Lavington Security Limited v Waigi (Civil Appeal 614 of 2018)
[2022] KEHC 2994 (KLR) (Civ) (28 April 2022) (Judgment)

Neutral citation: [2022] KEHC 2994 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 614 OF 2018

CW MEOLI, J

APRIL 28, 2022

BETWEEN

LAVINGTON SECURITY LIMITED ..... APPELLANT

AND

MUNYUTU WAIGI ..... RESPONDENT

(Being an appeal from the ruling of D.O Mbeja, SRM delivered on 24th May, 2018 in Nairobi Milimani CMCC No. 521 of 2017)

JUDGMENT

1. This appeal emanates from the ruling delivered on 24th May, 2018 in Nairobi CMCC No. 521 of 2017. On February 1, 2017 Munyutu Waigi, (hereafter the Respondent) filed a suit in the lower court against Lavington Security Limited (hereafter the Appellant) seeking payment of Kshs. 212,500/- and general damages for mental anguish. The cause of action arose from an alleged break-in and theft that occurred on 12th May, 2014 at the Respondent's Apartment No. 8, Karue Court on Menelik Road Kilimani , Nairobi during a period when the Appellant was contracted to provide security and to ensure was no such break in occurred. It was averred that Appellant was vicariously liable for the acts of its employees responsible for securing the apartment and was liable to compensate the Respondent for the property lost during the break-in.

2. The Appellant filed a statement of defence on March 24, 2017 denying the averments in the plaint. The Respondent thereafter filed a motion dated March 31, 2017 seeking to strike out the Appellant's statement of defence and judgment in his favour in terms of the plaint. The motion was canvassed by way of written submissions and by its ruling delivered on September 8, 2017 the lower court allowed the Respondent's motion with costs.

3. Subsequently, the Appellant filed the motion dated 15th September 2017 expressed to be brought under Section 3A of the *Civil Procedure Act* and Order 45 & 51 of the *Civil Procedure Rules*, seeking the review of the said ruling and that the suit be set down for full trial. The grounds on the face of the motion were amplified in the supporting affidavit of Janet Biwott. She deposed that in the ruling of the lower court delivered on 8th September, 2017 the court had observed that the Respondent's motion was unopposed whereas in fact the Appellant had filed and served its replying affidavit on May 29, 2017 in opposition to the motion; that upon perusal of the court file it was confirmed that the Appellant's replying affidavit was indeed missing, arising from a clear error or mistake at the registry; and that the Appellant was aggrieved by the said ruling as it was clear that the court based his decision on the fact that the Respondent's motion was unopposed in striking out its statement of defence. That the failure by the court to consider the duly filed replying affidavit qualified as an error or mistake apparent on the face of the record and it was in the interest of justice for the motion to be allowed so that the case could be heard on merit.

4. The Respondent opposed the motion through a replying affidavit dated September 26, 2017, and thereafter parties canvassed the motion by way of written submissions. In a ruling delivered on May 24, 2018 the trial court found the Appellant's motion devoid of merit and dismissed it with costs to the Respondent, provoking the instant appeal which is based on the following grounds:

> " 1. The Learned Magistrate erred in law and in fact in finding that the Appellant's affidavit dated May 29, 2017 was not useful or significant to warrant the court to review its ruling delivered on September 8, 2017.
>
> 2. The Learned Magistrate misdirected himself on matters of the law and fact by holding that there was no discovery of new and important matter or evidence yet the Appellant's ground for review was that there was an error on the face of the record.
>
> 3. The Learned Magistrate erred in law and in fact by failing to determine whether there was an error on the face of the record to warrant the grant of the orders sought and thus occasioned a miscarriage of justice against the Appellant.
>
> 4. The Learned Magistrate erred in law and in fact in finding that there was no sufficient ground for review." (sic)

5. The appeal was canvassed by way of written submissions. The Appellant anchored its submissions on the decisions in *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR and *Abok James Odera t/a J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR regarding the duty of the first appellate court. Counsel argued that the ruling delivered on 8th September, 2017 was based on the finding that the Respondent's motion was unopposed, an incorrect position as the Appellant had filed a replying affidavit on 29th May, 2017 and the failure by the trial court to consider the affidavit was a mistake or an error on the face of the record.

6. Relying on the case of *Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd* [2019] eKLR counsel pointed out that the trial court misdirected itself on law and fact by holding that no discovery of new and important evidence had been demonstrated. Emphasizing the right to hearing under the provisions of Article 50 of *the Constitution*, counsel asserted that the lower court erred in dismissing the replying affidavit as inconsequential and not warranting the review of the court's ruling. In conclusion it was submitted the failure to consider the Appellant's replying affidavit was an error or mistake apparent

on the part of the court and that the Appellant should not suffer an injustice due to a fault not of its own making. The court was therefore urged to allow the appeal.

7. The Respondent failed and or neglected to file his submissions despite being given ample opportunity to do so.

8. The court has perused the record of appeal as well as the original record and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* [1958] EA 424; *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982 – 88] 1 KAR 278.

9. The Court of Appeal stated in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

10. The lower court in dismissing the motion expressed itself in part as follows:

> ... "I have considered the affidavit evidence before the court and I have also read the submissions by the parties. I find nothing useful or significant to warrant this court to vary the ruling delivered herein. There is so far no discovery of a new and important matter or evidence which after due diligence was not within the defendants knowledge or could not be furnished. It appears to this court that there is no sufficient ground for review.
>
> The present application in the opinion of the court is devoid of merit all circumstance of this case considered. I have considered the grounds advanced by the applicant in support of the instant application. I have also considered the affidavits filed and the history of this case. Consequently, having all the circumstances of this case into consideration I find that the application dated 15/9/2017 is devoid of merit, and it is dismissed with costs to the Plaintiff all the circumstances of this case considered." (sic).

11. The Appellant's motion before the subordinate court was primarily anchored on the provisions of Order 45 (1) of the *Civil Procedure Rules* which provides that:

> "(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 made the order without unreasonable delay."

12. In the court's view, the appeal turns on the question whether the lower court properly exercised its discretion in dismissing the application for review as the grant or refusal of an application for review of any decree or order involves the exercise of discretion. However, such discretion must be exercised judicially and upon reason, rather than arbitrarily or capriciously. The Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR stated;

> " This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Shah v Mbogo (supra)
>
> "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 this 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 has been clearly wrong in the exercise of his discretion and as a result there has been injustice". [Emphasis added]
>
> See; *United India Insurance Co. Ltd v East African Underwriters (K) Ltd* [1985] EA 898: -

13. In *Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited* [2020] eKLR the Court of Appeal stated that;

> " An application for review, therefore, involves exercise of judicial discretion. The circumstances in which this Court, as an appellate court, can interfere with the exercise of judicial discretion are limited".

14. There is a long line of authorities on the principles applicable to an application for review under Order 45 (1) of the *Civil Procedure Rules*. In the judgment of Okwengu JA in *Associated Insurance Brokers v Kenindia Assurance Co. Ltd* [2018] eKLR the Court of Appeal stated that:

> " It is clear that Order 45 rule 1(1) of the *Civil Procedure Rules* provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:
>
> "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." (Emphasis added)
>
> In *Nyamogo and Nyamogo Advocates v Kogo* [2001]1 EA 173 this Court further explained an error apparent on the face of the record as follows:
>
> "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a

mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

15. Further, in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 others* [2020] eKLR the Court of Appeal held that:

> " It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:
>
> "The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."

16. The Appellant's review motion dated September 15, 2017 was premised on the ground of error or mistake apparent on the face of the record. It was deposed at paragraph 9, 10 & 11 of the supporting affidavit that:

> " 9. THAT upon perusal of the court file, we noticed that the Defendant's replying affidavit was indeed missing which was a clear error/mistake at the registry.
>
> 10. THAT the Defendant is aggrieved by the said ruling as it is clear that the learned magistrate based it's decision on the fact that the Plaintiff's application was unopposed and consequently struck out the Defendant's statement of Defence.
>
> 11. THAT failure by the learned magistrate to consider the duly filed replying affidavit qualifies for an error/mistake apparent on the face of the record as per Order 45 Rule 1(b) of the *Civil Procedure Act*." (Sic)

17. Did the Appellant demonstrate before the lower court the asserted error on the face of the record? In the oft-cited case of *National Bank of Kenya Ltd v Ndungu Njau* [1995-98] 2 EA 249 the Court of Appeal held that:

> "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.
>
> In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters on controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it."

18. There appears to be no dispute that the Appellant's replying affidavit in opposition to the Respondent's motion in the lower court dated March 31, 2017 though apparently filed and served, was inexplicably missing from the court record at the time the ruling on the motion was written and delivered. The submissions of the Appellant in opposition to the said motion for striking out referred to the said replying affidavit, and for their part, the Respondents have never disputed that indeed such an affidavit had been filed and served upon them in opposition to their motion. Perhaps, for good reason. Attached to the Appellant's affidavit in support of the review application dated September 15, 2017 was a copy of the replying affidavit marked annexure JB2 and sworn by David Kigen on May 29, 2017 in opposition to the Respondent's motion dated March 31, 2017 as well as a copy of the court receipt dated May 29, 2017 in respect of filing charges (annexure JB3).

19. On the face of the annexure JB2 are several stamp impressions, including a court stamp bearing the words "MILIMANI COMMERCIAL COURTS CASH OFFICE" and the date May 29, 2017. The second is a stamp impression of Hassan Madowo Said Advocate which bears the word "RECEIVED" above the date May 29, 2017. Below the stamp date is what appears to be a signature or endorsement signifying receipt of the replying affidavit.

20. In his ruling on the motion dated March 31, 2017, delivered on 8th September 2017, the learned magistrate drew attention to the fact that there was no replying affidavit before him by stating that:

> "The application is not opposed by the respondent. Order 51 rule 14(1) (of the *Civil Procedure Rules*) states and I quote; "any respondent who wishes to oppose any application may file any one or combination of the following documents;
>
> (a) A notice of preliminary objection;
>
> (b) A replying affidavit.
>
> (c) A statement of grounds of opposition".
>
> None of the above documents were filed by the respondent to challenge the application before the court save for submissions filed on 6/7/2017."

21. The court then proceeded to consider the defence statement "and the affidavit evidence so far on record" before concluding that that the defence consisted of mere denials and raised no triable issues, before allowing the Respondent's application by striking out the defence and entering judgment in favour of the Respondent in terms of the plaint dated 6th December 2016.

22. On this appeal as in the lower Court the Appellant asserted that failure by the lower court to consider the Appellant's affidavit dated 29th May 2017 filed in response to the Respondent's motion dated 31st March, 2017 constituted a mistake or error apparent on the face of the record and that the review application was well founded. From its ruling, the lower court treated the review application as one grounded on the discovery of a new and important matter or evidence. The court did not address itself at all to the fact of the missing replying affidavit asserted by the Appellant and undisputed by the Respondent, but nevertheless concluded that there was "no discovery of a new and important matter or evidence... (or) sufficient ground for review."

23. The application before the lower court was premised on the ground of error on the face of the record and not on the discovery of a new a new and important matter or evidence or other sufficient ground. The Appellant's complaint in that regard is therefore justified. I agree with the Appellant that the absence of their replying affidavit on the record led to the finding that the motion dated March 31, 2017 had been unopposed. While the lower court cannot be blamed for this finding given the state of the record, it ought to have given due consideration to the fact when subsequently brought to its attention by way of the review application.

24. It mattered not whether the missing replying affidavit comprised a sufficient answer to the motion dated March 31, 2017, or whether the court by its ruling of 8th September 2017 on the said motion had duly considered the pleadings and submissions of the parties on the record in respect of the motion dated March 31, 2017. The absence of an admittedly filed replying affidavit from the record impacted upon the Appellant's right to a fair hearing under Article 50 of *the Constitution*, and which right "is also the cornerstone of the rule of law." See *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR.

25. Parallel to that, the lower court determined the motion dated March 31, 2017 based on an evidently incomplete record. This in my view amounted to a self-evident error on the face of the record and the Appellant's motion for review was well grounded and should have been allowed. Had the trial court considered the grounds in that motion and the material placed before it, it would have so found. Moreover, even if the Appellant's motion for review had been based on the ground of discovery of a new and important matter or evidence, the Appellant's material before the lower court to my mind satisfied that ground as well, and the trial court could have allowed the motion on that account.

26. Consequently, I find the appeal meritorious and accordingly allow it with costs to the Appellant. The order of the lower court dated 24th May 2018 rejecting the review motion dated September 15, 2017 is hereby set aside and the Court substitutes therefor an order allowing the review motion. The court directs that the motion dated March 31, 2017 be heard afresh and expeditiously, before a magistrate other than Mbeja SRM, and that for this purpose, the Appellant be allowed to place on the record, its copy of the replying affidavit sworn by David Kigen on May 29, 2017 in opposition to the motion.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH APRIL 2022

C.MEOLI

JUDGE

In the presence of:

Mr Achola h/b for Mr Kiprono for the Appellant

Respondent: absent

C/A: carol