REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 59 of 2000

MICHAEL NJOROGE NDUNGU…….....……..APPELLANT

VERSUS

CHAIRMAN BOARD OF GOVERNORS, TUMAINI SECONDARY SCHOOL……1ST RESPONDENT

HUMPREY WANJAU…….....……..2ND RESPONDENT

JUDGMENT

The appellant in this appeal, filed suit against the respondents seeking to be paid special damages of Kshs 45,650/= on account of the damage which he claimed was occasioned on his motor vehicle registration number KAD 898R, Toyota Land Cruiser on the 5th of July 1995 by the students of Tumaini Secondary School. He further averred that he was injured when the said students damaged the said motor vehicle. The respondents were served with summons to enter appearance, they entered appearance and filed a defence, but during the hearing of the case failed to attend court. The hearing of the case therefore proceeded *ex-parte* and judgment was entered against the defendants. He testified before the trial magistrate and after the close of his case the trial magistrate found that the appellant had established his case on a balance of probabilities. The appellant was awarded Kshs 45,650/= special damages being the cost of repair of the said motor vehicle. He was further awarded the sum of Kshs 40,000/= as general damages for the injuries that he had sustained when his said motor vehicle was damaged.

When the appellant sought to execute against the respondents, the respondents made an application before the trial magistrate's court to have the said decision made by the trial magistrate reviewed under the provisions of **Order XLIV rule 1, Order L rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**. The main thrust of the said application was that the respondents contended that the respondents could not be held vicariously liable for the acts of the students of the school. The appellant opposed the application and after hearing the parties, the trial magistrate made the following pertinent observations in his ruling delivered on the 7th of April 1999;

"***The defendants have not given reasons which made them fail to attend court and defend the suit when it was listed for hearing. That is the time they had the opportunity to raise the issues now in the application either as a preliminary objection or in the submissions at the conclusion of the hearing. They were notified of the hearing five times but chose to sleep on their alleged rights."***

After making these observations, the trial magistrate however went ahead and ordered the *ex-parte* judgment which had been entered against the respondents together with all the consequential orders to be

set aside. He gave an opportunity to the respondents to articulate their defence in a hearing.

The appellant was aggrieved by this decision of the trial magistrate and appealed to this court. He raised three grounds of appeal which are as follows:

"***1. The learned trial magistrate erred in finding that the application dated the 10th of October 1998 was properly drawn and filed.***

2. The learned trial magistrate erred in finding that the case called for review when there was nothing new in the proceedings on the ruling to warrant a review.

3. The application was brought later after the respondents had already paid some money to the auctioneers, six months after the ruling."

During the hearing of the appeal, Mr. Musembi learned counsel for the appellant submitted that the respondent filed the application dated the 10th of December 1998 seeking to review the judgment of the court which was made on 11th of June 1997, and which found the respondents to be vicariously liable for the acts of the students of Tumaini Secondary School. He submitted that the trial magistrate failed to rule on the issues that were the subject matter of the application and instead proceeded to grant orders which were not sought. He submitted that the trial magistrate went outside the ambit of the application when he set aside the judgment, an issue the respondents had not prayed for. He submitted that the issues which were canvassed by the respondents were not issues which were recognised as falling under the ambit of what could be reviewed under the provisions of **Order XLIV of the Civil Procedure Rules.** He referred this court to two decided cases i.e. **Nyamogo & Nyamogo –vs- Kogo [2001]E.A. 170** and **National Bank of Kenya Ltd –vs- Ndungu Njau CA Civil Appeal No. 211 of 1996 (Nairobi) (unreported).** He submitted that when a trial magistrate misconstrued the applicable law it could not be a ground to have the subsequent ruling reviewed. He urged this court to allow the appeal with costs.

Mr. Ndegwa learned counsel for the respondent submitted that the appellant had improperly filed the appeal to this court against a ruling made by the subordinate court on an order of review without seeking the leave of the subordinate court. He submitted that an appeal from an order of review was not a matter of right but required leave first to be sought. He took issue with the fact that the record of appeal prepared by the appellants in this appeal, did not contain a certified copy of the order or ruling which was delivered by the subordinate court. He submitted that the trial magistrate exercise his jurisdiction judicially when he set aside the *ex-parte* judgment because he had been convinced that the respondents could not be held vicariously liable for the acts of the students of the said school. He submitted that the respondents made the proper application for review before the subordinate court instead of appealing and the same was properly allowed by the trial magistrate.

This being a first appeal, this court is required to hear the appeal by way of retrial and reconsidering the evidence that was adduced before the trial court so as to reach its independent decision whether or not the finding of the trial magistrate was correct. As was held in the case of **Selle & Anor –vs- Associated Motor Boat Company Limited & Others [1968] EA 123** at page 126 by Sir Clement De Lestang VP;

"***An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's finding of fact if it appears either that he clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholani (1955) 22 EACA 270)."***

In the present case, the issue for determination is whether the trial magistrate properly entertained the application for review which was brought before him and thereafter made a ruling setting aside the

judgment which had been entered in favour of the appellant and against the respondents. I will in the first instance deal with the point which was raised by the counsel for the respondent to the effect that the appellant's appeal was incompetent due to the fact that he had not sought leave of the subordinate court before he filed this appeal. **Order XLII rule 1(1) (aa) of the Civil Procedure Rules** allows a party who is aggrieved by the decision of a court made in an application under **Order XLIV of the Civil Procedure Rules** for review to appeal against the said decision as a matter of right. The objection raised by the respondents does not therefore have merit. I disallow the objection.

Secondly the respondent objected to the record of appeal filed by the appellants on the grounds that the appellant did not extract and include in the said record a certified copy of the ruling. I have perused the provisions of **Order XLI of the Civil Procedure Rules** and I have not seen anywhere a requirement that an appellant has to include a certified copy of the order or ruling. In fact **Order XLI rule 8B (4) of the Civil Procedure Rules** lists the documents which are to be contained in a record of appeal. There is no requirement that an appellant includes a certified copy of the order or ruling in a record of appeal. The objection by the respondent therefore is unmeritorious.

I will now proceed to address the merits of this appeal. According to the facts of this case as stated at the earlier part of this judgment, judgment was entered in favour of the appellant after the respondents had been served five times and had failed to attend court when the case was listed for hearing. When judgment was entered against the respondents, instead of making an application to set aside the said *ex-parte* judgment, the respondents made an application to review the said judgment on the basis that the trial magistrate had erred in finding the respondents vicariously liable for the acts of the students of Tumaini Secondary School. The trial magistrate rightly observed that the respondents had spurned the opportunity availed to them by the legal process when they failed to appear in court to defend the suit filed by the appellant. He however went ahead and made an order setting aside the *ex-parte* judgment and made an order giving the respondents a chance to ventilate their defence.

Unfortunately in doing so, the trial magistrate fell in error. He granted the respondents a prayer which they had not sought in their application. The respondents did not make an application to have the said ex-parte judgment set aside. Instead they were challenging the basis of the appellant's suit on a point of law on an application for review. The procedure adopted by the respondents was therefore an abuse of the rules of procedure. As was held by the Court of Appeal in **National Bank of Kenya Limited –vs- Ndungu Njau CA Civil Appeal No. 211 of 1996 (Nairobi) (unreported)** at page 8;

"***A review may be granted whenever the court considers it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."***

In **Nyamogo & Nyamogo Advocates –vs- Kogo [2001] EA 173** at page 175 the Court of Appeal held that;

"***As was stated in the AIR commentaries on the code of civil procedure by Chitaley and Rao (4th ed) Volume 3 at page 3227; "a point which may a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is not ground for a review though it may be a good ground for an appeal."***

In the instant case, it is clear that the trial magistrate erred in allowing the application filed by the respondents for review when clearly there were no grounds for the said trial magistrate to entertain such an application for review. As stated earlier in this judgment, the respondents could have ventilated what they considered to be points of law in their defence during the actual trial of the case. They failed to attend court during the hearing of the case. After judgment had been entered against them, they sought to raise the issue of whether or not the appellant ought to have sued them in an application for review under the provisions of **Order XLIV of the Civil Procedure Rules**. Unfortunately the said rules do not allow

for an application for review to be made based on the grounds put forward by the respondents.

In the circumstances therefore, it is clear that the appeal filed by the appellant herein shall be allowed. The order made by the trial magistrate on the 7th of April 1999 allowing the respondents' application for review dated the 10th of December 1998 is hereby set aside and substituted by an order of this court dismissing the said application with costs to the appellant. The appellant shall have the costs of this appeal.

DATED at NAKURU this 15th day of June 2006.

L. KIMARU

JUDGE