



IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 32 OF 2015

BETWEEN

JOHN MWINGA MACHARIA..... APPELLANT

AND

GEOFFREY GITHAGUI WACHIRA.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nyeri (Wakiaga, J.) dated 28th November, 2014

in

(H. C. C. A NO. 106 OF 2001)

JUDGMENT OF THE COURT

This is a second appeal against the Judgment of J. Wakiaga J. delivered at Nyeri on the 28th day of November, 2014.

The background to this appeal is that the appellant **John Mwinga Macharia** (the Appellant) sued the respondent **Geoffrey Githagui Wachira** (the respondent) and two others **Joe Kimani Ngacha** and **Mary Wanjiru Kimani** (two others) in Nyeri CMCC No. 904 of 2004 seeking general, special and loss of earning capacity damages together with costs and interest at court rates till payment in full, in respect of bodily injuries sustained by the appellant in a road traffic accident involving M/V KAN 146 L a Nissan Matatu belonging to the respondent in which the appellant was travelling on the material day as a fare paying passenger. It collided with M/V Registration Number KAR 498 L belonging to the other two. The respondent defended that claim. The other two did not, and the appellant applied for and had interlocutory judgment entered against them. The merit disposal of the suit resulted in the Judgment of R. Nyakundi CM (as he was then) in which he observed that he was unable to place blame to one over the other for the causation of the said accident hence his finding the respondent and the other two jointly and severally liable to meet the appellant's claim against them. He assessed quantum as follows:

- a. **general damages in the sum of Ksh 1.7 million.**
- b. **Special damages of Ksh 20,000/-**
- c. **Loss of future earning capacity plus costs and interest at court rates till payment in full.**

The respondent was aggrieved by the decision on liability and filed **Nyeri Civil Appeal No. 14 of 2007** against it which was subsequently struck out on 7.7.2008 by Makhandia, J (as he was then) on a technicality. Almost two (2) years and eight (8) months later the respondent moved to the same venue (trial court) and filed a Notice of Motion dated the 30th day of March, 2011 seeking review of the very Judgment he had purported to appeal against, basically seeking review limited to the apportionment of liability on a 50% - 50% basis as between him (the respondent) and the other two.

The major ground for seeking the said review was that since T.W. Mwirigi S.R.M. in Muranga SPMCC No. 515 of 2003 in the matter of **Stephen Kariuki Kihara versus the Respondent** and the other two arising from the same accident had apportioned liability at 50% - 50% each as against the respondent and the other two, it would be prudent of the Nyeri Court CMCC 904 of 2004 made provision for the same mode of liability.

The merit disposal of the said application is what resulted in the ruling of S. Muketi CM (as she was then) of 29th June, 2011 in which she declined the respondent's plea for the review for the reasons that the respondent had appealed against the same decision; and failed; R. Nyakundi who rendered the judgment then sought to be reviewed was not bound by the decision in **Muranga SPM CC No. 515 of 2003** and thirdly, that matters raised before her should have been raised before the trial court.

The respondent was aggrieved by that refusal and he appealed to the High Court vide **Nyeri HCCA No. 106 of 2011** citing three grounds of appeal in essence basically raising one complaint that the learned magistrate fell into an error when she declined the request to review and apportion liability at 50% - 50% as between the respondent and the other two.

In allowing the respondent's appeal the learned judge reasoned that the respondent was entitled to a review as the appeal he had earlier proffered against the same decision had been struck out on technical grounds and had thus not received a judicious decision on the matter by the said court and in terms of **Article 159** of the **Kenya Constitution 2010**, the appeal before him deserved a merit decision.

Second since the appeal was not directly arising from the judgment of R. Nyakundi but from the order on refusal to review of S. Muketi, CM under **Order 45** of the **Civil Procedure Rules**, the respondent did not require leave of court to appeal to the High Court and the appeal was therefore properly before him and deserving a merit determination.

Third, that the judgment in Murang'a SPMCC 515 of 2003 in which the trial court had apportioned liability at 50% - 50% each as between the respondent and the other two and which had been placed before R. Nyakundi though not binding on him should not have been ignored as doing so was likely to lead to the danger of having two courts dealing with the same set of circumstances arriving at different conclusions. On that account the learned judge faulted both the trial and the review courts and apportioned liability at 50% - 50%. This stand was further fortified by the fact that interlocutory judgment had at the time of delivering both decisions been entered against the other two in favour of the appellant.

It is the above findings that the appellant has invited us to overturn. He has put forth eleven grounds of appeal. These are that the learned judge erred in law:-

- **in allowing a review of a judgment which was delivered in the year 2006 by the learned magistrate Hon. R. Nyakundi CM.**
- **In allowing review to which the 2nd and 3rd respondents were not parties to the appeal.**
- **In applying Article 159 of the Constitution of Kenya while the same was not in operation when Nyeri High Court and Appeal No. 14 of 2007 was dismissed by Justice Makhandia.**
- **In failing to appreciate that the provision of law invoked by the appellant in the lower court did not entitle him to orders for review.**

- **In failing to consider the submissions by the appellant's advocates.**
- **In determining the appeal against the dismissal of the application by the learned magistrate S. Muketi CM as if he was determining an appeal against the judgment of R. Nyakundi CM.**
- **In importing Order 45 into the matter while the same was not canvassed before the learned magistrate S. Muketi CM.**
- **In finding that the appellant did not require leave of the court to lodge appeal as the provisions invoked in their motion dated 30th March, 2011 were orders 1 Rule 23, Order 22 Rule 22(1) Civil procedure.**
- **In misconstruing the appeal as an appeal against the judgment of the learned magistrate R. Nyakundi CM.**
- **In not addressing all the issues raised by the ruling of S. Muketi CM.**

In failing to consider all issues or to do so adequately and critically all the issues of law raised and consequently came to the wrong decision.

In his submission before us **Mr. Gathiga Mwangi** learned counsel for the appellant reiterated the grounds of appeal that the respondent having premised his application for review on the provisions of law cited, he ought to have sought leave of court if he wished to appeal against the decision of S. Muketi CM. Failure to do so rendered the respondent's appeal invalid and it ought not to have been entertained on its merits.

Further that the learned Judge fell into an error when he imported **Order 45 of the Civil Procedure Rules** into his reasoning as issues regarding it had neither been raised nor canvassed by either party on appeal before him; there was therefore an inordinate delay in seeking the Court's intervention through the review which inordinate delay had not been sufficiently explained.

Lastly that S. Muketi CM correctly found that the judgment in Muranga SPMCC 515 of 2003 was not binding on R. Nyakundi, CM; the learned Judge fell into an error when he made orders affecting third parties whom the respondent had not joined to the appeal, and lastly **Article 159** of the **Kenya Constitution 2010** ought not to have been invoked as the same was not operational at the time the judgment sought to be reviewed was made.

To buttress his arguments Mr. Gathiga relied on the case of **Kenya Breweries Ltd versus Godfrey Odoyo [2010] eKLR** in which this court approved the holding in the case of **Martin versus Glywed Distributors Ltd t/a MBS Fastening [1983] ICR 511** for the proposition that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion which would be the same as holding that the decision is bad in law.

In reply to the appellant's submissions **Mr. Warutere Davidson** learned counsel for the respondent urged us to dismiss the appeal on the grounds that although the respondent erroneously cited wrong provisions of law for the relief of review, there was no doubt from the content of the prayer of the application before S. Muketi CM that he was seeking review of the Judgment of R. Nyakundi. It was therefore, proper for the learned Judge to ignore the erroneously cited provisions and apply **Order 45** of the **Civil Procedure Rules** to determine whether the relief of review ought to have been withheld from the respondent or not. Further that no prejudice was suffered by either side as all that the learned judge did was to invoke and apply the correct provision of law on review.

With regard to the appellant's argument on lack of competence for the respondent's appeal on account of lack of leave to appeal, Mr. Warutere urged us to find that the learned Judge properly rejected that

argument, first, because the provisions under which the respondent needed leave of court to appeal had erroneously been cited by the respondent. Second, the relief of review then sought by the respondent fell under **Order 45** of the **Civil Procedure Rules** under which leave to appeal was not necessary and we should therefore affirm the findings of the learned Judge that the respondent needed no leave to appeal against the decision of S. Muketi CM.

On the rejection of the respondent's application for review on account of him having appealed and failed, **Mr. Warutere** urged that the learned judge was right to fault S. Muketi CM on that finding for the reason that the purported appeal had long been struck out on a technicality as at the time the application for review was presented to court.

With regard to the invocation of **Article 159** of the **Kenya Constitution 2010**, it was **Mr. Warutere's** argument that this provision was properly invoked as it was operational as at the time the appeal was determined.

Turning to the issue of the learned Judge making orders affecting persons not party to the appeal, **Mr. Warutere** urged us to affirm the stand taken by the learned Judge because the said persons were parties to the proceedings resulting in the judgment then sought to be reviewed which judgment was binding on them. It was therefore, prudent for the learned Judge to factor in his determination the role the 3rd parties were to play in satisfying the decree arising from the judgment in favour of the appellant.

This is a second appeal. Our mandate is limited to matters of law only see **Kenya Breweries Ltd versus Godfrey Odoyo** (*supra*).

We have given due consideration to the findings of the learned Judge and considered them in the light of the rival arguments set out above. In our view, only one issue arises for our determination that is: whether the learned Judge properly appraised himself of the issues in controversy before him, applied the law properly to those issues and then arrived at the correct conclusions on the matter.

S. Muketi CM withheld the relief of review from the respondent on three grounds namely; that the respondent had appealed and failed; second, that the judgment in Muranga SPMCC 515/2003 was not binding on R. Nyakundi; and third, that issues raised before her should have been raised at the trial.

There is no dispute that the respondent filed an Appeal No.14/2007 against the judgment of R. Nyakundi, which was struck out by Makhandia J (as he was then) on a point of technicality on 7th July, 2008. It therefore follows that as at the time the respondent presented the application for review dated the 30th day of March, 2011, there was no appeal in place pending determination over the same judgment of R. Nyakundi. Although we do not have the proceedings of the struck out appeal for us to know the nature of the technicality that led to the said appeal being struck out, we have no doubt that by reason of this striking out, the purported appeal was no appeal at all. The technicality must have been one that went to the root of the said purported appeal rendering it incompetent and unworthy of any merit interrogation. In this regard, such a purported appeal was incapable of attracting the operation of **Order 45 Rule 1(1)** of the **Civil Procedure Rules** in its favour and was therefore incapable of being termed "a failed appeal" whose purported existence could not have operated as a bar to the respondent presenting an application for review against the same decision that he had earlier purported to appeal against. We therefore, find that the learned Judge fell in no error when he discounted this first reason as a ground for withholding the relief of review from the respondent.

We note as argued by **Mr. Gathiga** that the application for review was presented long after the delivery of the judgment sought to be reviewed. We however, do not agree that the application for review was presented six (6) years later. It was presented about four (4) years after the delivery of the judgment sought to be reviewed and two (2) years and eight (8) months after the purported appeal against it was struck out. This was however not one of the grounds of objection relied upon by the appellant in their opposition to the application for review. Neither was it given as one of the reasons for withholding the relief of review in favour of the respondent by S. Muketi CM. We find its being raised now belatedly before us as nothing but an afterthought. We reject it.

With regard to the complaint that the learned judge ought not to have made orders affecting 3rd parties not party to the appeal, we find no fault in the learned Judges' action in doing so because the **Muranga SPMCC 515/2003** decision had arisen from the same accident. It was therefore prudent for the learned judge to harmonize the findings on liability in both proceedings. Such harmonization was necessary to avoid a situation where by successful litigants would be subjected to different modes of execution of any decree resulting from such proceedings in their favour.

As for the rules of procedure cited by the respondent in support of his application for review, we agree with **Mr. Gathiga's** argument that **Order 45 Civil Procedure Rules** was not one of the rules cited by the respondent. Instead the respondent cited **section 3A** of the **Civil Procedure Act Order 1 rule 23** and **Order 22 rule 22(1)** of the **Civil Procedure Rules**. **Section 3A** of the **Civil Procedure Act** enshrines the inherent power of the court to meet ends of justice to parties before it. **Order 1 rule 23** deals with the apportionment of costs between a 3rd party and other parties to a suit. Whereas **Order 22 rule 22(1)** on the other hand deals with a stay of execution. None of the prayers in the body of the said application related to apportionment of costs between a 3rd party and other parties to a suit nor for a stay of execution. They all related to the request to review the judgment of R. Nyakundi, CM with a view to apportioning of liability as between the respondent and the other two.

Lakha JA (as he then was) in the case of **Mwaniki Ngoronge Kamau and others versus Lee She Poong [1998] eKLR** had this to say with regard to the need to observe rules of procedure:

“The first principle is that the rules of the court must be observed. The second principle is that a party should not be denied a determination of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate.”

See also the reiteration of the same principles by **A. Murgor JA** in **Francis Kaagu Karichu versus John Mburu Karichu [2015] eKLR**.

When the above principles are considered in the circumstances of this appeal, it is our view that the failure by the respondent to cite the correct rules for the relief of review did not in any way mislead or prejudice the appellant. The defect was curable. It was therefore, prudent for the learned Judge to invoke the inherent power of the Court under **section 3A** of the **Civil Procedure Act**, identify the correct relief sought, apply the correct provisions of law namely **Order 45** of the **Civil Procedure Rules** to the arguments before him and then arrive at the correct conclusion on the matter. We affirm the stand taken by him and the applicability of **Order 45** of the **Civil Procedure Rules** as against the rules that the respondent had erroneously cited.

As for the application of **Article 159** of the **Kenya Constitution 2010** there is no dispute that this provision came into operation in 2010 long after the proceedings giving rise to this appeal had been initiated and substantially determined at the subordinate court level. There is also no dispute that as at the time the appeal at the High Court was disposed of, this provision had come into operation. In **Jaldesa Tuike Dabelo versus Independent Electoral and Boundaries Commission and Another [2015] eKLR**, the court observed that **Article 159** was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiation of a cause of action before courts. In **Patricia Cherotich Sawe versus Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR**, this court approved its own observation in **Law Society of Kenya versus the Centre for Human Rights and Democracy and 12 others Petition No. 14 of 2013** Thus:

“Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls not all procedural deficiencies can be remedied by Article 159; and such is clearly the case where the procedural step in question is a jurisdictional requisite”

Lastly in **Lamanken Aramat versus Harunmeltamel [2014] eKLR** the court added thus:

“The courts authority under Article 159 of the Constitution remains unfettered, especially where a procedural technicality poses an impediment to the administration of Justice.

In the light of the above pronouncements on the applicability of this provision (**Article 159(2)(d)** of the **Constitution**) we find no fault in the learned Judge invoking it as a ready hand maid of justice to defuse an otherwise technical impediment to the administration of justice, where the appellant stood to suffer no prejudice. Its invocation together with that of the inherent jurisdiction of the court blended well to ensure justice to both parties.

In the result and in the light of the totality of the reasoning given above we find no merit in this appeal. It is dismissed with costs to the respondent both on appeal and the High Court.

Dated and delivered at Nyeri this 3rd day of February, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR