REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 1109 OF 1999

JACINTA NJURA GATHOGO ..... PLAINTIFF

VERSUS

MUGOYA CONSTRUCTION &

ENGINEERING COMPNAY LTD. .....D EFENDANT

RULING

When this suit came for hearing before me on the 1st of December, 1999, I finalised it and delivered judgement whereby the suit was duly dismissed on the 2nd of December 1999. The grounds being that of lack of evidence on the part of the plaintiff.

I relied on the case law of:-

Mary Ayo Wanyama & Others Vs Nairobi City Council

CA 252/98 unreported.

The court of appeal upheld the decision by the superior court that it is not enough to say that an accident occurred. Negligence has to be proved to establish liability on the part of the defendant.

In this case the plaintiff, the wife to the deceased sued the defendant and stated she heard that an accident had occurred. She prayed to be compensated.

When I dismissed the suit, the advocate for plaintiff filed this present application on the 22.3.2000. This was four months after the judgement had been delivered.

I could quite sympathise with the plaintiff in that she stated that the deceased was sole bread winner. The advocate further said that the parties had done a considerable amount of out of court settlement. Due to the desperate need of the plaintiff he had quickly set down the case for hearing hoping that a settlement could be reached.

In the said application brought under order 45 r 1 CPR and section 3A of the CPR. The said rules is one for a review. The main grounds seeking for a review is that the plaintiff has now been able to trace the chief witness to the accident. This is the turn boy who was also involved in the accident. The plaintiff

thus sort orders that if the said witness was to be called to give evidence and prove negligence then the estate of Nelson Gathogo, the sole bread winner, would not suffer.

In the supporting affidavit the said proposed witness narrated how actually the accident occurred. The advocate for the plaintiff also deponed to an affidavit described the search for the witness.

The advocate for the defendant filed an affidavit in reply together with grounds of opposition. This is where they annexed a statement written by the witness who stated, inter alia, that he did not really know what occurred during the accident.

Further the advocate for the defendant opposed this application on the grounds that there, already there is an appeal filed against the decision of this court. Order 45 Civil Procedure Rules applied where no appeal has been preferred.

The advocate for the plaintiff stated that though an appeal has been preferred, it is only a notice. The actual appeal had not been filed. The other objection was the affidavit sworn by the proposed witness was defective and did not comply with order 18 r 5 CPR. This rule is one that states the affidavit must be deponed to in the first person. The advocate for the plaintiff stated that this is what had infact been done. That referring to "we" in the affidavit meant it to be in the first person.

The other grounds of objections is on the aspect of discovery new and important evidence.

From the documents before the court the plaintiff was all along aware of the said witness. The witness was mentioned long before in the documentions. It thus was not a new and important matter that was actually being sort.

The advocate for the defendant then relied on the case of:

1) Kisya Investment Ltd. & Another

Vs

Kenya Finance Corporation Ltd

. Hccc No.3504/93 which dealt with affidavit and covered order 18 r 3 Civil Procedure Rules.

The case law of:-

Uhuru Highway development Ltd

. vs

Central B ank of Kenya & 2 other Hccc No. 29 of 95.

That dealt with the order 45 CPR, the principle of what a person who is aggrieved by a decree or order may apply for a review.

As such the advocate for the defendant argued that this may not apply to the judgment. I would not agree and not that section 80 refers to a person aggrieved by a decree or order may apply for a review of judgement.

Nonetheless my task is to consider whether I should permit a review in this instance.

I find that there has not been any mistake established to show that the judgement on the face of it had a mistake. That there is nothing to show that there is an error to be rectified. Most of all the finding of a witness is not a new and important matter when all along the witness was in the known knowledge of the

plaintiff.

I also note that the plaintiff has an appeal pending and therefore cannot rely on this section. I say this as order 41 4(4)CPR states:-

> "For the purposes of this rule or appeal to the court of appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given."

As notice has been given according to the advocate for the plaintiff an appeal has been deemed to have been filed. The application prays under order 45 is therefore not available to the plaintiff.

Can this court evoke section 3A of the CPR? I believe it can't as this would grossly hinder the rule of law. Per chance that it would the evidence of the proposed witness is contradicting from his affidavit.

I will hereby dismiss this application on technicalities. Namely that the advocate has no right of review in the light of a notice of appeal to the court of appeal having been filed This application is dismissed with costs to the defendant.

Dated this 12th day of April, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE