



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 248 OF 2011

ALEJANDRO CAMPON (Suing as the holder of the power

Of Attorney for Baustista Buendia Valentin and Maria
Doloves

Martinez as the administrator of the estate of the late

ESTHER BUENDIA MARTINEZ.....PLAINTIFF

VERSUS

1. SWALEH BROK ISLAM

2. MASH BUS SERVICES LIMITED.....DEFENDANT

R U L I N G

Outline

1. On 31/05/2016, this court delivered a judgment by which it did enter judgment for the plaintiff against the defendants as follows:-

“The final calculation for damages works as follows:-

(i) Lost years	(Euros) 180,960
(ii) Pain and suffering	Kshs.30,000/
(iii) Loss of expectation of life	Kshs.150,000/
(iv) Special damages	Kshs.645,978/

2. Some sixteen and a half (16 ½) months later, the plaintiff then filed an application expressed to be founded on the provisions of Section 1A, 1B, 3A, 80 and 100 of the Act and Order 42 Rule 1, 2, 3 & 4 of the Rules and sought two substantive prayers:-

(a) THAT the court herein do hereby review its judgment and award for lost years of life from Euros 180,960 to Euros 301,655.

(b) Review of the taxed costs to reflect the enhanced award herein.

3. The application was premised on the grounds that there exist an error apparent on the face of the Record in that in the body of the judgment, the court settled on a multiplier of 25 years but in calculating the actual sum inadvertently adopted a multiplier of 15 years.
4. The application was supported by an Affidavit sworn by the plaintiffs' counsel, Mr. Mcmillan E. Jengo, which essentially reproduces the excerpts of the judgment to prove an inadvertence which it says evidences an error apparent on the face of the record.
5. The Application was opposed by the Defendant/Respondent by an affidavit sworn by Mr. Kishore Nanji. The first point taken up is the fact that since the delivery of the judgment, the plaintiff had never initiated the process of settling the decree and that the application did not annex and exhibit the decree it seeks to have reviewed hence the Application is totally defective.
6. The second point taken up was the fact that the actual calculation of the sums due for award under the heading lost years was arrived at by the court making a conscious decision to award a sum of EUROS 180,960 after settling on a multiplier of 15 years unlike 25 and 20 years as can be seen in the handwritten judgment, and that the error is the failure to correct the figure of 25 years earlier on chosen in the judgment. To the advocate, the court decided to award to the plaintiff the sum of EUROS 180,960 and not 301,655.
7. The third issue taken as an opposition to the Application was that there was a bill of costs drawn and based on the sum of EUROS 180,960 as an award for lost years and the same was in fact taxed by consent and the plaintiff did on the 16/3/2017 make a demand from both counsel and his client for the decretal sum calculated on the basis of the sum and the consent on costs on which a certificate of costs had been issued.
8. Based on the said three facts, the Defendant/ respondent took the fourth point and opinion that the application for review had not been brought without undue delay and without explanation for a delay of some 16 months.
9. There was a fifth point taken that the defendant having filed a Notice of Appeal, the plaintiff has an opportunity to address the issues now canvassed here in the appeal rather than by way of review.

Submissions by the parties

10. Parties did file written submissions which they attend court to highlight. The plaintiffs submissions are dated 7/2/2018 and filed on 12/2/2018 together with Reply to the defendants submissions filed in court on the 19/3/2018. On its side the defendant filed submissions on the 14/3/2018.
11. The written submissions by the plaintiff as highlighted oral take the position that there is an error apparent on the face of the record regarding and limited to the sole issue of choice by court on the multiplier factor. The plaintiff's position is that the court having in the body of its judgment choose a multiplier factor of 20 years, it was an inadvertent error on the face of the record to adopt use the factor of 15 years in undertaking the actual calculation.
12. On the challenge mounted against the Application by the defendant, the plaintiff reiterated what the counsel called the ha overbearing nature of Article 159 (a), seeking to achieve substantial justice and to discourage defeatist overreliance on technical objections in determination of disputes. On that note it was submitted that the decisions cited by the defendant/Respondent were made prior to the introduction of the provisions on the overriding objective of the court and article 159 of the constitution. To the plaintiff those decisions represent the old thinking and jurisprudence but was candid enough to cite to court the decision by the ***Court of Appeal in Water Mboga Onyango vs Elisha Juma Owour & Another EACA No. 46 of 2010*** in which the Court of Appeal observed that the new thinking does not totally uproot the well-established principles of precedent in the exercise of judicial discretion devoid of whim and caprice but

enriches those principles while guided by broad sense of justice and fairness.

13. The last submission made was that the reliance on the draft judgment by the plaintiff was improper as the same was just a draft and not the judgment since the same was not drafted, signed nor delivered in open court as dictated by the provisions of Order 21 Rule 3(1).

14. For the defendants/Respondent submissions were made to the effect that an application for review must be made timeously and without unreasonable delay and in support thereof cited to court the decisions in *John Agina vs Abdul Swammad Sharriff A/No. [CACA No. 83 of 1992* and *Kenfreight (E.A.) Ltd vs Star East Africa Company Ltd [2002] 2 KLR 782* to support the proposition that an application for review brought after unreasonable delay will be disallowed. In both cases, a delay for 2 years and 3 months respectively was found to be unreasonable and the applications were disallowed.

15. The decisions in *Francis Origo vs Jacob Kumali Mungala [2005] 2 KR 307* and *Muyodi vs Industrial & Commercial Development Corporation [2006], EA 243* were also cited for the same proposition of the law and to underscore the submission that a delay of more than 16 months was not reasonable and therefore disentitled the Applicant to the relief sought.

16. To counter the plaintiff submissions that the new thinking emphasises substantive justice rather than procedural technicalities the Defendant cited to court the two decisions by the Court of Appeal touching on Section 3A & 3B of the Appellants Jurisdiction Act, which are the same as those in Section 1A & B Civil Procedure Act for the proposition that the provisions on overriding objectives of the court did not sweep aside or just uproot the established principles and precedent so as to excuse every failing by a party to a litigation and that such principles and precedents were important for parties and counsel to determine with certainty the validity of claims before making a decision to file same in court [\[1\]](#).

17. There was a second ground of objecting to the Application for review on the basis that it did not comply with Order 45 Rule 1 by having the decree drawn and exhibited before seeking to file the application for review. For that proposition and submission the counsel cited to court two decisions of the High Court and as many number the decisions of the Court of Appeal for the proposition that a party aggrieved by a judgment can only seek to have the resultant decree reviewed because it is in the decree where the ratio *decidendi* lies and is to be found.

18. On the question of whose duty it was to extract the decree, the defendant relied on the decision by Onyango Otieno J, as he then was, in *Kenfreight (E.A.) Ltd vs Star East Africa Co. LTD [2002] 2 KLR* for the proposition of the law that it is the party desiring to seek review to move the court to have the order extracted from that purpose.

Issues, analysis and determination

19. I have had the benefit of reading the Application for review, the Replying Affidavit filed in opposition thereto and the written and oral submissions offered and the authorities cited and I appreciate the industry by both counsel. Having done so, I do consider the issues that call for determination to be the following:-

- a) **Whether there is power or jurisdiction in this court to review the order on taxation of costs entered by consent to reflect the enhanced sum awarded as damages upon review.**
- b) **Whether the Application having been brought after 16 months was brought without unreasonable delay as the rules dictate.**
- c) **Whether the failure to extract and exhibit the decree resulting from the judgment sought to be reviewed is fatal to the Application.**
- d) **Whether is there an error apparent on the face of the record to merit a review of the judgment so as to enhance the same from the sum of EUROS 180,960 to EUROS 241,324.**

20. Before I delve into the parameters to be observed in an application to review a judgment, I seek to delve into the peripheral issue of the prayer to review the order on taxed costs. I have looked at the proceedings of 13/3/2017 before Hon. G. Kiage, DR and the same reveal that the costs were on that day taxed by consent in the sum of Kshs.680,124.

21. That is a consent order and a contract that cannot be set aside otherwise than by another consent, or where it is proved that there existed a vitiating factor as would warrant setting aside a contract. In the application before me no reason has been advanced to warrant setting aside or varying the consent parties willingly entered into.

22. The second reason is that the advocates Act is a complete code on matters of taxation and ascertainment of costs. Where costs have been taxed and a certificate of taxation issued, it is final on the question of quantum of such costs and a person dissatisfied must and can only approach the court as provided under Rule 11 of the Advocates Remuneration Order and not otherwise[2].

23. In this matter there is no application to set aside the certificate of costs dated the 13/3/2017 as envisaged under the law and it would amount to affronting the law to seek to venture towards upsetting that certificate of costs. Where there is a statutory enacted prescribing the mode of seeking redress that prescription must be followed[3].

24. On those two grounds alone the prayer to review the order on costs is wholly and totally misconceived and cannot be granted but must be dismissed.

25. On review of the judgment, I understand the law in the statute and *stare decisis* to set the following parameters among the others to be met by an applicant:-

i) The application must be made without undue delay.

ii) The application must be premised on an error apparent on the face of the record, discovery of new and important matter of evidence, which after due diligence could not produced by the party at the time the decision was made or for any the sufficient reason.

iii) The review is only available against a decision against which no appeal lies on one against which an appeal lies but the person seeking review does not intend to appeal.

iv) The remedy is not available where the trial court misapprehended the law or where the impugned decision involve exercise of judicial discretion.

