IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & M'INOTI JJA.)

CIVIL APPEAL NO. 196 OF 2005

BETWEEN

IKERE GITAU …….....…….....……..……..……..…….. APPELLANT

AND

CHARLES OKOTH NYAJWAYA …….....…….....……. RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (Rawal J.) dated 3rd June, 2005

in

HCCC NO. 2455 OF 1992)

****

JUDGMENT OF THE COURT

This appeal has its genesis in an accident that occurred along Juja Road in Nairobi more than two decades ago on 2nd December 1990 in which **CHARLES OKOTH NYAJWAYA**, the respondent herein, sustained some injuries. He was a pedestrian crossing the said road when he was violently hit by a motor vehicle which he asserted was being recklessly and negligently driven, managed and controlled at the material time.

The respondent consequently filed suit at the High Court in Nairobi being **HCCC No. 2555 of 1992**, in which he sought damages against the registered owner of the culprit motor vehicle at whom he pointed the finger of liability for the injuries suffered. He blamed that owner for the negligence the elements whereof were particularized in the statement of claim. That owner was named as **IKERE GITAU,** the appellant herein, and the motor vehicle in question stated to bear registration number **KVP**

The appellant filed a written defence in which he denied liability. On the question of ownership of the accident motor vehicle, he pleaded as follows;

> ***"2. The defendant does not admit that he is the registered owner of motor vehicle registration number KVP 716 or that the said vehicle was involved in an accident on the stated date or on any other date or at all and the plaintiff is put to strict proof of all allegations to the contrary."***

The suit proceeded to full hearing before K.H. Rawal, Commissioner of Assize, (as she then was) who, in a considered judgment, found for the respondent herein and entered judgment for him on 29th May 2000 as follows;

1. General damages …… Kshs. 510,000
2. Special damages ……. Kshs. 3,100

Total ……**Kshs.513,100**

3. Costs of the suit plus interest.

Now, the appellant neither satisfied that judgment nor preferred any appeal against it even after execution proceedings were commenced against him. Instead, he filed a notice of motion application before the High Court more than 4 ½ years later on 16th December 2012 by which he sought orders that;

> ***"1. The Honourable Court be pleased to review and set aside the judgment of this Honourable Court of 29th May 2000.***
>
> ***2. Pending the hearing of No (1) above this honourable court be pleased to stay or set aside the warrant of arrest issued by this honourable court against the defendant."***

In an affidavit sworn in support of that application, the appellant stated the gist of his quest for a review of the judgment as follows;

> ***"11. THAT I would like the judgment of the High Court to be reviewed on ground that motor vehicle reg. no. KUP 716 is not my vehicle. (Copy of OB 15/2/12/90 annexed marked "IG1)."***
>
> ***12. THAT my vehicle KVP 716 is a Peugeot Pick up which is different from the car that caused the accident (copy of log book annexed marked IG2)."***

After hearing the application for review, which was opposed by the respondent, Hon. R.K. Rawal (by that time a puisne Judge) dismissed it. In doing so, the learned Judge expressed herself on the question of the registration number of the accident vehicle as follows;

> ***"I have carefully considered contents of the said documents, and can safely state that the issue on which the application is based is the registration number of the vehicle entered in the Occurrence Book. According to him the O.B. shows the registration number of the vehicle as KUP 716, while his vehicle's registration number is KVP 716.***
>
> ***I must state that the issue was very much alive at the trial of the case and that in my judgment I have considered the same and have arrived at my finding after due deliberations (sic) …***

I see from my judgment that the defendant applicant has stated in his evidence that he did not instruct his advocate to deny the ownership of the vehicle. What is sought to be reviewed is not a ground under which this Court can review its judgment which is an issue already contended before it at the trial."

The learned judge also found as a fact and a reason for dismissing the applicant's application that the appellant had not explained the undue delay in filing the application for review. As we have stated, the delay was over 4 ½ years.

Aggrieved by the learned judge's dismissal of his application, the appellant appealed to this Court against the whole ruling citing some five grounds in his Memorandum of Appeal as follows;

"1. THAT the learned judge erred in law and in fact in failing to find that there had been placed before her sufficient grounds to entitle her to review her earlier decision, to wit, that the Police Occurrence Book extract No. 15/2/12/90 which had not been produced earlier in evidence and which gave the registration number of the motor vehicle that caused the accident as KUP 716 and not the appellant's motor vehicle registration number KVP 716 constituted new and important matter and/or evidence which was not before the court at the time the decree was passed.

2. THAT the learned judge erred in law and in fact in holding that the delay in filing the application for review had not been sufficiently explained by the appellant whereas the appellant had demonstrated that prior to the application for review he was being represented in the superior court by Advocates appointed on his behalf by his insurers under the doctrine of subrogation.

3. THAT learned judge further erred in fact in holding that she had sufficiently addressed her mind to the issue of the registration of the motor vehicle that caused the accident while in actual fact the police occurrence book extract had not been produced before her as evidence during the trial.

4. THAT the learned judge erred in failing to direct her mind to the fact that the appellant had been acquitted in the traffic matter upon appeal to the superior court.

5. THAT the learned judge erred in misdirecting herself as to the legal principles applicable in determining an application for review and thereby arriving at a decision which was erroneous in the totality of the circumstances of the matter."

Urging the appeal before us, Mr. Waithaka Wachira, learned counsel for the appellant, argued all the grounds globally and focused on the identity of the vehicle that caused the accident. It was counsel's contention that whereas the respondent pleaded in his plaint that and testified in court the vehicle that knocked him down was **KVP 716**, an abstract of the Occurrence Book subsequently obtained from the police showed that the vehicle involved in the accident was **KUP 716** which is unknown to the appellant. That typed abstract is of course a derivative of the handwritten entry in the Occurrence Book itself. It is clear even at a cursory glance that the person who hand-wrote the entry in the Occurrence Book clearly penned **KVP 716**. The Official Police Abstract Form also bears handwritten entries indicating the accident vehicle to have been **KVP 716**.

From a careful reading of the record, it seems to us quite clear beyond peradventure that the appellant herein went back to the High Court after a nearly five-year hiatus to seek to review a judgment on the basis only of what could only have been either a misreading, misspelling or mistyping of the handwritten 'V' in the Occurrence Book as a 'U'. In the totality of the circumstances of this case, the

effort and expense that has been expended in reiterating to the appellant that what he calls a 'U' is a clear 'V' is much to be regretted. That he should have so engaged the courts on the issue amounts to an unfortunate and rather cynical misuse of scant judicial time.

The provisions relating to the review of judgments at the material time were set out in Order XLIV Rule 1 of the Civil Procedure Rules [Rev. 1998] as follows;

> ***"Any person considering himself aggrieved … [by a judgment] … and who <u>from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge and could not be produced by him at the time when the decree was passed</u> … 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 …, may apply for a review of judgment of the court which passed the decree without unreasonable delay."***

(Emphasis ours)

Rule 3(1) of the same order captured the discretionary character of the court's jurisdiction on review, which the learned judge exercised herein, as follows;

> ***"Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application."***

As an appellate court, we are always slow to interfere with the trial court's exercise of discretion and this has been restated in a long line of authorities. An oft-quoted formulation of the applicable principles is that of President Newbold in **<u>MBOGO Vs. SHAH</u> [1968] E.A. 93** at 96G as follows;

> ***" … a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge had been clearly wrong in the exercise of his discretion and as a result there has been misjustice."***

This principle was endorsed in, among other cases, **<u>MAINA Vs. MUGIRA</u> [1983] KLR 78** and **<u>SEBASTIAN BEN ADUORDI Vs. A.G</u>, CIVIL 1960 OF 2006** (unreported). We affirm it as sound and applicable to the appeal before us.

From our own assessment of the record and all the material that was before the learned Judge, we find that she was entirely correct in dismissing the appellant's application for review. The matter of the identity of the accident motor vehicle had been fully ventilated before the learned Judge at the trial and she was perfectly right in treating it as neither new nor important. Further, the Occurrence Book or the extract thereof was not a piece of evidence that due diligence on the appellant's part could not have availed at the trial for whatever it was worth. If anything, it is clear that the appellant had no interest in that piece of evidence. Rather, it is the respondent's advocate, Mr. Oduk, who had intimated a desire to have the same produced but subsequently did not follow it through.

The learned Judge was also justified in finding that the appellant was guilty of undue and unexplained delay in bringing the application for review. That delay was running towards five years and it was in every respect indicative of undue dilatoriness of a kind that would disentitle the appellant of favourable discretion.

The upshot is that we find this appeal to be totally devoid of merit and dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 20th day of September 2013.

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

……...…

JUDGE OF APPEAL

K. M'INOTI

……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR