REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 45 OF 2013

KENYA POWER & LIGHTING & CO. LTD
..... APPELLANT

VERSUS

BRIGADIER (RTD) PETER NYANGWESO RAMOYA (SUING ON BEHALF OF JALATH RAMOYA---------- RESPONDENTS

EUSEBIUS BARASA RAMOYA
.....RESPONDENTS

(*An Appeal arising from the Ruling of Hon. T.I. Maisiba, Principal Magistrate in Busia CMCC No. 70 of 2013 delivered on 9.10.2013*)

JUDGMENT

1. In a Cause of Action based on negligence the Respondent (hereinafter also referred to as the Plaintiffs) successfully sued the Appellant (hereinafter also referred to as the Defendant). In a Judgment dated and delivered on 10th July 2013, the Trial court entered judgment in favour of the Plaintiffs for the sum of Kshs. 5,534,000/- plus costs and interest at Court rates.
2. Following that judgment the Defendant moved Court by way of Notice of Motion dated 6th August 2013 for the following prayers;

i. **That this application be certified as urgent and the same be heard ex-parte in the 1st instance in respect of prayer 2 below.**
ii. **That this Honourable Court be pleased to grant a stay of execution of the decree herein pending the hearing and determination of this application inter parties.**
iii. **That the Honourable Court be pleased to review and set aside its judgment delivered on 10th July 2013.**
iv. **That the Honoruable court be pleased to allow the Defendant/Applicant to tender additional evidence before writing a new judgment.**
v. **That costs of this application be provided for**

3. The Trial court declined to grant the said application in a ruling made on 9th October 2013. It is that ruling that has given rise to this Appeal in which the Appellant raises the following 7 grounds of Appeal:-

1. **The learned Trial Magistrate grossly misdirected himself on the law and fact in dismissing**

the application for review dated 6.8.2013 as lacking in merit..

2. **The learned Trial Magistrate grossly misdirected himself in law and fact by failing to admit and taken into consideration the investigation report prepared by Mclarens Young International which contained discovery of new and important matters or evidence which, after the exercise of due diligence, was not within the knowledge of the Appellant and/or court not be produced by the Appellant at the time when the judgment and the decree was passed.**
3. **The learned Trial Magistrate misdirected himself in law and facts by failing to take into consideration relevant matters and judicial guidelines in determining applications for review thereby erroneously dismissing the Appellant's application for review.**
4. **The learned Trial Magistrate erred in law and grossly misdirected himself on fact by failing to judiciously determine the matters canvassed by the Appellate in the application for review thereby occasioning miscarriage of justice.**
5. **The learned Trial Magistrate erred in law and grossly misdirected himself on facts by failing to appreciate or for otherwise ignoring the tenets and principles applicable in application for review which were concisely raised and addressed in the Appellant's application dated 6.8.2013.**
6. **The learned Trial Magistrate erred in law and grossly misdirected himself on facts by taking into consideration factors that were irrelevant in arriving at the decision to dismiss the application for review on the grounds of lacking merit.**
7. **The learned Trial Magistrate grossly misdirected himself on law and facts by filing to take into consideration issues canvassed by the Appellant which laid indisputable basis for reviewing his decision on liability and quantum in the judgment delivered in Busia CMCC No. 70 of 2013.**

4. The Appeal was argued by way of written submissions which were highlighted by arguments made in open court. In a nutshell the Appellant argued that it had difficulty obtaining an investigation report prepared by Mc Larens Young International occasioned by a fire that affected the offices of the said firm in 2012. That the document could not easily be retrieved and by the time the report was recovered the Appellant had already closed its case. It was argued that the Appellant had demonstrated in its Application before the Trial Court that it had obtained new and important evidence which could not be obtained at the time of hearing, even after it had exercised due diligence. It was submitted for the Appellant that the Application before the Trial court met the threshold required by Order 45 of the Civil Procedure Rules. This Court was referred to the Decision in **Francis Origo & Another vs Jacob Kumali Mungala** (2005) eKLR. Lastly I was urged to give effect to the spirit of the Constitution 2010 as provided by Article 159 (1) that justice should not only be done but must be seen to be done.
5. In submissions dated 13th October 2015 and filed on the same day, the Respondents urged this court to dismiss the Appeal. Counsel of the Respondents argued that the evidence sought to be introduced by the dismissed application was available to the Defence at the time of hearing and before the close of the Defence case. It was argued that :-

"there is absolutely no reason for the Defendants' failure to inform the court of the ongoing investigation; In fact they would have sought for more time from the court in the event that they felt the investigation ought to have obvious (sic) taken longer than anticipated."

6. Further the Respondents submitted that another Investigation Report by Synergy Risk Solution Ltd had been in evidence and that there was little or no difference between that report and that of McLarens.
7. The substantial issue raised by this Appeal may not be involved. The question to be posed is

whether the Report by Mclarens was a new and important evidence which, after the exercise of diligence on the part of the Appellant, was not within its knowledge and could not be produced by it before the delivery of the judgment. The answer to his question is provided, partly, by the averments of Caroline Warui Emase in her affidavit of 6th August 2013 sworn in support of the application for Review before the Trial Court.

8. Caroline Warui was at the time of disposition the Insurance Officer of the Appellant Company. In paragraph 3 of that Affidavit she depones:-

3. **That I know of my own knowledge that M/S APA Insurance Limited who are the Defendant's Insurers instructed the firm of Mclarens Young International to conduct investigations and establish the cause of a fire alleged by the Plaintiff and assess the extent of damage in the year 2012.**

She then stated that the process of investigation took time because it involved field work.

10. The Officer further stated that their effort to get the report on time was frustrated by a fire that affected the offices of the Investigator in the year 2012 and so (paragraph 7 of her affidavit.)

"… the said firm of investigators availed the final report to our insurer in May 2013."

11. What is clear from the evidence of the Insurance Officer is that the Appellant would have been aware of the existence of the Investigators Evidence before the delivery of judgment on 1st July 2013. In her own words the Officer confirms that:

"**my department co-operated with the said private investigators by providing them with the necessary documentation and personnel that they required in conducting their investigation."**

And from the Report itself, the Investigation had been completed by 28th May 2012, the date of the report. This was about 12 months before the Defence case closed.

12. From the Affidavit evidence of the Officer, what prevented the timely production of the report by the Appellant was its inability to get obtain it as the offices of Mclarens Young International had been affected by a fire. One, of course, notices that the Investigators themselves did not corroborate this or state when as a fact it was able to avail the report to the Appellant or its Insurers. But even if the Appellant's explanation was to be accepted, it is curious that its Advocate never mentioned this to Court. It cannot be said, fairly, that the Defence was diligent when it never, at the hearing, brought the existence of important evidence and the challenge it had in procuring it to the attention of the Court. The Defence should have in the very least sought an adjournment and time to avail this evidence. And strange (is it not"), that the Appellant's only witness never even mentioned that the Appellant had, through Its Insurers, sought an Expert opinion from Mclarens.
13. Further, even if the Appellant can be excused for not making its difficulty known to Court what is to be made of its delayed action in moving the Court after it had received the report. The Court record shows that the Defence closed its case on 15th May 2013 and judgment set for 19th June 2013. Judgment was however not delivered until 10th July 2013. The evidence is that the Report by Mclarens reached the Appellant and its Advocate on 20th May 2013. While this was after the close of the Defence, it was about 4 (four) weeks before the date set for judgment. The Appellant would have demonstrated diligence if it had moved the Court immediately so as to arrest the delivery of the Judgment. Instead, the Appellant waited until after judgment had been delivered on 10th July 2013 to seek leave of Court to allow it tender the additional evidence. The Appellant

cannot be said to have acted diligently.

14. This Court has no doubt therefore that the Trial Court was justified in declining the Application for Review. It was without merit and so is this Appeal.
15. The result, the entire Appeal is dismissed with costs.

Dated, signed and delivered at Busia this 9th day of December 2015.

F. TUIYOTT

J U D G E

In the presence of :-

Oile -C/Assistant

N/A for Appellant

N/A for Respondent