



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 487 OF 2009

TITUS MULANDI KITONGA. APPELLANT

VERSUS

B O (a minor suing through his mother and next friend

S N O. RESPONDENT

J U D G M E N T

The Appeal herein arises from an Order that was issued on the 11th day of August, 2009 by the then Honourable M. K. Kiema Resident Magistrate) in Nairobi CMCC No. 3997/2006 between the Appellant and the Respondent herein.

The order appealed against reviewed a judgment that had been delivered on the 30th day of October, 2009 whereby general damages were reviewed to Ksh.450,000/- from an earlier assessment of Ksh.150,000/- by the same magistrate.

The trial court also awarded a sum of Ksh.6,000/- as doctor's court attendance fee which was not subject of that judgment. The order emanated from a Notice of Motion dated 22nd May, 2009 which had been brought under Section 3A and 63(e) of the Civil Procedure Act and Orders XLIV Rules 1, 2, 3 & 6, L Rule 1 of the Civil Procedure Rules. The Application sought for Orders inter alia: -

- i. That the Honourable Court be pleased to review, vary and/or set aside its judgment delivered on the 30th October, 2008 and the consequential decree and the court be pleased to make an appropriate judgment in substitute thereof.
- ii. Costs of the application be in the cause.
- iii. Any other or further relief or order that this Honourable court may deem fit to grant.

It was premised on the grounds that: -

1. The judgment was given for the Plaintiff on the 30th October, 2008.
2. The Plaintiff is dissatisfied with the award of general damages in the said judgment.
3. The Plaintiff reasonably believes that the said low award were due to some mistake or error apparent on the face of the record.
4. It is in the interest of justice and fairness that the award be enhanced.
5. Any other reasons adduced at the hearing.

It was supported by the Affidavit of S N O annexed to the application wherein she depones that she is the mother, a next friend of B O who suffered grave injuries as a result of a traffic road accident that occurred on the 25th day of December, 2005 in Kangemi, Nairobi, which accident she blames the Appellant for.

She further depones that as a result of the said accident, the Respondent filed the case herein which was heard and concluded. In the judgment of the court, the Appellant was found 100% liable and general damages were awarded at Ksh.150,000/-, special damages of Ksh.16,545/- plus costs and interest.

In her affidavit she stated that she reasonably believed that the award of General Damages of Ksh.150,000/- was inordinately low considering the extent of the Plaintiff's injuries, his prognosis and the doctor's opinion. She further depones that the doctor who testified in the case adduced the medical report which shows the very serious, grave and extensive injuries and fractures suffered by the Respondent due to the accident and his painful prognostic experience and that the doctor's attendance fees of Ksh.6,000/- was not factored into the award.

That, she reasonably believed that both the awards of general and special damages should be enhanced to make a fair award commensurate with the Respondent's injuries and medical condition and to reflect the true circumstances of the Respondent's case plus inflationary trends.

The said Application was opposed vide the grounds of opposition filed on the 26th day of June, 2009 and a replying affidavit sworn by Titus Mulandi Kitonga sworn on the 8th day of July, 2009 and filed on the same day.

The Appellant opposed the Application on the grounds that the court lacks jurisdiction to make orders sought, the application is bad in law misconceived and an abuse of the court process, the Appellant has since settled the judgment and that the Respondent having filed an Appeal in Civil Appeal Case No. 648 of 2008, the Application amounts to an abuse of the court process.

In addition, the Appellant further avers that the Application for review ought to be made without unreasonable delay and that the Respondent having lodged the Application 7 months after judgment had been delivered, there was inordinate delay and as such the orders sought ought not to have been granted.

He further deponed that an award of general damages is an exercise of discretion by the court and is not a ground to warrant a review of the judgment and that the grounds put forward by the Respondent for review are not proper grounds of review as they are inviting the Honourable Magistrate to sit on appeal on his own judgment.

The learned magistrate heard the Application and the same was allowed on the 11th August, 2009 wherein he enhanced the general damages to Ksh.450,000/- allowed special damages at Ksh.16,545/- plus Ksh.6,000/- for the Doctor's court attendance. That ruling/order is the subject of the Appeal herein.

The Appellant has moved this court by way of a Memorandum of Appeal filed on the 3rd day of September, 2009 wherein he has listed the following grounds of Appeal: -

1. The learned trial magistrate erred and misdirected himself both in law and in fact in allowing the Respondent's application for review when no valid ground for review as provided by Section 80 of the Civil Procedure Act and Order XLIV of the Civil Procedure Rules had been advanced by the Respondent in the Application.
2. The learned trial magistrate erred in law and in fact by proceeding to hear and allow the Respondent's application for review despite the fact that the Respondent had prior to the filing of the application for review, lodged an appeal being Nairobi Civil Appeal Number 648 of 2008 against the Judgment that was being sought to be reviewed.
3. The learned trial magistrate misdirected himself in law and in fact in failing to find that there was "some error/mistake on the part of the court" in its earlier award of general damages to warrant a review without identifying the particular error and/or mistake.

4. The learned trial magistrate erred in law and in fact in failing to find that the Respondent's application for review was fatally defective in light of the fact that the decree that emanated from the court's judgment had not been annexed to the application seeking review.
5. The learned trial magistrate erred in law and grossly misdirected himself in finding that the copies of proceedings and judgment that had been annexed to the application seeking review was adequate compliance to the rule of law that, a decree or order that is sought to be reviewed, must be annexed to the application seeking review.
6. The learned trial magistrate erred in law and grossly misdirected himself by permitting review when there was inordinate delay on the part of the Respondent.
7. The learned trial magistrate erred in law and in fact in failing to consider and/or address in mind the Replying Affidavit sworn by the Appellant and the submissions of the Appellant's Counsel.
8. That the learned trial magistrate erred in law and in fact in failing to consider fully, adequately or at all the authorities placed before him by the Appellant's Counsel.
9. The learned trial magistrate erred in law and in fact in failing to consider, address in mind, and state his findings and the reasons for the findings on each of the issue of law and fact that had been raised by the Appellant's Counsel.
10. The learned trial magistrate erred in law and in fact in reviewing the award of general damages to a figure that was inordinately high in the circumstances, entirely erroneous, unsupported by evidence and without basis both in law and in fact.
11. The learned trial magistrate erred in law and in fact in reviewing the court's Judgment and awarding the Respondent Kshs.6,000/- as doctors attendance fee despite the fact that such amount had not been pleaded in the plaint as required in law.
12. The learned trial magistrate erred in law and in fact in failing to consider the fact that in allowing the application for review, he was in fact sitting on appeal against his own judgment.

The appeal came up for hearing on the 24th November, 2015 when Mr. Kiplagat appeared for the Appellant but there was no representation on the part of the Respondent though they had been duly notified of the hearing date by way of a hearing notice that had been served on them on the 17th September, 2015 and the same had been stamped as received.

The learned counsel for the Appellant argued the twelve (12) grounds of appeal together and his submissions are the same as the ones that were made on behalf of the Appellant in the trial court and according to him there was no good reason to review the judgment.

I have carefully considered the submissions that were made by the counsel for the Appellant and also the grounds set out in the Memorandum of Appeal.

The issue that this Honourable court will have to determine is whether there was a valid ground for review of the judgment delivered on the 30th day of August, 2009.

The relevant provisions in this regard are Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

Section 80 provides: -

“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.”

Order 45 of the Civil Procedure Rules on the other hand provides: -

“1(i) 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 after the exercise of due diligence was not within his knowledge or could not be produced by him at the time 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..... may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

It is apparent in the case before me that the Respondent had already lodged an Appeal against the judgment of the learned magistrate, on the 26th November, 2008. The Memorandum of Appeal was annexed to the Appellant’s Replying Affidavit as annexure TMK 2. Having filed the appeal the remedy of review was not available to him as clearly provided under Section 80 of the Civil Procedure Rules.

In his ruling to the Application for review, the learned magistrate stated that there was an error/mistake on the part of the court in awarding the general damages payable. He did not clarify the error that he said there was. In Black’s Law Dictionary the word error is defined as here below: -

“A mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law – such a mistaken or false conception or application of the law to the facts of a cause as will furnish ground for review of the proceedings upon a writ of error. A mistake of law or false or irregular Application of it such as vitiates the proceedings and warrants the reversal of the judgment.”

In my view, there was no error apparent on record which the learned magistrate purportedly made in his judgment. An award on general damages is purely within the discretion of the court and once the award was made the only remedy available to the Respondent was to Appeal against the judgment and not a review of the same. The learned magistrate did not, in his ruling state the reason that informed his decision to enhance the general damages. It was not enough for him to merely state that there was an error apparent on the face of the record.

The other ground of appeal raised by the Appellant is that the Respondent failed to extract a decree as it’s required in law when seeking review of an order. Courts have severally expressed themselves in this regard and it is now well settled law that a party seeking to review an order has to annex a copy of the order which he seeks to review. The Respondent herein failed to comply with this legal requirement and the omission in my view is fatal. On this issue, the learned magistrate noted that a copy of the proceedings and judgment were exhibited by the Respondent and to him, that is adequate. To me, this is not the current position in law. The word decree is defined in Section 2 of the Civil Procedure Act as: -

“Decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines that rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91, but does not include.....”

A decree follows a judgment upon which it is grounded and if a person is aggrieved at the decree, his Application should be for review of the judgment upon which it is based.

It is the duty of the party, who wishes to appeal against, or apply for a review of, a decree or order to move the court to draw up and issue a formal decree or order. The Respondent should have applied for a decree to be drawn up and issued. At that stage, there was nothing upon which the learned magistrate’s judgment could be reviewed. In view of the above, failure by the Respondent to extract a formal decree was fatal to the Application and the same ought to have failed on that account. (See the case of Uhuru

Highway Development Limited Vs Central Bank of Kenya & 2 Others, HCCC No. 29/1995 (Milimani).

On ground 11 of the Memorandum of Appeal that the learned magistrate erred in awarding a sum of Ksh.6,000/- as Doctors attendance despite the fact that the same had not been pleaded, my view on it is that the same cannot be said to be “**special damage**” because at the time the plaint is filed, it has not been incurred as an expense. It is incurred much later in the proceedings after the doctor attends court and testifies. In my view, the Respondent ought to have amended the plaint after the doctor testified to claim the amount or in the alternative the same could have been claimed as witness expenses at the time of drawing the decree or when taxing the costs as long as there was an order for witness expenses.

In the case before us, the amount was neither pleaded nor was there an order for witness expenses in the sum of Ksh.6,000/- which the learned magistrate awarded on review and therefore he erred in awarding the same.

Lastly, on ground 6 of the Appeal, it was submitted that the delay in filing the Application for review was inordinate in that it was filed almost nine (9) months after judgment had been delivered. An Application for review has to be brought without unreasonable delay. The issue of delay was not considered by the learned magistrate and there was no explanation for the delay by the Respondent. A period of nine (9) months is unreasonable in the circumstances of this case.

I have said enough to show that I find merits in the Appeal which I hereby allow with costs to the Appellant.

Dated, signed and delivered at Nairobi this 11th day of February, 2016.

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L. NJUGUNA

JUDGE

In the presence

..... ***for Appellant.***

..... ***for the Respondent.***