



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & M'INOTI, JJA)

CIVIL APPEAL NO. 245 OF 2012

FATUMA NJERI MWANGI.....APPELLANT

AND

WAWERU GATIMU KARIUKI.....1<sup>ST</sup> RESPONDENT

WAWERU GACHIE.....2<sup>ND</sup> RESPONDENT

ANDREW KATO KAYI.....3<sup>RD</sup> RESPONDENT

ST. BENEDICTINE MONASTERY.....4<sup>TH</sup> RESPONDENT

*(Being an appeal against the Judgment and Order of  
the High Court of Kenya at Nairobi (Okwengu, J.)*

*dated 17<sup>th</sup> March, 2009 in*

**H.C.C.A. No. 743 of 2013)**

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JUDGMENT OF THE COURT

The appeal for determination before this Court is a second appeal, the same having originated from the ruling made by the Chief Magistrate's Court in **Civil Suit No. 10073 of 2002** in Nairobi. The appellant "**Fatuma Njeri Mwangi**" filed an application seeking review of the magistrate court's judgment in which the learned magistrate dismissed her suit. The application for review before the trial court was premised on the ground that the appellant had discovered new and important evidence which was not within her knowledge at the time of filing or hearing the suit. The facts of the suit were that motor vehicles belonging to the 2<sup>nd</sup> and 4<sup>th</sup> respondents were involved in an accident along Mombasa-Nairobi road near Taru Trading Centre on 21<sup>st</sup> June 1996. At the time of the accident, the vehicles were being driven by 1<sup>st</sup> and 3<sup>rd</sup> respondents as employees, servants or agents of the 2<sup>nd</sup> and 4<sup>th</sup> respondents, respectively. The accident claimed the life of **Daniel Mwangi Kangoi** who was a passenger in the 4<sup>th</sup> respondent's motor vehicle and a husband of the appellant. Besides, he was an employee of the 4<sup>th</sup> respondent.

The appellant instituted suit to recover damages on behalf of his estate and the suit was dismissed on grounds that liability was not proved, that the trial court further held that the appellant failed to adduce evidence to support the particulars of negligence pleaded, failed to establish that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were not acting on their own behalf, and failed to adduce evidence relating to the ownership of the motor vehicles. The appellant subsequently filed an application for review which the trial court dismissed on grounds that she had failed to establish that the new and important evidence was not within her knowledge at the institution and hearing of the suit, even after exercise of due diligence. Of course Order 45 Rule 1 allows an aggrieved person to apply for a review of a decree or order where there is 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 by him at the time when the decree or order was issued, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons. Following the dismissal of the review application aforesaid, the appellant mounted an appeal in the High Court against the said ruling and order.

So what was this new and important evidence that the appellant came by? In her application, the appellant alleged that the new and important evidence discovered was that the accident had been the subject of litigation in **SPMCC 5321/99** in which the respondents had conceded

liability through a consent order. The other new and important evidence was that she could now establish that the motor vehicles were owned by the 2<sup>nd</sup> and 4<sup>th</sup> respondents through copies of the records from the Registrar of Motor Vehicles. As these facts were not disputed, the issue before the High Court on appeal was whether the evidence was new evidence, which was not available to the appellant at the time the suit was heard, notwithstanding the exercise of due diligence on her part.

The Judge (**Okwengu, J.** as she was then), found that the judgment in the magistrate's court had been delivered on 27<sup>th</sup> June 2003 and in her affidavit in support of her application for review sworn on 21<sup>st</sup> August 2003 the appellant did not disclose when she discovered the alleged new evidence. The learned Judge further found that the consent judgment in SPMCC 5321/1999 had been recorded on 19<sup>th</sup> December 2000 well before the appellant's suit proceeded to hearing on 29<sup>th</sup> April 2003. According to the Judge, the appellant did not show what action she took to find out what was happening in the other suits since the accident had other victims which she knew as some were her deceased husband's friends or why the information regarding the consent judgment was not available to her at the time of hearing. Further, that she failed to show why the information from the registrar of motor vehicles could not have been availed during the hearing of the suit. Ultimately, the Judge ruled that the motor vehicles' search was made after the hearing of the suit, considered it an afterthought and proceeded to dismiss the appeal.

In her second appeal now before us, the appellant has advanced four (4) grounds. She basically faults the Judge for failing to find that there was discovery of new and important evidence which was not within her knowledge or could not have been produced when the decree was passed. Further, for failing to find that she had established sufficient cause to warrant review of the judgment and decree and in dismissing the appeal and finally in failing to find that she had given sufficient reasons to warrant a review of the decree.

In the appellant's submissions, she sought to invoke the inherent powers of court to make such orders as may be necessary for the ends of justice. She pointed out that there was a police abstract produced during trial showing that the 2<sup>nd</sup> and 4<sup>th</sup> respondents were the owners of the motor vehicles involved in the accident and its contents ought to have been admitted since the respondents had not challenged that evidence. The appellant termed as wrong for the High Court to fault her for not establishing the on goings in the other cases involving other victims when in fact she did not know them as they were her late husband's colleagues and not hers.

The appellant reiterated that she discovered the other proceedings where liability had been conceded to after delivery of judgment. According to her, after the trial court's judgment she sought to establish the fate of other proceedings and that is when she discovered the existence of SPMCC No. 5321 of 1999. She submitted that the courts below disregarded the above factors which resulted in a miscarriage of justice. The appellant cited the case of **KPLC v Benzene Holdings Ltd t/a Wyco Paints (2016) eKLR** where the Court of Appeal observed that the court's inherent jurisdiction under sections 3A and 80 of the Civil Procedure Act is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. She argued that the burden of proving the respondents' liability was wrongly placed on her as the issue of liability was an issue between the respondents who had in their respective defences blamed each other.

Further and according to the appellant, failing to allow a review was tantamount to the court sanctioning an abuse of the court process since it would be allowing the respondents to admit liability in one cause and deny in another cause though the facts were similar. She submitted further that once it was brought to the attention of the court that the owners of the vehicles had admitted liability in a different cause and ownership of the vehicles had been confirmed by records from the registrar, the dictates of justice required the court to amend its records accordingly for the sole reason of maintaining harmony and consistency in the court's records and prevent abuse of the due process.

In conclusion, the appellant, on the authority of **Easy Coach Ltd v Dinah Habwe Omutsali (2015) eKLR**, submitted that in the event of a collision, either one or both vehicles are to blame but they cannot both escape liability. According to her, in the event of a collision the burden of proof in respect of liability lies on the drivers of the vehicles and not the passengers. She also faulted the trial court for failing to find that a police abstract, which was produced without any objection, met the standard of proof on a balance of probabilities required in civil proceedings. These factors according to the appellant provided sufficient reasons to warrant the court to review its judgment in her favour.

The 3<sup>rd</sup> and 4<sup>th</sup> respondents made joint written submissions. In the submissions, they point out that in a second appeal, the appellate court confines itself to matters of law. They also reminded us that review orders are discretionary. According to the respondents therefore, the issue for determination is whether or not the trial court failed to exercise its discretion properly and thus arrived at a wrong decision. They cited the case of **Ken Odondi & 2 Ors v James Okoth Omburah t/a Okoth Omburah & Company Advocates (2013) eKLR** for the principles upon which this Court will interfere with the exercise of discretion of a trial court. The respondent submitted that the appellant failed to prove her case before the trial court as properly found by the learned magistrate. In particular, they argued that it was not enough for the appellant to simply allege negligence, it was incumbent upon her to prove the same. They denied that the appellant could prove ownership of the motor vehicles by way of police abstract as submitted by the appellant. According to the respondents, at the material time, it was trite law that in order to prove ownership of a motor vehicle, one had to place before the court a certificate of search signed by the registrar of motor vehicles. They cited the case of **Thuranira Karauri v Agnes Ncheche Civil Appeal No. 132 of 1996** for that proposition.

The respondents were also of the view that the appellant all along knew the existence of the other suits relating to the accident. They pointed out that the appellant had in her affidavit in support of the application admitted that she had knowledge of the consent on liability entered in respect of SPMCC No. 5321/99 but she never availed that information to the court until after judgment. They contended that the appellant's behavior was not the conduct of a diligent litigant and that the trial court exercised its discretion properly in refusing to allow her application. In their opinion, the appellant had not advanced the grounds upon which this Court can set aside the decisions of the two courts below. In response to the appellant's submission that failure to allow review or this appeal would result in an injustice, the respondents argued that the grounds relied upon by the appellant to advance that claim would constitute grounds of appeal but not grounds of review as submitted. In conclusion, they prayed that this Court finds that there was no basis to interfere with the decisions of the two courts below.

This Court's jurisdiction in a second appeal was discussed at length in the case of **Margaret Njeri Mbugua v Kirk Mweya Nyaga (2016) eKLR**. In that case, the Court observed as follows;

**“As this is a second appeal, Section 72 (1) of the Civil Procedure Act, Chapter 21 Laws of Kenya restricts this Court to**

consideration of matters of law only. In Kenya Breweries Ltd V Godfrey Odoyo, Civil Appeal No. 127 of 2007, Onyango Otieno, J.A expressed himself as follows:

**“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 in a 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.”**

Through her memorandum of appeal, the appellant has put forth the following matters of law for consideration; failure by the Judge to find that there was discovery of new and important evidence subsequent to the judgment and decree and failure to find that she had established sufficient cause to warrant review of the decree. Essentially, what the appellant is contesting is failure by the trial court to exercise its discretion judiciously and in her favour. The principles upon which this Court can interfere with the exercise of discretion exercised by a trial court are well settled. The respondents have cited the authority of Ken Okondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company Advocates (2013) eKLR where the Court observed that this Court will only interfere with the exercise of discretion if it is satisfied that the court misdirected itself in some matter and as a result arrived at a wrong decision, or if it is manifest from the case as a whole that the trial court was clearly wrong in the exercise of his discretion and as a result there has been misjustice.

The appellant alleges that the new and important matter that warranted review of court’s findings were that she had discovered that a consent had been recorded in another suit arising from the same accident in which the respondents had conceded liability. In her affidavit in support of the application, the appellant depones as follows;

**“10. That I know of my own knowledge that a consent on liability was recorded in SPMCC 5321/99 Florence Nthangu Kiio v Benedictine Fathers & Waweru Gachie of which the Plaintiff in this suit was my late husband’s colleague and they were both involved in the accident (Annexed herewith and marked “FNMs” is a copy of the proceedings when the consent was recorded on 19<sup>th</sup> November 2000)”.**

The appellant does not state as to when exactly she discovered that the respondents had conceded and recorded liability for their actions and or omissions that led to the accident. She however would rather have the trial and first appellate courts believe that she came by that information after the delivery of judgment in her suit. She has stated that the suit was heard on 29<sup>th</sup> May 2003 and judgment was delivered on 27<sup>th</sup> June 2003. The appellant therefore claims that she failed to discover the existence of the consent for a period of about three (3) years when the consent was in existence, even after exercise of due diligence. The High Court did consider those circumstances and failed to find them convincing. The court delivered itself as follows;

**“From the proceedings which were availed to the court, it is evidence (sic) that the consent judgment was recorded on 19<sup>th</sup> December, 2000. This was well before the hearing of the appellant’s suit which proceeded on 29<sup>th</sup> April, 2003. The appellant was well aware that there were other persons who were also victims of the accident subject of her suit. The appellant has not shown what action she took to find out what was happening to the other claims nor has she disclosed why the information regarding the consent judgment was not available at the time the case was heard.”**

In dismissing the appellant’s application for review, the trial court came to the same conclusion. The trial court held that the appellant had not shown that the new and important evidence was not within her knowledge at the time the hearing of the suit commenced and when the judgment was delivered. We have no basis to depart from those concurring findings.

The other new and important evidence that would have warranted review according to the appellant was the evidence of the records from the registrar of motor vehicles proving that the 2<sup>nd</sup> and 4<sup>th</sup> respondents were the registered owners of the motor vehicles that were involved in the accident. Though the appellant has contended that the police abstract she produced during trial to prove ownership of the motor vehicles met the standard of proof (on a balance of probabilities) required in civil proceedings, the respondents deny that allegation. The lower court in dismissing the appellant’s suit took issue with the appellant for having failed to prove ownership of the motor vehicles and also rejected the attempt by the appellant to prove the vehicles ownership by way of police abstract. The respondents have argued that during the material time, proof of ownership of a motor vehicle required a certificate of search signed by the Registrar of motor vehicles. They cited the authority of Thuranira Karauri v Agnes Ncheche (supra) for that proposition. The High Court found that despite the appellant knowing that the issue of ownership of the vehicles was an issue to be determined at trial, she failed to procure the proof from the registrar of motor vehicles. The judge termed the attempt to produce it after delivery of judgment as an afterthought. This is evidence that the appellant cannot claim was not within her knowledge or that it could not be produced during the hearing even after exercise of due diligence. But even if that was the case, it is not a ground for review, rather it would be a good ground for an appeal since it amounts to accusing the court for proceeding on an incorrect exposition of the law. In National Bank of Kenya Ltd v. Ndungu Njau (1997) eKLR, the Court of Appeal stated as follows;

**“It will not be a sufficient ground for review that another judge would have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. ....If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review.”**

It follows therefore that what would constitute a good ground for appeal would not necessarily be a ground for review. The grounds the appellant has advanced in the submissions that she alleges constitute injustice would be grounds for appeal but the strictures of review do not permit the same as grounds for review. In Pancras T. Swai v Kenya Breweries Limited (2014) eKLR, this Court stated that;

**“If parties were allowed to seek review of decisions on grounds that the decision are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Courts in which they were made under the guise of review when such**

***courts are functus officio and have no appellate jurisdiction. The power to review the decisions on appeal is vested in appellate courts. Order 44 Rule 1 (now Order 45 Rule 1 of the Civil Procedure Rules 2010) gave the trial court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.” The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted....”***

The appellant has therefore not demonstrated that in the exercise of its discretionary powers to allow or decline review, the trial and first appellant courts committed any error in principle to warrant interference with the findings by this Court. The upshot is that this appeal fails and is dismissed with costs to the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of May, 2018.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**