REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 209 OF 2010

ABDULLAHI MOHAMUD……...…….PLAINTIFF

VERSUS

MOHAMMUD KAHIYE…….DEFENDANT

RULING

By a Notice of Motion dated 3rd November, 2014 and filed in Court on 6th November, 2014, the plaintiff Abdullah Mohamud seeks from this Court orders that this Court be pleased to review and or vary the judgment of the Court delivered on 24th October, 2014 in respect of the awarded special damages.

The application is brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, & Order 45 of the Civil Procedure Rules and all other enabling provisions of the law.

The above prayer is predicated on the sole ground that the judgment of 24th October, 2014 erroneously gave special damages of Ksh 90,600/= whereas the plaintiff had sought Ksh 2,006,886.43 and Ksh 1,500,000/= for future medical expenses. The application is supported by a brief sworn affidavit of Mr Seth Ojienda Advocate who conducted the plaintiff's case and who deposes that in the absence of any explanation for granting Ksh 90,000/= and not the amount sought for i.e- special damages 2,006,886.43/= and 1,500,000/= for future medical expenses, the judgment should be reviewed.

The Defendant opposed the plaintiff's application and filed grounds of opposition on 14th November, 2014 contending that the application is fatally defective and should be dismissed with costs. He also maintained that the application is misconceived, wrong in law and lacks merit. In addition, the Defendant contends that the Court properly exercised its discretion and there is no sufficient cause shown by the Plaintiff why the judgment should be reviewed. Further, that in awarding Ksh 90,600/= the Learned Judge was correct in light of the evidence provided by the plaintiff. Finally, that the plaintiff had not satisfied the requirements for review and therefore the notice of motion should be dismissed.

Advocates for the parties agreed to dispose of the application by way of written submissions. The plaintiff filed his on 20th November, 2014 whereas the defendant filed his on 3rd December, 2014. Both advocates relied on decided cases and the applicable law which is Order 45 of the Civil Procedure Rules.

I have anxiously and carefully considered the application by the Plaintiff; the grounds of objection by the Defendant, the parties' advocates' rival submissions and the law applicable as well as the authorities relied on by the defendant. As was correctly pointed out by both parties' advocates, there are only two issues that flow from the arguments raised.

1. Whether the application by the plaintiff is competent.
2. Whether the award of Ksh 90,600/= as special damages should be reviewed.

On the 1st issue, the Defendant contends that the plaintiff's application is incompetent and fatally defective because he never annexed a copy of the decree or order that is sought to be reviewed. The defendant submitted that the application for review must be accompanied by the order or decree of the Court as this is the source of the Plaintiff's dissatisfaction citing the decision in **Thomas Owen Ondieki Vs National Bank of Kenya (2011) eKLR and Gulans Hussein M. Jiranji Vs Ebrahim Jiranji & Another (1928-30) 12 EACA 44-45** that;-

"A person applying for a review under that order (now order 45) must be aggrieved by the decree or order…Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree, his application should be for a review of the judgment upon which it is based… However aggrieved that person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree or formal order based upon the judgment as a whole, that person cannot under order XLII (now order 45) appear before the Judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable.

The ratio decidendi expressed in a judgment cannot be a source of grievance to a party to a suit unless the resultant decree is a source of legitimate grievance to a party to a suit…It is the duty of a party who wishes to appeal against or apply for a review for a review of a decree or order to move the Court to draw up and issue the formal decree or order."

The defendant maintains that failure by the plaintiff to draw and attach a decree to this application is a fatal omission. He also relied on the case of ***Iyadi Vs Wamalwa (2008) 1 EA 137 cited with approval in Thomas Owen Ondieki (Supra)*** where the Court found that an application for review was incompetent as no decree had been drawn and attached to the application and dismissed the application. Other relevant cases referred to are ***National Industrial Credit Bank Limited Vs George Wakaro Kuhora (2001) eKLR and Edward Kings Onyancha Maina T/A Matra International Associates Vs China Jiangsu International Economic Technical Co-operation (2001) eKLR***.

