



IN THE COURT OF APPEAL

AT NYERI

(CORAM: GITHINJI, SICHALE & KANTAI J.J.A)

CIVIL APPEAL NO. 40 OF 2016

BETWEEN

STEPHEN GATHUA KIMANI.....APPELLANT

AND

NANCY WANJIRA WARUINGI

T/A PROVIDENCE AUCTIONEERS.....RESPONDENT

*(An appeal from the Ruling and/or order of the High Court of Kenya at Nyeri*

*(Mativo J.) dated 19<sup>th</sup> February, 2016*

In

NYERI H.C.C.C No. 142 of 2012)

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JUDGMENT OF THE COURT

This is an appeal from the decision of **Mativo, J** dated **19<sup>th</sup> February, 2016** declining to review the judgment of **Wakiaga, J** dated **28<sup>th</sup> November, 2014** on the basis that the grounds for review under **Order 45 of the Civil Procedure Code** had not been satisfied.

A brief background to this appeal is that **Stephen Gathua Kimani** (the appellant) was the owner of matatu registration number **KUP 953**. On **19<sup>th</sup> December, 1998**, the vehicle was involved in a road accident with another vehicle **KAK 806 S** belonging to **Habib Bank Limited**. At the material time, the vehicle was covered by **United Insurance Co. Ltd**. Habib Bank Limited filed a claim against the appellant in **C.M.C.C. No. 9965 of 2000** and obtained judgment in its favour. The appellant forwarded the judgment to United Insurance Co. Ltd expecting the Insurer to settle the claim. Unfortunately, the Insurer failed to do so.

As it turns out the Insurer was undergoing troubles of its own as it was on the verge of collapse and was soon placed under statutory management. By the appointment of **Kenya Reinsurance Corporation Limited** as the statutory manager on **15<sup>th</sup> July 2005**, this meant that the Insurer was unable to settle claims entered against its policy holders. In the meantime, some of the policy holders, **Kensilver Express Ltd** and **3 others** filed **H.C.C.C 1345 of 2005 (O.S)** against the Insurer's statutory manager and stay orders were granted by **Ang'awa, J** (as she then was) restraining execution in respect of suits against persons insured by United Insurance Company.

Since the Insurer had not settled the claim made against the appellant, Habib Bank Ltd moved to recover the decretal sum from him. Following the issue of a warrant of attachment, **Providence Auctioneers** (the respondent herein) attached the appellant's motor vehicle on **26<sup>th</sup> May 2005** and the same was stored at **Kianda Road Motor Garage** until its release on **10<sup>th</sup> April 2012**. According to the appellant, the respondent ignored court orders that directed the release of the vehicle. The vehicle was finally released on **10<sup>th</sup> April 2012**.

As stated above, in HCCC No 1345 of 2005 (OS), the High Court had granted an order of stay of judgment, execution and all processes including warrants of attachment and arrest entered against any defendants insured by United Insurance Co. Ltd until the O.S was heard and determined. In C.M.C.C No. 9965 of 2000, the appellant filed an application seeking an order for the release of his vehicle held by the respondent. On **22<sup>nd</sup> March, 2012**, **Obulutsa**, Senior Resident Magistrate made a finding that since there was a previous order made by the High Court in HCCC No 1345 of 2005 (O.S) for the release of the appellant's vehicle and as per the stay order given by the High Court, the

respondent lacked authority to continue detaining the vehicle. Further, the appellant was faulted for not enforcing that order. The appellant was therefore directed to take appropriate steps to enforce the order against the respondent who had failed to release the vehicle. The failure by the respondent to release the vehicle deeply aggrieved the appellant as he was not only deprived of the use of his vehicle but during the storage, the value of the car depreciated greatly.

This moved the appellant to file a suit against the respondent (HCCC No. 142 of 2012) for loss of use of the vehicle as well as general and special damages. The crux of the appellant's suit was that the respondent failed to heed court orders to release the vehicle to him, the resultant effect of which was that his vehicle was reduced to scrap value of Kshs.80,000/-. He claimed that he had been denied use of the vehicle between the periods beginning **18<sup>th</sup> December 2007** up to its eventual release on **10<sup>th</sup> April, 2012**. He asserted that this was particularly detrimental to him as the vehicle was the source of his livelihood.

**Wakiaga J** heard the dispute and found, *inter alia*, that: the appellant's claim against the respondent was misplaced as the respondent was only acting as the agent of a disclosed principal, that is, Habib Bank Ltd who ought to have been sued instead; that the release of the vehicle was conditional upon payment of the auctioneer's fees which the appellant had failed to pay; and that the respondent had acted lawfully in accordance to the warrant of attachment and could only have released the vehicle once her charges were paid. The suit was consequently dismissed with an order that each party bear its own costs.

The appellant was aggrieved with this outcome. He filed a motion dated **7<sup>th</sup> December 2015** seeking review of the judgment as well as an order for the matter to be heard afresh on merit. His application was based on the grounds that: the respondent disobeyed the order of the High Court in H.C.C.C No.1345 to release the vehicle; the trial court did not consider the release order issued in C.M.C.C No. 9965 of 2000; the applicant had suffered irreparable damage and loss of use of his motor vehicle while under the respondent's custody and that the Court did not consider the orders issued in **H.C.C.C No. 1345 of 2005** directing that no attachment should be made against properties insured by United Insurance Co. Ltd until its suit was heard and determined.

**Mativo, J** heard the application but was not convinced that it was a proper case to exercise his discretion in the appellant's favour. The learned judge found that the grounds for review had not been satisfied and dismissed the application. Aggrieved, the appellant has lodged this appeal premised on 19 grounds.

At the hearing of the appeal, the appellant, appearing in person, relied on his written submissions filed on **6<sup>th</sup> March 2017**. He submitted that the trial judge had failed to consider that the respondent had disobeyed court orders which led to the loss of use of his vehicle. Further, that the trial judge failed to consider that **Hon.Obulutsa (S.R.M)** had determined that the respondent had no authority to continue detaining the appellant's vehicle and that as per previous High Court orders no other order was necessary to get the respondent to release the appellant's vehicle.

According to the appellant, given the obvious contemptuous actions by the respondent, **Mativo, J** should have reviewed the judgment of the trial court.

The appellant was of the firm view that the respondent ought to have released the vehicle to him pending payment from United Insurance Co. Ltd or its statutory manager. It was the appellant's contention that there were sufficient grounds or reasons to review the judgment of the trial court.

**Mr. Ng'ang'a** acting for the respondent opposed the appeal highlighting only one issue for this Court's determination: whether **Mativo, J** could be faulted for refusing to allow the application for review. Counsel submitted that the applicant had failed to show that there were new matters to be considered and that there had been inordinate delay in filing the application for review. Counsel was of the view that if the appellant was aggrieved by **Wakiaga, J's** orders, then he should have filed an appeal and not pursued a review of the judgment of the trial court's judgment.

Counsel urged the court to dismiss the appeal.

As can be discerned from the record, the appellant filed a Notice of Motion application dated **7<sup>th</sup> December, 2015**. In the main, he sought an order that:

*“1.This Honourable Court be pleased to REVIEW its JUDGMENT delivered and dated 28<sup>th</sup> November 2014 and the case be heard again on merit because any proceedings subsisting against the United Insurance Company had been stayed but the respondent negligently ignored those orders and refused to release the motor vehicle to the appellant”. Mativo, J* was seized of the motion and in a ruling dated **19<sup>th</sup> February, 2016** dismissed the motion. It is the said dismissal that has provoked this appeal.

In the ruling dismissing the appellant's notice of motion, the learned judge, (**Mativo, J**) discussed the essence of a review application. In so doing, he considered the enabling provisions of the Civil Procedure Act and the Civil Procedure Rules.

He stated:

*“At this juncture, I find it is necessary to examine the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. In my view, the High Court has a power of review, but such said power must be exercised within the framework of Section 80 Civil Procedure Act and Order 45 Rule 1”.*

He proceeded to cite Section 80 of the Civil Procedure Act which provides as follows:

***“80. Any person who considers himself aggrieved-***

***(a) by a decree or an 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 Court, 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”.***

The learned judge also placed reliance on **Order 45 Rule 1 of the Civil**

**Procedure Rules, 2010** which provides as follows:

***“45 Rule 1(I) 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”***

After analysing the enabling provisions, the learned judge rightly so, in our view, found that an application for review is restricted to certain parameters. These are as set out in **Orders 45 Rule I of the Civil Procedure Rules, 2010** cited above.

In our view, the appellant felt aggrieved as there was in existence, an order that vehicles insured by United Insurance Company Ltd should not be attached, and that an order had been made directing the respondent to release the appellant’s motor vehicle. One can surely understand the appellant’s grievances. However, unfortunately for him, and in the absence of legal counsel, he moved the court seeking an order for review. At the risk of being repetitive, an order for review is restricted to parameters set out by the law. The appellant may have had a genuine grievance but this did not fall within the ambit of a review application. To this extent, we cannot fault **Mativo, J** when he found:

***“The reason offered by the applicant is that there were orders issued in the various cases he referred to. This is not new evidence. The applicant has not satisfied that the orders in question were not within his knowledge. In fact he says he was an interested party in one of the cases. Alternatively, he has not demonstrated when he came to know about the said court decisions or that he could not obtain them despite due diligence. There is no allegation that there is an error apparent on the face of the record. It has not been shown that there is a sufficient reason to warrant the review”.***

In the end, the learned judge stated:

***“In the present case, guided by the facts of this case, the authorities cited herein and the relevant provisions of the law, I humbly find that the applicant has not demonstrated 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 nor has he shown that there is some mistake or error apparent on the face of the record nor has he proved that there as already stated the application for review was not made without unreasonable delay. The upshot is that my answers to number one is in the negative.”***

We too are of a similar view and it is in view of this that we find, albeit with sympathy, that this appeal has no merit. It is hereby dismissed with costs to the respondent.

It is so ordered.

***Dated and Delivered at Nairobi this 28<sup>th</sup> day of June, 2019.***

**E.M. GITHINJI**

**JUDGE OF APPEAL**

**F. SICHALE**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR