



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, SICHALE & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 6 OF 2008**

**BETWEEN**

**AGNES MUTHONI NYAGAH.....APPELLANT**

**AND**

**HOUSING FINANCE CO. KENYA LTD.....1<sup>ST</sup> RESPONDENT**

**SAMUEL P. GACHORA.....2<sup>ND</sup> RESPONDENT**

***(Appeal from the Ruling /Order of the High Court of Kenya at Nairobi***

***(Azangalala, J) in HCCC Application (Notice of Motion)***

***dated 2<sup>nd</sup> October, 2007 in***

***H. C. C. C. NO. 159OF 2000)***

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**JUDGMENT OF THE COURT**

The appellant, **CYRUS NYAGA KABUTE**, who is now deceased and has been substituted by **AGNES MUTHONI NYAGA**, (his legal representative) was aggrieved by the outcome of a review application rendered on 26<sup>th</sup> October, 2007 by Azangalala, J (as he then was). The background to this appeal is that the appellant filed HCCC No. 159 of 2000 against **HOUSING FINANCE CO. KENYA LTD** (the 1<sup>st</sup> respondent herein) and **SAMUEL P. GACHORA** (the 2<sup>nd</sup> respondent herein). The appellant's complaint, as can be discerned from the record is that the 1<sup>st</sup> respondent was not entitled to exercise its statutory power of sale over Gichugu Settlement Scheme/232 (the charged property) registered in the name of the appellant and which had been charged to the 1<sup>st</sup> respondent as security for sums of money lent and advanced to the appellant. On 14<sup>th</sup> December, 2006 Kasango, J dismissed the appellant's suit. Following this outcome, the appellant filed a review application vide a notice of motion dated 9<sup>th</sup> February, 2007. The motion was predicated on Section 80 of the Civil Procedure Act and the then Order XLIV rules 1, 2, 4 and 6 of the Civil Procedure Rules. The appellant sought the following orders:

**“1. THAT this Honourable court be pleased to review vary and or set aside the judgment passed herein on 14<sup>th</sup> December, 2006 by the Honourable Lady Justice Mary Kasango.**

2. **THAT this Honourable court do grant a stay of execution of the defendant statutory rights under section 74 of the registered land Act (Cap 300) pending the determination of this application.**

3. **THAT the cost of this application be provided for in any event.**

4. **THAT any other relief as this Honourable court may deem fit and just to grant in the circumstances of this case.”**

The appellant’s motion was grounded on what the appellant stated on the face of the motion that he had,

***“... come into possession and or discovery of new and important matter/evidence which after the exercise of due diligence was not within his knowledge and could not otherwise be submitted at the trial and/or before the decree was passed...”***

As stated above, the motion came before Azangalala, J who in a ruling dated 26<sup>th</sup> October, 2007 dismissed the appellant’s motion with costs. The appellant was aggrieved by the outcome, hence this appeal.

In his home grown grounds of appeal, the appellant listed no less than 16 grounds of appeal. The appeal came before us for plenary hearing on 19<sup>th</sup> January, 2017. In his written and oral submissions, Mr. Okatch learned counsel for the appellant urged us to find that there was a fundamental mistake when the 1<sup>st</sup> respondent unilaterally changed the appellant’s mortgage account number [particulars withheld] to mortgage account number [particulars withheld]; that the 1<sup>st</sup> respondent failed to furnish the appellant with statements of accounts; that the amount advanced to the appellant by the 1<sup>st</sup> respondent was less than the amount in the charge instrument; that the payments made by the appellant were not factored in by the 1<sup>st</sup> respondent; that the 1<sup>st</sup> respondent unilaterally varied the interest rate of the sum borrowed by the appellant and finally, that the learned judge failed to frame the issues correctly.

In a brief rejoinder, Miss Chege learned counsel for the 1<sup>st</sup> respondent submitted that the appellant’s grounds of appeal faulted the judgment of Kasango J (and not the judgment of Azangalala J) and yet there was no appeal against her judgment. Further, that the deposit of money by the appellant in court was not a new matter and that this was made pursuant to a court judgment, namely Civil Appeal No. 58 of 1996 filed by the appellant challenging the outcome of HCCC No. 46 of 1990.

