REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 227 of 2005

BROOKE BOND (K) LIMITED……...APPELLANT/APPLICANT

VERSUS

JOHN MWANGI NG'ANG'A....……RESPONDENT

R U L I N G

By a notice of motion dated 14th March, 2008, Brooke Bond (K) Limited, the appellant/applicant herein seeks to have the orders made on 31st March, 2006 dismissing its appeal, reviewed and set aside and the appeal reinstated. The grounds upon which the application is made are as follows: -

(i) The appellant/applicant's appeal was dismissed summarily when it came up for taking of directions on 31st March, 2006.

(ii) The ground for the said dismissal cited by the Hon. Justice O. Mutungi was due to the fact that the plaint in the record of appeal filed by the appellant/applicant was different from the plaint in the lower court file.

(iii) The appellant/applicant has however discovered an obvious mistake and error apparent on the face of the record in the High Court and the lower court.

(iv) The plaint in the lower court as per the record has been altered by the respondent working in cahoots with court registry staff with the sole aim of defeating prayer i(c) of the appellant/applicant's appeal.

(v) The error on the record occasioned by the respondent's fraudulent activities by typing and inserting a new paragraph 7 in the original plaint has caused the orders made on 31st March, 2006.

(vi) The submissions by both parties, proceedings, judgment, exhibits in the lower court and memorandum of appeal herein confirm that indeed the plaint has been altered by the respondent.

(vii) The court filing fees receipt No.518012 for filing of the plaint of Kshs.1,955.00 in the lower court confirms that the sum of Kshs.80,000/= inserted in paragraph 7 of the altered plaint was not pleaded for, further proving that a fraud has been committed within the corridors of justice.

(viii) The orders of 31st March 2006 were thus made without the knowledge that a mistake or error has been committed on the lower court record by court registry staff working in cahoots with the respondent herein.

(ix) It is in the interest of justice that the orders sought be granted.

(x) The respondent may proceed to execute the decree of the lower court judgment herein, in which event the appellant stands to suffer irreparably.

The application is also supported by an affidavit sworn by the appellant/applicant's advocate, Rosalind Kagure Muthiga on the 14th March, 2008. The advocate who has conduct of the matter on behalf of the appellant/applicant explains as follows:

The appeal was summarily dismissed on the 31st March, 2006 when it came up before Hon. Mutungi J. for directions. The reasons for the dismissal was the fact that the plaint in the record of appeal filed by the appellant was different from the plaint in the lower court file. The appellant/applicant has now discovered that there was an error apparent on the face of the record in the high court and the lower court, as the plaint in the lower court was altered by the respondent in collusion with court registry staff, with the aim of defeating the appellant's prayer i(c) in the memorandum of appeal, which sought to have the award of Kshs.70,000/= for future medical expenses dismissed, as it had not been pleaded. Towards that end, the respondent fraudulently altered the plaint in the lower court by typing and inserting a new paragraph 7 in the original plaint providing for medical expenses estimated at Kshs.80,000/=. No filing fees was paid in respect of the sum of Kshs.80,000/= as it was not in the original plaint. The font and number of lines in page 2 of the original plaint and the altered plaint are different. The respondent initially prepared and filed a record of appeal including this altered plaint. His record of appeal was however struck out on 3rd March, 2006. Subsequently, the appellant/applicant prepared a record of appeal using the original plaint served on it wherein there was no mention of the sum of Kshs.80,000/=. It was then that the court noted the difference in the two plaints and made the order of 31st March, 2006.

The appellant/applicant's advocate contends that the plaint containing the medical expenses of Kshs.80,000/= is not the original plaint as it was neither served on the appellant/applicant nor was any court fees assessed or paid in respect of Kshs.80,000/=. Counsel for the appellant submitted that the dismissal of the appeal was an error on the face of the record arising from the apparent alteration of pleadings namely the plaint. Secondly, the dismissal of the appeal was an error apparent on the face of the record as there is no mandatory legal requirement for preparing and filing of a record of appeal in the High Court. Further, Counsel submitted that the discovery of the alteration of the record is a new matter which only came to the appellant/applicant's notice after the appellant/applicant prepared its record of appeal. Counsel maintained that this was discovery of new and important matter which was not within the knowledge of the court and therefore justifies the review of the order dismissing the appeal. In support of his submissions, Counsel relied on the following authorities:-

(1) Kamuti Masai vs James Muinda Ng'ang'a, Civil appeal No. 28 of 1987 or Digest on Civil Case Law & Procedure pg 695.

(2) Joshua Otieno Buyu vs Petro Ochieng Wasambwa, Civil Appeal No.347 of 2000 or Digest pg 696. 1870A.

