



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 458 OF 2014**

**BENARD MULI KINYILI .....APPELLANT**

**VERSUS**

**DHL WORLDWIDE EXPRESS LIMITED.....1<sup>ST</sup> RESPONDENT**

**DAVID KEMULI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 11<sup>th</sup> February 2019 filed by the appellant seeking a review of the judgment delivered by this court (*Hon. Kariuki J*) on 14<sup>th</sup> December 2018. The review is sought to correct a mathematical error in the calculation of the total award of damages that was made by the court in favour of the appellant (hereinafter the applicant).

2. The application is premised on grounds stated on its face which are reiterated in the depositions made in the supporting affidavit sworn on 11<sup>th</sup> February 2019 by the applicant's learned counsel *Ms. Rose Obaga*. It is the applicant's contention that there is an error apparent on the face of the record which was an accidental slip by the court when calculating the damages it had awarded to the applicant; that the total award of damages was supposed to be KShs.1,216,550 less 30% which amounted to Kshs.851,585 not KShs.841,158 as shown in the judgement; that the respondent has refused to approve a corrected version of the draft decree hence the need for the court to correct the error before the final decree was drawn.

3. The respondents though duly served with the application which had the hearing date endorsed on its face did not attend the court on the hearing date nor did they file any response to the motion. The motion therefore stands unopposed.

4. I have considered the application as well as the brief oral submissions made by learned counsel for the applicant. I have also read the judgment delivered by the court on 14<sup>th</sup> December 2018.

5. The jurisdiction of the court to review its orders is donated by *Section 80 of the Civil Procedure Act (the Act)* and *Order 45 of the Civil Procedure Rules (the Rules)*.

Section 80 of the Act provides 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. *Order 45 of the Rules* gives effect to *Section 80 of the Act* and provides for the circumstances under which the court may exercise its power of review. *Order 45 Rule 1 (b)* provides that before the court can review its own orders, an applicant must satisfy any of the following conditions:

i. That he has discovered new evidence which after the exercise of due diligence was not within his knowledge or was not available at the time the order was made;

ii. That there was a mistake or error apparent on the face of the record; and

iii. That there is sufficient reason to warrant the review sought and that the application was filed timeously.

7. In this case, there is no doubt that the application was filed timeously having been filed less than two months after the judgment sought to be reviewed was delivered.

As stated earlier, the application is mainly based on grounds that there is a mistake or error apparent on the face of the judgment regarding the calculation of damages awarded to the applicant.

8. A reading of the judgment shows that liability was apportioned in the ratio of 70:30 in favour of the appellant. General damages were awarded as follows:

Pain and suffering - KShs.600,000

Loss of earning capacity - KShs.600,000

Special damages - KShs. 16,550

Total - KShs.1,216,550

Less contribution of 30% - KShs.364,965 which was KShs.851,585.

9. The above ought to have been the correct calculation of the damages awarded to the applicant. A cursory look at the judgment confirms the applicant's assertion that there is indeed an error in the way the court calculated the damages. The court came up with a total figure of KShs.841,158 instead of KShs.851,585. This was an accidental slip on the part of the court and the resultant error which is apparent on the face of the court record must be corrected so that the applicant can enjoy the full fruits of his judgment.

10. In view of the foregoing, I am satisfied that the Notice of Motion dated 11<sup>th</sup> February 2019 is merited and it is hereby allowed on terms that the judgment delivered on 14<sup>th</sup> December 2018 is reviewed to the extent that the aggregate amount shown in the judgment as the award made to the appellant in the sum of KShs.841,158 is set aside and is substituted with an amount of KShs.851,585. All other findings or orders made in the said judgment shall remain intact.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of April, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Wangui holding brief for Mr. Obaga for the appellant

Mr. Malaga holding brief for Mr. Mwangi for the respondents

Mr. Salach: Court Assistant