The plaintiff did not respond to this issue of failure to draw and annex a decree being fatal to his application for review. He only concentrated on the merits of the application. I shall therefore determine this issue right away.

Order 45 Rule 1 of the Civil Procedure Rules provides that:-

> ***"(a) Any person considering himself aggrieved 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.***

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being the respondent, he can present to the appellate Court the case on which he applies for review.

The above provisions of the Civil Procedure Rules is an offshoot of Section 80 of the Civil Procedure Act which provide 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."

The case law relating to review of judgments is abundant. In ***Nuh Nassir Abdi Vs Ali Wario & 2 Others (2013) eKLR***, the Court held that a decision whether or not to vary, set aside or review earlier orders is an exercise of judicial discretion and the Court ought only to exercise such discretions if to do so would serve a useful purpose.

Therefore, on the first issue of whether the application as presented without an extract order or decree is fatally defective, the case of ***Stephen Boro Gitiha Vs Family Finance Building Society & 3 Others Civil Appeal Nairobi 263/2009*** is relevant. In that case, the Court held that:-

"The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflicts with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The Court must warn the litigants and counsel that the Courts are now on the driving seat of justice and the Courts have a new call to use the overriding objective to remove all the cobwebs hitherto experimented in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the Courts is to use the new broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory application and instead to adjudicate on the principle issues in a full hearing if possible.

In this case, the plaintiff's counsel did annex copy of the judgment which is sought to be reviewed. The extraction of a decree or order sought to be reviewed no doubt stems from the judgment and is a purely procedural omission which should not be used to impede access to justice. Furthermore, Section 99 of the Civil Procedure Act gives latitude to this Court to amend judgments, decree or orders. It states

Clerical or arithmetical mistakes in judgments, decree or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

Therefore, failure to extract decree in this case is not fatal to an application for review. I am not persuaded by the cases cited by the Defendant, which cases were decided before the enactment of Sections 1A and 1B of the Civil Procedure Act and Article 159 (2) (d) of the Constitution of Kenya, 2010, which enactments require the Courts to administer justice ***"without undue regard to procedural technicalities,"*** and especially, where in the omission like the one in the instant case is not demonstrated to occasion any prejudice or injustice to the defendant, and which prejudice cannot be adequately compensated by an award of costs. This is not to say that Article 159, (2) (d) of the Constitution was meant to aid in the overthrow or destruction of rules of procedure and or to create an anarchical free-for all in the administration of justice.As was held in the case of ***Nicholas Kiptoo Arap Korir Salat Vs IEBC & 6 Others [2013] eKLR by Kiage JA,*** that Courts must never provide succor and cover to parties who exhibit scant respect for rules and timelines which make the ***process of judicial adjudication and determination fair, just, certain and even handed…."***

However, the Supreme Court in the case of ***Raila Odinga & 5 Others Vs IEBC & 3 Others Petition 5/2013 SC [2013] eKLR***, held that Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls, ***…it is plain to us that Article 159(2) (d) is applicable on a case to case basis."***

Having examined and considered the matter herein anxiously, I am of the view that this is a proper case

where omission to extract and annex a decree to an application for review will not occasion any injustice to the defendant, without overthrowing the rules and procedures since they guide the Court and parties in obtaining justice.

This Court as an agency of the legal processes of justice is called upon and appreciates all the relevant circumstances and the requirements of a particular case, and to conscientiously determine the best cause. I am convinced that this is one of the cases where a Court can disregard procedural technicalities in favour of substantive justice, having regard to all relevant circumstances obtaining in this case. For the above reasons, I dismiss the defendant's objection that failure to annex copy of decree sought to be reviewed renders this application fatally defective.

I therefore proceed to determine the merits of the prayer for review of judgment of the Hon. Waweru Judge delivered on 24th October, 2014, on special damages having already laid down the applicable law.

The re-amended plaint filed on 1st October, 2013 vide a consent order recorded in Court on 25th September, 2013 introduced at paragraph 6 thereof a claim for special damages as follows:-

Particulars of special damages

a. Medical express 1,931,266.43
b. Transportation 75, 400.00
c. Police Abstract 200.00

2,006,866.43

In the final prayers of the re-ammended plaint, the plaintiff claimed

a. Special damages Ksh 2,006, 866.43
b. Future medical expenses Ksh 1,500,000.00
c. General damages for plain and suffering
d. Costs and Interest

In the original plaint dated 17th March, 2010, the plaintiff's claim under special damages consisted of

a. Medical express Ksh. 1,926,316.35
b. Transportation Ksh. 75,400.00
c. Police Abstract Ksh. 2,001,916.35

On the other hand, the prayers sought compared as follows:

a. Special damages Ksh. 2,000, 916.35
b. Future medical Ksh. 1, 500,000.00
c. General damages for pain & suffering
d. Cost and Interest

What is striking about both plaints the original and re-ammended is that neither of them lay any basis for the claim for future medical expresses. The figures are simply placed in the plaints.

In the medical report dated 11th January, 2010 prepared by Dr. Fred Kambuni a consultant pediatric surgeon/pediatric urologist, he had this to say concerning complications of accident and surgery of the plaintiff.

"The boy has unsightly laparotomy scars after repeated abdominal surgeries and peritoneal drainage. The scars will be revised to give the boy a more cosmetic scar. The scar will ache for a long time and he will require medication to alleviate the pain. He is likely to get intestinal obstruction resulting

from the abdominal surgeries he has had. If this happens, surgery must be done to solve this. <u>Hence he will be on surgical follow up under my care until he attains the majority age before I transfer his case to the adult surgical team:</u>

The liver injury he had could progress to liver cirrhosis and portal hypertension. He requires annual follow up to detect and treat this condition when it occurs… overall, Master Mahamud will require approximately Ksh 500,000 annually for follow up; medical tests and medication.

The surgery to correct the surgical scars on the abdomen may cost KKsh 700,000.00/= - 1,000,000/= at the current cost of hospitalization in Nairobi.

Dr. Fred Kambuni;"

One year later, Mr. W. M. Wokabi, a consultant surgeon examined the plaintiff. He confirmed the injuries sustained as per the medical documents submitted to him including Dr. Fred Kambuni's medical report.

On progress, however, Dr. Fred Kambuni opined that although the plaintiff sustained multiple life threatening injuries which required surgeries, ***"he had nevertheless made very remarkable recovery and had no major complaint. The scars he had on various parts of his body although multiple and prominent and disfiguring are not the type of scars that will require any plastic surgical excision at any time in his life. The opinion expressed by Dr. Kambuni concerning correction of these scars is no longer true….what I am saying in his report is that as a young person who has great healing potential he has made very remarkable recovery and he is unlikely to ever suffer any complications as listed by Dr. Kambuni or require any surgery either. As such he will require (sic) any follow up either. He should be considered to have fully recovered from the major injuries.***

Mr. W. M. Wokabi. MB. ChB. M. MED. Consultant Surgeon."

The above medical examination reports by Dr's Fred Kambuni and Mr. W.M. Wokabi were reproduced by Hon. Waweru Judge on pages 15, 16, and 17 of the judgment. At page 19 of the judgment Hon. Waweru Judge had this to say concerning special damages.

Paragraph 37. ***"As for special damages, Ksh 90,600.00 has been proven by way of receipts in Exhibit P1. I will award this sum."***

At page 18, Paragraph 35, Hon. Waweru Judge acknowledged that ***"the Plaintiff suffered very serious injuries that required hospitalization for a long time. Treatment was painful and uncomfortable. There is a bright side though; probably because of his young age at the time of the accident the his (sic) injuries healed very well; so well, in fact, that some of the fractures that he had suffered could no longer be detected when he was examined by the second Doctor in February, 2011. No permanent incapacity was noted by that doctor. But the ugly scars are still there."*** It should be noted that none of the two doctors testified in Court on oath. Their medical reports were admitted in evidence by consent.

With Dr. Wokabi discrediting Dr. Kambuni's report on the progress made by the plaintiff in recovery, it would have been appropriate for the two doctors to be called to testify and be subjected to the rigours of cross-examination to determine who between the two was more accurate in the assessment of the plaintiff's injuries. It was clear that whereas Dr. Kambuni's examination provided a window for the need for future medical care and expenses, Dr. Wokabi discounted that estimation. The Court nonetheless believed Dr. Wokabi's opinion, although it did not refer to the future medical expenses pleaded.

On the special damages, Hon. Waweru Judge awarded Ksh 90,600.00/= as proven damages. He did not specify what special damages were proven from Exhibit PI referred to.

However, when I examine the bundle (list) of documents produced by the plaintiff filed on 10th February, 2011 and produced in evidence by consent, the available receipts are for.

a. Ksh 200 police abstract
b. Ksh 3,000 consultation fee by Dr. Fred Kambuni
c. Ksh 10,000 receipt from Aga Khan University
d. Ksh 2000 receipt from pediatric surgery at Aga Khan University Hospital
e. A bundle of receipts for transport Ksh 75,400/=

The total amount for the receipts comes to Ksh. 90,600.00/=. This figure, I am convinced, is what Hon. Waweru Judge found in favour of the plaintiff as proven special damages and awarded him.

Although the Plaintiff had claimed in his re-amended plaint for Ksh 2,006, 866,43, I do not find any receipts for the rest of the special damages relating to medical expenses amounting to Ksh 1,931, 266.43/=.

In as much as there was a hospital bill listed as document No. 14 and a bundle thereof produced, there was no receipts to show that the plaintiff paid the said medical bills. As at the hearing of the suit, no evidence was led to prove the same.

The law is clear that special damages must, not only be pleaded, but must be strictly proved. Bills by any stretch of imagination, cannot be construed to mean receipts. The plaintiff was expected to produce receipts and not bills showing the amount due and owing.

The plaintiff now complains that the Hon. Justice Waweru did not give an explanation to the figure Ksh 90,600.00/= which I have given above and that he did not give the status of the other claims for special damages (which I have equally given – that there was no proof for the rest of the special damages warranting an award) and Ksh1,500,000 for future medical expenses which I have addressed when analyzing the medical reports produced Dr. Kambuni and Mr. Wokabi as analyzed by Hon. Waweru Judge. In other words, albeit Ksh 1.5 million was pleaded for future medical expense as per Dr. Kambuni's prognosis and estimation, no fool proof evidence was led to warrant such an award, after Dr. Wokabi's medical report discounted the findings and prognosis of Dr. Kambuni on the necessity for future medical expenses. In ***Dhalay Vs. Republic (1995-1998) EA 29, the Court of Appeal*** held that;

"Where the a qualified expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected, but if a Court is satisfied on good and cogent ground (s) that the opinion though it be that of an expert, is not soundly based, then a Court is not only entitled but would be under a duty, to reject it.

As to whether this is a proper case for review, I find that indeed it is, as there is a very thin line between review and appeal. In <u>Benjoh amalgamated Limited & Another Vs KCB Limited [2014]</u> eKLR, the Court of Appeal held that;-

"The case law on the subject of review jurisdiction shows that two principles seen to be in competition. There is the "Principle of finality" of litigation on the one hand which does not support review and there is ***"the justice principle"*** on the other hand which favours limited review predicated on the basis that the object of litigation is to do justice. The finality principle is urged on the basis of public interest as a public policy and is premised. ***On the need for stability and consistency in law which the justice principle is urged on the basis of justice to the parties."*** The credibility of the two witnesses had to be weighed and on that the best Judge would have been the person hearing and watching the demeanor of those 2 witnesses who, unfortunately, did not testify and or be subjected to cross-examination. The latter report by Dr. Mr. Wokabi was believed by the Hon. Justice Waweru and I have no reason to interfere with that assessment which, no doubt, could have led him to ignore the claim for future medical expenses.

In **<u>Kwame Kariuki & Another Vs. Mohamed Hassan Ali & 4 Others [2014] eKLR,</u>** the Court observed that:-

"It is evident that the relief of review is only available where an appeal has not been preferred as

against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal."

On the purpose of review, ***Mwihoko Housing Company Limited Vs Equity Building Society [2007] 2 KLR 171*** is relevant. It was held, inter alia: - ***"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;***

"An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"

The Court further took from a commentary by Mulla on similar provision of the Indian Civil Procedure Code, 15th Edition at page 2726 thus:

"Application on this ground must be treated with great caution and as required by rule 4 (2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that existence of the evidence was not within his knowledge,; where review was sought for ***on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of view and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

In this case, the applicant is not relying on the grounds that there is discovery of fresh evidence or new matter. However, in my view, his application can adequately fall in the category of the provision ***"on account of some mistake or error apparent on the face of the record."*** In the plaintiff's view, the trial Judge made a mistake when he awarded Ksh 90,600/= special damages, without giving an explanation as to how he arrived at that figure and moreso, when the claim was for Ksh 2,006,886.43/= further that the trial Judge did not give the status of the claim for 1,500,000/= for future medical expenses.

But as I have stated above the trial Judge made it clear that on special damages, the plaintiff had orally proved Ksh 90,600/=. I have gone to greater lengths to examine the receipts produced and indeed, I concur with the Learned Judge that only 90,600/= was proved out of the pleaded Ksh 2006, 886.43/=. What other explanation is the plaintiff looking for? On the cost of future medical expenses, I have also found that the Learned Judge did not award it, having found that the medical report by Mr. Wokabi was clear that the plaintiff had no permanent incapacity, contrary to the medical report of Dr. Kambuni made one year earlier. There is nothing on record to show that the Learned Judge simply ignored this evidence of the figure of 1.5 Million. He must have taken into account those factors before settling on Ksh 90,600/= as there was no other independent medical evidence adduced after the medical report by Mr. Wokabi to prove otherwise. Nothing prevented the plaintiff from subjecting the Doctors to cross examination or calling other evidence to prove otherwise, as the burden of proving that he was indeed entitled to this colossal sum of Ksh 1.5 million lay on him throughout the trial. He did not discharge that burden on a balance of probability and he cannot by any stretch of imagination, seek to have a second bite at the cherry's through a review.

Furthermore, as this issue is highly argumentative, it would have been appropriate for the plaintiff to file an appeal to determine it as opposed to seeking for a review. To find otherwise would be tantamount to assisting a party to strengthen the weak part of his case during the trial by giving it a different complexion especially when it is apparently clear that there was remissness on their part in adducing all possible evidence at the hearing/trial.

In any event, albeit the plaintiff has an unfettered right to seek a review, that right cannot be sccessfully maintained on the basis that the decision of the Hon. Waweru Judge was wrong either on account of wrong application of the law relating to award of special damages or due to failure to apply the law thereof applicable in claims for future medical expenses, that could only have been a good basis for an appeal.

See ***National Bank of Kenya Limited Vs Ndung'u Njau Court of Appeal 211/96 (UR)*** where the Court of Appeal made it clear that ***"…. Misconstruing a statute or other provision of law cannot be a ground for review"…. "The Learned Judge made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the Learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.***

N Francis Origo & Another Vs Jacob Kubali Mungala (Court of Appeal 149/2001 (UR) the Court of Appeal stated that:-

"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the Learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

It seems clear to me that the plaintiff in his application for review is faulting the failure by the Hon. Waweru Judge to consider the evidence on record and in arriving at a decision that was not reasoned (Explanation) which, as I have stated, would be a good ground for appeal but not for an application for review. In ***Pancras T Swai Vs Kenya Breweries Limited 2014] eKLR.*** The Court of Appeal was clear that:

"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 the decisions on appeal is vested in appellate Courts. Order 44 Rule 1 (now Order 45 Rule 1 of the Civil Procedure Rules 2010) gave the trial Court discretionary power to allow review on the three limbs therein stated or "for any sufficient reason". The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. …"

For those reasons, I find no merit in the plaintiff's application for review of the judgment of Hon. Waweru J delivered on 24th October, 2015 and dismiss it accordingly. I further order that each party bear their own costs of this application, taking into account the fact that the plaintiff is a minor who is being subjected to unnecessary legal intrigues.

Dated, signed and delivered at Nairobi this **25th** day of **March, 2015**.

R.E. ABURILI

JUDGE