(3) Timber Manufacturers & Dealers vs Nairobi Golf Hotels (K) Ltd Nairobi (Milimani) HCCC 5250 of 1992 or Digest pg 697 1876A.

The respondent relied on his replying affidavit sworn on 17th April, 2008. He deponed that the allegations made by the appellant/applicant were outrageous and scandalous bordering on actionable defamation. He maintained that the court could not have awarded a figure that was not pleaded in the plaint and that if there was an error of calculation of the court fees, he could not be held responsible. He maintained that his advocates only prepared a record of appeal because the appellant/applicant was indolent in doing so. It was further contended that the appellant/applicant was guilty of laches, the orders sought to be reviewed having been made over two years ago, and no explanation having been given for the inordinate delay.

In his submissions, Counsel for the respondent submitted that the issues alluded to by the appellant/applicant having been submitted before Mutungi J. prior to his making the order summarily dismissing the appeal, the appellant/applicant cannot ignore that order or come for review of that order as doing so is inviting this court to sit on appeal on its orders. It was submitted that the appellant/applicant ought to have pursued an appeal against the order made on 31st March, 2006. Counsel maintained that there was no error apparent on the face of the record as the lower court file clearly showed that there was a plaint upon which the judgment was based. The issue of the appellant/applicant having a different plaint, not having been raised in the lower court, the lower court had the right to go by what was on record. It was submitted that if the appellant/applicant discovered that the plaint in the lower court record did not correspond with the record of appeal, the appellant/applicant ought to have sought leave to file a supplementary record so that it could introduce that element as an issue for determination in the appeal. It was submitted that the alleged alteration in the plaint has not been proved at all. It was contended that under assessment of the court fees was not the respondent's mistake and that in any case, further court fees was actually paid during the extraction of the decree. Relying on the case of ***Nyamongo & Nyamongo Advocates vs Moses Kipkolum Kogo Civil Appeal No. 322 of 2000 (2001 JA E.A 173),*** it was submitted that the alleged error on the face of record must be one that stares on the face and this was not such an error.

From the record of this court, it is evident that the appeal was admitted to hearing under Section 79B of the Civil Procedure Act on the 17th November, 2005. On 31st March, 2006, the appeal came up before Hon. Mutungi J. for directions under Order XLI Rule 8B of the Civil Procedure Rules. Order XLI Rule 8B(3) & (4) provide as follows: -

"***(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise."***

"***(4) Before allowing the appeal to go for the hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say –***

(a) The memorandum of appeal;

(b) The pleadings;

(c) The notes of the trial magistrate made at the hearing;

(d) The transcript of any official shorthand or palantypist notes made at the hearing;

(e) All affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal;

(g) Where the appeal is from a decision of a subordinate court given in the exercise of its appellate jurisdiction, the documents corresponding to those specified in paragraphs (a) to (f) inclusive so far as they relate to the appeal to such subordinate court:

Provided that –

(i) a translation into English shall be

provided of any document not in that

language;

(ii) the judge may dispense with the production of any document or part of a document which is not relevant other than those specified in paragraphs (a), (b) and (f).

Hon. Mutungi J. gave the following directions: -

(1) upon perusal of the now filed record of appeal, drawn and filed and served by the appellant and comparing the same with the plaint, in the original file, it is clear that the record of appeal filed on 8th March, 2006 is not a true record of the plaint in the lower court file.

(2) Accordingly the entire appeal was wrongly admitted by this court and I hereby dismiss the appeal summarily for incompetence.

Subsequently, the appellant/applicant by a notice of motion filed on 13th April, 2006 sought *inter alia*, orders to review and set aside the orders made on 31st March, 2006 dismissing the appellant/applicant's appeal summarily and reinstatement of the appeal for hearing and determination on merit. This application was referred to Mutungi J. whose orders were sought to be reviewed. It was adjourned on several occasions. Finally on 30th July, 2007 Mutungi J. directed that the application be heard by any Judge in the civil division as he was not able to hear the application due to the tight schedule in the murder section where he had been transferred to. Thereafter the matter was placed before Hon. Nambuye J. on 20th September, 2007. Parties agreed to file skeleton arguments in respect of a preliminary objection which had been raised by the respondent. On 14th February, 2008 Hon. Namubuye J. delivered a ruling upholding the preliminary objection and striking out the application dated 12th April, 2006 and filed on 13th April, 2006 on the grounds that the same was incompetent, the order sought to be reviewed not having been extracted or annexed to the application. Hon. Nambuye J. granted leave to the appellant/applicant to file a proper application. It was thereafter that the appellant/applicant filed a current notice of motion dated 14th March, 2008.

Contrary to the submissions made by the counsel for the respondent, the court record does not reveal that any submissions were made before Mutungi J. prior to his making the order of 31st March 2006 summarily dismissing the appeal. It is also evident that the accusation that the appellant/applicant was indolent and that it took no action for about 2 years from the time of the order of dismissal, is not borne out by the court record. The appellant/applicant moved the court just about 12 days after the order was made. Further, the submission that the affidavit sworn by the appellant's counsel is incompetent cannot hold as counsel has sworn to matters relating to the court proceedings which are matters within her knowledge and which she is in a better position to depone to than her client.

The application before me being one for review, under Order XLIV Rule 4(1) of the Civil Procedure Rules it ought to have been placed before the Judge who made the order sought to be reviewed. The only exceptions provided is where the Judge is no longer attached to the court or where the Judge who made the order or decree is still attached to the court but is precluded by absence or other cause from hearing the application and the Chief Justice has designated another Judge. In this case, the Judge who made the order sought to be reviewed, is still attached to this court, but is precluded from hearing this application because of his assignment to a different division. The Hon. The Chief Justice, having assigned me the responsibility to deal with High Court Civil Appeals, it is my understanding that under Order XLIV Rule 4(2) of the Civil Procedure Rules, I have mandate to deal with the application before me even though the order sought to be reviewed was not made by me.

It was submitted that the appellant/applicant ought to have come to this court by way of appeal and not by way of review. Order XLIV Rule 1(1) of the Civil Procedure Rules provides as follows: -

"***(i) 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 that passed the decree or made the order without unreasonable delay."

In this case, the appellant/applicant opted not to pursue an appeal but instead brought an application for review. That was an option available to the appellant/applicant and this court in hearing the application for review is not sitting on appeal against its own order as was suggested by the counsel for the respondent. The challenge that the appellant/applicant is faced with in pursuing the application for review is to satisfy the conditions upon which an order for review can be made as provided under Order XLIV Rule 1of the Civil Procedure Rules. As was held in the case of ***Orero vs Seko (1994) KLR 238***, review may be sought on the following grounds:

(i) Where there is new and important matter or evidence, which after exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed.

(ii) Where there is some mistake or error apparent on the face of the record.

(iii) Or for any other sufficient reason.

In this case, the order dismissing the appeal was made on the basis that the appeal was wrongly admitted to hearing as the record of appeal filed on 8th March, 2006 did not contain a true record of the plaint in the lower court. The admission of the appeal on 19th August, 2005 under Section 79B of the Civil Procedure Act, was not based on perusal of the record of appeal, but on perusal of the memorandum of appeal and the original record of the lower court with a view to establishing whether there was sufficient ground for interfering with the decree. In admitting the appeal the judge, by implication, made a finding that there may be sufficient ground for interfering with the decree or part of the decree appealed against. The issue relating to the disparity between the record of appeal and the original record of the lower court was not an issue for consideration under Section 79B of the Civil Procedure Act. It was a matter to be dealt with under Order XLI Rule 8B(3) and (4) after the admission of the appeal. In my considered view this was an error of law the kind of error described in ***Nyamongo & Nyamongo Advocates vs Kogo*** (Supra) as "a kind that stares one in the face and one which there could reasonably be no two opinions." I am satisfied therefore that there is an error apparent on the face of the record as it was not open to the court to summarily dismiss the appeal at the stage of giving directions.

It is further evident that there was disparity between the plaint which was before the lower court which contained the plea for medical expenses estimated at Kshs.80,000/= and the plaint which was served on the appellant which did not contain this figure. It is not clear whether this was through inadvertence or deliberate manipulation of the record. However, this is a matter which the appellant/applicant appears not to have been aware of and that is why the appellant/applicant used the copy of the plaint served upon him in compiling the record of appeal. The appellant/applicant had no reason to examine the plaint in the court record. It was only after the order of dismissal, that the appellant/applicant established the anomaly. The fact that there was inconsistency between the plaint served on the appellant/applicant and the one filed in court was not within the knowledge of the appellant/applicant at the time of the making of the order of dismissal. Had the appellant/applicant been aware of the anomaly, both the plaints would have been included in the record of appeal and appropriate directions sought.

For the above reasons, I come to the conclusion that the appellant/applicant has established that there is justification for review of the order made on 31st March, 2006 dismissing the appeal. Accordingly, I set

aside the order and reinstate the appeal to hearing. I further order that the costs of this application shall be in the appeal.

Those shall be the orders of this court.

Dated and delivered this 14th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Muruka H/B for the appellant/applicant

Nyagah for the respondent