REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.176 OF 2011

KEN-KNIT(K) LTD……..…...……....…….APPELLANT

VERSUS

EZEKIEL OMBASA OMBUI……..……..……..RESPONDENT

(Being an appeal from a decision and ruling of Honourable G. Mmasi Senior Resident Magistrate dated and delivered

on 10th July, 2011 in Eldoret MCC No.973 of 2005)

JUDGMENT

The present appeal arises from a ruling the learned trial magistrate gave on the 10th October, 2011, arising from an application dated 26th July, 2011 seeking a review of orders from her judgment delivered on the 7th July, 2011. The respondent was the plaintiff whereas the appellant was the defendant. The respondent had sued the appellant seeking judgment for both special and general damages. He had averred that the appellant company had not supplied him with protective devises such as dust masks following which he contracted tuberculosis. He averred that the appellant was negligent in failing in its duty of care over him as it knew that he was working in a dusty environment and ought to have provided him with a dust mask. On the part of the appellant, its defence was that it had provided adequate protection to the respondent and he did not suffer from the disease because of his occupation as its employee.

From the medical report produced in court the respondent first suffered lung tuberculosis for a period of about eight months and later was diagnosed with chronic tuberculosis as a result of long term exposure to dust. A Doctor Gaya recommended that he be retired on medical ground which he was.

In her judgment the learned trial magistrate found the appellant 100% liable and awarded general damages for pain suffering and loss of amenities to the tune of Kshs.350,000/-. She also awarded a sum of Kshs.2,000/- as special damages. It is this judgment that gave rise to the application by the appellant for review of the judgment and decree on the following grounds:-

1. **That the judgment was delivered on 7th July, 2011.**
2. **That the court proceedings confirmed that the defendant/applicant duly filed its submissions.**
3. **That there is an apparent error on the face of the record by the court failing to take into account and/or consider the defendant/applicant's submission.**
4. **In the circumstances it is necessary and/or warranted that the orders sought be granted to enable the court to take into account and/or consider the defendant's/applicant's submissions.**
5. **That the plaintiff/applicant will not at all be prejudice in the event the application is allowed.**

6. **The application is timeously made.**
7. **The rules of natural justice necessitates the grant of orders sought.**

The application was not considered favourably giving rise to this appeal. In a Memorandum of Appeal dated 25th October, 2011 the appellant raises the following grounds of appeal:-

a. **The trial magistrate erred in law and act in failing to properly consider the applicable rules and provisions of the law in determining the appellant's application.**
b. **The trial magistrate erred in law and in fact by misdirecting herself on the application of the Civil Procedure Act and the rules respectively in determining the appellant's application.**
c. **The trial magistrate erred in law and fact in failing to consider the applicable principles of law in determining the appellant's application.**
d. **The trial magistrate erred in law and fact in failing to consider and/or make a determination on whether there was an apparent error on the face of the court record, in respect of the appellant's application.**

The applicant's submissions were filed on 23rd May, 2014 and are dated 22nd May, 2014 by M/S. Nyaundi Tuiyott Advocates. They cited the relevant principles for granting review order as set out under Order 45 Rule 1(a) (b) of the Civil Procedure Rules which are, from a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant, on account of some error apparent on the face of the record or for any other sufficient reason as the court may deem just. The court was referred to the cases of **Francis Orogo& another –Vs- Jacob KumaliMunagala (2003) Eklr**and **National Bank of Kenya Ltd. – Vs- Njau (196) (CAK)** which was quoted in **Nancy Wanjeri& Others –Vs- Michael Mungai (2014) eKLR** which expound on the applicable principles for granting review orders.

The respondent's submissions are dated 30th May, 2014 and were filed on 5th June, 2014 by Douglas Ombati & Co. Advocates. His submission is that the appellant does not dispute the decree in terms of quantum and liability as awarded by the court. That further it has not demonstrated there has been a discovery of new and important matter or evidence which after due diligence was not within its knowledge and could not be produced at the time the decree was passed or there was a mistake or error apparent on the fact of the record or any other sufficient reason. He further submitted that it is possible that the appellant did not place its submissions in the court file because the learned trial magistrate had indicated that the proceedings had been filed yet no mention was made to them. That a perusal of the record shows that the appellant filed submissions on 26th May, 2011 being the same date that the file was in court. Further, according to the respondent, it is possible that those submissions were not placed in the court file because in the record of appeal they annexed the original instead of a photocopy. That this is further attested by the fact that the date on the stamp of a copy of the appellant's submissions was altered. That in any case, even if the trial magistrate ignored the appellant's submissions the same is not fatal as submissions are just but a summary of proceedings in the court file which the magistrate considered in arriving at her decision.

The respondent further submitted that the learned magistrate indicated in her judgment that she had fully considered the evidence on record which fact has not been denied by the appellants. The same applied before she arrived at her decision in the review application.

It was the respondent's submission that the learned trial magistrate having noted that the appellant did not file its submissions the redress falls in filing an appeal against the judgment. The court was referred to the case of **Nyamogo and Nyamogo advocates –Vs- Kago (2001) 1EA 173** in which the court noted that 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 is possible. As such, a mere error or wrong view certainly is not a ground for a review although it may be a ground for an appeal. Again in **Sylvia WanguiWandeto – Vs- Francis WandetoKahui (2007) @KLR** the court noted that a point which may be a good ground of appeal may not be a good ground of an application for review. Thus an erroneous view of the evidence or of law is no ground for a review though it may be a good ground for an appeal.

I have accordingly considered the submissions together with entire application and the only issue for determination is whether the learned trial magistrate was wrong in dismissing the application for review of her judgment. As per the dictum in **Muyodi –Vs- Industrial& Commercial Development Corporation & Another (2006) 1 EA 243** for an application for review under Order 45, Rule 1 to succeed,

"…….the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay."

The court in the case of **Antony GacharaAyub –Vs- Francis MahindaThinwa Civil Appeal No.92 of 2008 (Nyeri)** went into detail in determining exactly what consisted an "error apparent on the face of the record" citing the case of **Draft and Develop Engineers Ltd. –Vs- National Water conservation and Pipeline Corporation, Civil case No.11 of 2011**where the court stated as follows:-

> ***"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 factors 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 for a review although it may be for an appeal."***

Having considered the relevant case law and what the learned trial magistrate had to say in her judgment, I wish to emphasize that submissions by nature are a summary of all evidence and facts of a case. They are not themselves evidence. The failure by a court not to have considered the submissions whether or not they were on record cannot of itself constitute a mistake, omission, commission or an error on the face of the record. The judgment was arrived at after a careful consideration of evidence and facts on record as well as applicable principles of law as were within the knowledge of the court. And the court was careful to note that it had considered that evidence. Although the court may have arrived at the wrong view, of itself, should not be a ground for favourably considering an application for review. Redress lies in filing an appeal. I do accordingly find that the failure to consider the submissions did not constitute an error apparent on the face of the record as stipulated under Order 45 Rule 1. As such, I dismiss the appeal with costs to the respondent.

It is so ordered.

DATED and **SIGNED** this 22nd June, 2015.

G. W. NGENYE – MACHARIA

JUDGE

DELIVERED at **ELDORET** this 6th day of July, 2015

BY:- G. K. KIMONDO

JUDGE

In the presence of:-

1. No appearance for the appellant.
2. Mr. Ombati for the respondents.