REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 611 of 199

GEOFFREY MAINA NJUGUNA……...……...……PLAINTIFF

VERSUS

JAMES WANGOMBE GITONGA…….…..……DEFENDANT

RULING

This is a notice of motion brought by the defendant under the provisions of Sections 3A, 80 and 99 of the Civil Procedure Act and Order XLIV rule 1 of the Civil Procedure Rules seeking the following orders of this court;

"(i) That this court be pleased to correct an error arising from an omission in the judgment herein by subjecting the final award in general damages and costs to contribution at the ratio of 70:30 as liability had been agreed by the parties and the court duly recognised that in the first paragraph of the judgment.

(ii) That upon the said correction of error mentioned hereinabove being done, the court do review the decree accordingly.

(iii) That the court do review and set aside the consent order recorded on 20th December 2006 and more so paragraph 3 of the said consent order since the same was founded on an erroneous decree."

The application is based on the grounds on the face of the application and supported by the affidavit of James Wangombe Gitonga, the defendant herein. The application is opposed. The plaintiff has filed grounds in opposition of the application. In the said grounds of opposition, the plaintiff stated that this court lacked jurisdiction to grant the orders sought in the application and further that the application of review was presented to the court by the defendant after an undue and inordinate delay. The plaintiff urged this court to dismiss the application with costs.

At the hearing of the application, I heard the submissions made by Mr. Karanja learned counsel for the defendant and the response thereto made by Miss Magana learned counsel for the plaintiff. In summary, Mr. Karanja argued that the learned judge who heard the case (*i.e. Lady Justice S. Ondeyo*) erred when she failed to subject the final award made in the said judgment to the apportionment of liability which had earlier been agreed by consent between the plaintiff and the defendant. He submitted that although the parties had agreed to apportion liability at the ratio of 70:30 in favour of the plaintiff and as against the defendant, the said apportionment was not taken into account when the trial judge assessed the damages payable to the plaintiff.

He submitted that the error made by the learned judge, was an error which was amenable to be reviewed

by this court because it was an error apparent on the face of the record. He further submitted that this court would still rectify the error by applying the slip rule as provided by Section 99 of the Civil Procedure Act. He further argued that the defendant had proceeded and paid the decretal sum due based on the mistaken assumption that the trial judge had apportioned liability in accordance with the consent of the parties. Mr. Karanja urged the court to set aside all the subsequent consent orders which were entered between the plaintiff and the defendant based on the said erroneous decree and make an appropriate order directing the Deputy Registrar of this court to calculate the sum due to the plaintiff after duly rectifying the erroneous decree. He submitted that the defendant had made the application for rectification in good faith and was prepared to pay the sum legitimately due and owing to the plaintiff after apportionment of liability. Mr. Karanja relied on several decided cases in support of his submissions. He urged this court to allow the application with costs.

Miss Magana for the plaintiff opposed the application. She relied on the grounds filed in opposition to the application and the record of the court. She submitted that there was no accidental slip in the judgment which could be corrected by this court. She argued that the application filed by the defendant was actually an appeal against the decision of the trial judge made under the guise of an application for review. She submitted that the trial judge had taken into account the apportionment of liability when she entered judgment in favour of the plaintiff in the suit. She argued that the defendant had spurned the opportunity to correct or review the decree in the six years since the judgment was delivered by the trial judge. She submitted that the application had been brought by the defendant as an afterthought and for the sole purpose of defeating the execution process which had been commenced by the plaintiff.

She argued that since judgment was delivered, the plaintiff and the defendant had entered into subsequent consent orders in furtherance to the giving effect to the decree issued by the trial judge. In her view, there was no legal ground which has been placed before this court that would enable the said judgment of the trial judge to be reviewed. She submitted that the defendant had brought the application because he was not prepared to pay interest which had accrued on the decretal sum after the said judgment was delivered by the trial judge. She submitted that the slip rule could not be applied in the circumstances of this case. She therefore urged this court to dismiss the defendant's application with costs.

I have carefully read the pleadings filed by the parties to this application. I have carefully read the proceedings of this court prior and subsequent to the entry of the said judgment. I have also considered the rival submissions made before me by the plaintiff and the defendant. The issue for determination by this court is whether the defendant has established a case so as to enable this court grant him his application to review the judgment of the trial judge. For this court to determine whether the application is meritorious or not, it will have of necessity to refer to the judgment which the defendant sought to have reviewed. The genesis of the current dispute between the plaintiff and the defendant, which is the subject of this application, started on the 24th August 1999 when the plaintiff entered into a consent judgment whereby liability was apportioned as between the plaintiff at the ratio of 70:30 in favour of the plaintiff.

Subsequently thereafter, the suit was placed before Ondeyo J. for the assessment of damages to be paid to the plaintiff on account of the injuries sustained by the plaintiff during the accident. In her considered judgment delivered on the 26th April 2001, Ondeyo J. awarded general damages of the sum of Kshs 400,000/= to the plaintiff. She awarded special damages of Kshs 1,000/=. Having read the said judgment, it is clear that although the learned judge at the beginning of the judgment mentioned that liability had been apportioned between the plaintiff and the defendant to the extent of 70%, at the conclusion of the said judgment there is no evidence to suggest that the said learned judge had apportioned the general damages she had awarded to the plaintiff in accordance with the consent judgment on liability. The learned judge properly, in my view, analysed the authorities that were presented to her by the plaintiff in light of the injuries that the plaintiff had sustained and arrived at a decision to award the plaintiff general damages to the sum of Kshs 400,000/=. It is evident that the learned judge, after assessing the general damages payable to the plaintiff on account of the injuries that he had sustained failed to subject the said general damages awarded to apportionment as agreed by consent between the plaintiff and the defendant.

Can this court review the judgment of the trial judge in view of the finding reached by this court that

there exists an error apparent on the face of the record? It is my humble view that this court has the requisite jurisdiction to review the said judgment. If the learned judge (*who has since retired from judicial service*) was still in service, this court would not have hesitated to refer the case to her for her appropriate consideration. Order XLIV rule 4(1) of the Civil Procedure Rules grants this court jurisdiction to hear an application for review in a situation where the judge who issued the decree is no longer attached to the court. Order XLIV rule 1(1) of the Civil Procedure Rules grants this court jurisdiction to review a decree or an order of the court if it is established that, *inter alia,* there was a mistake or error apparent on the face of the record or for any other sufficient reason provided that the applicant makes the application for review without undue delay.

Although the plaintiff has sufficiently established that the defendant has been guilty of inordinate delay and laches, in the broader interest of justice, I am not prepared to dismiss a meritorious application for review on account of the fact that the application for review was presented to the court without undue delay. In Nduati –vs- Mukami [2002]2KLR 778, Mbito J. (*as he was then*) held that there is nothing in the Civil Procedure Act or Rules that limits or otherwise affects the inherent jurisdiction of the court to make such orders as may be necessary for the ends of justice to be met or to prevent the abuse of the due process of the court. Although the above quoted decision is of a court of concurrent jurisdiction, I entirely agree with its reasoning.

In the present application, it is clear that the defendant entered into subsequent consent orders pursuant to the said judgment of the trial judge under the mistaken belief that the said judgment was valid and had subjected the award made to apportionment as agreed by the consent of the parties. Although it is not clear when the defendant became aware of the error in the judgment, from his affidavit sworn in support of the present application, once this court was made aware of such an error, it will act appropriately so that the ends of justice may be met.

The upshot of the above reasons is that the application by the defendant to review the judgment of the trial judge delivered on the 26th April 2001 is hereby allowed. The said judgment is reviewed and the award of general damages of Kshs 400,000/= is hereby reduced by the agreed contributory negligence to be borne by the plaintiff to the extent of 30%. The said general damages awarded is thus reduced by a sum of Kshs 120,000/=. The plaintiff is thus awarded the sum of Kshs 280,000/=. Similarly the special damages awarded of Kshs 1,000/= is hereby reduced by 30%. The plaintiff is thus awarded Kshs 700/=. The decree extracted pursuant to the erroneous judgment is hereby set aside. All the subsequent orders made pursuant to the said erroneous decree are also set aside. The deputy registrar of this court is hereby ordered to calculate the decretal amount payable to the plaintiff taking into account the adjustments made, the interest charged at usual court rates and the amount paid by the defendant in part payment of the said decretal amount. If need be, in the event that there shall be a disagreement on the costs payable to the plaintiff, the said party to party costs shall be taxed afresh after the plaintiff has filed an adjusted bill of costs in consonant with reviewed award of this court. Pending the resolution of the decretal amount to be paid to the plaintiff (*if any*) any further execution of the decree which has been set aside is hereby stayed. The defendant shall have the costs of the application.

It is so ordered.

DATED at NAKURU this 9th day of May 2007.

L. KIMARU

JUDGE