



**Mwangi & 2 others v Njeri (Civil Appeal E235 of 2020)
[2024] KEHC 6096 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E235 OF 2020
HI ONG'UDI, J
MAY 30, 2024**

BETWEEN

KIHIA MWANGI 1ST APPELLANT

PAUL MWANGI NYOTA 2ND APPELLANT

MISTER DELIVERY LTD 3RD APPELLANT

AND

HENRY WACHIRA NJERI RESPONDENT

(Being an appeal from the ruling delivered by Hon. D. O. Mbeja – Senior Resident Magistrate on 25th September, 2020 in Nairobi Chief Magistrate’s Court Civil Suit No. 4784 of 2008)

JUDGMENT

1. Kihia Mwangi, Paul Mwangi Nyota, Mister Delivery Limited hereinafter referred to as the 1st, 2nd and 3rd appellants are the 1st, 2nd and 3rd defendants respectively while the respondent is the plaintiff in the lower court case. The ruling being challenged is dated 25th September, 2020 and is in respect of a notice of motion dated 30th January, 2020. Vide the said ruling the learned trial Magistrate granted the orders sought by reviewing the ruling delivered on 17th September, 2019 in respect of the two applications dated 13th September, 2019 and 18th September, 2019.
2. Being dissatisfied with the said ruling the appellants filed this Appeal on the following grounds:
 - i. The learned Magistrate erred in law and fact in allowing the plaintiff’s notice of motion dated 30th January, 2020 contrary to the provisions of Order 45 rule 6 of the *Civil Procedure Rules*.
 - ii. The learned Magistrate erred in law by allowing the judgment dated 20th August, 2020 to be reviewed more than once.



- iii. The learned Magistrate erred in law and fact by failing to consider the merits of the Defendant’s preliminary objection dated 10th March, 2020 and the submissions filed in court in support of the same.
3. This is a case that was filed in the year 2008. After a lot of pushing to and fro among the parties, the matter proceeded to hearing of the 1st and 3rd appellants case on 28th March, 2019. The respondent did not call any witness. Judgment was finally delivered on 20th August, 2019 in favour of the respondent.
4. The 1st and 3rd appellants filed a notice of motion dated 13th September, 2019 seeking stay of execution of the Judgment premised on their appeal filed in the High court. On the other hand, the 2nd appellant filed a notice of motion dated 18th September, 2019 seeking stay of the Judgment premised on his request for review of the Judgment dated 20th August, 2019. Both applications were heard and a joint ruling delivered on 17th December, 2019, by Mr. D. O. Mbeja Senior Resident Magistrate.
5. In the said ruling the application dated 13th September, 2019 seeking stay of execution of the Judgment was granted on condition that half the decretal sum be paid to the respondent while the remaining half was to be deposited in a joint interest account in the names of the parties’ advocates: On the other hand, the application dated 18th September 2019 was equally allowed in terms of prayer 4 which provided:
- “That this Honourable court be pleased to set aside the Judgment dated 20th August, 2019 and re-open the plaintiff’s case for de novo hearing on priority basis and to grant the 2nd defendant an opportunity to participate in the trial by defending the suit”.
6. What came next is the notice of motion dated 30th January, 2020 filed by the respondent herein. The application sought a review of the ruling delivered on 17th September, 2019 (sic) in respect of the two applications dated 13th and 18th September, 2019. The applicant also sought for directions to be issued on the hearing of the case against the 2nd appellant. The learned trial Magistrate delivered his ruling on 25th September 2020 which is the subject of this Appeal.
7. With the above set up I now move to the Appeal which was canvassed by written submissions.
8. The Appellants submissions were filed by COL Advocates LLP and are dated 5th March, 2024. Counsel submitted that the ruling the subject of the respondent’s application dated 30th January, 2020 was the ruling dated 17th December, 2017. He further submitted that the ruling of 17th December, 2017 was in respect of an earlier review sought by the parties vide the applications dated 13th and 18th September, 2019. Its counsel’s contention that an error apparent on the face of the record is a case of review as provided for under Order 45 Rule 2(1) of the Civil Procedure rules. He referred to the respondent’s then application as an abuse of the process of the court.
9. Lastly referring to Order 45 Rule 6 *Civil Procedure Rules* he submitted that the said Rule bars subsequent applications to review an order made on an application for a review. In stressing this he cited the case of *Bethwel Omondi Okal V Mananging Director* [2019] e KLR where it was held:
- “However, under Rule 6 of Order 45 Civil Procedure Rule there is a clear bar of subsequent application for review once a decision or a ruling is made on an application for review. Simply put, a court while exercising its jurisdiction for review cannot be asked to review a review order because the law does not allow it”
10. Counsel further submitted that their preliminary objection based on the issue of jurisdiction was never considered in the trial court’s ruling dated 25th September, 2020.



11. The respondent's submissions were filed by Musili Mbiti advocates LLP and are dated 18th March, 2024. Counsel submitted that the Appeal revolves around the provisions of Order 45 Rule 2(1) of the Civil Procedure Rules. He argued that one who is aggrieved by a court decision and is not a party to the appeal retains the locus to file an application for review. That the respondent never filed an appeal against the ruling and he retained his right to apply for review. He relied on the cases of:
- i. Uganda Misc. Application No. 18 of 2023 (arising from Civil Suit No. 009 of 2011) 5 Daj communications Ltd Vs David Kihika
 - ii. National Bank of Kenya Ltd V Ndungu Njau [1997] eKLR where the court 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. 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 provision of law cannot be a ground for review”
12. He argued that the Appellants want to benefit from the orders made in respect of the 2nd appellant who never participated during trial and yet the appellants fully participated in the proceedings before the trial court. He urged this court to uphold the learned trial Magistrate's decision and dismiss the appeal.

Analysis and determination

13. Having considered the grounds of appeal, the record of appeal, plus the submissions, I find only one issue falling for determination. The issue is whether the notice of motion by the respondent dated 30/01/2020 was properly before the learned trial magistrate.
14. There is no dispute about the orders that the trial court issued in his Ruling of 17th December, 2019 in respect of two applications dated 13/9/2019 and 18/9/2019 respectively. For the application dated 19/9/2019 the trial court set aside the Judgment delivered on 20/8/2019 and re-opened the respondent's case for hearing de novo.
15. After this ruling the 1st and 3rd appellants herein filed an Appeal HCCA No. 526 of 2019 against the respondent and the 2nd appellant herein and they were now respondents therein. In that said Appeal the 1st and 3rd respondents sought orders of stay of execution of the Judgment dated 20/08/2019.
16. A ruling by Lucy Njuguna J delivered on 13th February, 2020 in the said Appeal (HCCA No. 526/2019) clearly found that there was nothing to stay since the Judgment of 20/08/2019 had been set aside. The application was therefore dismissed.
17. Having suffered that blow the respondent herein went back to the trial court seeking a review of the Judgment of 20/08/2019 vide the application dated 30/01/2010 which was allowed.
18. Upon perusal of the Judgment dated 20/08/2019 I note what the learned trial court stated at pg 14 of the Record of Appeal lines 10 – 17 to be as follows:

“Guided by the circumstances obtaining in the instant case, the injuries suffered by the plaintiff, the evidence so far adduced together with the submissions filed, Judgment is entered in favour of the plaintiff against the defendants jointly and severally for Ksh



2,000,000/- general damages for pain and suffering, the plaintiff is also awarded special damages of Ksh 163,000/= as pleaded and proved all the circumstances of this case considered. The above award shall carry costs plus interest at court rates”

19. In view of the above finding in the Judgment, how was the trial court now splitting the Judgment to pull the 2nd appellant out of it? What was now the portion the remaining parties (1st & 3rd) appellants were to pay out of the decretal sum awarded?
20. My finding is that the trial court having set aside the Judgment of 20/8/2019 should not have entertained that application by the respondent. The respondent herein who was a respondent alongside the 2nd appellant herein in HCCA No. 526/2019 should have raised his issues before that court or file a cross-Appeal therein. Its not even clear to this court what the position in that Appeal is since it originated from the same Judgment as the one before this court.
21. The solution to the mess created by the trial court and which mess the parties herein find themselves in is to have the matter heard a fresh, to cure all the anomalies.
22. The upshot is that the Appeal has merit and is allowed. The following orders to issue:
 - i. The Ruling delivered on 13/2/2020 by the trial court is hereby set aside
 - ii. The Judgment delivered on 20/8/2019 by Mr. D. O. Mbeja (SRM) is hereby set aside.
 - iii. The Lower court case Milimani Chief Magistrate’s Court Civil Case No. 4784/08 to be heard afresh before any Magistrate with jurisdiction besides Mr. D. O. Mbeja SRM
 - iv. Owing to the age of the said case the same should be given priority and heard and determined within 12 months.
 - v. Costs shall be in cause.
24. Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