26. In seeking to determine the prayer for review of the judgment and having isolated some 3 issues around that prayer, I propose to deal with those issues seriatim.

Was application brought without unreasonable delay?

27. That the judgment sought to be reviewed was delivered on 31/5/2016 but the application to review was not filed till the 19/10/2018 is not in dispute and therefore simple arithmetic reveal that it took the applicant some 16 ½ months to present this application. The question one has to ask and answer is whether that reveals unreasonable delay or promptitude and timeliness with which court's business ought to be dispatched.

28. When the constitution dictates that justice shall not be delayed, that obligation is not only imposed upon the court but also upon the litigants. It is an old legal maxim which the drafters of Kenyan constitution, 2010, incorporated in the constitution not due to any novelty but to underscore the need to dispose of court business in a timely manner for delay is known to visit all manner of prejudice and injustice including the ultimate remedy granted at the end of the matter being defeated or just being of less efficacy. While I appreciate that the test of reasonableness may differ from one case to the other depending on the relevant attendant circumstances that test when it is left to the determination of a court

must be reasonable so as to meet the ends of justice. Wherever there is any delay it behooves the person accused of such delay to offer an explanation. In this case it was the duty and onus of the plaintiff to offer an expectation on why it took him the 16 months to conceive and bring the application.

29. Unfortunately, for this court, no attempt at all was ever proffered both in the application and the submissions. Where no reason or explanation is offered, I hold the opinion that such delay is not based upon any justifiable reason and to that extent I consider it undue and unreasonable. Without more, I hold and find that there was unreasonable delay which has remain unexplained and therefore the requirement of the law that the application brought without unreasonably delay has not been met but has been affronted.

Must the decree resulting for the judgment be in existence having been extracted and exhibited?

30. The opening words of both section 80 and Order 45 rule one is that

“any person who considers himself aggrieved by a decree or order for” that expression has been interpreted by the courts to mean that a party seeking review must seek the review of a decree or order. The difference I discern between the two words is that a decree is the formal expression of a final adjudication of a dispute or matter while an order could be interlocutory and does not amount to a decree.

31. Accordingly whether one seeks to review a final determination or an interim or interlocutory determination, the formal expression of that determination ought to be in place.

32. Therefore one can safely say that a review is only permissible where the determination has been extracted in a formal document known as a decree or an order. The review jurisdiction is different and distinct for that on appeal and therefore while an appeal is against the entire decision in the judgment or other decision and on any point of dissatisfaction, a review must be confined to the established grounds under the Act and the Rules. It is the rules that aid efficient and due administration of justice and even though they ought not to be exalted to the level of being masters to justice or its administration, they are the handmaids thereof and cannot be just be ignored or neglected with abandon.

33. On that basis it cannot be gainsaid that the inclusion of the overriding objectives in the Act and distain for procedural technicalities under article 159 were intended to encourage disregard for the rules. I refuse to be persuaded that the provisions under section 80 and 45 (1) are mere procedural technicalities. As observed by the Court of Appeal in **Water Mboya Onyango’s case** and that of **city chemists (Nrb) Ltd** (supra), rules and precedents setting established principles are the beacons which assist parties and their counsel in determining the validity of disputes before setting to file the same in court.

34. In this matter, I do find that in the absence of a final decree drawn in accordance with the law under Order 21 Rules 7 & 8 of the Rules, there is no decree the plaintiff is seeking to upset by review and therefore the application is made in the air, lacks a foundation and cannot succeed.

Is there apparent error on the face of the record?

35. The law is that an error that will merit review of a decree must be self-evident and should invite no elaborate argument to be established. In this matter, the error sought to be corrected by review is the finding by court at paragraphs 24 and 28. It is not deniable that the two portions of the judgment do not agree and present some incongruence. However it is of great help that it is this court which rendered that decision being called upon to review it.

36. The answer to the question is to be found by seeking to find out what did the court actually intend to achieve in the judgment with particular reference to the award of damage under the heading **loss of dependency**. The goal of the court is not difficult to disclose even by reading that judgment between paragraphs 24 and 28. I may only reproduce the position of the judgment that would reveal the goal the court set to meet. At paragraph 24, the court said:-

“The death certificate produced as PEXH 5 show that the deceased was aged 25 years. In this country, whose law I am bound to apply, the retirement age is 60. Taking into account the vicissitudes of and uncertainties in life, there being no assurance that one has to live till age of retirement, and being guided and persuaded by the past decisions while noting that the sum I will arrive at the end of exercise will be an accelerated payment, I adopt a 25 years as the multiplier. Based on the authorities cited I don’t agree with the defendants proposal of 7 years”.

37. In coming to this conclusion I have the guidance from the often quoted decision by The same proposition was put by Lord Hailsham of Marylebone, L.C in **Cassel & Co. Ltd. V Broome and Another** (1972) 1 ALL ER, 810 at P. 825 as follows: -

“... The whole process of assessing damages where they are “at large” is essentially a matter of impression and not addition..”

38. The law is that damages awarded in personal injury claim must be on compensatory, not intended to enrich the claimant^[4] nor to punish the torfeasor ^[5]. It is to be noted that at paragraph 24 of the judgment the court was not making the award but debating on the factors to be employed in calculating the sum to be ultimately awarded. The real and ultimate decision is at paragraph 28, when the court had settled on all the factors for calculation. It was at that time the court was to apply its sense of justice and establish whether the award it was making was going to achieve its purpose of being compensatory and not capable of being in the categories capable of injuring the body politic and the economy. It is therefore clear from the draft judgment that the court looked at the figure the calculations was yielding and decided to moderate it to a sum the court in its discretion decided was just. That is the reason there is clear and incontestable change of the multiplier factor and the total award in the draft judgment exhibited by the defendant .

39. Can it be said that once a court makes it choice on a factor of calculation like the multiplier then it is bound and cannot revisit same before it pronounces its judgment? I don’t think so. A court is only bound by its judgment once pronounced or delivered to the parties. In this case, in crafting and formulating the judgment I adapted a multiplier factor of 25 years but on realizing what that factor was yielding decided to reduce that from 25 to 15 years. This was done deliberately to keep the award within what I considered reasonable compensatory and incapable of hurting the Kenyan economy and the public who have to shoulder that by way of increased costs of insurance being passed to them. And that must be a genuine concern to any judicial officer. It is not lost to this court that there has been a general concern about the court awards that has seen parliament make attempt at taking away the determination of damages due to litigants on personal injury claims from the court. One need only to remember the proposed structure compensation and the recent copping of sums payable by insurance companies under **Section 5(b)(iv) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405)of the Insurance Act** to appreciate the public concern on the effect of very large awards on the economy.

40. The other reason the court proceeded as it did and was free to tinker with its chosen multiplier factor is the known position of law that multiplier formula is not the only formula for ascertaining and assessing damages for loss of dependency^[6].

41. Being not the only formula, the court has the power and discretion to settle on any figure provided it would qualify to be reasonably compensatory when regard is had to comparable cases. The court can even settle on a lump sum. This court was fully cognizant of its duty in assessment of damages and therefore chose the multiplier factor of 15 in its final calculation, deliberately and without any mistake. The only inadvertence and which is regretted is the failure to appropriately correct the earlier choice of the factor of 25 years. For that reason the only error I need to correct in this decision is at paragraph 24, which I hereby effect and in place of the figure 25 years I substitute 15 years.

42. Only to that extent is the judgment corrected rather than being reviewed. The upshot and totality of the foregoing is that the application lacks merit and the same is dismissed.

43. On costs, while the application has been dismissed and therefore the defendant has emerged the

successful party, I note that costs have been taxed prior to the application being filled and I also appreciate that there was a genuine need to correct and harmonize the two conflicting factors of calculation.

44. For reasons that there was an error that needed to be corrected and which the plaintiff brought to the attention of the court, I do exercise my discretion on costs and instead of awarding same to the defendant, I order that each party bears own costs.

Dated and signed at Mombasa this 7th day of September 2018.

P.J.O. OTIENO

JUDGE.

Delivered and signed at Mombasa this 7th day of September 2018

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JUDGE

[1] Walter Mboyo vs Elisha Juma Owuor [2010] 1 EA and CITY CHEMISTS NRB VS ORIENTAL COMMERCIAL BANK LTD [2010] 2 EA

[2] Machira & Co. Advocates vs Arthus Magugu [2012] eKLR

[3] Kimani Wayoke vs Electrical Commission of Keya CACA No. 213 of 1995 and The National Assembly vs Karume [2008], KLR 425

[4] Francis Oyatsi V Wachira Waruru & another [2010] eKLR

[5] Per ngaah Jairus j, in John Kamore & another v Simon Irungu Ngugi [2014]eKLR

“Ultimately, the objective of assessment of damages is to put the victim in a position that is as nearly as possible to the position he was in before the occurrence of the events that may have led to his injuries. Damages are not meant to enrich the plaintiff unjustly and except for punitive damages, they are not meant to punish the tortfeasor or the defendant.”

[6] In **Hussein Ahmed Hanshi another v Peter Gichuru Njoroge & 2 others [2016] eKLR**, this court said

“...the multiplier formula is a helpful and important formula but not the only formula available. In *Mwanzia vs Ngali Mutua & Kenya Bus Services Ringera J Said:-*

“It is plain that is useful and practical where facts such as the age of the deceased, the amount of annual dependency and the expected length of dependency are known or are knowable without undue speculation”

per