REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 22 OF 2017

TABITHA NJERI KINUTHIA.....APPLICANT

VERSUS

SAID SWALEH SAID.....1ST RESPONDENT

MOMBASA MAIZE MILLERS.....2ND RESPONDENT

(An Appeal from the Judgement of Senior Resident Magistrate Y.I. Khatambi

made on 17th March, 2017 in CMCC No. 50 of 2017)

RULING

[THE APPELLANT'S NOTICE OF MOTION DATED 9TH OCTOBER, 2018]

1. The Applicant, Tabitha Njeri Kinuthia, through her notice of motion dated 9th October, 2018 seek a review of the judgement delivered by this court on 27th September, 2018. The application is brought under sections 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act (CPA), and Order 45 Rule 1 of the Civil Procedure Rules, 2010 (CPR).

2. In summary, the Applicant's case as gleaned from the grounds on the face of the application and her supporting affidavit is that there is an error apparent on the face of the judgement as the court equally apportioned liability between the respondents, Said Swaleh Said and Mombasa Maize Millers Ltd., and a person who was not a party to the proceedings. Further, that there is an apparent error on the face of the record as the court denied the Applicant the costs of the appeal.

3. The respondents opposed the application through a replying affidavit sworn on 30th October, 2018 by Caren Nada Jaguga, a legal officer with Fidelity Insurance Shield who are the insurers of the respondents. It is the respondents' position that this court has been rendered *functus officio*; that the application is misconceived, untenable, an afterthought, without merit and a brazen abuse of the court process; and that the application does not meet the grounds for seeking a review of judgement.

4. Order 45 Rule 1 of the CPR empowers a court to review its decree or order on the grounds stated in the rule which provides as follows:

> **"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**."

5. The power donated by the said rule springs from Section 80 of the CPA which states that:

"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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

6. The power granted to a court to review its decrees or orders is restricted to the terms of Order 45 Rule 1 CPR.

7. A perusal of the instant application shows that the same is hinged on the allegation that there is an error apparent on the face of the record.

8. In the case of **Muyodi v Industrial and Commercial Development Corporation and another E.A.L.R. [2006] 1 EA 243** the Court of Appeal at pages 246 – 247 described an error or mistake apparent on the face of the record thus:

"In *Nyamogo and Nyamogo v 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 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. This laid down principle of law is indeed applicable in the matter before us.""

9. In **Michael Mungai v Ford Kenya Elections & Nominations Board & 2 others [2013] eKLR** it was observed that:

"The scope for review of a decree or order is therefore limited to a situation where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason."

10. The Court further explained that:

"14. We agree with this opinion. For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal. The Applicant before us has not established that there is an error or mistake in the decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the Court's decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground."

11. In **Benson Bernard Mbuchu Gichuki v Kenneth Kiagiri Mwangi & another [2012] eKLR** G.V. Odunga, J observed that:

"A review, it has been stated time without a number, is not and should not be a substitute for an appeal since the grounds for an appeal are not necessarily the same as grounds for review."

12. The learned Judge also observed that:

"A review is not an avenue by parties to fill in blanks that were left during the hearing, but which were, due to negligence, inadvertence, omitted. To do so would defeat the well-known legal maxim that litigation must come to an end."

13. A perusal of the principles enunciated in the above cited decisions show that a review of a decree or order is not meant to grant a losing party an opportunity to reopen his case and convince the court otherwise. Indeed, an applicant can only succeed in an application for review of a decree or order on the ground that there was a mistake or error on the face of the record if the mistake or error is so clear and does not require much explanation.

14. In order for the Applicant to succeed in this matter she must demonstrate that there is an error on a substantial point of law which **"stares one in the face, and there could reasonably be no two opinions"** on that point of law – see **Muyodi** (supra).

15. The application was disposed of through written submissions. Counsel for the Applicant submitted that this court committed an error by blaming and making adverse orders against a person who was not a party to the suit. It was submitted by counsel that if the respondents blamed a third party for the accident, then it was incumbent upon the respondents to institute third party proceedings against the third party as per the provisions of Order 1 Rule 15(a) of the CPR. It was further submitted by counsel for the Applicant that it was erroneous for the court to apportion blame to the motorcycle rider who was not a party to the proceedings.

16. On his part, counsel for the respondents commenced by asserting that the instant application does not meet the grounds set by Order 45 Rule 1 of the CPR for setting aside a decree or order. His position is that there is no error of law apparent on the face of the record and even if there is such an error then the same would be prone to a long process of reasoning and therefore appropriate for disposal through an appeal.

17. It was submitted for the respondents that it is a cardinal principle of law that litigation must come to an end and this application is unnecessarily highly prejudicial to the respondents, expensive and time consuming.

18. The respondents' counsel contended that this court has been rendered *functus officio* considering that the Applicant has already filed a notice of appeal against the judgement. Counsel also submitted that the issues raised herein were determined during the hearing of the appeal and the matter is therefore *res judicata*.

19. A summary of the case leading to the judgement that the Applicant seeks to review is that the Applicant was a pillion rider on a motorcycle when it was hit by a lorry being driven by the 1st Respondent and belonging to the 2nd Respondent. The motorcycle rider died on the spot.

20. The Applicant sued the respondents at the Chief Magistrate's Court at Malindi and at the conclusion of the trial the court found the respondents 100% to blame for the accident. On appeal to this court, I found the 1st Respondent and the deceased motorcycle rider equally to blame for the accident. Although I upheld the trial magistrate's award, I ordered that the respondents would pay half the amount having found the deceased rider equally to blame for the accident. I directed the parties to meet their own costs of the appeal. This is the decision that the Applicant seeks to review.

21. Order 1 Rule 9 of the CPR states that:

> **"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."**

22. A reading of the cited rule shows that in case of non-joinder the court should proceed to determine the controversy between the parties that are actually before it. In this case, the parties that were before the trial court were the Applicant and the respondents.

23. Where a defendant feels that he is entitled to contribution or indemnity from a person not already a party to the suit, the defendant should commence third party proceedings in accordance with Order 1 Rule 15 of the CPR.

24. It is not disputed that the estate of the motorcycle rider was not a party to the proceedings before the trial court and the appeal. The respondents did not take out third party proceedings.

25. The claim before the trial court alleged negligence on the part of the respondents. In a common law legal system like ours where there are two or more tortfeasors they may either be held to be jointly or severally liable. In such a situation, where a plaintiff obtains judgement he may execute the judgement against one tortfreasor who is in turn entitled to recoup the decretal amount from the other tortfeasor. It is upon a tortfeasor to ensure all the other tortfeasors are brought on board by commencing third party proceedings.

26. In the case at hand therefore, the Applicant had a judgement against the respondents who had not bothered to commence third party proceedings against the estate of the deceased motorcycle rider. The Applicant was therefore entitled to judgement against the respondents for the entire sum. It was thus an error of law on the part of this court to proceed to apportion blame between a person who was not a party and the respondents.

27. In the case of **M.S. Ahlawat v State of Haryana, Writ Petition (cr.) 353 of 1997** the Indian Supreme Court stated that:

> **"To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience."**

28. The error committed by this court is one that stares one in the face and does not require the intervention of an appellate court.

29. Although there is a claim by the respondents that the Applicant has filed an appeal, no notice of appeal was exhibited. Indeed an application for review cannot be entertained where an appeal has been preferred but in this case there is no evidence of such an appeal.

30. In the circumstances, the Applicant's application for review succeeds. The judgement delivered by this court on 27th September, 2018 is reviewed so that the decision apportioning blame between the respondents and the deceased motorcycle rider is set aside. The meaning of this is that the respondents' appeal is dismissed with costs to the Applicant. For avoidance of doubt the award to the Applicant will be Kshs. 4,124,770.00 as particularized in paragraph 47 of the judgement dated 27th September, 2018. As already stated, the respondents' appeal having failed, the Applicant who was the respondent in the appeal will have the costs of the appeal. The Applicant is also awarded the costs of this application for review.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT