

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 5155 OF 1992

MESHACK OMARI MONYORO.....PLAINTIFF

versus

DAVID KINYANJUI & TWO OTHERS.....DEFENDANT

RULING

This is an application by the defendants under Order 44 Rules 1 2 3 & 6 and order 50 Rule 3 of the Civil Procedure Rules for an order that this court do review and consequently set aside or vary to such extent as it deems fit the orders of 26th June, 1998. The grounds of the application have been set out. There is also an affidavit sworn by the learned counsel for the defendants/applicants in support of the application.

The said application is opposed. The learned counsel for the plaintiff/respondent has filed grounds of opposition and a replying affidavit. Both learned counsel have also made their respective submissions which I have on record.

On 26th June, 1998 this court granted the plaintiff leave to execute the decree in this suit before the taxation of the bill of costs. Further, leave was granted to the plaintiff to execute the said decree against M/s United Insurance Company Limited the guarantor of the defendants in this suit.

For the defendants to succeed in this matter they were found to show discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree was passed or order made or some mistake or error apparent on the face of the record or any other sufficient reason. The application has to be made without unreasonable delay.

The present application was made only four days after the order sought to be reviewed and so there was no delay.

The learned counsel for the defendants has submitted that the orders sought to be reviewed were obtained upon an incompetent application. It is true that in the application by the plaintiff dated 10th June, 1998 and filed on 12th June, 1998 did not set out in general terms the grounds upon which it was based. That offended order 50 Rule 3 of the Civil Procedure Rules.

In Civil Appeal No. 211 of 1996 National Bank of Kenya Limited -v- Ndungu Njau the Court of Appeal found that such an omission is fatal. It nevertheless allowed counsel, in the broad interest of justice, asked counsel to say what grounds he had argued in the superior court. The failure to set out the grounds should not, in my view be used to lock out a litigant from justice. To do so would amount to giving more emphasis to form rather than substance and the discretion given by the court of appeal should be exercised in the superior court. Further, I believe, if the grounds can be discerned by cross reference to the affidavit in support of the application, the requirement of order 50 Rule 3 will have been complied with.

The requirements of Order 44 Rule 1 have to flow directly from the decree or order sought to be reviewed. It is true that the orders were granted ex-parte. The matter came up in the Friday list. It had been served. That counsel was not present did not form part of the orders granted.

The orders sought were discretionary. There is no complaint that the court exercised its discretion on wrong principles. Further the issue of United Insurance Company Limited being brought in has been raised. There is nothing on record to show that the guarantee was ever withdrawn. It is true that the

insurance company is not a party to these proceedings but it entered into the arena of conflict well aware of the consequences.

With respect therefore, the application falls short of the requirements of Order 44 Rule 1(1) and must fail. The only anomaly I have noted is the lack of approval of the decree by the defendants. I direct that the plaintiff shall comply with order 20 Rule 7 of the Civil Procedure Rules before execution.

Otherwise the defendants' application is hereby dismissed with costs. Order accordingly.

Dated and delivered at Nairobi this 3rd day of September, 1998

A. MBOGHOLI MSAGHA

JUDGE