



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 91 of 2001

ALLAN MUNDIA KAHINYA PLAINTIFF/APPLICANT

VERSUS

ATHI RIVER MINING CO. LTD. DEFENDANT/RESPONDENT

RULING

Before me is an application dated 13th February 2011 filed by the plaintiff. It was filed under Order XLIV Rule 1(b), Order L Rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap 21). The main prayer is for review of the judgment of the court. It is prayer 3, which reads:-

3. This Honourable court be pleased to review the judgment made on 16th July 2009, on account that it contains arithmetical and clerical errors.

The errors complained of are captured in paragraphs 5 and 6 of the supporting affidavit sworn on 18th February 2010 by **Allan Mundia Kahinya** the plaintiff, in which it was deponed that:-

5. It was indicated in paragraph 4 of the judgment by Honourable Justice Lenaola that special damages would be awarded at kshs.184,000/=, however in paragraph 10, the special damages have been itemized as Kshs.124,000/= instead of the said Kshs.184,000/=.

6. Further, the issue of loss of motor vehicle registration number KAD 989 J was not mentioned in the judgment and the same was pleaded for in further amended plant dated 22nd August 2005 (Annexed hereto is a copy of the further amended plaint and mark the same as “AMK3”).

The application is opposed. Both counsel for the parties filed written submissions.

In the submissions, counsel for the plaintiff M/s Wandabwa Advocates contended that though the amount of special damages awarded was Kshs.184,000/=, the judgment itemized special damages as **John Mundiah** case Kshs.57,000/=, **Ann Mutisya's** case Kshs.52,000/=, and **Kezia Njoroje's** case Kshs.15,000/= totaling Kshs 124,000/= which left out an amount of Kshs.60,000/=. It was also contended that the amount of Kshs.60,000/= was not part of the global sum of Kshs.900,000/=. In any case the global sum was Kshs.900,000/=.

It was further contended that the judge failed to make a finding on the loss of the motor vehicle KAD 989 which was prayed for and relevant evidence tendered on the same. Reliance on this court's jurisdiction to review its decisions was made to the case of **Njoroje & Other –vs- Savings & Loan Kenya Ltd & Another (1990) KLR 78**.

It was contended that the application was not frivolous and that it was made without inordinate delay. An attempt was made in the submissions to explaining the delay in filing the same between July 2009 to February 2010.

The defendant through counsel Manthi Masika & Company Advocates filed written submissions. Counsel highlighted the provisions of Order XLIV rule 1 of the Civil Procedure Rules with regard to the court's jurisdiction review. It was contended that there was inordinate delay in making the application for review. Judgment was entered on 16/7/2009 and the application for review was filed on 18/2/2011. That was an inordinate delay which was not explained in the application. Reliance was placed on the cases of **Reliance Bank Limited –vs- Southern Credit Bank Corporation – Civil Application No. 118 of 2007 (UR 78/2007)** and the case of **Ntarangwi –vs- Commissioner of Lands (2010) e KLR**, wherein it was held that even a delay of one day had to be explained.

It was further contended that the fact that the judge did not mention the motor vehicle claim meant that the prayer on the same was not granted by the court. That could be a ground for appeal not a review. Reliance was placed on the case of **National Bank of Kenya Ltd –vs- Ndungu Njau – Civil Appeal No. 211 of 1996** (unreported).

It was also contended that the errors, if any, were corrected when in the end the judge entered judgment for the plaintiff in the global sum of Kshs.900,000/= plus costs and interest.

Mr Khasiani for the plaintiff and M/s Thiongo for the defendant, who appeared at the hearing, relied on the submissions filed.

I have considered the application, I have perused the judgment and also considered the submissions and authorities cited.

Order XLIV rule 1, now 45 rule 1 of the Civil Procedure Rules gives the parameters under which a court may review its own decision. The parameters are limited. It provides:-

1. (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.

In my understanding, the plaintiff has made this application for review on the basis of an error on the face of the record.

The first issue I have to consider is whether the application was filed without undue delay. The judgment was dated 16th July 2009. It was delivered on the same day. This application was filed on 18th February 2010 a period of about seven (7) months. In the affidavit in support of the application, no explanation was given for the delay. An explanation for the delay was however given in the plaintiff's written submissions. I am guided by what was stated by the case of **Ntarangwi –vs- Commissioner of Lands (2010) e KLR** wherein the judge stated:-

“The plaintiff did not explain the delay; infact he was silent over that matter in his affidavit in support of the application. On that ground alone, this application will be dismissed.”

Under Article 159 (2) (d) of the Constitution, courts are required not to give undue regard to technicalities. The plaintiff has explained the delay and its cause in submissions, to which the defendant would have responded to if they wished. They did not. In my view, since the explanation for the delays given in the submissions was not controverted, I hold that that explanation is sufficient to justify the delay. The application will therefore stand. The above case in my view is distinguishable both in that an explanation for the delay was given in the written submissions and not controverted, and also that the Constitution now enjoins courts not to give undue regard to technicalities. It will not be dismissed on that account.

All sides agree that the figure for general damages awarded was Kshs.184,000/=. However, in the final calculations, it was somewhat reduced to Kshs.124,000/= without any explanation, or any visible logical justification for such a reduction. Both parties agree on this in their respective submissions. In my view, the error is self evident and calls for correction through review of the judgment. In this regard, I am fortified by the decision in **National Bank of Kenya Ltd –vs- Ndungu Njau – Civil Appeal No. 211 of 1996**. The error of the court on the figure is self evident and does not require an elaborate argument. It call for correction. I will therefore add the amount of Kshs.60,000/= which was erroneously omitted to the award of special damages.

Lastly, the plaintiff wants a review by the omission of the motor vehicle from the judgment. I am afraid that request will require going into evidence and evaluating the same. It is not every error on the face of the record that falls for correction through revisions. In my view, substantive errors such as the failure of the court to consider any issue, or any relevant issue; or an error of law can only be corrected on appeal not through review. I decline to grant that prayer.

Consequently, I allow the application to the extent that I order that the total amount of special damages in the final figure should be Kshs.184,000/= instead of Kshs.164,000. That figure of Kshs.184,000/= special damages is what the plaintiff is entitled to. The costs of this application are awarded to the plaintiff.

Dated and delivered this **12th** day of **October** 2012.

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George Dulu
Judge

In the presence of:

Mr Gathua holding brief for Mr Wandabwa for Plaintiff

N/A for Defendants

Mutinda - Court clerk