RWP (Minor) (Suing through Next Friend and mother CNC) v Agroline Hauliers Limited (Civil Appeal E006 of 2022) [2023] KEHC 882 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEHC 882 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E006 OF 2022

PJO OTIENO, J

FEBRUARY 16, 2023

BETWEEN

RWP (MINOR) (SUING THROUGH NEXT FRIEND AND MOTHER CNC) ..... APPELLANT

AND

AGROLINE HAULIERS LIMITED ..... RESPONDENT

(Being an appeal from the Judgment of Hon. M. A. Onyango (RM) in Mumias SPM's Civil Case No. 19 of 2021 delivered on 10th January 2022)

RULING

1. On the July 27, 2022 when the file was placed before the court for perusal pursuant to section 79B, *Civil Procedure Act*, the court summarily rejected the appeal.

2. That order has aggrieved and dissatisfied the appellant who has sought to have the same set aside, vary or review the orders of summary rejection of the appeal. The Notice of motion reveals that the application is founded on the provisions of section 1A, 1B, 3 & 3A of the *Act* and order 45 rule 1 of the *Rules*. It is essentially invoking the overriding objectives of the court, the inherent powers of the court and its power to review its orders made on summary rejection of the appeal.

3. The notice of motion and the affidavit in support seek review of the decision on the basis that summary rejection should only be made in sparing manner and only where the appeal is bogus unlike in the instant matter where the appeal raises heavy grounds meriting hearing on the merits.

4. The application was resisted by the respondent by the grounds of opposition dated September 5, 2022 which assert that the motion is incompetent and abusive of court process in that the appeal has no chance of success and that no new evidence has been disclosed to merit review and that the appellant is yet to serve the memorandum of appeal upon the respondent.

5. Both sides have filed written submissions to the motion. For the appellant/applicant the position taken is that looking at the grounds of appeal, the appeal raises serious issues that need to be considered by the court at the merit hearing and not summarily. The appellant cited to court the decision in *Orero v Seko* [1984] eKLR for the proposition that an order summarily rejecting an appeal, where no appeal has been preferred, may be challenged by an application for review and that the power of summary rejection should be exercised very sparingly and on appeals on matter of facts only upon which proper finding would have been made.

6. It was equally submitted that there being no uniform formula of awarding damages in personal injury claims, the Courts are only guided by decided cases disclosing similar injuries and *Moses Maina Waweru v Esther Wanjiru* [2022] eKLR was cited for the proposition that comparable injuries should attract comparable awards. Lastly, the decision in *Kalpana Rawal v JSC*. [2015] eKLR was cited to underscore the need to accord a party the right to be heard.

7. For the respondent the submissions filed narrowed down the foundation of the application to be review and underscored that in every such application, the appellant must demonstrate the discovery of a new and important matter of evidence that was not within the knowledge of the appellant and what would not have been availed by him, due diligent notwithstanding, and cited to the court the Court of Appeal decision in *Ndungu Njau v National Bank of Kenya Ltd* [1995]-1998] 2 EA and *Nairobi City Council v Thabiti Enterprises Ltd* [1995-1998] EA. It was added for the respondent that in coming to the conclusion to summarily reject the appeal the court perused the record at trial and was satisfied with the judgment of the trial court on assessment of damages was not fit for disturbance.

8. Having perused the record of the file, the notice of motion, the response thereto and submissions by both sides, the court discerns the only question for determination to be whether the court is satisfied that in rejecting the appeal acted improperly or committed any error on the principles applicable.

9. Section 79B of the *Civil Procedure Act* provides:-

> " Before an appeal from a subordinate court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily."

11. A reading of the that provision clearly show that on perusal of an appeal file pursuant to section 79b, the court has only two options to choose from; it either admits the appeal to hearing and gives directions on way forward or rejects it summarily. The admission is the easier option and occasionally done routinely and at times mechanically. The other option is the summary rejection. The question then is, what would a court take into account before rejecting an appeal summarily?

12. In *Michael AO Mashere v Rotas Makokha Walusala* [1987] eKLR, Court of Appeal did lay the principles applicable to be:-

> " ...the power to summarily reject appeals must be sparingly used and only in the clearest cases. A sparing use can indeed only refer to rejection in the clearest cases of fact or law. So the spectrum is narrow."

13. Those considerations when placed into the context of the facts and pleadings in this appeal must be the guiding light for determination of the court. The grounds of appeal were largely on assessment of damages. Liability was not an issue because judgment on liability was by consent hence not challenged.

14. In the judgment by the trial court, who is the trier of facts, the court awarded to the appellant general damages of Kshs 350,000/=, Special damages of Kshs 8,490/=. In coming to the assessed general damages the trial court discounted the pleading that the plaintiff had suffered fractures and gave the reason for such finding to be the fact that appellant went to hospitals severally and none of the doctors who saw him detected a fracture on the lateral tibia and that of the medial malleolus of the left ankle joint. in own words the trial court observed and held:-

> " I have looked at the medical documents produced by the plaintiff, the outpatient card from Bungoma District hospital indicates that the minor was at the facility on September 19, 2019 he was given amoxyl, on September 20, 2019 his wounds were cleaned and dressed and an x-ray done and the next entry was for September 30, 2019. Treatment notes from Kabula Health Centre indicate that he went to the facility on September 27, 2019 and it is indicated he had mechanical burns secondary to an RTA. The discharge summary from Bungoma Referral Hospital indicated that he was admitted on September 30, 2019 and discharged on October 5, 2019 and the diagnosis was soft tissue injury and the procedures undertaken were dressing and cleaning the patient's wounds. The discharge summary indicated there were no fractures. PW3, the doctor stated that although he relied on the treatment documents availed to him he was a surgeon and an expert that is why he could identify the greenstick fracture while the doctors who treated the patient could not identify the said fracture from the X-ray film. No evidence was put forth by the plaintiff's witness that the officers and or doctors who saw the plaintiff were junior to him and that they could not identify the said fracture. In my considered opinion the Plaintiff went to the hospital on several occasions before being admitted on 30/9/2019 and discharged on October 5, 2019 yet the said fracture could not be seen or discovered on all these occasions. The superior court in *Shah & another v Shah & others* [2003] 1 EA 290, held that:-
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> "The opinion of the expert witness is not binding on the court but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

15. For this court, perusal of a record is never mechanical exercise but a tedious and judicious one. In this matter the court viewed the appeal to challenge the assessment of damages on the alleged erroneous finding that the appellant did not suffer fractures alleged by the doctor, PW3.

16. In coming to that decision rejecting the appeal, the court did read both the judgment and the documents produced by the plaintiff with consent of the respondent. The trial court, which had the advantage of hearing and seeing the witnesses testify disbelieved the witness and opted to believe the initial treatment documents. That was a finding of fact by the trier of facts which it take a very strong case for a first appellate court to interfere with. As the court perused the file, it was well aware of its duty and mandate as a first appellate court[1]. Even at that time the court was aware that it is a strong thing for it to reverse the trial court unless the finding is perverse and not in consonance with the evidence led and that the duty of assessment of damages is a discretionary jurisdiction and it takes a very strong case for an appellate court to interfere merely because it had it sat, it would have made an award different from that by the trial court[2].

17. There was a salient complaint that the trial court ought to have made an award of loss of earning capacity and future medical expenses. Even that was duly considered at the perusal by the court and it

1 Gitobu Imanyara v AG [2016] eKLR

2 mwanasokoni v Kenya Bus Services [1982-88] 1 KAR 278

was appreciated that the plaint at paragraph 11 revealed the heads of damages to be pains and suffering and loss of amenities. There was never a specific pleading nor prayer for general damages for loss of earning capacity or future medical expenses. In coming to its decision it reached, this court was aware that cases are determined on the basis of pleadings filed from the principle of law that parties and the court are bound by the pleadings filed[3].

18. Lastly the court appreciated that the duty of assessing damages is a heavy task upon the trial court and that is it not upon to an appellate court, even on first appeal, to easily and freely substitute its discretion for that of the trial court.

19. In essence, the court did an elaborate assessment and appraisal of the appeal in light of the record of the trial court and consciously found it to be possessed of very remote chances of success in that it was a challenge in assessment of damages. It was to the court a clear case where only the mandate to assess damages was challenged.

20. It is however unfortunate that the expectation at that time of perusal is not to do a detailed ruling. It is however a learning that next time when an appeal presents itself for summary rejection, the court will remind itself to give a reason for such an order.

21. Having said all foregoing, the court while appreciating that in the application for review the appellant fits not under the grounds of error apparent on the face of the record or discovery of a new and important matter of evidence, the court views the appellant to have been grounded on the grounds that there is a sufficient cause. The sufficient cause here seems to have been the position taken by the appellant that the court misapprehended the law applicable under section 79B of the *Act*.

22. It is the established position of the law that misinterpretation of the law is never a ground of review but an appeal. That is the position settled by the Court of Appeal in *Ndungu Njau v National Bank of Kenya Ltd* (*Supra*) where the court said:-

> "In this instant case the matter in dispute had been fully canvassed before the trial Judge. He made a conscious decision on the matter in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it would be a good ground of appeal but not for review."

23. In conclusion, there is no merit in the application dated August 29, 2022 which is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF FEBRUARY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Wamalwa for the Appellants

No appearance for the Respondent

Court Assistant: Polycap

[3] IEBC v Stephen Mutinda Mule [2014] eKLR