IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI, & SICHALE, JJA)

CIVIL APPEAL NO. 286 OF 2009

BETWEEN

ATHUMANI RAMADHAN MKOMWA…….....APPELLANT

AND

SCANDINAVIA EXPRESS SERVICE LTD.....RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 17th June, 2008)

in

H.C.C.C. No.1473 of 2005)

****

JUDGMENT OF THE COURT

The appellant **ATHUMANI RAMADHAN MKOWA** filed this appeal against the judgment of Ang? awa, J. delivered on the 7th June, 2008. **SCANDIVANIA EXPRESS SERVICE LTD,** the respondent herein, was the then defendant.

The background to this appeal is that the appellant filed suit by a plaint dated 7th December, 2015 against the respondent vide HCCC No. 1473 of 2005. The respondent did not file a defence and the appellant made a request for judgment on 5th July, 2006. Subsequently the matter was set down for formal proof. The appellant testified before Ang?awa, J. (as she then was). The appellant also called Dr. Maurice Peter Simiyu who testified as PW2. Thereafter the appellant closed his case and the trial court reserved its judgment to 29th November, 2006. In the judgment, the trial court awarded the appellant a total of Ksh.2,768,115/-. The appellant was dissatisfied with the outcome of the formal proof as the trial court did not make awards in respect of loss earnings and loss of future earnings, a sum of Ksh.144,000/- and Ksh.720,000/-respectively. The appellant filed a Notice of Motion application dated 4th April, 2007 seeking orders to review the court?s judgment. In a ruling dated 17th August, 2009, the learned trial judge dismissed the application for review thus provoking this appeal.

In a memorandum of appeal dated 9th December, 2009, the appellant faulted the trial judge on the grounds:-

"1. That the Honourable Judge erred in law and fact by finding and expressing an opinion that the appellant was on half pay before final termination of his employment, contrary to evidence adduced by the plaintiff and without any evidentiary basis.

2. That the Honourable Judge erred in law and fact by finding that the appellant ought to have produced a pay slip or letter to prove the actual sum being paid as salary contrary to the position that interlocutory judgment had been entered on the 17th July, 2006 and therefore it was not incumbent upon the appellant to prove matters which were not denied and were deemed admitted by the Respondent pursuant to Order VI Rule 9(1) of the Civil Procedure Rules.

3. That the Honourable Judge erred in law and fact by failing to record clearly and verbatim the precise oral evidence adduced by the appellant and further failed to appreciate the mistake or error apparent on the face of the record in that respect at page 6 of the typed certified proceedings and page 7 of the hand written proceedings.

4. That the honourable Judge erred in law and fact by failing to appreciate that there was sufficient cause to review the Decree and Judgment granted/delivered on the 29th day of November, 2006."

The appellant sought an order, inter alia:-

"**That the judgment and decree delivered on the 29th day of November, 2006 be and is hereby reviewed to grant the appellant Ksh.144,000/- for loss of earnings and Ksh.720,000/-for loss of future earning**".

The appeal came before us for hearing on 31st March, 2017. Mr. Jaoko, learned counsel for the appellant, relied on the appellant?s submissions filed on 22nd March, 2017. In the submissions the appellant consolidated grounds 1,2 and 3 which deal with an error on the face of the record. The appellant contended that the trial judge erred in finding that the appellant had failed to produce his pay slip and a letter to show that he was on half pay. It was the appellant?s contention that he had produced his employment card issued on 24th September, 2003 as proof of employment and that although a notice to produce had been served upon the respondent to produce the appellant?s pay slip, the truth of the matter is that the appellant acknowledged receipt of his salary by signing on a book; that the learned judge erred in finding that the appellant had failed to prove that he earned Ksh.11,000/- per month, bearing in mind that the interlocutory judgment had been entered. Further, the appellant contended that the fact that the respondent had not filed a defence, the respondent was deemed to have admitted the appellant?s averments in the plaint; and that the learned trial judge **"... failed to clearly record the plaintiff's/appellant's oral testimony by failing to complete the plaintiff's/appellant statement."**

Secondly, the learned judge was faulted for **"...failing to appreciate that there was sufficient cause to review the decree and the judgment/granted delivered on the 29th day of December, 2009"** on the basis that the claim was not opposed and that "**in light of the interlocutory judgment entered in favour of the plaintiff/appellant the burden of proof was lighter."** It was the learned counsel?s contention that trial court in failing to appreciate that no defence had been filed constituted an error apparent on the face of the record. Counsel cited this court?s decision of **NATHAN NYAMBU MAAGHANGA VS BENARD M. WANJALA & ANOTHER [2016] eKLR Eldoret Civil Appeal No. 110 of 2013 UR** in support of the proposition that inspite of failure to produce a pay slip, the court had sufficient basis to assess and award damages for loss of earnings and loss of future earnings.

We have considered the record, the submissions of counsel, the authorities cited and the law.

The appeal before us is against Angawa?s, J. dismissal of the Notice of Motion application dated 4th April, 2007. The Notice of Motion was predicated on the then O.XLIV rule 1(5) now order 45(1) of the Civil Procedure rules and S.80(a) of the Civil Procedure rules Chapter, 21 of the Laws of Kenya. It sought

a specific order to wit:-

> **"That the decree and judgment delivered on the 29th day of November, 2006 by Lady Justice Mary A. Anga'wa be reviewed with a view to grant loss of earnings (Ksh.144,000) and loss of future earnings (Ksh.720,000)."**

Suffice to state that in the motion the appellant sought an order of review. **Order 45(1)** of the Civil Procedure Rules provides as follows:

> **"Any person considering himself aggrieved:-**
>
> **(a) By a decree or order from which an 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."**

It is evident from the above provision that a party seeking to avail himself/herself of the relief of a review must demonstrate that there is 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 the decree or order was made or on account of an error apparent on the face of the record or for any other sufficient reason. A review cannot be an avenue for a fresh hearing or of correcting an erroneous view taken earlier. An application for review is for purposes of correcting a patent error which stares on the face without any argument to establish the error.

In the appeal before us, learned counsel faulted the judgment of the trial Judge on several respects. Counsel contended that failure to appreciate that an interlocutory judgment was already in existence at the time of the formal proof amounted to an error apparent on the face of the record. In our view the failure complained of (if at all) was not an error on the face of the record. The alleged „error? was not a patent error staring in the face without any argument establishing the error, such as a mathematical error. On the contention that the trial judge failed to appreciate that the appellant had no pay slip but instead acknowledged his salary on a notebook, the said failure (if at all) may be a ground of appeal but it cannot be said to be an error apparent on the face of the record and neither can it be said that it was a new and important evidence which was not within the appellant?s knowledge at the time of the trial.

We believe we have said enough to show the appellant?s application for review did not fall under **O.XLV (Now O.45)** of the Civil Procedure Rules. The learned trial judge was right in dismissing it. We find that this appeal is devoid of merit. It is dismissed accordingly.

As the respondent did not take part in this appeal, we make no order as to costs.

Dated and delivered at Nairobi this 28th day of July, 2017.

E.M. GITHINJI

….....

JUDGE OF APPEAL

G.B.M. KARIUKI

…….

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR