



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEALNO.19 OF 2019

KENYA ORIENT INSURANCE.....APPELLANT

- V E R S U S -

ZACHARY NYAMBANE OMWAGWA.....RESPONDENT

R U L I N G

1. The Application coming for consideration in this ruling is dated 9/2/2021 filed under certificate of urgency seeking the following orders;
 - (i) THAT the Application be certified urgent (SPENT)
 - (ii) THAT this court be pleased to grant temporary stay of execution of its judgment and/or decree delivered on 29/1/2021 and all consequential orders pending the hearing and determination of this Application interpartes.
 - (iii) THAT this court be pleased to review its judgment delivered on 29/1/2021.
 - (iv) THAT costs of the Application be in the cause.
2. The Application is based on the ground that the Appeal was erroneously dismissed by the court having arrived at a decision that the Respondent cannot compel the Appellant to pay more than the prescribed maximum limit of Kshs.3,000,000 under the Act.
3. Further, that there is an error apparent on the face of the record to warrant a review of the said order.
4. The Application is supported by the Affidavit of MORINE WANGECI sworn on 9/2/2021 in which it is deposed that the court having ruled that the Appeal had succeeded went on to dismiss it with costs.
5. Further, it is stated in the Supporting Affidavit that there is an error apparent on the face of the record in paragraph 22 of the judgment where the court said that the Appellant had already paid Kshs.3,000,000.
6. The Respondent opposed the Application and filed grounds of opposition dated 12/2.2021 stating that there was no error apparent on the face of the record and further that the judgment was correct in not allowing new grounds of defence on appeal which would have shifted the goal post for the Respondent.
7. Further that the court was right in disregarding the claim of paying Kshs.3,000,000 as their limit under Cap 405 as the same was not raised in the Defence, the Replying Affidavit or Submissions of the Appellants.
8. The parties were directed to file written submissions which I have duly considered. The Appellant submitted that the court having agreed that the Appellant cannot pay more than the statutory limit of Kshs.3,000,000 erroneously dismissed the appeal with costs.
9. The Appellant is seeking review on the basis that there is an error apparent on the face of the record on paragraph 22 of the judgment dated 29/1/2021 which stated as follows;

“... I find that the Appellant has already paid the three million and therefore the appeal lacks in merit and I accordingly dismiss it with costs to the Respondents.”
10. On the issue of costs, the Appellant/Applicant submitted that the Application dated 9/2/2021 be allowed with costs to the Appellant.
11. The Respondents submitted that parties are bound by their pleadings/prayers and further that there is no error apparent on the face of the

record in the judgment dated 29/1/2021 to warrant a review of the said judgment.

12. The applicable law for review has been provided for under section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules.

13. Section 80 of the Civil Procedure Act provides as follows:

“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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

14. Whereas Order 45 rule 1 sets out the grounds for review as follows:

“(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. I have considered the submissions by the parties and I agree with the Applicant that there is an error apparent on the face of the record to warrant a review of this court.

16. The supreme court of Uganda in *Edison Kanyabwera versus Pastori Tumwebaze (2005) UGSC 1*, provided for what constitutes an error apparent on the face of the record, it stated as follows;

“it is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law.”

17. The court of appeal in *National Bank of Kenya Limited versus Ndungu Njau (1997)eKLR* stated as follows;

“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.”

18. The court having found that the Appellant had already paid Kshs.3,000,000 erroneously dismissed the appeal with costs instead of allowing the same.

19. I accordingly allow the application and review the order dated 29/1/2021 and I allow the appeal.

20. The mistake on record was a regrettable error.

21. I accordingly order that each party bears its own costs of both the appeal and the Application dated 9/2/2021.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 9TH DAY OF JULY 2021.

A. N. ONGERI

JUDGE