



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & G B M KARIUKI, J.J.A.)

CIVIL APPEAL NO. 94 OF 2013

BETWEEN

ASSOCIATED INSURANCE BROKERS.....APPELLANT

AND

KENINDIA ASSURANCE CO. LTD.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Onyancha, J.) dated 7th March, 2013

in

H.C.C.A. NO. 29 OF 2007)

JUDGMENT OF GITHINJI, JA

[1] I have read the judgment prepared by Okwengu, JA in draft

[2] The dispute was between an insurance company and an insurance broker about breach of an agency agreement by failing to remit Shs.798,376 allegedly due to the insurance company on accounts. The Chief Magistrate entered summary judgment in favour of the insurance company, the respondent herein. The appellant appealed against the judgment to the High Court and in the meantime obtained an order granting stay of execution of the decree on the ground that the appellant deposited the decretal amount in Court. However, pursuant to correspondence exchanged between the parties, the appellant paid the full decretal amount to the respondent. The appellant's subsequent attempt to prosecute the appeal was thwarted by a ruling of Sitati, J. holding that the appeal had been compromised.

[3] The appellant filed an application for review of the Ruling of Sitati, J. contending that there was an error apparent on the fact of the record as the payment of the decretal sum to the respondent was not intended to compromise the appeal. Onyancha, J. dismissed the review application mainly on the ground that the decision of Sitati, J. did not disclose an error apparent on the face of the record and thus could only be challenged on appeal.

[4] The decision of Sitati, J. that the appeal had been compromised was arrived at after the ascertainment of facts from the documentary evidence and the interpretation of those facts to find out if the parties had reached a compromise. Thus, the decision of the learned Judge was a judicial determination of the dispute which is not reviewable. It could only be questioned in an appeal.

[5] I respectively agree with the exposition of the law relating to exercise of review jurisdiction by Okwengu, JA and with the entire decision.

[6] Accordingly, the judgment of the Court is that the appeal is dismissed with costs.

[7] This judgment has been delivered under Rule 32(3) Court of Appeal Rules,

G.B.M. Kariuki, JA having ceased to hold office.

Dated and delivered at Nairobi this 9th day of February, 2018.

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF HANNAH OKWENGU, JA.

[1] It is appropriate to commence this judgment by recapitulating the background to this appeal. Kenindia Assurance Company Limited who is now the respondent in this appeal, instituted a suit in the Chief Magistrate's court at Nairobi, seeking judgment against Associated Insurance Brokers who is now the appellant, for the sum of Kshs.798,376/=. The respondent's claim was anchored on the appellant's breach of duty in regard to an agency agreement wherein the appellant who is an insurance agent and/or broker, allegedly failed to remit various insurance premiums to the respondent. Before the suit proceeded to hearing, the respondent filed an application to have the appellant's defence struck out and judgment entered in its favour as prayed in the plaint on the grounds that the defence was frivolous, vexatious, and an abuse of the court process. The trial court allowed the application and entered summary judgment in favour of the respondent.

[2] The appellant who was aggrieved filed an appeal in the High Court against the summary judgment, and also sought to have the judgment stayed pending the hearing and determination of the appeal. The respondent filed a replying affidavit opposing the application for stay. The High Court granted an order for a temporary stay of execution on condition that the appellant deposits the decretal amount in court. The appellant did not deposit the decretal amount in court but paid directly to the respondent a sum of Kshs.846,194/=-, then proceeded to request the court to give directions on how the appeal was to be heard.

[3] Before the appeal was fixed for hearing, the respondent filed an application seeking orders that the appeal had been compromised as the appellant had paid the entire decretal sum and costs to the respondent. The appellant opposed the application contending that the same was not filed in good faith but was only intended to delay the hearing of the appeal. By a ruling delivered on 1st December, 2011, the High court (Sitati, J) allowed the application holding that the appeal had been compromised as the appellant wrote a letter to the respondent proposing the terms on which it intended to pay the decretal sum and that this letter which was not written on a without prejudice basis was accepted by the respondent and thereby a binding contract resulted.

[4] Being dissatisfied with that decision, the appellant in a notice of motion dated 1st February, 2012 sought review of the ruling of 1st December, 2011 on the grounds that there was an error apparent on the face of the record, as the appellants payment of the decretal sum was not intended to compromise the appeal nor was there any clear and unequivocal agreement between the parties that the payment of the decretal sum would compromise the appeal. In a ruling delivered on 7th March, 2013, the High Court (Onyancha, J) dismissed the application for review holding, *inter alia*, that he had no jurisdiction to reverse the earlier ruling of Sitati, J.

[5] It is the decision of Onyancha, J that provoked this appeal in which the appellant has raised four grounds of appeal contending that the learned judge erred in failing to appreciate that the review orders were sought to correct a self evident error that was apparent on the face of the record; that the learned judge failed to appreciate that the error apparent on the face of the record regarded the compromise of the appellant's application for stay of execution and not the appeal; and that the learned judge failed to appreciate that denying the appellant an opportunity to be heard should be the last resort.

