



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELATE SIDE

CIVIL APPEAL NO. 47 OF 2012

EASTERN PRODUCE (K) LIMITED

(KAPSUMBEIWA TEA ESTATE).....APPELLANT

-VERSUS-

ANNAH KIPCHOGE.....RESPONDENT

RULING

[1] The Notice of Motion dated **3 December 2018** seeks orders that the Judgment delivered herein on **22 November 2018** be reviewed to the extent that the appeal be dismissed with costs to the Respondent; and that costs of the application be in the cause. The application was filed under **Sections 1, 1A and 99** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** on the grounds that:

[a] There is an error apparent on the face of the record;

[b] In the Judgment delivered on **22 November 2018** the learned Judge, *inter alia*, pronounced and ordered that the liability be apportioned at the ratio of 80:20 between the Appellant and the Respondent respectively yet the trial magistrate had already apportioned the same;

[c] Costs normally follow the event;

[d] In the interest of justice this application ought to be allowed.

[2] The application was supported by the affidavit sworn on **3 December 2018** by **Mr. Chanzu**, Advocate, wherein it was averred that the Appellant, being dissatisfied with the Judgment of the lower court, filed this appeal; and that on **22 November, 2018**, Judgment was delivered in open court whereby the Court (Hon. Kemei, J.) set aside the trial court's finding on liability and substituted it with apportionment at 80:20 in favour of the Respondent against the Appellant. He further averred that, since the lower court had already apportioned liability in the ratio of 80:20 in favour of the Respondent, there is an inadvertent error on face of the record in so far as the Judgment of the Court is concerned, in proceeding on the basis that liability had been fixed at 100%; which error ought to be rectified in the interests of justice. Annexed to the Supporting Affidavit are copies of the lower court and High Court Judgments as well as the lower court Decree.

[3] The Respondent, **Annah Kipchoge**, opposed the application, contending that the orders sought can only be granted on appeal and not by way of review, granted that the Court failed to properly analyze the evidence on record. The Respondent further contended, in the Grounds of Opposition dated **2 April 2019**, that the application is not only misconceived, but is also bad in law, as it does not disclose sufficient reasons to warrant a review of the Judgment dated **22 November 2018**.

[4] In **Order 45 Rule 1** of the **Civil Procedure Rules**, which is one of the enabling provisions relied on in support of this application, it is stipulated 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.

[5] It was therefore incumbent upon the Plaintiffs to satisfy the Court that:

[a] there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time; or

[b] there is some mistake or error apparent on the face of the record; or

[c] that there is any other sufficient reason for review.

[6] In addition to the foregoing considerations, time is also of the essence, for **Rule 1** requires that the application be filed without undue delay. There is no doubt that the application was filed within days of the delivery of the impugned Judgment and therefore the only issue for consideration is whether there is indeed an error on the face of the record, which is the ground proffered by the Applicant. The error complained of is in the learned Judge not appreciating that the lower court had already apportioned liability between the parties at 80:20. To prove this, Counsel for the Applicant annexed to the Supporting Affidavit copies of both Judgments.

[7] The brief background of the matter, as can be gleaned from the record, is that the Respondent sued the Appellant before the lower court for general and special damages on account of injuries sustained by her in the course of her employment with the Appellant at the Appellant's premises. The lower court made an award of **Kshs. 121,500** less contributory negligence, having settled liability at 80:20 in favour of the Respondent. On the issue of liability, the lower court held that:

"I hold the defendant shoulders 80% liability. The plaintiff is not entirely blameless. She had a duty to [be] watchful and careful for her own safety [at] the place of work. She ought to have anticipated the presence of the stick that injured her. She should have avoided the stick for this failure the plaintiff until 20% liability."

[8] The appellate Judge, having considered the submissions made before him by the parties, was of a similar mind, namely that:

"The respondent ought to have been careful having the knowledge of the fact that she did not have gloves and the risk involved. In the circumstances I find that the trial court erred in apportioning liability wholly on the appellant. Liability is hereby apportioned at the ratio of 80:20 between the Appellant and the Respondent...In the end, I set aside the trial court's finding on liability and substitute it with apportionment at 80:20 between the appellant and the respondent. The Appellant is awarded half costs of the appeal while the Respondent shall have full costs in the lower court."

[9] Having carefully considered the application and the averments set out in the Supporting Affidavit in the light of the proceedings and Judgments both in the lower court and in this appeal, I would be of the view that the error complained of is an error of judgment; and that the best recourse would have been to have it corrected on appeal. This is because, first and foremost, it entails an appreciation, of the full tenor and effect of the lower court Judgment. Secondly, and more importantly, what is sought is a reversal of the exercise of the appellate judge's discretionary order on costs.

[10] In Nyamogo & Nyamogo Advocates vs. Kago [2001] 1 EA 173 the Court of Appeal made the point that:

"... 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, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

[11] In the more recent case of Pancras T. Swai vs. Kenya Breweries Limited [2014] eKLR, the Court of Appeal restated its viewpoint thus:

"...If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *functus officio* and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts."

[12] In the result, there being no other sufficient reason advanced by the Plaintiffs to warrant a review of the Judgment delivered on **22 November 2018**, it is my considered finding that the Plaintiff's application dated **3 December 2018** is completely devoid of merits and the same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF AUGUST 2019.

OLGA SEWE

JUDGE