



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 463 OF 2015

ROBERT GITONGA MUIRURI 1ST APPELLANT/APPLICANT

NUCLEAR INVESTMENT LIMITED.....2ND APPELLANT/APPLICANT

- V E R S U S -

ELIUD KARANJA GATUOTA RESPONDENT/RESPONDENTNT

RULING

1) The subject matter of this ruling is the motion dated 09.10.2017 taken out by Robert Gitonga Muiruri and Nuclear Investment Limited the 1st and 2nd appellants herein. In the aforesaid motion, the applicants sought for the following orders:

1. THAT this application be certified urgent and be heard ex-parte in the first instance.

2. THAT pending the hearing and determination of this application inter-partes, there be a stay of the execution of the judgement /decree delivered on 19/10/2017 and all incidental and consequential orders and proceedings thereto.

3. THAT the honourable court be pleased to review its judgement delivered herein on 19th October 2017 upon considering the appellants written submissions fled in court on 1st April 2017 in support of the appeal.

4. THAT this honourable court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.

5. THAT the costs of the application be in the cause.

2) The motion is supported by the affidavit of Allan Odongo. The motion was not opposed. The parties to this dispute made oral submissions when the motion came up for interpartes hearing.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support of the application. It is the averment of the applicants that on 19th October 2017, this court delivered its judgment dismissing the appeal with costs to the respondents. The court also stated that the appellants had not filed submissions. The applicants are aggrieved and are now seeking for the review of the said judgement. This is on the grounds of mistake and apparent error on the face of the record, since their written submissions were duly filed in court and stamped as received on 21st April 2017 and served on the respondent on 24th April 2017. That the court confirmed that both parties had actually filed

their submissions. The applicants state that the submissions are crucial and informative on the award on quantum and the same should assist this court in the just and fair determination of the appeal. The applicants aver that they stand to suffer irreparable loss because they face eminent execution. It is argued that the application was filed expeditiously without unreasonable delay.

4) Having considered the material placed before this court it is now clear in my mind that the substantive issue raised and argued in the motion dated 09.10.2017 is the question as to whether or not this court's judgement delivered on 19.10.2017 should be reviewed. The principles to be considered in an application for review are well stated under Section 80 of the Civil Procedure Act. First, there is a discovery of a 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. Secondly, on account of some mistake or error apparent on the face of record. Thirdly, for any sufficient reason.

5) I can infer that the applicant is relying on the ground that there is an error apparent on record. That error is to the effect that this court proceeded on the basis that the applicants had not filed written submissions to the appeal, thus judgment was entered without factoring in its written submissions.

6) The error now being pointed out by the applicants in my view is something which was not within the knowledge of the applicant, because it introduces a new issue. I find merit in the motion dated 09.10.2017. The same is allowed. The order for review is hereby granted, the judgement of this court delivered on 19th October 2017, is set aside. I will now look at the submissions of the appellant to the appeal to enable make an inclusive judgement of all the parties to this suit.

7) Consent on liability having been entered by the parties in the ratio 85%:15: against the appellant, the appellant submissions were to aid the ground of appeal on quantum. The respondent was satisfied in the damages awarded and on appeal stated that they were not excessive or erroneous.

8) It is the appellants submission that the trial courts award on general damages of ksh.2,000,000/= be set aside and replaced with an award of between ksh.1,000,000/=to ksh.1,300,000/= which is reasonable and in line with current trends for similar injuries. The appellants cited the case of **Joseph Musee Mua –vs- Julius Mbogo Mugi & 3 others (2013) eKLR** where it was held that damages for injuries suffered must be within consistent limits. The damages should present a fair compensation but should not be excessive.

9) The appellant submits that the award on loss of future earnings be set aside completely as the respondent failed to prove the same. the respondent stated that he worked as a plumber before the accident and could no longer do such a job and was earning 8,000 – 15,000/= but did not produce any proof of the same.

The trial court applied the minimum wage of 2013 and relied on L.N. no. 197/2007 and Kenya Subsidiary legislation at 8,000/= thus **8,000x12x5(multiplier)=ksh.480,000/=**

On future medical expenses: The appellant submits that future medical expenses be re-assessed at between ksh.80,000/= - ksh.100,000/= and thereafter subjected to appointment of liability. The respondents submitted that future medical expenses based on the medical doctors report was pegged at ksh. 950,000/- which award should not be disturbed.

10) In the end, the judgement delivered on 19.10.2017 is reviewed

and set aside and is substituted with the following awards

i. General damages ksh.2,000,000/=

ii. Loss of earnings ksh. 480,000/=

iii. Future medical expenses ksh. 950,000/=

iv. Special damages ksh. 391,000/=

Total ksh.3,821,000/=

Less 15%contribution ksh. 573,150/=

Total ksh.3,247,850/=

Dated, Signed and Delivered in open court this 2nd day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent