



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 617 OF 2006

TRISHUL CONSTRUCTION

COMPANY LIMITED.....APPELLANT

VERSUS

TIMONA AGAL JOHANA.....1ST RESPONDENT

BEATRICE INJEHU SHAVULIMO.....2ND RESPONDENT

RULING

This case has a long history. The respondents had sued the appellant in the lower court following a road traffic accident. The lower court entered judgment in favour of the respondents in the sum of Kshs. 500,000/=. The appellant settled the decretal sum following that judgment which was by consent. After about 6 months thereafter, the respondents filed an application for review of the settled suit under Order 44 rule 1 of the Civil Procedure Rules seeking an additional sum for loss of profits which had not been taken into account by the lower court.

It was the position of the respondents that this claim was pleaded but the lower court failed to address it which amounted to an error on the face of the record. The application for review dated 21st March, 2006 was listed for hearing on 19th May, 2006. Both counsel for the parties recorded consent once again in the following terms,

“There be a further award of Kshs. 540,000/= on account of the deceased’s given grocery business.”

The above consent aggrieved the appellant who instructed counsel to appeal the same. However, counsel advised that this could not be done as it was already out of time to appeal that judgment. The appellant then changed advocates who then filed an application dated 4th September, 2006 to review the consent order in the lower court. That application was dismissed by the lower court.

The appellant then lodged an appeal following the dismissal of the review application. That appeal was heard by Onyancha J who, in the judgment dated 27th February, 2013 allowed the appeal, and the orders of dismissal of the application dated 3rd August, 2006 were set aside.

The court then considered the option of remitting the application to the lower court for hearing or decide the same and decided to take the latter option. Finding that the application was fatally defective for not including a certified copy of orders intended to be reviewed the Judge struck out the application.

That notwithstanding, since the application was said to have raised weighty matters related to alleged mis-conduct of counsel, leave was granted to the appellant to file a fresh application within 21 days. I pause here to observe that the appeal determined by Judge Onyancha related to the dismissal of an application for review by the lower court. The appeal was not related to the impugned consent recorded after the first judgment.

Following leave by the court contained in the judgment of Onyancha J, the appellant filed an application dated 20th March, 2013 specifically seeking the order that the consent order made on 19th May, 2006 be reviewed and or set aside or varied. There are two substantive reasons given on the face of the application. It was stated the order was obtained without instructions, and that it was obtained by collusion. There is a supporting affidavit sworn by one Regina Kitheka, the Chief Manager, legal department Kenindia Assurance Company Limited.

I have perused the entire record before me and noted that application dated 20th March, 2013 has never been served upon the respondents nor prosecuted. What this means is that, the consent order made on 19th May, 2006 still stands and there is no appeal to challenge the same. This court is now confronted with two applications. The first application is by the appellant dated 7th August, 2019 seeking the release of Kshs. 850,000/= deposited in court.

The grounds upon which the application is brought are that the appeal was determined on 27th February, 2013 in favour of the appellant, and that the said sum had been deposited as security pending the determination of that appeal. Since there is no appeal pending, the release should be ordered. The affidavit annexed thereto repeats the grounds on the face of the application.

The second application was filed on 26th November, 2019 by the respondents. It seeks the dismissal of the appellant's application dated 7th August, 2019 for want of prosecution and being an abuse of the court process. It also seeks the release of the sum of money deposited in court by the appellant's insurer to the respondents together with all the interest accrued on the deposit.

From the time the judgment of Onyancha J was delivered and the appellant filed the application as advised, eight years have gone by. By filing the present application seeking the release of the money deposited as security, the appellant must be taken to have abandoned the application dated 20th March, 2013.

That notwithstanding, since both parties seek the release of the money in the two applications, I have considered it my duty to look once again at the entire record to determine the genesis of the dispute with the view to putting this matter to rest once and for all.

The application for review that led to the consent recorded after the lower court judgment had been settled is dated 20th March, 2006. The reasons given on the face of the application were that there was an error apparent on the face of the record, in the failure to pass judgment on the deceased's green grocery business. There was also said to be an error relating to the multiplier adopted.

The other reason was that the green grocery business was expressly pleaded and evidence led, but the judgment of the lower court was totally silent on that issue.

In the plaint at paragraph 7 (a) (page 7 of the record of appeal) it was pleaded inter alia as follows,

“The deceased was also a small scale trader and had a green grocery and cereals business ran by his wife the 2nd plaintiff. The deceased made a profit of Kshs. 150/= on average every day. By reason of his death his dependants have lost the support and benefit of the deceased and have suffered loss and damage.”

The 2nd respondent Beatrice Injehu Shavulimo gave evidence in the lower court that appears at page 17 of the record of appeal. In her evidence in chief she stated as follows,

“My husband was a businessman and a casual worker. Here are entries of business account and I produce them as exhibit 4. I depended solely on my husband. The business ceased as I got such severe shocks I could not carry on. I pray for damages and costs.”

The 2nd respondent was subjected to cross –examination by counsel for the appellant and the following is what she stated,

“My husband used to assist me on running the groceries business. After his death psychologically I could not carry on. While I ran the business I would earn may be Kshs. 200 per day or less and I would ran it for two weeks then go upcountry and then to continue.”

It is clear to me that the record set out above is in conformity with the requirement that special damages must be specifically pleaded and strictly proved. That threshold in my view was met.

The foregoing notwithstanding, the judgment of the lower court was silent in relation to the said pleading and evidence. Clearly, this was an oversight which could not elicit an appeal but a review as correctly submitted in the respondents' application to review the judgment dated 20th March, 2006.

I have given that background deliberately to show that, the recording of a further order to award the respondents the sum disputed was properly grounded in the pleadings and evidence. Up to this time there is no appeal against that order and in my view, even if one were to be filed it is unlikely to succeed. As I have observed, the application filed to review the same has never been prosecuted. I add the same sentiments that, even if that application were to be prosecuted chances are that it would not succeed.

I must therefore come back to the two applications claiming the release of the money. Having addressed the record and the numerous applications lodged, I have come to the irresistible conclusion that the sum deposited as security should be released to the respondents. The record before me supports that conclusion.

The end result is that, the appellant's application dated 7th August, 2019 is hereby dismissed while the respondent's application dated 22nd November, 2019 is allowed. The said sum shall be released to the respondents within 14 days from the date of this ruling. Each party shall bear their own costs.

Dated and delivered at Nairobi this 4th day of March, 2021.

A.MBOGHOLI MSAGHA

JUDGE