



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL APPEAL NO. 13 OF 2018

KENYA PLANT HEALTH INSPECTORATE SERVICES...APPELLANT/RESPONDENT

VERSUS

JAPHETH MUKOYANI KHAOYA Suing as the personal and legal representative of the

estate of EVANS MUTORO MUKOYANI.....1ST RESPONDENT/APPLICANT

ISAAC MWANGI.....2ND RESPONDENT

JESSIKAY ENTERPRISES.....3RD RESPONDENT

RULING

This ruling is in respect of an application dated 23rd June, 2020 brought under Certificate of Urgency by the 1st respondent/Application. The application seeks;-

1. spent.
2. That the honourable court be pleased to review and or vary its judgment made on 02/06/2020.
3. That costs be in the cause

The application is supported by the grounds on the face of the motion and the sworn affidavit of Japheth Mukoyani Khaoya dated 23rd June, 2020.

Briefly, the grounds are that there is an error apparent on the face of the record, that the suit against Jessikay Enterprises Ltd(2nd defendant in the lower court) was withdrawn before hearing, that the 2nd respondent (1st defendant in the lower court) admitted being in possession of the Motor Vehicle which caused the accident, that this court erroneously found the 3rd respondent liable for 50% of the liability that it is in the interest of justice that this court finds the 2nd respondent bears the 50% liability.

The respondents did not oppose the application and the applicant filed his submissions wherein M/s Mumalasi in support of her argument has cited the provisions of Order 45 Rule 1 of the Civil Procedure Rules (CPR) and the case of **Re Estate of Oliokampai Sarapae Sanguti (2019)eKLR**.

This court rendered its judgment on 29/5/2020 and stated;

I therefore find both 2nd and 3rd defendant's drivers liable. I therefore set aside the judgment on liability at 100% against the appellant and substitute thereof that the 2nd defendant (Jessikay Enterprises) bears 50% liability and the 3rd defendant (Kenya Plant Health Inspectorate Services-the appellant)50% liability.

The applicant filed suit against the respondents via plaint dated 3rd December 2013, the 2nd defendant filed his defence wherein he admitted being in possession of Motor Vehicle Registration Number KAW 465T while the 3rd respondent was the registered owner. On the strength of the said admission, the applicant filed a notice of withdrawal of suit against the 2nd defendant on 8th April, 2014.

The issue therefore in this application is whether there is an error apparent on the face of the record which calls this court to review its judgment.

Section 80 of the Civil procedure Act cap 21

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 REVIEW 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.

In **Muyodi Vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, the Court of Appeal described an error apparent on the face of the record as follows:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out....”

In **National Bank of Kenya Limited v. Ndungu Njau** (Civil Appeal No. 211 of 1996 the court of Appeal held:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established....”

I have analyzed the law as contained in section 80 of the Civil procedure Act and Order 45 of the Civil Procedure Rules and I am of the view that there is an error apparent on the face of the record since it is clear that the suit against Jessikay Enterprises Ltd was withdrawn on 8th April, 2014. There is no way liability could have accrued to them.

Consequently; the orders of this court given on 29th May, 2020 are reviewed only to the extent that the liability shall be shared between the Appellant (Kenya Plant Health Inspectorate Services) and the 2nd Respondent (Isaac Mwangi) at the ratio of 50% each. Each party to bear his costs.

Orders accordingly.

DATED AT BUNGOMA THIS 9TH DAY OF MARCH, 2021

S. N RIECHI

JUDGE