REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

MISC CIVIL APPLICATION NO.546 OF 2019

CATHERINE NDUKU (Suing as Legal Representative of the estate of

KELVIN MAINGI................................ PLAINTIFF/RESPONDENT

VERSUS

TRINITY TRANSPORT SERVICES...DEFENDANT/APPLICANT

PANIJ AUTOMOBILE K LIMITED...DEFENDANT/APPLICANT

RULING

1. This is an application for review of the ruling of this court entered on 27.1.2019 as well as an order that the defendant/applicant furnish security by way of payments or deposits within limits as provided in the Insurance (Motor Vehicles Third Party Risks) Act CAP 405 Laws of Kenya. It is brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 45 of the Civil Procedure Rules, section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act CAP 405 and Article 159(d) of the Constitution of Kenya.

2. The grounds of the application are that the ruling delivered on 27.1.2020 was to the effect that half the decretal amount of Kshs 3,202,225/- was to be paid to the plaintiff/respondent and the balance of Kshs 3,202,225/- be deposited in a joint interest earning account and yet CAP 405 provide that sums could only be paid up to a maximum of Kshs 3m/-. It was averred that it was an error on the part of the court to give a ruling that was against the provisions of section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act CAP 405.

3. The application was supported by an affidavit deponed by Isabella Nyambura from the insurance company that insured the suit vehicle. She averred that the orders of this court were to the effect that the defendant/appellant was to pay an amount in excess of Kshs 3m/- and yet section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act states that a policy shall not be required to cover liability in excess of Kshs 3m/-.

4. The application was opposed vide a replying affidavit deponed by Alex Kyalo Mutua, from the firm of Advocates in conduct of the suit on behalf of the respondent. He averred that the applicant has failed to comply with the conditions for grant of the stay order that was issued on 27.1.2020. It was averred that there was no appeal preferred against the judgement of the principal magistrate in CMCC 462 of 2018. Counsel maintained that the applicant had not satisfied the conditions for review and that if the applicant is willing to pay a maximum of Kshs 3m/- then the same could be paid.

5. The application was canvassed vide written submissions. Counsel for the applicant submitted in placing reliance on section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act that the applicant should not be forced to pay an amount above that provided for in CAP 405. The court was invited to consider the case of **Africa Merchant Assurance Co Ltd v William Muriithi Kimaru (2016) eKLR** and urged the court to allow the application.

6. In reply, counsel for the respondent brought attention to the court that the applicant had not complied with the court orders issued on 27.1.2020. Learned counsel took issue with the failure of the applicant to extract the decree that he was aggrieved with; to counsel, there was non-compliance with section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules. According to counsel, the applicants had not demonstrated that they were aggrieved by the orders of the court and that the insurance was to indemnify the applicants to its maximum and the insureds are to pay the difference.

7. I have considered the application as a whole and submissions by learned counsel. As can be deduced from the Notice of Motion and submissions, the summary of the applicant's case is that my ruling was an error. On the other hand, the respondent opposes the application

arguing that this application is incompetent and fatally defective.

8. The issues for consideration are:

> **a. Whether the applicants have satisfied the grounds to warrant an order of review.**
>
> **b. Whether the applicant is entitled to the orders sought in the application**.

9. It is trite law that just like the right of appeal, an order in review is a creature of statute which must be provided for expressly. In considering an application for review, the court exercises its discretion judicially as was held in the case of **Abdul Jafar Devji Vs Ali RMS Devji [1958] EA 558**. The law under which review is provided is section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

10. Order 45 states that :

> 1. (1) Any person considering himself aggrieved—
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> 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.

11. In order for an application for Review to succeed, the Applicant must convince the court of the existence 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. The applicant is obliged to clearly and specifically state the new evidence or matter and strictly prove the same. In the case **of James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR** Visram *(as he then was)* held as follows: -

> "Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.

12. The applicant appears to rely on the 1st and 3rd reasons. Regarding whether there is a mistake or error apparent on the face of the record, examples of such situation could be where a suit proceeds ex-parte when there is no affidavit of service on record or where the court enters a default judgment when there is no affidavit of service. Therefore, a misdirection by a judicial officer on a matter of law cannot be said to be an error apparent on the face of the record. An error apparent on the face of the record was defined in **Batuk K. Vyas Vs Surat Municipality AIR (1953) Bom 133** thus:

> "No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it………….."

13. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it mutates into an appeal.

14. In the case of **Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173** the court defined an error apparent on the face record, thus:

> "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 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 opinions, 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 or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

15. In the instant case therefore, I am not convinced that there is an error apparent on the face of the record in this case. What is being raised by learned counsel for the applicant requires examination of the law and arguments for or against the award of an amount beyond what is in CAP 405. In my considered view it would have instead been an error apparent on the face of the record if I had awarded an amount that was in excess of what was awarded in the trial court.

16. Regarding the element of sufficient reason, this means a reason sufficient on ejusdem generis to those in Order 45. In the instant case, a sufficient reason put forward by the applicant is that failure of the court to give a ruling that fits in the glove of the Insurance Act CAP 405 cannot be visited on the Insurance Company. Whereas I appreciate the reasoning in the case of **Africa Merchant Assurance Co Ltd v William Muriithi Kimaru (2016) eKLR,** I disagree with its relevance to the instant case as the mentioned matter is in regard to a declaratory suit while the instant matter is an appeal by the insureds. I am not convinced that in the instant case the Insurance Company was

obliged to pay the decretal amount, neither is the insurance company a party to the intended appeal or to the suit in the trial court that is being appealed against. Suffice here to add that the applicants were the tortfeasors in the trial court and that with or without an insurance company being in the picture, they remained the judgement debtors for all intents and purposes. There has been no declaratory suit filed yet so as to bring in the insurance company and hence the applicants still remain as the adjudged parties in the suit. Finally, if an erroneous decision had been made by this court as alluded to by the applicants, then the same is not a ground for review but an appeal. The applicants if aggrieved ought to move to the higher court on appeal.

17. For the foregoing observations, it is my finding that the applicants' application dated 18.2.2020 lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 7thday of October, 2020.

D. K. Kemei

Judge