The appeal before us is a first appeal. The position of the law as regards a first appeal is that we are entitled to re-evaluate and re-analyze the evidence tendered in the trial court and come to our own independent conclusion.

In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or it is based on misapprehension of the evidence or the judge is shown to have acted on a wrong principle in reaching the findings he/she did. (see ***Selle & Another v Associated Motor Boats Co. Ltd. [1968] EA 123***).

The learned Judge (Azangalala J) considered the motion before him and came to the conclusion that there was no new and important matter or evidence which after the exercise of due diligence was not within the appellant’s knowledge and that there was no mistake or error apparent on the face of the record and further that there was no other sufficient reason to justify review of the judgment of Kasango J.

As pointed out by the 1<sup>st</sup> respondent’s counsel, in the appellant’s memorandum of appeal dated 21<sup>st</sup> January, 2008, the appellant faulted the judgment of Kasango J and not the outcome of the review application that was heard and determined by Azangalala J. In the memorandum of appeal, Azangalala J was faulted for ***“... refusing to review to the judgment of Kasango J delivered on 14<sup>th</sup> December, 2006 ... which had not stated how the appellant breached the contract between him and the respondent ...”***; for ***“... refusing to review the judgment of Hon. Kasango J ...”*** and for failing to find that the

appellant's relationship with the respondent was that of a creditor and a debtor and not a mortgagee and mortgagor; erred in not finding that Kasango J failed to order for the accounts to be taken; erred in failing to review Kasango's J criticism of the appellant in depositing Kshs. 116,670.50 in court; failed to consider that the judgment of Kasango J imposed interest rates and penalties hitherto not agreed upon; that Kasango J failed to consider "... **that when the appellant was sued by the respondent in ... HCCC No. 4610 of 1990, Nairobi the appellant was waiting for the balance of Kshs. 40,000/= to be released to him by the respondent so as to start paying in instalments as in the legal charge document...**"; that Kasango J did not consider the evidence of the respondent's witness namely Mwaduma; that the learned Judge erred in law and in fact in failing to review the said judgment of Hon. Kasango J which was extensively written in favour of the respondent and this was a new discovery; that Kasango J failed to take into account the appellant's evidence, submissions and his list of authorities and finally, that Kasango's J judgment was biased. From the above grounds which we have quoted in *extenso*, it is clear that the appellant was aggrieved by the judgment of Kasango J which he sought to review in his motion dated 9<sup>th</sup> February, 2007. It is this motion that was heard and determined by Azangalala J. Suffice to state that the grounds as set out above did not bring the appellant's complaint within the ambit of O. 45 (1) of the Civil Procedure Rules.

Order.45(1) of the Civil Procedure Rules provided 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."**

The learned judge (Azangalala J) considered the motion before him and came to the conclusion that:

**"From my findings above, it is clear that the plaintiff has not persuaded me that there has been discovery of new and important matter/evidence which after the exercise of due diligence was not within his knowledge and could not otherwise be submitted before Kasango J before passing her judgment.**

**I have further carefully considered the background of this dispute leading to the judgment sought to be reviewed and have not found any other sufficient reason to warrant review of the said judgment."**

We too are of a similar view. We find that there was no new and important matter that after due diligence on the part of the appellant that could not have been brought to the fore at the time of hearing; and neither was there a mistake on the face of the record or any sufficient reason to warrant a review. Suffice to state that the appellant faulted the judgment of Kasango J in arriving at the conclusion she did but not on account of any error apparent on the face of the record, and neither was there any new and important matter which after due diligence was not in the appellant's possession during the trial or for any sufficient reason.

Having considered the totality of the record, the impugned ruling, the written and oral submissions made before us and the law, it is our view that there has been no demonstration of how the learned judge fell into an error in concluding as he did.

The appeal herein has no merit. It is dismissed with costs.

*Dated and delivered at Nairobi this 31<sup>st</sup> day of March, 2017.*

**M. K. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**