[6] During the hearing of the appeal, the appellant was represented by learned counsel **Mr. Odera Obar**, while learned counsel Mr. Jackson Omwenga represented the respondent. Mr. Obar faulted the learned judge of the High Court for failing to consider that the application was one for review and that the judge who made the orders sought to be reviewed having been transferred, the application could be heard by any other judge. Counsel relied on **National Bank of Kenya Limited vs Ndungu Njau, Civil Appeal No.211 of 1996** wherein it was held that a review may be granted whenever the court considers that it is necessary to correct an error apparent on the face of the

record, and the error is self-evident and does not require an elaborate argument to establish. Counsel also relied on *Nyamogo & Nyamogo advocates vs Moses Kiplokum Kogo Civil Appeal 322 of 2000*

[7] Mr. Omwenga, learned counsel for the respondent, submitted that the application for review did not disclose any error apparent on the face of the record to justify review. Counsel relied on *Nyamogo & Nyamogo (supra)*; and *Colourprint Limited vs African Express Airways Limited (HCCA. No.486 of 2004, Nairobi)* for the proposition that a finding or a conclusion of a court cannot in law reveal an apparent error on a substantial point of law which can be a basis of review. Counsel argued that Sitati, J had dealt with the issues that were raised in the application for review, and after considering the evidence before her concluded that the full decretal sum had been paid and the appeal compromised.

[8] I have carefully considered the record of appeal and the submissions made by both parties. Order 45 Rule 1(1) of the Civil Procedure Rules that deal with applications for review provides as follows:

1. (1) 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 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.

[9] The appellant faulted the learned Judge for holding that he had no jurisdiction to review the ruling of Sitati J, and failing to note that there was an error apparent on the face of the record as Sitati, J erred in finding that their appeal was compromised, while in essence, it was their application for stay of execution pending the hearing and determination of their appeal at the High Court that was compromised.

[10] It is clear that **Order 45 rule 1(1)** of the **Civil Procedure Rules** provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In *National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR*, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

[11] In *Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E. A. 173* this Court further explained an error apparent on the face of the record as follows:

“An error apparent on the face of the record cannot be defined precisely and 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.”

[12] In the Notice of Motion dated 15th July, 2010, Hon Sitati J was called upon to determine whether the appeal that had been filed by the appellant against the ruling of the High Court striking out the appellant’s defence and entering judgment in favour of the respondent had been compromised by the appellant paying the decretal sum in full. In the ruling that was subject of the application for review, Sitati J in arriving at her conclusion stated, *inter alia*, as follows:

“13. From the above history, I am satisfied that this appeal has indeed been compromised. The appellant/ respondent made an offer dated 4th December, 2007 and that offer was accepted by the Respondent/ Applicant by a letter of the same date.

The letter of acceptance was acknowledged by the Appellant/Respondent vide their advocate letter dated 11th December, 2007. A contract was thus concluded. That contract contained sufficient certainty for the parties to appreciate what they were up to. To my mind the fact that a consent order to that effect has not been recorded in court does not vitiate the contract which was concluded on 4th December 2007

“15. In the premises, I am satisfied that this appeal has been compromised by the payment of the full decretal sum to the respondent/applicant...”

[13] The appellant’s Notice of Motion dated 1st February 2012 that sought review of the order made by Sitati J, was anchored on the ground that the learned judge erred in declaring the appeal to have been compromised when there was no clear and unequivocal agreement between the parties that the payment of the decretal sum would compromise the appeal. In dealing with the application, Onyancha J had to address the issue whether in Sitati J arriving at the conclusion that the appeal was compromised, there was an error on the face of the record, and if so whether this error was an error on a point of law that was self evident, and one which there could be no other opinion.

[14] In his ruling on the application for review, the learned judge after noting that he would have come to a different conclusion from Sitati J stated as follows:

“I, on the other hand notice that the issues before me were fully in the mind of the Court and Sitati, J considered the merits of the application. It was her clear view upon the same facts as are before me that the appeal had been compromised. This Court has no jurisdiction to reverse her ruling which could only be challenged through an appeal as this Court cannot sit on appeal on such a decision... The application dated 1st February, 2012, is, therefore hereby dismissed with costs....”

[15] I cannot but agree with the learned judge. Sitati J addressed the issue that was before her and made a determination after being guided by relevant authorities that the appeal had been compromised through an agreement. The issue was not whether it was the application for stay of execution that had been compromised, but whether the appeal had been compromised. This required the learned judge to make a determination based on her findings on the facts and the law.

[16] It was not disputed that the appellant had paid the decretal sum in full, and that this was done pursuant to an offer made and agreed upon. The decision of Sitati J was based on her understanding of the facts and interpretation of the law. It may well be that the decision was arguably an erroneous decision to the extent that one may not agree with her understanding of the facts or interpretation of the law, but that cannot be an error that is self-evident. It is a conclusion that can only be arrived at after a drawn argument. It is not therefore an error that is capable of review. As was stated in Nyamogo and Nyamogo vs Kogo (Supra) a wrong view of a matter may not be a ground for review although it may be a ground for an appeal.

[17] I come to the conclusion that although Onyancha J had jurisdiction under **Order 45 rule 2(2)** of the **Civil Procedure Rules** to hear and determine the application for review as Sitati J was no longer attached to the High Court sitting in Nairobi, this did not give the learned judge the jurisdiction to rehear and determine the appellants original motion dated 15th July, 2010 that had been determined by Sitati J. It mattered not that he would have taken a different view from that of Sitati J. The mandate of Onyancha J at that stage was to review the proceedings before Sitati J with the aim of determining whether there was an error that was apparent on the face of the record, and in regard to which there was no other possible opinion. Such an error is distinguishable from an erroneous considered decision anchored on a wrong conclusion on law or evidence that may be subject of an appeal.

[18] For the above reasons, I find that Onyancha J was right in rejecting the appellant’s motion for review. Accordingly, I find no substance in this appeal and would therefore dismiss it with costs.

Dated and delivered at Nairobi this 9th day of February, 2018.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR