



No. 361

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 170 OF 2009

ASRAM KHAN1st APPELLANT

PANAFRICAN HAULIERS LIMITED.....2nd
APPELLANT

-VERSUS-

**JAMES OKEMWA MAORE (Suing as a brother and Legal representative of the estate of
EVANS ONGESA MAORE – DECEASEDRESPONDENT**

JUDGMENT

**(Being an appeal from the Ruling of Hon. Z. J Nyakundi SRM Rongo in Civil Case No. 59 of 2008
delivered on the 11th August, 2009).**

This an appeal by the appellant against the ruling and order of **Hon. Z. J Nyakundi** delivered on 11th August, 2009 in Rongo RMCCC No. 59 of 2008. The appeal raises 6 grounds to wit:

- “1. The learned magistrate herein misdirected himself in holding that no new information had been adduced before to warrant a review when such information was abundantly clear in the application and supporting affidavit.***
- 2. The learned magistrate erred in law in not finding that the essence of justice was to accord parties a full inter-partes hearing rather than for a suit to be determined ex-parte, more so when the***

defendants were genuinely not aware of the hearing date(s).

- 3. That Order XLIV was precisely put in place for such eventualities as were clearly manifested in the application.**
- 4. That the learned magistrate had full scope to exercise his discretion in the light of powers *inter alia* granted to him in Order XLIV Rule 81 (1) “or for any other sufficient reason” and he misdirected himself grossly in not allowing the application.**
- 5. That the learned magistrate erred in law in entering the arena.**
- 6. That the learned magistrate erred in not holding that the application has merit and was filed without unreasonable delay; and that, in sum, it should be allowed”.**

Apparently, the respondent as the administrator of the estate of **Evans Ongenga Maore** filed a civil suit against the appellants for compensation arising from a road traffic accident wherein the deceased passed on. The appellant upon being served with suit papers entered appearance and subsequently filed a defence. The suit was then heard. The respondent testified and called witnesses. However, when it came to defence case, the appellants’ lawyer had no witnesses to call and therefore opted to close their case. On 18th June, 2009 the trial court delivered its judgment and proceeded to award the respondent Kshs. 280,000/= as general damages. On 17th July, 2009 the appellants filed an application by way of Notice of motion dated 16th July, 2009 praying in the main:

“3. That the same trial court be pleased to grant leave to the appellants to re-open the defence case and permit the defence witnesses Mr. Amit Joshi to adduce evidence. They also prayed that the costs of the application be provided for”.

The application was expressed to be brought under section 3, 3A, 63e and 80 of the **Civil Procedure Act**, Order XLIV rule 1 (1) (a) (b), rule 3(2) of the **Civil Procedure Rules** and **all other enabling statutes of law**. The grounds in support of the application were:-

“a. That the defendant company did not receive the letters informing it of the hearing date as the wrong box number was used.

b. That the letters to the defendant company were being sent to the box number of Barclays Bank of Kenya Limited, Kisumu.

c. That as such the defendant company did not receive the letters and only came to know that hearing had proceeded after being informed by the advocate on the 16th July, 2009.

d. That unless the defence case is re-opened the defendant will be greatly prejudiced as the defence evidence does not form part of the proceedings and the defence will have been condemned unheard.

e. That no prejudice will be visited upon the plaintiff if the above orders are granted as the plaintiff’s counsel shall have the opportunity to cross examine the defence witness and the plaintiff can be compensated in costs.

f. That the defence witness is prepared, willing and able to adduce evidence at any time and date the court directs or orders”.

In response, the respondent filed grounds of opposition stating that:

“1. The application was misconceived, frivolous, ambiguous, an after-thought and unmeritorious.

2. The court does not make orders in vain.

3. Court’s discretion cannot be exercised in a vacuum.

4. The practice of estoppel applies against the applicant”.

The application was heard inter-parties and in a reserved ruling delivered on 11th August, 2009, the learned magistrate dismissed the application thereby triggering this appeal.

On 13th May, 2010 parties herein filed a consent letter dated 3rd May, 2010 regarding the agreed directions in the appeal. It was to the effect that: _

“1. Hearing be at Kisii before one Judge.

2. The parties do file written submissions within 30 days of this order followed by judgment.

3. This matter be mentioned on 31st May, 2010 for directions accordingly”.

The above consent which was in terms of directions was adopted by court on 6th October, 2010. Subsequently parties filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

From the provisions cited in support of the application, it is clear that the application was for review though it is not categorically stated so in the application. It is trite law that a review will be ordered on account of:-

a. Discovery of new and important matter of evidence, which

- After the exercise of due diligence was not within his knowledge or could not be produced by him at the time of passing decree or order.

or

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

or

c. For any other sufficient reason and,

d. The application is made without inordinate delay.

A closer scrutiny of the prayers in the application reveals that indeed there was no prayer for review. Is re-opening of the case for further hearing not a review. The foregoing notwithstanding can it be said that the appellants met the conditions of granting a review aforesaid? I do not think so. The appellants contended that the failure to call their witness was due to non-communication of the hearing date to their witnesses since the letters informing them of the hearing date were misdirected to post office box number 831, Kisumu instead of 298 Kisumu. Just like the learned magistrate I do not think that the appellants are being candid with this assertion. First and foremost the case was not heard in a single day. Thus if the appellants did not turn up for hearing on the 1st day, a prudent lawyer would have tried to find out what contributed to their failure to turn up. I am sure the appellants were on phone, one phone call would have therefore unwrapped the problem.

In paragraph 3 of the plaint, the respondent gave a description of the 2nd appellant and gave its postal address as above. That description was expressly admitted in the appellants' statement of defence. The postal address, if incorrect as presented in the plaint was neither denied nor otherwise made an issue in the said defence. The appellant cannot therefore raise the issue after judgment.

The appellants' counsel opted to close his case without calling any witnesses. As correctly submitted by counsel for the respondent, the appellants failure to call witnesses was clearly not due to mix-up of postal address and consequent absence of correspondence between themselves and counsel but it was a professional decision arrived at in a cool, calm and collected manner. Infact, the record shows that even in their submissions before the trial court, the appellants stated "**... The defence did not call any witnesses since the plaintiff grossly failed to establish only cause of action hence there was nothing to rebut ...**". What does this say of the appellants' sudden turn around.

In fact had the appellants been serious about the need to call witnesses, their counsel should have applied for an adjournment on the grounds that his witnesses were absent and that he needed time to trace and avail them. That is what a diligent lawyer should have done. However that was not the case here. The appellants' counsel was confident that the respondent had grossly failed to establish a cause of action against his clients and therefore there was nothing worthy rebutting and therefore opted not to call any evidence in rebuttal. He made the bed himself and must sleep on it. The application was therefore not made in good faith and was infact an afterthought.

The court having delivered its judgment, I do not see how again it should have been called upon to reopen the case and receive the evidence of the appellant's witnesses. The appellants did not even seek to set aside the judgment already entered. Of what use then would have been the evidence of that witness. It would not have led to the re-writing of the judgment. Courts do not act in vain. It would have been understandable if the application was made before the delivery of the judgment. Indeed the appellants had a right to move the court for the arrest of judgment which they did not take up.

In a nutshell, the appellants did not meet the threshold under order XLIV of the **Civil Procedure Rules**. Sections 3, 3A of the **Civil Procedure Act** do not assist the appellants either in the light of specific provisions available to take care of the application filed by the appellants.

In any event, the appeal itself is incompetent for want of a certified copy of the formal order appealed against as required by law.

The appeal therefore fails with costs to the respondent.

Judgment dated, signed and delivered at Kisii this 31st day of January, 2011.

ASIKE-MAKHANDIA

JUDGE