REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NUMBER 86 OF 2000

KITHUKU NYAMAI.....APPELLANT

- VERSUS –

ROSE KASILI KAVELE.....RESPONDENT

(Being an Appeal from the Ruling delivered by the Honourable N. Ithiga, PM in Kitui PMCC No. 140 of 1995 on 8th August, 2000)

=IN=

ROSE KASILI KAVELE.....PLAINTIFF

=VERSUS=

KITHUKU NYAMAI

ACTION AID KENYA LTD.....DEFENDANTS

JUDGEMENT

1. This appeal arises from the decision of the learned trial magistrate in dismissing an application for review made before it by the appellant herein.

2. The agreed facts of the case before the trial court were that the Respondent sued the appellant herein and **Action Aid Kenya Limited** for recovery of damages arising out of the Road Traffic Accident involving a motorbike that was being ridden by the appellant while the Respondent was a pillion passenger. It was not contested that the said motor-cycle was the property of the 2nd defendant, **Action Aid Kenya Limited** and that both the appellant and **Action Aid Kenya Limited** had been sued jointly and severally since it was alleged that **Action Aid Kenya Limited** was vicariously liable for the torts of its employee the appellant herein. The said **Action Aid Kenya Limited** filed a notice of indemnity against the appellant herein. However, by a consent judgment filed in court on 15th September, 1999, judgment was entered for the plaintiff against the 2nd defendant in the sum of Kshs.94.038.00 all inclusive.

3. Thereafter the case against the appellant proceeded to hearing and both the appellant and the respondent closed their cases and judgement was delivered on 16th May, 2000 in which judgement was entered against the appellant in the sum of Kshs 112,983/- with costs and interests. By an application dated 19th June, 2000, the appellant sought to review the said judgement substantially on the ground that the judgement amounted to compensating the respondent twice over the same cause of action thus there was an error apparent on the face of the record.

4. By the ruling, the subject of this appeal, the learned trial magistrate found that the consent judgement was only entered against the 2nd defendant and that the suit against the appellant was not dismissed as the same was ordered to proceed. The court found that the appellant was at all material times seized of the matter pertaining to the case and there was no evidence of discovery of any new and important matter or any error on the face of the record to warrant review of the orders. According to the court, it was clearly understood by the parties that the consent judgement was the 2nd defendant's share of the settlement of the claim as the appellant was unwilling to be a party to it. The court's view was that the fact that the 2nd defendant had settled part its part of the judgement did not absolve the appellant from liability and payment.

5. While agreeing that the claim being joint and several could not be split, and treated independently, the court's view was that the parties'

conduct and intention can treat and make the joint and several claim separate and partial and the consent did. It was therefore the court's view that the issue of double compensation does not arise.

6. I have considered the grounds of appeal and in my view, grounds 2 and 3 therefore, in so far as they attack the entry of judgement, were properly speaking ground for an appeal against the judgement. In my view, where a party opts to review a decision, an appeal against the decision arising from that application ought to attack the exercise of the discretion by the court on review rather the judgement that was sought to be reviewed.

7. The two relevant grounds being ground 1 and4 were couched in the following terms:

> **1. That the Learned Principal Magistrate erred in law and misdirected himself on the facts when after finding that the plaintiff's claim against the two defendants in the lower court could not be split and treated independently of each other, failed to hold that such treatment as he did, amounted to an error apparent on the face of the record.**
>
> **2. The Learned Principal Magistrate erred and misdirected himself when he declined to grant the appellant orders of review in spite of the overwhelming evidence placed before him.**

8. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1 of the ***Civil Procedure Rules***, certain requirements must be met. The said provision provides as follows:

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

9. 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—***
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> ***(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."***

10. On the merits 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 [now Order 45] 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 and so the words "for any sufficient reason" need not be analogous with the other grounds specified in the Order.

11. 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".**

12. Whereas the application for review was based on the discovery of new and important matter or evidence and error apparent on the face of the record, it is clear that the court's discretion under section 80 of the Act is wider.

13. In this case, it is clear that the liability of the defendants was joint and several. In fact the only reason why the 2nd defendant was sued was because, the appellant was its agent. In other words the liability of the 2nd defendant was conditional on the appellant being found liable. In **V D Chandaria and Another vs. T D Ghadially Civil Appeal No. 69 of 1961 [1962] EA 500**, it was held by the then East African Court of Appeal that:

> **"Persons whose respective shares in the commission of a tort are done in furtherance of a common design are joint tortfeasors."**

14. In this case for the 2nd defendant to have been vicariously liable, it was necessary to prove that the accident occurred in circumstances under which the 2nd defendant and the appellant had a common design since if it is shown that the accident occurred when the agent (read the appellant) was on a frolic of his own the principal (read the 2nd defendant) would not be vicariously liable. See **Mwona Ndoo vs. Kakuzi Ltd. (1982-1988) 1 KAR 523.**

15. In ***Chandaria's Case*** (supra), it was further held that:

> **"The rule at common law is that where joint tortfeasors are sued together not more than a single judgement can be rendered against those who are held liable. It is a consequence of the single-judgement rule that the court has no power to sever the plaintiff's total damages and enter judgements for different amounts against the different defendants. This is even though the issues against the different defendants are tried separately. The plaintiff is forbidden to take several judgements for apportioned parts of his damages even if he wishes to do so. There must be one judgement and one assessment of damages."**

16. In **C Christopher (Hove) Ltd. vs. Williams & Another [1936] 3 All ER 61** it was held that:

> **"Where there are alternative claims against the defendant and judgement is entered against one defendant further proceedings against the others is barred."**

17. In my view whereas it is possible to find a master not vicariously liable for the actions or omissions of the servant where the servant was on a frolic of his own, it is not possible to find the master vicariously liable unless his agent was on the wrong. It follows that any procedure which has the potential effect of making the principal liable and not the agent cannot be countenanced. To my mind once judgement is entered against the principal, there cannot be any further proceedings against the agent, and the plaintiff and the 2nd defendant had no power to separate the claim against the 2nd defendant from that of the appellant even by consent since such a procedure is not permissible. Once judgement was entered against the 2nd defendant, further proceedings against the appellant were, by operation of law, barred.

18. It follows that the subsequent judgement against the appellant ought not to have been entered against the appellant and the application for review should have been allowed.

19. In the premises, this appeal succeeds, the order dismissing the appellant's application for review is hereby set aside and is substituted therefor an order allowing the said application and setting aside the judgement entered against the appellant.

20. However, in light of the appellant's conduct before the trial court. There will be no order as to the costs of this appeal

21. It is so ordered.

Read, signed and delivered in open Court at Machakos this 21st day of January, 2019.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Miss Watta for Mr Mwaniki for the Appellant

CA Geoffrey