



REPUBLIC OF KENYA

High Court at Kitale

Civil Case 20 of 2005

ISAAC NDARWA KIARIE ::: PLAINTIFF.

VERSUS

HARRISON WAFULA KHAMALA

HOLMAN BROTHERS (E.A.) LTD::: DEFENDANT.

R U L I N G.

The application vide the Notice of motion dated 28th September, 2012 is made under section 3A and 99 of the Civil Procedure Act as well as Order 51 Rule 1 of the Civil Procedure Rules.

The orders sought by the applicant are basically that the clerical and/or arithmetical mistakes as well as the errors in the judgment delivered on 2nd August, 2012 be corrected and that the judgment and the decree issued consequent thereto be set aside or otherwise corrected/amended.

The grounds for the application are set out in the body of the Notice of Motion and are supported by the averments contained in the applicant's supporting affidavit dated 28th September, 2012.

The plaintiff opposes the application on the basis of the averments contained in a replying affidavit deposed by his advocate dated 16th October, 2012.

The third party did not file any response to the application as it does not affect them in any way.

Under Section 99 of the Civil Procedure Act, "clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from an 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.

Herein, it is contended by the applicant that due to the court's consideration of documentary evidence not formally tendered in evidence by the respondent/plaintiff (i.e. P.Exh 1, P.Ex 2, P.Ex 3, P.Ex. 4, P.Ex 5 and P.Ex 6) special damages were computed at Ksh. 450,000/= instead of Ksh. 54,705/=.

It is further contended by the applicant that the said exhibits were irregularly produced by the plaintiff at the submissions stage thereby allowing the plaintiff to introduce new evidence and exhibits after the close of the trial.

Having heard and considered the oral submissions by both the applicant and the respondent through their respective counsels, this is what this court has to say. The judgment dated 2nd August, 2012 marked the conclusion of this case at this stage. It must be appreciated that the case was filed in the year 2003 but was delayed due mostly to the transfer of judges who had initially handled it. This court took over the

matter when it was due for defence hearing and towards that end the court received the evidence by the defendant/applicant. Written submissions were filed prior to the delivery of the judgment on the 2nd August, 2012.

The judgment was rendered after a careful consideration for the entire evidence presented to the court by all the parties. The said evidence included documentary evidence which the court had to rely on in computing special damages which ordinarily must not only be pleaded but also specifically established by necessary evidence.

In this case, special damages were pleaded in the plaint dated 29th August, 2003. In that regard, a claim of Ksh. 500/= was made for a police abstract; Ksh. 1000/= for a medical report and Ksh. 600,000/= special damages but was awarded Ksh. 450,000/= on the basis of available documentary evidence including documents formally tendered in evidence as (P.Ex. 1, 3, 4, 5, 7 & 8)

It is the applicants belief that the figure Ksh. 450,000/= was a mistake because some of the exhibits relied upon had not been regularly tendered in evidence but were tendered by the plaintiff at the time of filing his submissions. Therefore, the said exhibits amounted to new evidence being introduced after the close of the trial.

In the opinion of this court, the disputed exhibits were placed before the court during the trial and that is why they were marked awaiting formal production. The applicant had all the opportunity to question the validity of the documents during cross-examination of the plaintiff and/or his witness. A further opportunity was granted at the submissions stage for it is always assumed that parties exchange written submissions prior to filing there. Indeed, in his submissions, the defendant carefully addressed the issue pertaining to special damages but did not attack the inclusion of the disputed documents in the plaintiff's submission. In doing so, the plaintiff invoked Article 159 of the Constitution. Strictly speaking, the presentation of the disputed documents together with the plaintiff's submission was not usual practice. However, the documents had already been presented in court and marked accordingly. They did not therefore amount to new evidence.

In any event, if the court erred in law and fact by relying on documentation evidence which was not formally tendered in evidence then that is a matter for appeal if not review pursuant to Order 45 of the Civil Procedure Rules. The computation of special damages by this court was guided by the relevant documents presented to it. There was no mistake either clerical or arithmetical in the said computation and if the same led to a higher figure than deserved due to reliance on documents presented and marked for identification during trial, then the right forum will be the Court of Appeal and not this court. This application is therefore without merit and is dismissed with costs to the plaintiff.

[Read and signed this 30th day of October, 2012.]

[In the presence of Mrs. Sifuna for applicant and M/s. Munialo for respondent.]

J.R. KARANJA.

JUDGE.