REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 105 OF 2015

RICHARD FRANCIS MALELU.....APPELLANT

-VERSUS-

ODHIAMBO ASHER

GEORGE MUTISO MASESI.....RESPONDENTS

(Being an Appeal from the Ruling delivered by Honourable E M Onzere Resident Magistrate on the 29th May 2014 in Kilungu RMCC No. 24 of 2011)

BETWEEN

RICHARD FRANCIS MALELU.....PLAINTIFF

-VERSUS-

ODHIAMBO ASHER

GEORGE MUTISO MASESI.....DEFENDANTS

JUDGEMENT

1. By a plaint dated 27th May, 2011, the Appellant herein sued the Respondent seeking general and special damages arising from a road traffic accident which took place on 1st March, 2010 along Salama-Nunguni Road in which the Appellant sustained injuries due to the negligence of the Respondents. Pursuant to the same, summons to enter appearance were issued by the court on 29th August, 2011.

2. By an affidavit of non-service sworn on 4th July, 2013 and filed on 5th August, 2013, the Court Process Server deposed that he kept on looking for the defendants till 20th August, 2012 but was unable to trace the Defendants in order to effect the service. On 25th August, 2012 he explained his predicament to his instructing advocates who requested him to return the said summons back to court in order to enable them take the appropriate action which he did.

3. By an application dated 23rd August, 2013 filed on 17th September, 2013, the Plaintiff applied for extension of the validity of the said Summons and for reissue or renewal of the same. He also sought for leave to effect service of the said summons by way of substituted service and for the court to fix the period within which an appearance should be entered. The said application was based substantially on the affidavit of the process server above.

4. In the meantime, on 29th August, 2013 pursuant to the provisions of Order 5 rule 2(7) of the ***Civil Procedure Rules***, 2010, the Court on own motion, dismissed the suit on the ground that there was no application seeking to extend the validity of the said summons, 24 months after the issuance of the original summons. As a result of this development the Appellant sought to abandon the application dated 23rd August, 2013 filed on 17th September, 2013 though no formal order was made in respect thereof. He instead decided to pursue the subsequent application dated 14th October, 2013 in which he sought to set aside and/or reviewing the orders made on 29th August, 2013 dismissing the suit. The said application was brought under Sections 3A, 1B &3A of the ***Civil Procedure Act*** and Order 51 of the ***Civil Procedure Rules*** and was based on the fact that the Respondents were not traced for service and that though the Appellant sought to extend

the validity of the summons, unknown to the Appellants the suit had already been dismissed. It was submitted that the failure to extend the validity of the said summons was due to a mistake of counsel which ought not to be visited on the client.

5. In the ruling dated 6th December, 2013, the Learned Trial Magistrate dismissed the said application on the ground that Order 51 of the ***Civil Procedure Rules*** was not applicable to applications for setting aside. According to him the application ought to have been brought under Section 80 of the ***Civil Procedure Act*** which deals with review. He further found that the Appellant failed to bring himself within the provisions of Order 45 of the ***Civil Procedure Rules*** by not extracting and annexing the order sought to be reviewed. It was also his finding that the Appellant failed to satisfy the conditions stipulated under Order 45 Rule 1 aforesaid.

6. According to the Court, the validity of summons to enter appearance can only be extended where there is filed an affidavit setting out the attempts made in serving the same which was not done. According to the Court such an affidavit ought to have been filed during the validity of the summons but as at 5th July, 2013 when the affidavit of non-service was filed, the validity of the summons had lapsed hence there was nothing to extend. Further as at 29th August, 2013 when the order which was sought to be reviewed was made a period of 24 months had lapsed without an application being made under Order 5 rule 2(2) for extension of the said summons.

7. In the result, the court found the application unmerited and dismissed the same with costs.

8. Undeterred, the Appellant filed an application dated 14th April, 2014 expressed to be brought under Order 5 Rules 2(2) and (7), Order 45 rule 1(a), Order 50 rule 4 of the ***Civil Procedure Rules***, Sections 1A, 1B and 3 of the ***Civil Procedure Act***, section 3 of the ***Judicature Act*** and all other enabling provisions of the law seeking that the ruling dated 28th August, 2013 and 3rd December, 2013 be reviewed and set aside and that the Appellant be allowed to prosecute the Notice of Motion dated 23rd August, 2013. The said application was based on the fact that the suit was not properly dismissed as 24 months had not lapsed as at the date of the dismissal of the suit. It was argued that in computing the period the court did not take into account the excluded days between 21st December, 2011 and 13th January, 2012 and the period between 21st December, 2012 and 13th January, 2013 as provided under Order 50 rule 4 of the ***Civil Procedure Rules***.

9. In the ruling dated 29th May, 2014, which is the subject of this appeal, the Learned Trial Magistrate found that the issues raised in the above application were not glaring and self-evident as they had to be established by way of arguments as regards the provisions of Order 50 rule 1 and Order 50 rule 4 of the ***Civil Procedure Rules*** as to whether the computation of 24 months for validity of summons should be calendar months or are subject to exclusion under rule 4. According to the Learned Trial Magistrate as the Court had already found that a period of 24 months had lapsed from the date the summons were issued, even if that decision was wrong he would not disturb it as to do so would amount to sitting on appeal on the said earlier ruling. He therefore found that there was no error on the face of the record and dismissed the application with no order as to costs.

Determination

10. I have considered the issues raised in this appeal. Order 5 rule 2 of the ***Civil Procedure Rules*** provides as follows:

> ***(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.***
>
> ***(2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.***
>
> ***(3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.***
>
> ***(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.***
>
> ***(5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.***
>
> ***(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.***
>
> ***(7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.***

11. In this case the suit was dismissed under Order 5 rule 7 above. The Appellant however faulted that position stating that since the 24 months had not lapsed since the issuance of the original summons, the dismissal of the suit was an error apparent on the face of the record, a position that the Learned Trial Magistrate did not agree with.

12. In order to justify the Court in granting an application for review under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision provides 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

13. The foregoing provisions are based on section 80 of the ***Civil Procedure Act*** Cap 21 Laws of Kenya which states 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

14. It is clear that section 80 of the ***Civil Procedure Act***, unlike the provisions of Order 45 aforesaid, does not prescribe the conditions upon which an application for review may be granted. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the ***Civil Procedure Act*** enables a court to make such orders on review application which it thinks just so that the words "or any sufficient reason" as used in Order 44 rule 1 of the ***Civil Procedure Rules*** are not *ejusdem generis* with the words "discovery of new and important matter" etc. and "some mistake or error apparent on the face of the record" and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why "any other sufficient reason" need be analogous with the other grounds in the Order because clearly section 80 of the ***Civil Procedure Act*** confers an unfettered right to apply for review.

15. In dealing with the delegated legislation made under the Act **Farrell, J** in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself :

"In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules "not inconsistent with the provisions of this Ordinance". If a rule is inconsistent it is to that extent *ultra vires;* and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires.* If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle *"út res magis valeat quam pereat".* If the words "or for any other sufficient reason" can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review".

16. The Appellant, in support of the present application, relied on the ground of there being an error apparent on the face of the record.

17. What then constitute error apparent on the face of the record? In **Kanyabwera vs. Tumwebaze [2005] 2 EA 86** it was held that:

"In order that an error may be 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 correctness. It must be an error so manifest and clear, that no court would permit such an error to remain on the record. The "error" may be one of fact, but it is not limited to matters of fact and includes errors of law."

18. In **Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo Civil Appeal No. 322 of 2000 [2001] 1 EA 173** the Court of Appeal held that 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. Nevertheless, the Court held that there is a distinction between a mere error and an error apparent on the face of the record and that where an error on a substantial point of law stares one in the face, and could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. However, 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 neither can a view which is adopted by the Court in the original record, if a possible one, be an error apparent on the face of the record even though another view is also possible: mere error or wrong or an erroneous view of evidence or of law is certainly no ground for a review although it may be a ground for appeal. See also **Muyodi vs. Industrial and Commercial Development Corporation and Another [2006] 1 EA 243.**. pIt is so ordered.

19. In this case what was contended to constitute the error was the calculation of the days for the purposes of the 24 months prescribed in Order 5 rule 7 aforesaid. As stated hereinabove, the original summons to enter appearance were issued by the court on 29th August, 2011.

Section 3 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides that:

"month" means calendar month;

20. That definition is however subject to where it is expressly otherwise provided. Order 50 rule 4 of the ***Civil Procedure Rules*** provides as follows:

> ***Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:***

21. Therefore 24 months must mean 24 calendar months. In my view where the Court adopts an interpretation which does not conform to this section, that clearly constitutes an error on the face of the record since an error on the face of the record may be one of fact, but it is not limited to matters of fact and includes errors of law.

22. In **Simon Towett Maritim vs. Jotham Muiruri Kibaru Nakuru HCCC No. 188 of 2007**, **Ouko, J** (as he then was) expressed himself as hereunder:

> **"It is common ground that the cause of action arose on 27th July, 2004. The applicant's claim being for damages for conversion, he was required to file the suit, in terms of Section 4(2) of the Limitation of Actions Act, within three years from 27th July, 2004. The plaint herein was filed on 20th August 2007. In computing time for the purposes of a written law, unless the contrary intention appears, regard must be had to section 57 of the Interpretation and General Provisions Act, Cap 2. Between 27th July, 2004 (excluding 27th July 2004) and 20th August, 2007, there are eleven months which constitute what are referred to as excluded days in the Interpretation and General Provisions Act (Saturday, Sunday and public holidays). Eleven months out of the period in question would bring the suit well within the prescribed period. In the result, the instant application was therefore not necessary had computation of time been done in strict compliance with the law."**

23. In **Kermuli vs. Ngachi [1988] KLR 273** it was held that:

> **"A month is a period of time consisting of thirty days in April, June, September and November and of thirty one days in the remainder of the months except February which consists of twenty eight days, except in leap year when the intercalary day is added, making 29 days…A calender month is a legal and technical term. It is not a question of counting days…As the Interpretation and General Provisions Act (Cap 2) provides for a calender month which same provision has been made in England, when the period described is a calender month running from the period of any arbitrary date, expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts; save that, if the period starts at the end of the calender month which contains more days than the next succeeding month, the period expires at the end of the latter month."**

24. Therefore, from 29th August, 2011 when the summons were issued, the 24 months ran their course on 29th August, 2013 since the day of the event is an excluded day. The Court dismissed the suit on 29th August, 2013, the last prescribed day. To my mind the Appellant could have made the application any time on that day. Therefore, the earliest date on which the suit could have been dismissed was 30th August, 2013.

25. In those circumstances the dismissal of the suit clearly constituted an error on the face of the record, and the Learned Trial Magistrate erred in failing to correct that error.

26. In the premises I find merit in this appeal which I hereby allow, set aside the ruling made by the Learned Trial Magistrate on the 29th May 2014 in Kilungu RMCC No. 24 of 2011 and substitute therefor an order allowing the application for review dated 27th March, 2014. As there was no order made by the trial court disposing of the application dated 23rd August, 213, I direct that the said application be listed for hearing.

27. As there was no compliance with this Court's directions regarding the furnishing of soft copies in word format, there will be no order as to costs.

28. Judgement accordingly.

Read, signed and delivered in open Court at Machakos this 3rd day of November, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Musya for Mr B N Nzei for the Appellant

CA Zakia