Kenyan Alliance Insurance Company Limited v Nyaribari; Nyamongo (Interested Party) (Civil Case 1 of 2019) [2023] KEHC 3433 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3433 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL CASE 1 OF 2019

WA OKWANY, J

APRIL 20, 2023

BETWEEN

THE KENYAN ALLIANCE INSURANCE COMPANY LIMITED ..... PLAINTIFF

AND

EUNICE NYABOKE NYARIBARI ..... DEFENDANT

AND

CLEOPHAS NYAMONGO ..... INTERESTED PARTY

RULING

1. Through the application dated November 22, 2022, the Plaintiff/Applicant seeks the following orders: -

    1. ...Spent

    2. ...Spent

    3. That this Honourable court be pleased to review and set aside the judgment dated the 25th day of October 2021.

    4. That this Honourable court be pleased to hold and find that the defendant/respondent is not entitled to the pre-accident value of motor vehicle registration number KCK 263C, the subject matter herein but only entitled to the deposit that she paid for the subject motor vehicle in the sum of Kshs 881,200.00.

    5. That this Honourable court be pleased to hold and find that paying the pre-accident value of motor vehicle registration number KCK 263C. the subject motor vehicle herein to the defendant/respondent will amount to unjust enrichment as the vehicle had been financed by

M/s NIC Bank Limited current Ncba Bank Limited and the defendant/respondent had only paid and/or expended the deposit for the said vehicle only in the sum of Kshs 881,200/=.

6. That this Honorable court be pleased to hold and find that the said motor vehicle registration number KCK 263C having been repossessed by M/s NIC Bank Limited currently NCBA Bank Limited on account of non-payment of monthly rentals by the defendant/respondent paying her the pre-accident value of the said vehicle will amount to unjust enrichment as the only amount she expended on the said vehicle is the deposit the said of Kshs 881,200.00 and any amount and or value of the said vehicle and above a sum of Kshs 881,200.00 is an amount expended by M/s NIC Bank Limited currently NCBA Limited and not by the defendant/respondent.

7. That this Honourable court be pleased to hold and find the defendant/respondent only had a paltry ownership of motor vehicle registration number KCK 263C, in the sum of Kshs 881,200.00 she had paid as deposit and paying her the entire pre-accident value of the said vehicle will amount to paying her in respect of something she does not own and compensating her in terms of something she her not actually expended.

8. That this honourable court be pleased to hold and find that there is an error apparent on the face of the court's judgement dated 28th day of October 2021 as it assumes that the defendant/respondent had full ownership of motor vehicle registration number KCK 263C and hence entitled to pre-accident value of the said vehicle whereas her ownership was in respect of the paltry deposit of Kshs 881,200.00 she had paid and the balance was financed by M/s NIC Bank Limited currently NCBA Limited who had ownership of the balance of pre-accident value.

9. That costs hereof be in the cause.

2. The application is premised on the grounds that: -There is error apparent on the face of the Judgment dated the 28th day of October 2021.That the motor vehicle the subject of the suit herein has been repossessed by the NIC Bank Limited, now NCBA Bank Limited who had the ownership of pre-accident value.That the court proceeded to make judgement in error while under mistaken assumption and belief that the Defendant/Respondent had full ownership of motor vehicle registration number KCK 263C, whereas she had expended merely and paltry sum of Kshs 881.200.00, as deposit towards purchase price while the balance of purchase price (Kshs 4,406,000.00) was financed by NIC Bank (NCBA) Bank Limited, through asset finance.That allowing the Defendant/Applicant to recover the full pre-accident value of the suit vehicle as decreed would amount to unlawful enrichment equivalent to 100%, which the Defendant did not lose, in applicant's view.

3. The Defendant/Respondent opposed the application through the Replying Affidavit sworn on December 9, 2022 wherein she avers that this application is once again an attempt to frustrate, impede, delay and/or defeat justice as the Applicant has previously filed numerous applications that have all been dismissed.

4. She states that the Applicant has had its day in this court and before the Court of Appeal which courts found it to have breached the contractual obligations. She maintains that the Applicant has exhausted all the possible avenues and forums to pursue their case.

