

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 466 OF 1998

DAVIS MWANGENGI PLAINTIFF

- Versus -

RAMPEL DESIGN LTD. DEFENDANT

R U L I N G

Two applications were argued before me in this matter. The first one dated the 31st March 1998 brought under the provisions of Section 80(a) of the Civil Procedure Act, Order 44 Rule 1 of the Civil Procedure Rules and Section 25(1)(i) of the Workmen Compensation Act is by the defendant seeking a review of this court's judgment delivered on the 16th February 1998. I will refer to it as the First Application. The second application dated the 23rd September 2002 and brought under Order 3 Rule 9A and Order 16 Rule 6 of the Civil Procedure Rules is by the plaintiff and it seeks to have the defendant's said application dismissed for want of prosecution. I will refer to it as the Second Application. Counsel for the parties agreed and argued both the applications together.

The First Application seeks a review of this court's judgment delivered on the 16th February 1998 on the ground that:

“The court by error failed to take into account the fact that the amount paid out as Workmen Compensation dues to the plaintiff should have been deducted from the entire award of the plaintiff as is provided by section 25(1) (i) of the Factories Act Cap 236 of the Laws of Kenya – so that the decree should read minus the said sum of Sh. 181,227/=”.

I think the Act intended to be referred to in this prayer is the Workmen Compensation Act and not the Factories Act. In the supporting affidavit it is averred that evidence was led during the trial that a sum of Shs. 181,227/= had been paid to the plaintiff under the Workmen Compensation Act and submissions made on the same but in the judgment the trial Judge overlooked to order the deduction of that sum from the final award. That, it was further averred, was an error on the face of the record which even the plaintiff himself acknowledged and that the judgment should therefore be reviewed by deducting that sum from the final award. In the replying affidavit the plaintiff swore that he never received the said sum of Sh. 181,227/= and that the application was just a gimmick intended to delay the disposal of the matter. His advocate argued that the payment was taken into account.

I have perused Justice Hayanga's judgment on the 16th, 1998 in this case. Although the figure of Sh. 181,227/= claimed by the defendant to have been paid to the plaintiff under the Workmen Compensation Act does not tally with the one mentioned in the judgment, I find that the Judge did take into account payment under the Workmen Compensation Act when he dismissed the plaintiff's claim for damages under the head of lost earnings. The Judge also had in mind that payment when considering the claim for special damages. In the circumstances I find no error in the judgment calling for a review and I dismiss the First Application with costs.

The Second Application seeks a dismissal of the first one for want of prosecution. In support of that application it is averred that the judgment sought to be reviewed was delivered on the 16th February, 1998. The First Application is shown as having been drawn on the 31st March, 1998 but it was not filed until 3rd September 1998. That it came up for hearing on the 6th May 1999 when it was adjourned at the instance of the Defendant/Applicant but it was thereafter not fixed for hearing. No replying affidavit or grounds of opposition was filed in opposition to that application.

I have perused the court file. It is not true that the defendant did not fix the First Application for hearing. The record shows that the application was fixed for hearing on several occasions but for one reason or the other it was adjourned. All the same what comes out clearly is that the defendant was not keen on having the application heard and disposed of. The plaintiff also contributed to that as he had the application adjourned or taken out of the hearing list by consent several times. In the circumstances it cannot be said that the defendant did nothing to have the First Application heard and the Second Application therefore also fails with costs to the defendant.

For the reasons given both the applications are dismissed with costs.

DATED this 23rd day of July 2004.

D.K. Maraga

Ag. **JUDGE**