Nyakango v Subhani t/a Zohaib Trading Limited (Civil Appeal E206 of 2023) [2025] KEHC 942 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 942 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E206 OF 2023

RE ABURILI, J

JANUARY 31, 2025

BETWEEN

THOMAS MONGARE NYAKANGO ..... APPELLANT

AND

NAWAZISHI SUBHANI T/A ZOHAIB TRADING LIMITED ..... RESPONDENT

(An appeal from the ruling of the Hon. K. Cheruiyot Senior Principal Magistrate delivered on the 23.11.2023 in Kisumu CMCC No. E146 of 2022 at the Kisumu Chief Magistrate's Court)

JUDGMENT

Introduction

1. The appellant Thomas Mongare Nyakango sued the respondent Nawazishi Subhani t/a Zohaib Trading Limited in the trial court seeking a declaration that the respondent was in breach of car sale contract thus seeking an order compelling the respondent to sign necessary documents to ensure the transfer of the suit motor vehicle to the appellant as well as damages for the said alleged breach. The appellant also sought in the alternative, refund of the purchase price paid to the respondent together with interest at commercial rates. He also sought for costs of the suit.

2. The respondent did not take part in the proceedings in the trial court despite service of the plaint and summons to enter appearance and the trial court proceeded to order a refund of the sale price of Kshs. 900,000 plus interest at commercial rates to the appellant. A decree was issued to that effect on the 14th April 2023.

3. Dissatisfied by the said judgement, the appellant filed a notice of motion application dated 10th August 2023 seeking to review the trial court's judgement on the grounds that the trial court mistakenly ordered a refund of the purchase price to him an order which was unenforceable instead of ordering that the respondent surrender and transfer all the ownership documents in relation to the motor vehicle.

4. In his ruling of 23.11.2023 that is subject of this appeal, the trial magistrate held that the application for review was unnecessary as he had considered the matter on its merits and granted the orders the plaintiff had sought, a prayer that was pleaded by the appellant as an alternative to the unconditional release of the vehicle. The trial magistrate thus proceeded to dismiss the appellant's motion for review.

5. Aggrieved by the said ruling dismissing the application for review of the judgment, the appellant filed a memorandum of appeal dated 7th December 2023 raising the following grounds of appeal:

    a. That the learned magistrate erred in law and in fact by dismissing the Notice of Motion dated 10th August 2023.

    b. That the learned magistrate erred in law and fact by holding that there is no error apparent in the judgement delivered on 16th February 2023.

    c. That the learned magistrate erred in law and in fact by failing to consider that the orders issued are unenforceable.

    d. That the learned magistrate erred in law and in fact by holding that the most feasible prayer to be granted was the alternative prayer even though the same was unenforceable.

    e. That learned magistrate erred in law and fact by failing to properly evaluate evidence presented before him prior to the pronouncement of the ruling.

6. The appeal was canvassed by way of written submissions but only the appellant's submissions were on record as the respondent failed to participate in this appeal despite service.

The Appellant's Submissions

7. The appellant submitted that the trial court failed to note that the suit motor vehicle was already in the possession of the appellant and that the order granted by the trial court in its judgement was ambiguous and unenforceable and incapable of being implemented.

8. It was submitted that the order granted by the trial magistrate would subject the appellant to great prejudice and hardship in implementation as he was already in possession of the suit motor vehicle.

9. The appellant submitted that upon finding his appeal meritous, the court proceeds to grant the order he sought in his plaint compelling the respondent to unequivocally sign the necessary transfer documents over the suit vehicle to him.

Analysis and Determination

10. I have considered the pleadings, the evidence as adduced in the lower court, the grounds of appeal and written submissions by the appellant. The main issue for determination is whether the appellant met the threshold for the grant of orders of review of the judgment rendered. This appeal is against a ruling dismissing an application for review of the judgment of the lower court.

11. The applicable law for review is section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules which set out the parameters for an application for review as follows: -

    Order 45 Rule 1

    (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 order made or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case which he applies for the review.

12. It then follows that Order 45 of the Civil Procedure Rules provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

13. In the matter before the trial court, the appellant sought review on the grounds that there was an error apparent/mistake on the face of the record. According to the appellant, the order granted by the trial magistrate was prejudicial to him as it was unenforceable and the court ought to have granted him his prayer to compel the respondent to sign the transfer documents.

14. The error complained of must be self-evident and not require an elaborate argument to be established. This principle was enunciated by the Court of Appeal in National Bank of Kenya Ltd v Ndungu Njau Civil Appeal No. 211 of 1996 (UR) where it held: -

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. "

15. Similarly, in Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR the court stated:

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could 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. Misconstruing a statute or other provisions of law cannot be a ground for review."

16. The court further stated:

> "The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."

17. Evidently, from the above, it is clear that the error ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn-out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

18. In this case, the appellant pleaded as one of the prayers, refund of the purchase price together with interest at commercial rates. The lower court granted this alternative prayer. The question is, where is the error apparent on the face of the record or what sufficient reason existed for the trial court to set aside the order given and substitute it with another order that would not be prejudicial to the appellant and one capable of enforcement.

19. At the time of filing the plaint and in his testimony, it was upon the appellant to make full disclosure of whether he was in possession of the purchased motor vehicle so that the prayer for refund of the purchase price would mean that he surrenders the motor vehicle back to the respondent. He did not make that disclosure and left it to the trial court to make orders as it did and as prayed. The lower court cannot be blamed for that. The appellant got what he asked for.

20. It is my considered view that the appellant did not meet the threshold of orders of review. It was not demonstrated that any error on the face of the record occurred. The so-called error the appellant alluded to was not an error on the face of the record.

21. The appellant was aggrieved by the order of refund, which he had pleaded and prayed for, he ought to have filed an appeal instead of the application for review. The order granted by the trial court was one amongst those sought by the appellant. That cannot be an error which was capable of being reviewed. The appellant was therefore seeking that the trial magistrate sits on his own appeal and grants an order favorable to the appellant.

22. Accordingly, the applications dated 10th August 2023 was properly dismissed.

23. In the circumstances, I find that this appeal lacks merit and i proceed to dismiss it with no orders as to costs, the respondent having failed to participate in the proceedings.

24. This judgment to be uploaded. The lower court to be returned with a copy of the judgment.

25. The file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI VIA MICROSOFT TEAMS THIS 31ST DAY OF JANUARY, 2025

R.E. ABURILI

JUDGE