



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 115 OF 2011

(Being an appeal from the ruling of Hon. J. K. Ng'eno, SPM in the SPM's court at Kangundo on the 21st July, 2011 in Kangundo SPMCC No. 79 of 2008)

GEORGE KAHURA.....APPELLANT

VERSUS

ANTHONY NZYUKO MUNGUTI.....RESPONDENT

JUDGMENT

1. The Appellant, George Kahura was sued in the lower court by the Respondent, Anthony Nzyuko Munguti. The Respondent's case was that on 4th March 2008 he was involved in a road traffic accident while he was travelling in motor vehicle registration no. KAS 885C which was owned by the Appellant. The Respondent claimed general damages for the injuries, special damages, costs and interest. The claim was denied by the Appellant. On 19th May 2011 the lower court entered judgment in favour of the Respondent for Ksh 70,000/= General Damages, Ksh 3,200/= special damages plus costs and interest.

2. The Appellant subsequently filed the application dated 20th June, 2011. The application principally sought orders that the judgment/decreed entered on 19th May, 2011 be reviewed and/or vacated and that the case be re-opened and heard afresh. According to the affidavit in support sworn by one Judy Gitaari, a Legal Manager with the Appellant's insurer, investigations carried out subsequent to the delivery of the judgment revealed that the Respondent was not amongst the victims of the accident. It was further deposed that the Respondent relied on treatment notes, P3 form and a police abstract which were fraudulent.

3. The application was opposed. According to the replying affidavit, the application was brought after inordinate delay of over three (3) years since the date of the accident. That since the Appellant proceeded with their case, it meant that the insurer had completed investigations. The Respondent reiterated that he was a victim of the accident and stated that the documents in question were not objected to during the trial. He saw the application as a delaying tactic meant to frustrate him from enjoying the fruits of his judgment.

4. The Appellant was dissatisfied with the ruling of the lower court, hence this appeal. The grounds of appeal can be summarized as follows:

(1) That the ruling was against the weight of the evidence.

(2) That the trial magistrate misapprehended the provisions of Order 45 Civil Procedure Rules 2010.

(3) That the Appellant was not heard on merit at the main hearing.

5. This being the first appellate court, the court is duty bound to re-evaluate the evidence on record and come to its own findings – (See **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

6. The application was canvassed by way of written submissions which I have duly considered.

7. As was held by the Court of Appeal in **Anthony Gachara Ayub v Francis Mahinda Thinwa [2014] eKLR** defined an "**error apparent of the face record**" whilst referring to the case of **Draft and Develop Engineers Limited –v- National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011**, where they stated that the High Court correctly stated thus:

“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. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal”.

8. The lower court record (*SPMC Kangundo NO. 79 of 2008*) refers to SPMCC Kangundo No. 96 of 2008 and SPMCC No. 85 of 2008. However I have perused SPMCC Kangundo No. 79 of 2008. There is no order in the lower court record (*SPMCC Kangundo No. 79 of 2008*) consolidating it with SPMCC Kangundo No. 96 of 2008 and SPMCC Kangundo No. 85 of 2008. These other lower court files do not form part of the record herein. Indeed even the ruling the subject matter of the appeal is not reflected in SPMCC Kangundo No. 79 of 2008. There are no proceedings in regard to the hearing of the application complained of. Presumably the proceedings and ruling may be found in the other files referred to above. The record of appeal is therefore incomplete without the other two files.

9. What does the above position portend for the appeal herein? The complete lower court record in SPMCC Kangundo 79 of 2008 is before this court. This court can therefore decide this appeal without undue regard to technicalities of procedure which would mean calling for a supplementary record of appeal or striking out the appeal altogether.

10. It is abundantly clear from the application that the same was filed three years after the date of the accident. This was inordinate delay. The delay was not explained. The Appellant had all the time to carry out any investigations prior to the hearing of the case. The treatment notes, the P3 forms and the police abstract were available before the commencement of the hearing. There was therefore no discovery of any new matter. There was no sufficient reason for the review of the proceedings.

11. With the foregoing, I find no merit in the appeal. The appeal is dismissed with costs.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 7th day of May, 2015

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B. THURANIRA JADEN

JUDGE