



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KWACH, PALL & OWUOR JJ.A.)**

**CIVIL APPEAL NO.266 OF 1997**

**BETWEEN**

**MACHAKOS RANCHING CO.LTD.....APPELLANT  
AND  
WAEMA ITUMOMUOKA.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Kenya at  
Machakos (Hon. Justice Osiemo) dated 29th November, 1995**

**in**

**H.C.C.C. NO.303 OF 1994)**

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**JUDGMENT OF THE COURT**

This is an appeal from the order of the High Court at Machakos (Osiemo J) refusing to review his judgment delivered on 18th October, 1995.

By a notice of motion filed on 26th October, 1995, the appellant sought an order that the superior court review its judgment and dismiss the suit namely Civil Case No.314 of 1994 with costs. The application was made under S.80 of the Civil Procedure Act and Order 44 of the Civil Procedure Rules (the Rules). In contravention of Order 50 r.3 there was no statement of the grounds of the application in its body. However in the supporting affidavit Mr. Masika for the appellant stated that the learned Judge failed to consider that (a) the police abstract produced did not show that the defendant was the owner of the vehicle in question and as such the suit should have been dismissed; and (b) the defendant was not liable because the driver of the defendant did not have instructions or authority from the defendant to carry passengers in the tractor other than employees of the defendant. Under O.44 r. 1 any person aggrieved by a decree or order which is either not appealable or from which though appealable no appeal has been lodged may apply for review on the following grounds only:

(i) That there has been discovery of a new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced at the time

when decree was passed or order was made.

(ii) There is some mistake or error on the face of the record or

(iii) There is some other sufficient reason.

So far as the issue of ownership of the vehicle in question is concerned, by paragraph 3 of the plaint the defendant/appellant was alleged to be owner of the vehicle and by paragraph 2 of the amended defence this allegation was not denied. Moreover, Jackson Mulinge is said to be a director of the defendant/appellant. He should have known that the vehicle belonged to him if that was the case and not to the defendant. So this could not be a matter which was beyond his knowledge. Mr. Masika for the appellant has argued that there was a mistake apparent on the face of the judgment of the superior court on the issue of ownership of the vehicle in question but the ownership of the vehicle was never in issue in the superior court.

So far as the issue of vicarious liability of the defendant appellant is concerned according to the judgment of the superior court both counsel had agreed on the issue of liability. In any event this could be a ground for appeal but it cannot be a ground for review.

We do not see any merit in the appeal and therefore dismiss it with costs.

Dated and delivered this 10th day of November, 1999.

R.O. KWACH

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

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