



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 45 OF 2003

DANIEL KARANJA KIARIE ..... APPELLANT

VERSUS

JOHN GITUNGO WAIGANJO ..... RESPONDENT

JUDGMENT

By a Plaint filed on 28th February, 2001 and amended on 15th August, 2001, the Respondent (Plaintiff in the lower court) claimed damages for repairs to his motor vehicle arising from a motor vehicle accident on 17th July, 1999. His case was heard on merit and his claim for damages was dismissed by a Judgment of the lower court (Mrs. T. W. C. Wamae, SRM) dated 25th July, 2002 on the ground that the claim for special damages had not been pleaded. Ordinarily, that would have been the end of the matter. However, undeterred by his failure, the Plaintiff appointed new advocates and brought an application before the lower court for “review” of the Judgment, setting aside of the same, and for amendment of the Plaint to allow special damages to be pleaded. The lower court allowed that application in a short ruling dated 3rd September, 2002. It is against that Ruling that the Appellant has appealed to this court. His grounds of appeal are as follows:

- 1. THAT the learned Magistrate erred in law and fact in finding that leave to amend pleadings can be granted after a final judgment.***
- 2. THAT the learned Magistrate did not exercise her discretion properly in setting aside her judgment in absence of sufficient grounds to warrant such review and setting aside.***
- 3. THAT the learned Magistrate erred in law and in fact in finding that an application for review under Order XLIV could be brought under chamber summons.***
- 4. THAT the learned Magistrate erred in law and in fact in failing to record the submissions by counsel for the Respondent that the applicants application did not satisfy the requirements of Order 44 Rule 1, 2, 3.***
- 5. THAT the learned Magistrate erred in law and in fact in finding that a decree had been sent to the lower court for execution thus applicable (sic) the provisions of order 21 Rule 22.***
- 6. THAT the learned Magistrate erred in law and fact in disregarding in toto the evidence in the appellants replying affidavit and setting aside the judgment.***

Ms Kiarie, Counsel for the Appellant, argued before this Court that the lower court’s ruling which

allowed a review of its Judgment had the effect of allowing a Plaintiff to be amended after Judgment. She submitted that Order 6 A Rule 5 (2) of the Civil Procedure Rules disallows amendment of pleadings after Judgment. She also submitted that the lower court had improperly invoked the Review provisions in Order 44 as there was no new evidence before the lower court giving it discretion to “review” its Judgment. Nor could Order 44 be invoked on the ground that there was a mistake or error apparent on the face of the record. She argued that the Respondent’s previous advocates’ “mistake” in not pleading special damages, could not be construed as a “mistake on the face of the record.” In any event, the advocate had been made aware of this mistake during the course of the hearing, but had made no application to amend the Plaintiff.

In her response, Mrs Kinuthia, Counsel for the Respondent, submitted, without providing any authorities, that Order 44 could be invoked where the advocate had made a “mistake” in not pleading special damages, and further argued that such advocate’s mistake should not be visited upon his client.

This court disagrees with Mrs Kinuthia on her interpretation of Order 44. In **Tokesi Mambili & Others vs Simion Litsanga Sabwa (Civil Appeal 90 of 2001 – Kisumu)** the Court of Appeal had the occasion to interpret Order 44 Rule 1 (1) and after setting the same out, said as follows:

***“Hence in order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. In the application before the superior court the appellants failed to prove discovery of new and important matter or mistake on the face of the record.”***

For the same reasons as above the lower court was plainly wrong in invoking Order 44. There was nothing before the court to demonstrate the discovery of new and important matter or evidence, or a mistake or error apparent on the face of the record, to entitle the court to exercise its discretion to review the Judgment under Order 44. It would appear that the learned magistrate confused the wording in Order 44 relating to “mistakes or error apparent on the face of the record” with mistake on the part of the Counsel not to plead special damages. The two things are totally different. In any event, the record shows that the Respondent’s counsel was made aware of his so called “mistake” when the Appellant’s counsel objected to questions relating to special damages at trial, but took no steps to apply for amendment of the pleadings.

Under Order 6 A Rule 3 of the Civil Procedure Rules, pleadings may be amended at any stage of the proceedings, but not after Judgment [Rule 5 (2)]. The very purpose of the application before the lower court was to seek amendment of the Plaintiff after judgment, through an Order 44 review application. This cannot be allowed, and the lower court was clearly wrong in allowing it.

Accordingly, this appeal must succeed. It is allowed with costs to the Appellant. The lower court’s Ruling dated 3rd September, 2002 is hereby set aside, and the chamber summons application before it dated 1st August, 2002 is hereby dismissed with costs.

Dated and delivered at Nairobi this 17th day of January, 2005.

**ALNASHIR VISRAM**

**JUDGE**