5. She further states that the Applicant has not tendered any evidence to show that the suit motor vehicle had been repossessed by the bank. She adds that the instant application is an afterthought and does not meet the threshold set for the granting of orders for review.

6. Parties canvassed the application by way of written submissions which I have considered.

7. The main issue for determination is whether the Applicant has made out a case for the granting of the orders for review/setting aside of the judgment of October 25, 2021.

8. The Applicant argued that it is entitled to the order for review as the impugned judgment directed it to pay the pre-accident value of the suit motor vehicle which order was unfair given that the documents filed in court showed that the unit cost of the said vehicle was Kshs 4,406,000/=.

9. According to the Applicant, since the Respondent paid a deposit of Kshs 881,200/= for the vehicle and the balance thereof financed by the bank which later repossessed and sold off the vehicle, the only amount due to the Applicant was Kshs 881,200/=.

10. It was submitted that judgment for the payment of the pre-accident value of the suit motor vehicle is unfair as it would amounts to unjust enrichment of the Defendant. For this argument, the Applicant cited the decision in *Samuel K. Macharia vs Kenya Commercial Bank Ltd, Kenya Commercial Finance Company Ltd* [2003] eKLR where it was held that: -

> "...the idea of unjust enrichment or unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the plaintiff. The gist is that a defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to make restitution. As Lord Goff of Chieveley and Professor Gareth Jones state in their monumental treatise, The Law of Restitution, 5th edn (1998), at pp 11-12:
>
> "Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment."

11. The Applicant submitted that the impugned judgment had an error on the face of the record as it assumed that the Defendant paid for the full purchase price of the suit motor vehicle when she had only paid 20% of the purchase price.

12. The Respondent and the Interested Party, on the other hand, submitted that this court lacks the jurisdiction to entertain the review application in view of the fact that the Applicant filed an appeal against the impugned judgment.

13. The Respondent also faulted the Applicant for the unreasonable and unexplained delay in filing the application. It was submitted that the instant application is an appeal that has been disguised as an application for review.

14. Order 45 Rule 1 of the *Civil Procedure Rules* stipulates as follows: -

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.

15. The above provision sets out the circumstances/conditions under which an application for review can be made. The said conditions are: -

The discovery of new and important matter or evidence, mistake or error on the face of the record and for any other sufficient.

16. Besides the above conditions, Order 45 Rule 1 also provides that an application for review is only available where no appeal has been filed.

17. In the instant case, it was not disputed that the Applicant herein preferred an appeal before the Court of Appeal through the Notice of Appeal dated October 28, 2021.

18. My finding is that the Applicant is precluded from seeking orders for review in the face of the undisputed fact that an appeal was filed before the Court of Appeal.

19. Even assuming for argument's sake, that no appeal was preferred before the Court of Appeal, I still find that the instant application does not meet the threshold set for the granting of an order for review. The Applicant argued that there was an error on the face of the record in the judgement awarding the Defendant the pre-accident value of the suit motor vehicle when she had paid only 20% of the total value of the said motor vehicle. What constitutes an error on the face of the record was discussed in *Nyamogo vs Kogo* (2002) EA 170, as follows: -

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two pinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal." (Emphasis Mine)

20. In the present case, I find that the issue of whether the Respondent was entitled to the pre-accident value of the suit motor vehicle or to the deposit that she had paid towards its purchase is an issue which the trial court considered and determined based on its own analysis of the evidence presented before it. I find that the issue of the whether the court was right in awarding the Respondent the pre-accident value of the motor vehicle does not fall under the description of an error on the face of the record as it would require a long process of reasoning and an evaluation of the evidence presented before the trial court.

21. In my humble view, the issue of whether the court erred in its finding on what was due to the Defendant does not amount to an error on the face of the record but is an issue that can only be challenged on an appeal as it would require elaborate arguments to be established.

22. For the reasons that I have stated in this ruling, I find that the application dated November 22, 2022 is not merited and I therefore dismiss it with costs.

23. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 20TH DAY OF APRIL 2023.

W. A. OKWANY

JUDGE