



IN THE COURT OF APPEAL

AT NAIROBI

ICORAM: KARANJA, SICHALE & J. MOHAMMED, JJA

CIVIL APPEAL NO. 34 OF 2017

FURNCOM LIMITEDAPPELLANT

AND

NELSON MUGUKU NJOROGERESPONDENT

(Being an appeal from the ruling and order of the High Court at Kenya Civil Division at Milimani, Nairobi dated **16th August, 2016** (Sergon, J))

IN

HC CIVIL SUIT NO. 80 OF 1999

JUDGMENT OF THE COURT

This is an appeal against the ruling of **Sergon, J** delivered on **16th August 2016**.

A brief background will give this appeal context. In an amended plaint dated **16th April, 1999**, **Nelson Muguku Njoroge**, the respondent herein (and the then plaintiff) filed suit for rent arrears of Kshs 274,000.00, repairs of Kshs 136,000.00, unpaid electricity and water bills, all totaling to Kshs 610,843.60, in respect of the respondent's premises on LR No. 12948/9 situated in Mountain view Estate, Nairobi which was leased by the appellant (the then defendant). The appellant filed its statement of defence dated **2nd February, 1999** and denied owing the respondent the sum of Kshs 610,843.60 or at all.

In a judgment dated **23rd September, 2002**, **Mbiti, J** entered judgment in the sum of Kshs 610,843.60 in favour of the respondent, in default of appearance (the appellant did not attend the hearing on **28th June, 2002**). The said entry of judgment in favour of the respondent provoked a flurry of motions.

In a Chamber Summons dated **28th August, 2007**, supported by the affidavit of **Solomon Njoroge Kiore**, the appellant's Managing Director sworn on the same day (**28th August, 2007**), the applicant sought the following orders.

“(i) that the exparte judgment entered herein be set aside,

(ii) that there be a stay of execution of the decree herein and all consequential orders relating thereto pending the hearing and determination of this application,

(iii) that the costs of this application be provided for”.

The respondent opposed the motion in an affidavit sworn on **18th January, 2010**. He maintained that the appellant failed to attend court on **28th June, 2002** in spite of service of a hearing notice upon his representative.

In another Chamber Summons dated **1st December, 2010** and supported by another affidavit of the appellant's Managing Director, the appellant sought the following orders, that:

“(a) the defendant be granted leave to amend chamber summons and supporting affidavit dated 28th August, 2007 as per draft amended chamber summons,

(b) the defendant to be granted a further leave to expunge from record the whole of the further affidavit dated 23rd July, 2010 which is malicious and misleading,

(c) the draft amended chamber summons be deemed duly filed,

(d) the costs of this application be the costs in the cause.”

The respondent opposed this application as well.

In a ruling rendered on **11th December, 2015**, the learned judge dismissed both the applications of **28th August, 2007** and **1st December, 2010**. In his ruling, **Sergon, J** stated:

“After a careful consideration of the grounds stated on the face of the summons and the facts deponed in the affidavits filed in support and against the application plus the rival written submissions, I am convinced that the defendant was properly served with a hearing notice for September, 2002. The defendant denied service but it failed to tender any credible evidence to establish the allegation. I expected the defendant’s advocate to summon the process server to attend court for cross-examination but it failed to take advantage of the opportunity offered by law. It also failed to present to this court the outcome of the C.I.D’s report though it alleged it had the report with it. In the end, I see no merit in the summons dated 28th July, 2007. In the circumstances, the prayer for an order of stay of execution cannot be granted.

In the second application dated 1st December, 2010, the defendant is basically seeking to amend the summons dated 28th July, 2007. In my view, this application depended on the outcome of the decision on the summons dated 28th July, 2007. Since the summons dated 28th July, 2007 had been dismissed, I find no merit in the summons dated 1st December, 2010.

In the end, I find no merit in both summonses. They are dismissed with costs to the plaintiff”.

Undeterred, the appellant filed a motion dated **18th December, 2015** and sought *inter alia*, an order for review and to set aside the ruling of **11th December, 2015**. This motion was with consent of both parties disposed of by way of written submissions. The learned judge considered the rival submissions and in his ruling of **16th August, 2016** stated:

“I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against. I have also considered the rival submissions. It is the submissions of the defendant/applicant that it has discovered new and important facts/evidence which were not before the court. It is said that the exhibit memo delivered by the C.I.D to the defendant’s advocate was printed on both sides but due to an inadvertent mistake by the advocates assistant only one side was photocopied and attached to the affidavit leaving the side that had the results of the document examiner. The findings of the document examiner were very crucial to the determination of the two motions dated 27th August, 2008 and 1st December, 2010. This court was urged not to let the mistakes of counsel to be visited on the litigant.

The plaintiff on the other hand is of the view that the defendant is abusing the court process by lodging a plethora of applications with a view of delaying the execution process. The defendant/applicant was accused of not being diligent in following up the complaint. It is said there is no new facts nor evidence since the contents of the exhibit memo were known to the defendant/applicant and his advocate. The plaintiff/respondent also questioned the veracity of the portion of the exhibit memo which had been initially left out. The conduct of the defendant in the whole saga is said to be misduerous (sic) and manifests bad faith”

He concluded:

“I appreciate that a mistake was committed by the defendant’s advocate. The mistake cannot be said to be the discovery of a new fact. The advocate was simply not diligent. This is one of those cases where the client should be left to suffer for the mistake of its advocate.

In the end and on the basis of the above reasons, I find the motion to be without merit. It is dismissed with costs to the plaintiff.”

The appellant was dissatisfied with the said outcome, hence this appeal.

In a Memorandum of appeal dated **8th February, 2017**, the appellant listed eleven (11) grounds of appeal which are inelegantly drawn. However, in the appellant’s written submissions dated **12th October, 2017**, the eleven (11) grounds in the Memorandum of Appeal were reduced to five (5). The appellant also relied on its list of authorities dated **15th October, 2018** as well as a supplementary record of appeal dated **12th October, 2007**. In highlighting the appellant’s submissions, **Mr. Mungai**, learned counsel for the appellant urged us to find that the learned judge erred in failing to appreciate that the signature and the stamp on the hearing notice were forgeries; that the defence raised triable issues; that the trial court failed to issue directions for the examination of the process server and the document examiner; that the learned judge failed to exercise his discretion judiciously and erred in allowing the respondent’s administrator to revive the suit which had long abated. Reliance was placed on the decision of **Maina vrs. Mugiria, Civil appeal No. 27 of 1982** on the exercise of judicial discretion.

In opposing the appeal, **Mr. Ndirangu**, learned counsel for the respondent relied on the respondent's submissions as well as her list of authorities both filed on **17th June, 2019**. Counsel contended that the issue before the court was that of review. He cited Order 45 Rule I of the Civil Procedure Rules (CPR) which provides:

“ (1) Any person considering himself aggrieved:

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

We have considered the record, the rival submissions (both written and oral), the authorities cited and the law. For a start, Order 45 of the Civil Procedure Rules, 2010 is clear as regards when a court can review its orders. An applicant must be able to demonstrate that:

(a) there has been a discovery of new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant, or

(b) there was a mistake apparent on the face of the record, or

(c) for any other sufficient reason(s).

As to the discovery of new and important matter in evidence, it is our considered view that the learned judge correctly came to the conclusion that there was none. According to the appellant, the new evidence was that:

“The new evidence is the Exhibit Memo Form by the CID which was printed on both sides of the page ... the mistake occurred when photocopying the same for the purpose of presentation as an annexure to the applications where the assistant to the defendant's advocate on record, who was tasked with the said task, inadvertently and/or by accident, failed to photocopy the reverse page”

In considering the issue, the learned judge rendered himself as follows:

“The defendant's learned advocate has blamed his office clerk and assistant for failing to attach some portion of the exhibit memo to the supporting affidavit. It is his argument that had the said piece of information been presented to this court, it would have arrived at a different conclusion. The defendant's application heavily depended on the credibility of the process server ...”

The judge concluded that:

I appreciate that a mistake was committed by the defendant's advocate. The mistake cannot be said to be the discovery of a new fact. The advocate was simply not diligent.”

We agree. Failure to attach evidence already in one's possession is not discovery of new and important evidence. In essence, the appellant was saying there was a mistake in his office as it failed to photocopy both sides of a report from the Directorate of Criminal Investigations (DCI). This was not a new and important matter which after the exercise of due diligence was not within his knowledge. In our view, the mistake in photocopying only one side of a document as opposed to both sides does not constitute one of the grounds envisaged under O.45 of the CPR.

The other ground raised by the appellant is that the court failed to direct that the process server be called to testify. We hasten to state that it was not for the court to descend to the arena of litigation and advise counsel on what to do. It was for the appellant's counsel, if they so desired, to apply to have the process server summoned to appear for purposes of cross-examination. The appellant's counsel failed to do so.

There was also the complaint that the learned judge erred in allowing the respondent's administrator to revive a suit which had long abated. The record shows that **Leoh Wanjiku Muguku** vide an amended notice of motion of **14th June, 2013** sought to be substituted as the then plaintiff namely, **Nelson Muguku Njoroge** had died on **10th October, 2010**. The appellant opposed the motion vide grounds of objection dated **27th October, 2014**. In a ruling delivered on **28th November, 2014**, **Sergon, J** allowed the substitution of the deceased as well as revival of the abated suit. The orders of **28th November, 2014** were not challenged on appeal or otherwise. In the Notice of Appeal dated **19th August, 2016**, it is clear that the appellant's grievance was as it relates to the ruling delivered on **16th August, 2016**. The Notice of Appeal states:

“TAKE NOTICE that FURNCON LIMITED, the defendant in the above suit being dissatisfied with the decision of the Honourable Sergon, J delivered at Nairobi on the 16th day of August, 2016 intends to appeal to the Court of Appeal of Kenya against the whole of the said decision.

The address of service of the defendant is care of Macharia Kahonge & company advocates, Rehema House, 3rd floor, Kaunda/Standard Streets, P.O Box 50282-00200 Nairobi.

It is intended to serve copies of this notice on the plaintiff, through Messrs Kirundi & Company Advocates, Bruce House, 9th floor, Kaunda/Standard Street, P.O box 55319-00100, Nairobi.”

In view of the fact that the Notice of Appeal sought to challenge the ruling of **16th August, 2016**, the appellant cannot be heard to complain as regards the ruling of **28th November, 2014** when it did not file any appeal against the said outcome.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs.

Dated and Delivered at Nairobi this 20th Day of December, 2019.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR