



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 337 OF 2008

TAUSI ASSURANCE COMPANY LIMITED..... APPELLANT

- V E R S U S -

FIDELITY COMMERCIAL BANK..... RESPONDENT

RULING

1. The brief background leading to the filing of the motion dated 6th March 2017 is as follows: Fidelity Commercial Bank Limited, the respondent filed a suit on 23rd March, 2001 against Tausi Assurance Limited the appellant seeking for payment of ksh.600,000/=. The respondent claimed the appellant is liable to indemnify them under insurance policy no.POL/1799/070/1/98 in respect of a saloon car registration NO. KAH 518L make Subaru for the period between 1st April 1998 and 31st March 1999 upto the value of ksh.600,000/= in consideration of the premium of kshs.27,500/= to Mytrade Limited. On 3/3/1999 Mytrade Limited was placed under receivership and the receivers assigned full benefit of the policy in relation to the suit motor vehicle to the respondent (Fidelity Commercial Bank Limited). The motor vehicle was stolen on 27/1/99 during the convey of the policy. The trial court in C.M.C.C. No. 5723 of 2003 at the Chief Magistrate's court at Nairobi was to determine whether the appellant was liable to indemnify the respondent in the sum of ksh.600,000/=.

2. Hon. A. Muchelule, learned Chief Magistrate held that the respondent had shown they had an actionable claim, and the full benefit of the policy having been assigned to them by Mytrade Limited in (Receivership). The respondent had proved that the appellant is liable to indemnify them in the sum of ksh.600,000/= and in the end, judgement was entered for the respondent against the appellant.

3. Aggrieved by the judgment, the appellant preferred this appeal with the intention of having the trial court award set aside. The appeal was dismissed by Hon. Justice D. A. Onyancha on the 17th day of September 2014. The appellant was held liable to compensate the respondent for the amount covered under the insurance policy less the outstanding premium, excess contribution and any other discounts recognized in the insurance practices.

4. The appellant/applicant herein has taken out the notice of motion dated 6th March, 2017, the subject matter of this ruling in which it sought for the following orders:

1. That this court be pleased to review its judgment and decree therein entered on 17th September 2014.

2. That the said judgement be set aside and substituted with an order allowing the appellant's appeal as prayed.

3. That in the alternative to 2 above, the said judgment be set aside and the appeal heard denovo.

4. That the applicant be awarded costs of this application.

The motion is supported by the affidavit of Winfred Mwikali Muoki.

5. Fidelity Commercial Bank Ltd, the respondent herein did not oppose the motion.

6. When the motion came up for inter partes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support of the motion. I have also considered the rival written submissions.

7. The applicant avers that it was not aware of the appeal outcome since their former advocates did not advise them of the same. The appellant instructed another advocate to come on record on 27th January 2016. On 22nd September, 2016 the appellant states that the advocate on record had perused the court file and noted that the appeal had been heard and judgment delivered. The advocates further advised that they should seek for review.

8. The principles to be considered in an application for review are well settled. Under Section 80 of the Civil Procedure Act and Order 45 Rule no. 1 of the Civil Procedure Rules it is stated inter alia that a person who is aggrieved by a decree or an order from which an appeal is allowed, may within reasonable time, apply for a review of the judgement or ruling, if;

a. There is a discovery of a new and important matter or evidence which after the exercise of due diligence was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or eh order made;

b. On a of some mistake or error apparent on the face of the record.

c. For any other sufficient reason.

9. The appellant/applicant submits that there is nothing in the judgement justifying the final outcome to dismiss the appeal. It is argued that there is an obvious mistake/or error apparent on the face of the record that should be cured by review under Order 45 Rules 1, 22 and 5 of the Civil Procedure Rules.

10. The applicant admits that there was substantial time lapse between the date of delivery of the judgement in question and the date of filing of this motion. It is said that the delay has been adequately explained. It is also stated that the motion was timeously filed as soon as the applicant learnt of the outcome of the appeal and the error apparent on the record. The applicant states that it's only fair and just that the motion be considered on its merit and granted as prayed.

11. The applicant cited Section 156(1) of the Insurance Act, Chapter 487, Laws of Kenya which states inter alia that;

“No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until a deposit, of a prescribed amount is made in advance in the prescribed manner.”

12. It is the respondent's submission that the applicant's motion was filed over 3 years after delivery of judgment. The respondents submits that the applicant has not met the threshold for the grant of review orders as envisaged in Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules (2010). The respondent cited the following cases to buttress its disposition

National Bank of Kenya –vs- Ndungu Njau (1997) eKLR where it was held *inter alia* 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” Paneras T. Swai –vs- Kenya Breweries Limited (2014) eKLR which explained the distinction between an appeal and review and stated inter alia that:

“A point which may be a good ground of appeal, may not be a ground for an application for review. Thus an erroneous view of evidence of law is no ground for review though it may be a good ground for an appeal.”

13. On my part, I am convinced that the applicant has not demonstrated that it has met the conditions necessary for the grant of an order for review as envisioned in the Civil Procedure Act and the rules.

14. With respect, I agree with the respondent that the appellant’s application for review does not meet the threshold for such applications. The same is dismissed with costs being awarded to the respondent.

Dated, Signed and Delivered in open court this 16th day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent