REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 617 of 2006

TRISHUL CONSTRUCTION COMPANY LIMITED...... APPELLANT

VERSUS

TIMONA AGAL JOHANA. .... 1ST RESPONDENT

BEATRICE INJEHU SHAVULIMO. .... 2ND RESPONDENT

(From the Ruling and Order of E C Cherono, Senior Resident Magistrate in Milimani CMCC No. 1887 of 2005)

J U D G M E N T

The Appellant herein was the Defendant in Milimani CMCC No. 1887 of 2005 in which the Respondents herein who were the Plaintiffs, claimed General, Special and exemplary damages, costs and interests. The lower court on 22nd July, 2005, by consent of both sides, entered a judgment against the Appellant for a total of Ksh.500,000/-. The Appellant settled the said outstanding amount on 20th September, 2005. All this time the Appellant was being represented by the firm of Mbugua & Mbugua Advocates.

Six months after the final settlement, on 21st March, 2006, the Decree holders/Respondents herein, filed an application, purportedly under the settled suit, seeking a review under the then Order 44 rule 1. They sought an additional award of damages under the heading of loss of profits in relation to a green grocery business run by the deceased's wife and earning a minimum profit of Ksh.150/- per day. They pleaded that the honourable trial magistrate, had failed to address that specific claim and that the failure or error, amounted to an error on the face of the record of the judgment.

The above application for review was fixed for a hearing on 19th May, 2006, when a consent was recorded by both counsel for the parties in the following terms: -

"There be a further award of Ksh.540,000/- on account of the deceased's given grocery business..."

Mbugua & Mbugua Advocates informed their client of the above entry of consent by their letter of 23rd May, 2006. This aggrieved the Appellant herein who instructed M/s Mbugua & Mbugua to file an appeal against the entry of such consent. However, M/s Mbugua & Mbugua declined to appeal on the grounds that the instructions were being given outside the prescribed time. The Appellant then decided to instruct a different advocate M/s Jackson Omwenga & Company who promptly filed an application under Order 44 Rule 1 seeking a review of the consent Order of 19th May, 2006 on the grounds of collusion and lack of authority to enter the consent order on the part of his counsel M/s Mbugua & Mbugua Advocates.

The Appellant's review application was heard and by its ruling dated 4th September, 2006, the trial court dismissed the application on the following two grounds: -

a) That the application was brought under Order 50 rule 1 of the Civil Procedure Rules instead of Order 44 rule 1 and Section 80 of the Rules and Act.

b)That the applicant had failed to extract and annex the decree or order sought to be reviewed to the application before the court.

I have carefully considered the records. The appeal before me is limited to the issue as to whether or not the trial court had jurisdiction or right to dismiss the appellant's application to review the consent judgment entered with the agreement of his counsel M/s Mbugua & Mbugua. Furthermore, after carefully perusing the impugned ruling, it is clear to me that the trial magistrate dismissed the application merely on procedural or technical grounds and not on the merits of the application.

I have also perused the grounds of appeal and Appellant's written submissions. They are totally shallow and unclear.

I will start with and handle grounds one and two of the Memorandum of Appeal, together. The Appellant tends to give the impression that there were two applications for review filed by the Appellant and that one of them was heard by the honourable J. Were, Resident Magistrate on 4th August, 2006 and, the second by the honourable E.C. Cherono, Senior Resident Magistrate, on 23rd August, 2006. However, a careful perusal shows that the Appellant, through the firm of Jackson Omwenga & Company, filed a Notice of Motion dated 3rd August, 2006 seeking

(1) Certificate of urgency

(2) A stay of execution

(3) A review or setting aside of the courts orders of 19th May, 2006 and

(4) Costs of the application.

The record further shows that under a certificate of urgency, the application was placed before J. Were on 4th August, 2006. The Honourable magistrate heard the application on urgency basis and granted a stay of execution, thus exhausting grounds 1 and 2 of the application. The rest of the application was left to be heard later on 23rd August, 2006 after two adjournments in between. It was heard by E. C Cherono, Senior Resident Magistrate, who delivered the ruling dated 4th September, 2006 that is the subject of this appeal.

It is, therefore, difficult to understand why counsel representing the Appellant should distress the court's mind by arguing that there were two applications placed before the lower court while knowing fully, that he is trying to mislead this court. In the minimum, therefore, the first and the 2nd grounds of appeal make little sense and they are accordingly dismissed with the contempt they deserve.

The third ground of appeal is also vague in so far as it pleads that the trial court failed to consider the submissions of the parties. This is because the trial court decided to dismiss the application on procedural or technical grounds as already hereinabove stated and not on merits.

As to the fourth and last ground of appeal which raises the issue of lack of pecuniary jurisdiction, I have carefully perused Mr. Omwenga's submissions before the lower court found on page 30-32 and page 35-36 of the Record of Appeal. Nowhere in the submissions did the Appellant assert that the trial court had no jurisdiction. As a result neither the trial court nor the Respondent investigated the issue nor paid attention to it. It would, therefore, be unfair to try to bamboozle the issue into this appeal. In any case, the application decision was not based on it.

I now go back to examine the two grounds upon which the appellant's application for review were dismissed. The first ground as earlier stated, was that the application was brought under Order 50, rule 1. I have perused the application dated 3rd August, 2006. It clearly shows that it was brought under OXLIV, rule I and Section 3A of the Civil Procedure Rules and Act. It is not clear, therefore, why the honorable trial magistrate thought that the application was brought under Order L, rule 1. He clearly erred in thinking and stating so. In his ruling aforementioned, the trial magistrate stated thus on page 39 of the Record of Appeal: -

"The application now before me has been brought under Order L, Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. An application for review cannot be brought under Section 3A (of) Civil Procedure Act. Section 3A can only be cited for the court to exercise its inherent powers where no other provisions of the law are given. The provisions of the law under Order XLIV, rule 1 (of) Civil Procedure rules and Section 80 (of) Civil Procedure Act were not made in vain. The court cannot exercise its inherent powers where the law has clearly spelt out the procedure for his remedy. Without wasting the court's judicial time, I find the application before me fatally defective and the same is hereby dismissed with costs to the respondents. ...."

I have already said that the application by Notice of Motion in question was properly brought under order XLIV rule 1. The honourable magistrate, therefore, misled himself by stating that it was brought under Order 50 rule 1. He ended up dismissing the application for a totally non-existent reason. Although the magistrate had cited another reason upon which the application could be struck out, i.e. that the application was not accompanied with a certified order intended to be reviewed – he failed to use it to strike out the application but in the view of this court, should have done so upon existing legal authorities. In these circumstances, this court finds that appeal has merit. The appeal is hereby allowed and the orders of dismissal of the application dated 3rd August, 2006 are set aside.

The option open to this court is to send the application to the lower court to rehear the application. However, since that will take a further time, this court itself, considers and hereby finds that the application was fatally defective for being unaccompanied by a certified copy of the orders intended to be reviewed. The court orders the striking out of the said application. Because the application raised weighty matters touching on a probable misconduct of an advocate, however, the Appellant/Applicant is hereby given leave to file a related or similar fresh application within 21 days. No order as to costs is made as the Appellant in the court's consideration deserves none. Orders accordingly.

Dated and delivered at Nairobi this 27th day of February 2013.

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D A ONYANCHA

JUDGE