



1) Civil Practice and procedure

2) Application to review courts judgment of 2.3.00 (partially) on the grounds of fraud.

3) Reasons:

- i) Claim for “loss of user made”
- ii) The plaintiff claimed to have hired a vehicle from PW2
- iii) It was discovered that PW2 did not own any vehicle; the vehicle belonged to someone else.

4) Held:

- i) New matters before court and not in knowledge of court there was fraud
- ii) Judgment on the loss of user of Ksh.980,000/- be hereby set aside
- iii) The plaintiff to refund any sum due to the defendant which claim is Ksh.510,514/-
- iv) The plaintiff and PW2 to be preferred to investigations and prosecution on perjury made before this court in the year 2000

5) Case law

- a) Shah D. Haranch 1981 KLR650
- b) Kimita v Wakiburu 1985 KLR 317

6) Advocate

K. Kariuki advocate or plaintiff/respondent
J.K. Gitau advocate for the defendant/applicant

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 293 OF 1998**

PAGRAS NDUNGU KIRORIPLAINTIFF

VERSUS

JOSEPH WAWERU & ANOTHERDEFENDANTS

RULING

By an application dated the 3rd of June 2004, the applicant/defendants seek for prayers, inte alia:-.

A) APPLICATION

- 1) "That this Hon. Court be pleased to REVIEW the judgment dated 2.3.00 awarding the plaintiff a sum of Ksh.958,000/- on account of loss of user, by way of setting aside the award thus varying the said judgment accordingly.
- 2) That this Hon. Court to declare the defendants have fully settled and cleared the remainder of the judgment being an award of Ksh.450,000/- on account of material damages and costs duly taxed at Ksh.139,486/-. Total Ksh.589,586/-.
- 3) That the court be pleased to order the plaintiffs to refund to the defendants a sum of Ksh.510,514/- duly overpaid to the plaintiff by the defendants upon review prayed."

B) BACKGROUND TO THE APPLICATION

This matter arises from a traffic motor vehicle accident involving three vehicles.

The 1st and 2nd defendant driver and registered owners were sued for permitting their lorry vehicle KZP 099 to be parked along the Naivasha- Nairobi road with at least 7 feet of the lorry being on the road. The effect of this is that it caused an obstruction.

Another vehicle, not party to this suit travelling from the same direction and having passengers hit the motor vehicle KZP 099 then proceeded to hit the plaintiff/respondent. Isuzu 3.3 pick up covered registered KAB 642Q.

The defendants failed to join 3rd party proceeding.

When the trial was heard, this court awarded the plaintiff/respondent his claim for material damages only. It nonetheless gave the applicant defendant its claim for Special Damages and material loss damage.

There was an award for "loss of user" which was awarded by this court and which is the subject of this ruling amounting to Ksh.985,000/-.

C) ARGUMENTS BY APPLICANT

The defendants/applicant stated that they had no dispute on the judgment for the Special Damages. i.e. the material loss claim totaling ksh.450,000/- (and agreed Ksh.14,520/- special damages).

The genesis of the issue on the costs of hiring an alternative vehicle of Ksh,958,000/- arose when the plaintiff advocate went to the advocate complaints commission to complain about the conduct of his advocate claiming that his advocate had been over paid.

The applicants advocate was called to the commission to resolve the said dispute when it transpired that the claim for loss of user of Ksh.958,000/- for hiring alternative transportation was infact fraudulent. The plaintiffs advocate admitted as such.

The defendant/applicant at once filed this present application on 3.6.04 seeking that this court sets aside the award of Ksh.958,000/-. They were not disputing the other awards made by court. They claimed fraud.

This was on the grounds:-

- i) That the plaintiff/respondent called PW3 to give evidence stating he was from Sawagi Agencies which hired the vehicle out to the plaintiffs.
- ii) When a search was made it transpired that PW3 was never a partner in Sawagi Agencies.

iii) That Sawagi Agencies was owned by Samuel Waweru Gitau.

iv) It was registered as an import and export business (fruits and vegetables) yet the invoices produced to this court was that of dealers in stationary, printing, office equipment, hardware and electrical goods and general merchants.”

v) The motor vehicle reg. KWS 086 as of March 1995 was found to be registered in the name of Bensfound Omwenga Ngalinga with another.

vi) That the vehicle was a matatu and neither a lorry on truck.

vii) That the box number for Sawagi Agencies differed.”

This was further verified by investigations later carried out in an inquiry by the CID police in Nairobi. The respondent/plaintiff by now had changed advocates. He had been served with the application but did not make or attempt to make reply until two days before the hearing of the application. No leave to file his reply out of time under Order L r1 CPR was made.

D) FINDING.

From the foregoing I am most perturbed that there has been a clear indication of fraud that has been exhibited against the plaintiff/respondent.

I would note the further affidavit of the police CID and enquiry file No.3/04 said to have been opened on this matter that clearly shows that the vehicle alleged to be hired was in fact not an Isuzu 1.3 lorry registration KWQ 086 vehicle but a matatu vehicle.

Further that PW3 Geoffrey Maina used a fictions name in court. That he lied to say he was a partner of M/s Sawagi agencies which evidence he knew was false.

I hereby allow this application and make the following orders:-

1) That the defendants are entitled to a review of this courts judgment on grounds of fraud under Order 44 r 1 & (2) CPR supported by the case law of:-

i) Shah v Dffarachmi (1981) KLR 560

ii) Kimita v Wakibiru (1985) KLR 317

2) That I hereby review my judgment dated 2.3.00 awarding the plaintiff the sum of Ksh.958,000/- on account of the claim for loss of user and do set aside this part of the judgment

3) That whereas the defendants were paying the decreetal sum in installments, the court hereby declares that a sum of Ksh.589,586/- made up Ksh.450,000/- for material damage and Ksh.139,486/- for costs ie making a total of Ksh.589,586/- has been duly paid.

4) That the defendants are hereby entitled to a refund of the sum of Ksh.510,514/- by the plaintiff

5) I hereby order that the inquiry file of 3/2004 held by the police do proceed to its full end and that

i) Geoffrey Maina alias Geoffrey Gatirima Mwaura PW3 in this suit

ii) Pancras Ndung'u Kiroi the plaintiff herein Be charged with the offence of perjury contrary

to section 108 (1) and (2) as read with section 110 Penal Code and any enabling law for the just ends.

This is for the purpose of ensuring the administration of justice is not trampled on. The original advocate for the defendants are already before the advocates complaints commission a copy of this ruling be availed to the said commission, the Hon the Chief Justice. The Hon. The Registrar of High Court of Kenya.

I award the costs of this application to the defendant/applicant together with costs awarded for the decretal sum in question.

Dated this 28th day of September 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Mutua Mboya & Nzissi Advocates for the plaintiff

Gitau Kariuki & Co. Advocates for the defendant