JGK v AMW (Civil Appeal E016 of 2021)
[2024] KEHC 11675 (KLR) (Civ) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E016 OF 2021

AN ONGERI, J

SEPTEMBER 19, 2024

BETWEEN

JGK ..... APPELLANT

AND

AMW ..... RESPONDENT

RULING

1. The application coming for consideration is the one dated 4/9/2023 brought under Rule 3(1), (2) of the *High Court [Practice and Procedure] Rules of the Judicature Act*, and all enabling provisions of the Law seeking the following orders;

    i. That service of this application be dispensed with at first instance;

    ii. That the annexed Application dated 4th September 2023 herewith be heard during the current honourable court's vacation;

    iii. That the costs of this application be provided for.

2. The application is based on the following grounds;

    i. That the honourable court delivered a judgement on the 4th August 2023 and the Applicant prays for a review of the entire judgement and orders granted therein;

    ii. That there is an error and clear mistake apparent on the face of the honourable court's record and the same need to be corrected;

    iii. That honourable court while dismissing the Applicant's appeal herein stated and held that the Applicant had not denied the claim of defaming the Respondent at the subordinate court and before the honourable court;

iv. That the foregoing is not correct, it's a mistake made by the honourable court, the Applicant categorically denied defaming and publishing any defamatory material against the Respondent as seen paragraph 5 of the Applicant's statement of defence dated 11th April 2019, the applicant's witness statement dated 21 November 2019 at paragraph 3 and Submissions filed at the subordinate court dated 25th November 2020 on behalf of the Applicant;

v. That the honourable court at paragraphs 30-32 of its judgement held that the Applicant did not deny defaming and publishing the defamatory information, that the Applicant only raised the defence of qualified immunity and that the Applicant has divulged pleadings from the divorce cause number 149 of 2019;

vi. That the foregoing is a clear error apparent on the face of the record, because the Applicant denied defaming the Respondent, he denied publishing any defamatory information against the Respondent;

vii. That the applicant only filed documents and information to support his case in divorce cause number 149 of 2019 and the said information was published by the 2nd to 4th Defendants who are not party to this proceedings admitted to have published the divorce proceedings by themselves;

viii. That the Applicant is not a publisher or a newspaper company, he did not raise the defence of qualified immunity, this was raised by the 2nd to the 4th Defendants at the subordinate court;

ix. That due to the above mistakes and error the honourable court held that the Respondent had proved her case against the Applicant without producing any evidence and thus dismissed the Applicant's appeal;

x. That due to the aforementioned mistakes and error, the honourable court did not interrogate the subordinate court's findings in regards to the burden of proof in proving the defamation and invasion of privacy claim against the Applicant.

xi. That this caused the Applicant to suffer a great injustice, it is actually a miscarriage of justice and this honourable court is enjoined to remedy the mistakes and errors;

xii. That time is of the essence, the Applicant was only granted 30 days stay of execution from the date of the judgement herein being the 4th August 2023;

xiii. That there is sufficient reasons for the honourable court to review the judgement and orders herein;

xiv. That this application has been made without any undue delays;

xv. That if the prayers sought herein are not granted the Applicant stands to suffer immense injustice.

3. The application is supported by the affidavit of JGK sworn on 4/9/2023.

4. The respondent filed a replying affidavit sworn on 12/1/2024 opposing the application.

5. The parties filed written submissions which I have duly considered.

6. The appellant submitted that the Trial court held that the Applicant did not deny defaming and publishing the defamatory information, that the Applicant only raised the defence of qualified immunity and that the Applicant had divulged pleadings from the divorce cause number 149 of 2019.

7. The appellant said that this is an error apparent on the face of the record requiring a review of the judgment.

8. The appellant further stated that this Court did not re-evaluate the evidence adduced before the Trial court but merely adopted the same and failed to recognize the error and mistake by the Trial court.

9. The appellant submitted that the error is self-evident and does not require elaborate argument to establish.

10. The Respondent on her part submitted that there is no error apparent on the face of the record and that the appellant submitted that the publication was not defamatory at all and claimed that they were part of the evidence in Divorce Cause No.149 of 2019.

11. Further, the respondent led evidence that the appellant had obtained the screenshots and email conversations in an intrusive manner and he therefore violated the respondent's privacy.

12. The sole issue for determination in the application dated 4/9/2023 is whether this court should review its judgment delivered on 4/8/2023.

13. The governing provisions for review are Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The said provisions state as follows:-

Section 80. Review;

"Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

[Order 45, rule 1.] Application for review of decree or order.

"1.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

14. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure* summarize the circumstances or conditions under which orders for review may be made as follows;

    (a) Upon discovery of new and important matter or evidence which after the exercise of due diligence, which was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

    (b) on account of some mistake or error apparent on the face of the record,

    (c) Where for any other sufficient reason the applicant desires to obtain a review of the decree or order, he may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

15. I find that there is no discovery of new and important evidence which was not available to the applicant at the time the judgment was delivered.

16. This court at paragraphs 30-32 of its judgement held that the Applicant did not deny defaming and publishing the defamatory information and that the Applicant only raised the defence of qualified immunity.

17. The appellant claimed that the publication was part of the evidence in Divorce Cause No.149 of 2019.

18. Further, that the applicant only filed documents and information to support his case in divorce cause number 149 of 2019 and the said information was published by the 2nd to 4th Defendants who are not party to these proceedings.

19. The respondent opposed the application for review and submitted she led evidence in the Trial court that the appellant had obtained the screenshots and email conversations in an intrusive manner and the court found that he violated the respondent's privacy.

20. The Trial court found that the appellant divulged the divorce proceedings and to uphold the findings of the Trial court is not an error apparent on the face of the record.

21. In the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR, the court stated as follows;

> " There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

22. I find that the Trial court found that the Appellant defamed the Respondent and that verdict was upheld by this court upon re-evaluation of the evidence.

23. The Trial court found that it was the Applicant who divulged pleadings from the divorce cause number 149 of 2019.

24. There is therefore no mistake apparent on the face of the record to warrant review of the judgment dated 4/8/2023.

25. Although the application was filed on 4/9/2023, one month after the judgment dated 4/8/2023 was delivered, I find that there are no sufficient reasons to warrant the review sought.

26. I dismiss the application dated 4/9/2023 with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent