb of the review jurisdiction under **Order 45 Rule 3 (1)** thereby failing to take into account the material evidence adduced by the appellant in support of its case. He urged us to allow the appeal with costs to the appellant.

Mr. Obwatinya contended that the appellant voluntarily chose to close its case and did not seek an adjournment to enable it table the delayed report. The appellant closed its case on 15th May 2013, they proceeded to file submissions and take a date for judgment which was delivered on 10th July 2013, but never once mentioned the existence of another report, yet the same was within their knowledge.

More tellingly, by a letter dated 16th May 2013, a day after it closed its defence, the appellant's advocates on record received a copy of the said report. The report bore the date 28th May 2012, clearly an indicator that the said report was at the appellant's disposal long before it closed its case. Moreover, the appellant already had the benefit of producing the report from Synergy Risk Solution Limited, of what value the additional report would be. It was thus clear that the other was an afterthought and the appellant failed to exercise due diligence. The appellant failed to meet the requirements set out in **Order 45** of the **Civil Procedure Rules** and Counsel argued that the appeal was underserving and therefore ought to be dismissed with costs.

We have evaluated the record of the appeal and the submissions by Counsel. We are aware of our duty as the second appellate Court is limited to matters of law. As was expressed by Onyango Otieno, JA. in **KENYA BREWERIES LTD V GODFREY ODOYO [2010] eKLR**;

> ***"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."*** *(See Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125).*

The Supreme Court in **GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 3 OTHERS [2014] eKLR** stated what constitutes matters of law thus;

> ***"From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:***
>
> ***a. the technical element: involving the interpretation of a constitutional or statutory provision;***
>
> ***b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;***

c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

The sole issue for consideration is whether the learned judge correctly applied the provisions of **Order 45** of the **Civil Procedure Rules** in dismissing the appellant's application for review. The aforementioned Order in **Rule 1** 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 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. *Emphasis added*

It is clear that for an applicant to succeed in an application for review, he must show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason.

Significantly, the applicant must make the application for review without unreasonable delay. See **FRANCIS ORIGO & ANOTHER VS JACOB KUMALI MUNGALA [2005]**.

In this appeal, the appellant faults the learned judge for failing to appreciate that the report from Mclarens Young International constituted new evidence and that the same could not be obtained, even with due diligence before the close of its case. The appellant is unimpressed that the learned judge upheld the trial Magistrate's holding on grounds that there was sufficient evidence to prove that the appellant was aware of the existence of the report yet, it failed to inform the court of the same prior to the delivery of judgment. The learned judge was further criticized for holding that the appellant's application for review, which was made a month after the delivery of the judgment, was unreasonably delayed and therefore failed to meet the prerequisite of **Order 45 Rule 1** of the **Civil Procedure Rules**.

From our own scrutiny of the record, we find that the learned judge did not err as he did. The appellant was doubtless aware of the existence of the report from Mclarens Young International from as early as 2012. This is evidenced by the supporting affidavit sworn by the appellant's Insurance Officer. There is no reason why the appellant did not inform the court of the existence of the report and give reasons for the delay for the court to make a decision on the way forward.

What is more, a letter on record dated 16th May 2013, indicated that the appellant's advocate was in possession of the report at least 3 weeks before judgment. Even then, the appellant not only failed to bring this to the attention of the court, but waited another month after the delivery of judgment in order to make an application for review. We cannot but concur with the learned judge and hold that had the appellant exercised due diligence, the report could have been obtained and brought to the courts' attention prior to the delivery of judgment.

It is apparent from what we have said that the application for review was unreasonably delayed since the appellant's advocate was in possession of the report 3 weeks prior to the delivery of judgment. As if that was not bad enough, they waited another month to make the application. It is such conduct that justifies us to echo the dicta of Asike-Makhandia, J. (as he then was) in **OTIENO, RAGOT & COMPANY ADVOCATES V NATIONAL BANK OF KENYA LIMITED [2020] eKLR**;

"The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence."

Ultimately, we find that no injustice was caused by the learned judge in his determination. He soundly and judiciously applied the provisions of **Order 45** of the **Civil Procedure Rules** and we uphold him. The appeal lacks merit and we dismiss it with costs.

Dated and delivered at Nairobi this 4th day of December, 2020.

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR