



REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL NO. 48 OF 2019

ICEA LION INSURANCE COMPANY LTD.....APPELLANT

VERSUS

CHRIS NDOLO MUTUKU

T/A CRYSTAL CHARLOTTE BEACH RESORT.....RESPONDENT

RULING ON AN APPLICATION FOR REVIEW OF JUDGMENT

INTRODUCTION

1. This ruling determines a Notice of Motion application dated 14th July, 2021 brought under Certificate of urgency by the respondent/applicant Chris Ndolo Mutuku T/A Crystal Charlotte Beach Resort, seeking the following orders:

i. *Spent*

ii. *Spent*

iii. *That the judgement of the Court dated 20th January 2021 be reviewed, set aside and in its place an appropriate Order be made upholding the Judgement of the Principal Magistrate in Bondo PMCC No. 80 of 2018.*

iv. *That such further or other orders as are appropriate for the effective administration of justice be issued.*

v. *That the costs of this application be provided for.*

2. A brief history of this matter is that the appellant/respondent herein had instituted the instant appeal against the applicant seeking to have an award of Kshs. 1,421,000 awarded by the lower court to the applicant as special damages for consequential loss suffered as a result of a break in into the applicant's premises set aside.

3. This court's judgement delivered on the 20th January 2021 dismissed the respondent/ applicant's claim and award for consequential loss, on the basis that the insurance policy between the two parties herein explicitly provided that compensation for consequential loss would not be entertained. It is this judgement that the respondent is impugning through the current application that is subject of this ruling.

4. The applicant's application is premised on the ground that there was a gross error and mistake in the judgement delivered by this court on the 20th January 2021 and that the insurance policy only excluded computer related consequential loss.

5. The applicant specifically cites Clause 12 of the Insurance Policy which he states provides as follows:

COMPUTER LOSS GENERAL EXCLUSION CLAUSE

...(c) any consequential loss directly or indirectly caused by or contributed to by or consisting of or arising from the incapacity or failure of any computer, correctly or at all

6. The applicant's case is that the loss he suffered was not computer related but rather one of a rudimentary break-in and that as such the damages awarded by the lower court were justified as they would make good the loss he had suffered. The applicant further states that it would amount to a miscarriage of justice if the appellant/respondent was allowed to proceed with execution of decree in light of the undeniable mistake/error on the part of the court.

7. In opposition, the respondent filed a replying affidavit on the 19th July 2021 sworn by [Mr. Dancan Otieno Njoga advocate on the same date.
8. The respondent's contention is that the applicant has not met the requirements under Order 45 of the Civil Procedure Rules, 2010 that provide for instances where a court can review its orders/judgement. Further, the respondent states that the instant application by the applicant is an afterthought as the same has been brought with unreasonable delay, 6 months after the delivery of the judgement on 20/01/2021, the applicant having woken up after the appellant/respondent commenced the process of recovery of excess monies paid to him by the appellant/respondent.
9. The appellant/ respondent's further contention is that the applicant is acting in bad faith by challenging the validity of the same document from which he obtained a favourable judgement before the trial court.
10. The respondent further states that the applicant filed the instant application a day to a ruling for a preliminary objection that he had raised before the lower court, objecting to lack of jurisdiction of the said court to allow the appellant/respondent herein execute for recovery of the excess decretal money paid to the applicant by the respondent, in the enforcement of the judgment of this court, which ruling was made in favour of the respondent.
11. The respondent further contends that the basis upon which the applicant's application has been brought does not fall within the grounds of review that are now well settled.
12. The parties canvassed the application by way of written submissions.

Applicant's Submissions

13. It was submitted by the applicant that from the Court's Judgement, the only reason this court did not allow the applicant's award for consequential loss was because its interpretation of Memo 12 was that it was a contract between the parties that expressly excluded consequential loss in the event of the occurrence of an event which thus amounted to an error and mistake on the part of the court as Memo 12 only excluded consequential loss arising out of, or related to computers.
14. Further on the alleged court's mistake and error in arriving at its decision, it was submitted that the heading of the Memo is self-explanatory and is clear that the exclusion is for computer related losses and further that from the wording of Memo 12, there is no full stop after the words "*consequential loss*" and that the sentence immediately following it is a continuation and completion of the sentence that started with "Notwithstanding".
15. The applicant further submitted, regarding the wording of the Memo, that if the clause was to be interpreted without reading the entire sentence, then it would have the effect of negating all legal liability purported to be covered by the Insurance Policy.
16. The applicant's further submission was that the court having found, in paragraphs 22 and 23 of its judgement, that the appellant/respondent's reliance on the BizBora policy as its Insurance contract had no factual basis, it was a gross mistake of fact and law for the court to introduce a new contract as the one upon which the parties' relationship was based.
17. It was submitted that just as the BizBora Policy was declared not to be a contract, similarly, pages 14 and 18 of the Record of Appeal must be declared not to be a contract as any other reasoning would amount to an erroneous interpretation by the court.
18. On what amounts to a mistake and error apparent on the face of the record, the applicant relied on the case of **Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR** where the court stated that it is one which *strikes one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions*.
19. It was further submitted that the court had discretionary power to do what is right in the circumstances of the case so as to avoid any injustice that might occur as a result of its error/mistake. On the courts exercise of its discretionary powers, the applicant relied on the Supreme Court case of **Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others [2019] eKLR** where the apex Court stated that it lacked jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal.

Respondent's Submissions

20. It was submitted on behalf of the appellant/respondent that the applicant had not placed any new evidence before the court to warrant a review of the judgement. The respondent's counsel submitted that the applicant produced and relied on the Insurance Policy, that contained Clause 12, and as such cannot allege that the same is new evidence. The respondent relied on the case of **Francis Njoroge v Stephen Maina Kamore [2018] eKLR** where the court addressed itself to what amounted to new evidence as that which was not within the knowledge of the appellant and further went on to state that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal.
21. The respondent further submitted that there was no mistake or error apparent on the face of the record as alleged by the applicant. Reliance was placed on the case of **Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243** to buttress this point.
22. It was submitted that there are no sufficient reasons advanced by the applicant to warrant review and setting aside of the judgement delivered on 20/1/2021 as the policy document being challenged by the applicant was admitted into evidence by consent of both parties and was the basis upon which the applicant herein filed suit and obtained judgment in the lower court in his favour, which judgment was

subsequently overturned by this court in the present appeal. Reliance was placed on the case of **Abasi Belinda v Frederick Kangwamu & Another [1963] E.A. 557** where the court stated that a good ground of appeal is not necessarily a good ground for review.

23. Further submission by the Appellant's counsel was that the instant application has been brought with unreasonable delay six months after the delivery of the judgement, a clear demonstration of it being an afterthought instigated by the appellant/respondent's initiation of execution proceedings against the applicant in the lower court to recover the excess monies paid by the appellant to the respondent in execution of decree of the lower court.

Analysis & Determination

24. I have considered the applicant's application, opposition thereto and written submissions by both parties as supported by case law and statutory provisions. In my humble view, the only issue for determination is whether the application by the applicant has any merit.

25. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and realm of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010.

26. The above provisions empower this Court to review its orders or decisions, but such power must be exercised within the established legal principles. Under Section 80 of the Civil Procedure Act:

“80. Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

27. Order 45 Rule 1 of the Civil Procedure Rules, 2010 which is the procedural provision implementing section 80 of the Civil Procedure Act provides:

“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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

28. Section 80 of the Act and Order 45 of the Rules made under the Act are very explicit that a court can only review its decree or orders if the following grounds exist:

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

29. The pertinent question for determination herein, therefore, is whether the Applicant has established any of the above grounds to warrant an order of review of the judgment of this court delivered on 20th January, 2021.

30. In the **Muyodiv ICDC (supra) case**, the Court of Appeal described an error apparent on the face of the record as follows:

“...In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.” (emphasis mine)

31. I have considered the reasons given by the applicant for seeking an order of review. The applicant is specific that there was an error and mistake on the part of the court for its failure to allow the applicant's award for consequential loss because of the court's interpretation of Memo 12.

32. Memo 12 of the Insurance Policy between the parties as relied on by the applicant in the lower court to obtain judgment in his favour provides as follows:

COMPUTER LOSS GENERAL EXCLUSION CLAUSE

General exclusion applicable to all actions of this policy ensuring damage to property or the consequences of damage to property or any liability.

Notwithstanding any provision of this policy including any special exclusion or extension or other provision not included herein which would otherwise override a general exclusion, this policy does not cover;

a) Loss or destruction of or damage to any property whatsoever (including computer) or any loss or expense whatsoever resulting or arising therefrom

b) Any legal liability of whatever nature

c) Any consequential loss directly or indirectly caused by or contributed to by or consisting of or arising from the incapacity or failure of any computer, correctly or at all...."

33. The applicant asserted that the clause above only covers computer generated/caused consequential loss as a result and not break-ins.

34. However, my reading of the said Memo 12 and specifically Paragraph (a) provides that compensation for consequential loss would not be entertained in any instance including where the same is instigated by computer. A complete reading of Memo 12 reveals that consequential losses as a result of computer action are specifically laid down in clause (c).

35. I reiterate the Court of Appeal's definition in the *Muyodi v ICDC* (supra) case of a mistake or error on the face of the record as ***an error which has to be established by 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.***

36. My re reading of the memo 12 above shows even more clarity on what loss was excluded in the policy and therefore it is my humble view and finding that there was no mistake or error in the interpretation of Memo 12. Neither is there any apparent error or mistake capable of being rectified by this court by way of review of that judgment.

37. The applicant further asserts and submitted that the court having found that the respondent's reliance on the BizBora policy as its Insurance contract had no factual basis, it was a gross mistake of fact and law for the court to introduce a new contract, in the form of Pages 14 -18 of the Record of Appeal and construed the same as a valid contract between the parties herein.

38. It is my observation and finding that the applicant's assertion that the Insurance Policy which was produced by consent of both parties and which he relied on both in the trial court and in this appeal was not based on any truths, is an assertion which cannot stand. The applicant cannot seek to have his cake and eat it. It is important to distinguish grounds of appeal and grounds for review. Guidance can be obtained from the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR** where the court held:

"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added).

39. In **Abasi Belinda v Fredrick Kangwamu and another {1963}E.A 557**, the Court held that:-

"a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal."

40. The following excerpt from the judgement in the above cited case of **National Bank of Kenya Ltd(supra)** is a useful guide where 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 provision of law cannot be a ground for review."

41. It should be noted that the grounds for review are very specific as discussed herein above. The Applicant herein has not demonstrated that there was an error apparent on the record.

42. The applicant has also not demonstrated that there is any sufficient reason or cause for review of the judgment of this court which was rendered over six months prior to this application being filed. He has not given any plausible reason why there has been such inordinate delay in bringing the application for review and why he only approached this court after his preliminary objection in the lower court as contended by the Respondent, was dismissed, paving way for execution to recover the excess money paid out to the applicant pursuant to the judgment of the lower court, which judgment on the award for consequential loss was set aside by this court on appeal.

43. The applicant in this case is flip drooping from relying on the Insurance Policy herein to seeking to have it set aside when it is convenient. This is a court of justice and not a court of convenience such that it has to consider the conflicting interests of all the parties. And in so, considering courts have to be guided by the laid down principles of law. In the circumstances, it is my finding that the application for review of the judgment of this court delivered on 20th January 2021 is unmeritorious in that the applicant has not established any ground for review of the Judgment of this court and therefore his application is declined and dismissed with costs to the Respondent/appellant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 27TH DAY OF SEPTEMBER, 2021

R.E. ABURILI

JUDGE