



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & G.B.M. KARIUKI JJ.A)

CIVIL APPEAL NO. 271 OF 2009

RYCE MOTORS LIMITED.....APPELLANT

VERSUS

JONATHAN KIPRONO RUTO.....1ST RESPONDENT

MIDWAY ASSURANCE INTERNATIONAL LIMITED.....2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Warsame, J) dated 31st October 2007

in

HCCC NO. 559 OF 1995)

JUDGMENT OF THE COURT

This is a first appeal by **Ryce Motors Limited (the appellant)** from the ruling and order of the High Court (Warsame J.) (as he then was) issued on 31st October 2000, dismissing the appellant's application dated 28th June 2007 for lack of merit. The application sought to review the judgment and decree of the High Court given on 29th May 2002. It also sought that the judgment or decree given in favour of **Jonathan Kiprono Ruto (the 1st respondent)** in the counterclaim be reversed and set aside, or in the alternative that the judgment and decree be expunged from the court record. In this appeal, the appellant seeks that the said application dated 28th June 2007 be allowed with costs and that the Ruling and Order issued on 31st October 2007 be reversed.

In order to place this matter in its proper perspective, it is necessary for us to recapitulate the facts and circumstances that led to the impugned Ruling. The appellant filed High Court Civil Case No. 559 of 1995 at the High Court of Kenya at Nairobi claiming Kshs. 666,538.55 from the 1st respondent and Midway Assurance International Company (the 2nd respondent) jointly and severally, for work done and services rendered in respect of Motor Vehicle registration No. KAD 221G. The 1st respondent filed a defence denying the claim and counter-claimed for a sum of Kshs. 170,000/= and in the alternative, a sum of Kshs. 166,917.00 and damages from the 2nd respondent. The 2nd respondent, on the other hand, vide a statement of defence dated 30th March, 1995 denied the claim and counterclaim by the 1st respondent.

Bosire J, (as he then was) only heard the claim by the appellant, and in his judgment dated 4th November 1997, found in favour of the appellant against the 2nd respondent. Thereafter, the matter was placed before Osiemo, J, for the determination of the 1st respondent's counter-claim. The Honourable Judge heard the case and found in favour of the 1st respondent as against the appellant. However, on the record, there appeared to be two separate judgments. The first judgment dated 17th April, 2002 which was hand written, awarded the 1st respondent Kshs. 7,500,000 plus Kshs.170, 000.00 and costs. The second judgment dated 29th May 2002 which was typed, awarded the 1st respondent Kshs. 7,500,000.00. From the record before the trial court, there was no reflection of any proceedings recorded on the date the judgment was said to have been delivered. It is also worth noting that save for the order on the Ksh. 170,000/=, the rest of the contents of the two judgments was exactly the same. The only sentence in the hand written judgment which was missing in the typed judgment reads as follows;

“plus Ksh. 170,000/= he had paid for the insurance cover.”

Being dissatisfied with the decision and the alleged apparent anomaly, the appellant filed several applications seeking an avenue for redress on the contested delivery and validity of the judgement. The first application filed by the appellant was the Notice of Motion application dated 6th November 2002, in which the appellant sought an order inter alia that the court corrects the judgment in question ***“so as to specify the date when it was actually rendered if at all”***.

From the proceedings Osiemo J., on 25th November, 2002, clarified that the valid judgment was the one dated and delivered on 29th May 2002. The Appellant then filed a Notice of Motion application dated 27th November 2002 seeking an extension of time within which to file and serve a Notice of Appeal against the judgment, which application was granted by Mwera J, on 17th December 2002. The appellant filed a Notice of Appeal the same day. Later on, the applicant filed the Notice of Motion Application dated 5th July 2005 seeking an order of stay of execution pending the hearing and determination of its intended appeal. The application was heard by Kasango J., who on 15th August, 2005 granted the stay order on condition that the appellant deposits Kshs. 7.5 million in an interest earning account in the joint names of the Advocates for the appellant and 1st respondent.

Dissatisfied with the outcome of these applications, the appellant filed another Notice of Motion application dated 24th November 2006 seeking a review of the order by Kasango J. The application was dismissed on 6th February 2006 for being without merit. Undeterred, the appellant filed a Notice of Appeal dated 12th February 2007 against the dismissal order.

Subsequently, the appellant filed yet another Notice of Motion application dated 28th June 2007 before the High Court (Warsame J.) (as he then was) in which it sought orders of review of the judgment and decree of the High Court given on 29th May 2002. This application was dismissed with costs on 31st October 2007. This appeal is against that dismissal. The appellant has proffered six grounds of appeal which in summary are integrally centered on the validity of the judgment of 29th May 2002.

At the hearing of this appeal, the parties agreed to file written submissions and lists of authorities and also informed the court that they did not wish to highlight the submissions. The appellant in its written submissions dated 18th August 2015 contends that the trial court failed to meet the threshold set by the law in the pronouncement and delivery of the impugned judgment. Learned counsel for the appellant, Shapley Barret & Co. Advocates further contends that the said delivery of the judgment is required by law to have been recorded in the proceedings. He argued that there were two judgments, one dated 17th April, 2002 and the other dated 29th May, 2002, both signed by the same judge. Further, that the certified copies of the proceedings do not contain an entry of any court proceedings that took place in the case on 17th April 2002. It was also argued that the certified proceedings did not contain an entry of any proceedings that took place in the case on 29th May 2002. Counsel contended that the certified proceedings are final and conclusive evidence of all the proceedings that take place in a case.

Consequently, it was his submission that there was no judgment pronounced either on, 17th April 2002, or on 29th May 2002. He argued that this is confirmed by the certified proceedings on record.

Counsel submitted that after submissions were concluded on 30th January, 2002 and the date of judgment reserved, the next proceedings took place on 20th September 2002, when counsel for the 1st respondent appeared before the Registry and fixed a date for taxation of a Bill of Costs. He urged that since the record of appeal is unchallenged, the record as is, is the true record of the proceedings. He submitted that despite the glaring error on the face of the record, the learned Judge erred when he failed to make a finding to that effect. In conclusion, he urged this Court to allow the appeal on the basis that there was no valid judgment delivered by the High Court.

Shapley Barret & Co. Advocates, learned counsel for the 1st respondent filed submissions on 23rd December, 2015. The thrust of these submissions is that there cannot be an appeal against review orders. Counsel contended that a review order is final and can therefore not be appealed as provided under **Order 45 rule 6** of the Civil Procedure Rules; 2010. He further argued that one cannot pursue both avenues of review and appeal. He contended that the phrasing of Section 80 of the Civil Procedure Act and **Order 45 Rule 1 of the Civil Procedure Rules, 2010**, set out that a party is only allowed to pursue either a review or an appeal but never both. It was learned counsel's submission that the appeal herein challenges the decision of Osiemo J, through the back door, as opposed to the decision of Warsame J, as indicated in the Notice of Appeal.

According to learned counsel, the said judgment has been challenged repeatedly in three applications, all of which have been dismissed. There must be an end to litigation, submitted counsel, and so this appeal ought to be dismissed to put an end to this matter once and all, so that the 1st respondent can be allowed to enjoy the fruits of his judgment.

In reply to these submissions, the appellant reiterated that the law does not stop any party from appealing against review orders and cited **Order XLII of the Civil Procedure Rules** (now repealed) which was applicable then, and which provided as follows:

“Appeal from Orders

1. (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1) of the

Act. Order XLIV, rule 3 (application for review)”

This being a first appeal our primary role as a first appellate court is to re-evaluate, re-assess and re-analyse the evidence on the record and thereafter determine whether or not the conclusions reached by the learned trial Judge are correct. We are also required to give reasons for our determination. See the case of **Kenya Ports Authority v. Kustron (Kenya) Limited (2009) 2EA 212** wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

We have considered the record, the grounds in support of the appeal, submissions by counsel and the law. From the onset, we have to be very clear that what is before us is not an appeal against the judgement of 29th May 2002, but rather an appeal against the Ruling of Warsame J (as he then was) rendered on 31st October, 2007, dismissing an application for the review of that judgement. We must resist the invitation by the appellant to determine whether there is a valid judgment in Court that is capable of being enforced

or not. We have narrowed down the cardinal issues for determination arising from this appeal to two.

First, is whether the appellant has a right to appeal against an order issued by the court following an application for review. In our considered view, the law is quite explicit on the issue.

Review as at the time this matter was heard before the High Court was governed by **Section 80** of the **Civil Procedure Act, Cap 21, Laws of Kenya** and **Order XLIV of the Civil Procedure Rules** (now repealed). **Section 80** of the Act gives a person aggrieved by a decision the opportunity to seek a review when no appeal has been preferred or when the decision cannot be appealed, while **Order XLIV of the Civil Procedure Rules** (now repealed) sets out the rules. **Section 80** of the Act provides as follows:

“80. Any person who considers himself aggrieved –

a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

In this case, the Judgment of Osiemo J was appealable; No appeal had been preferred against it, and the appellant therefore had a right to move the court by way of Review under the relevant provisions of the law. Related to that issue is whether having gotten a Ruling that was not in its favour, the appellant could lodge an appeal against that Ruling. The answer to this is to be found in **Section 75 of the Act** and **Order XLII rule 1(1) of the Civil Procedure Rules**.

Our reading of **Section 75 of the Act** and **Order XLII rule 1(1) of the Rules** confirms that an appeal can lie as of right from an order of review. These provisions of the law are set out below.

Section 75 of the **Act** provides that;

“75 (1) An appeal shall be as of right from the following orders; and shall also be from any other order with leave of court making such order or of the court to which an appeal would be if leave were granted...”

a.

b. any order made under the rules from which an appeal is expressly allowed by rules”.

Order XLII Rule 1(1) (aa) provides the rules referred to in **Section 75** of the **Act**

as follows;

“1. (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75

(1) (h) of the Act -

.....

(aa) Order XLIV, rule 3 (application for review);”

It is clear therefore in our view, that learned counsel for the respondent is wrong on this point, and the appeal by the appellant is properly before this Court.

This brings us to the second issue as to whether the learned Judge erred in not allowing the application for

review. The principles that guide the court when considering applications for review were clearly enunciated by this Court in the case of **National Bank Ltd v. Ndungu**, Civil Appeal Number 211 of 1996, (Kwach, Akiwumi & Pall JJ.A.) where it stated that;

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.

Jurisdiction or power to review an order or decree of the court is largely discretionary. What we need to consider now is whether given the facts and circumstances of the case, the learned Judge failed to exercise his discretion according to the law in declining to review the judgment dated 29th May 2002. That discretion must nonetheless be exercised within the law and other specific parameters pronounced by the courts in various decisions. Discretion cannot be exercised whimsically, or capriciously. The said parameters were clearly set out in the locus classicus case of **Mbogo & Another v. Shah** (1968) E.A. 93 at pg. 95, where the predecessor of this Court held:

“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice....”

The exercise of a Court’s discretion in a review is also fettered by conditions under **Order XLIV of the Civil Procedure Rules** (now repealed) which are ably set out in this Court’s decision in **Muyodi v. Industrial & Commercial Development Corporation & Anor.**, (2006) 1 EA 243) where it was held that:

“For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.

The application dated 28th June 2007 that sought review was centrally premised on the ground that there was an error apparent on the face of the record as the judgment dated 29th May, 2002 was not pronounced or delivered by the court as required by law. A mistake apparent on the face of the record was determined in the case of **Nyamogo and Nyamogo Advocates v. Kogo** [2001]1 E.A. 173 where this Court stated 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.”

From the record before us, it is clear to us that Warsame, J considered thoroughly the material before him before arriving at his decision to dismiss the application. He considered the Rulings of Kasango, J and Azangalala, J who had been moved by the appellant earlier on in the applications we have referred to earlier on in this judgment. Both these Judges had also considered the record before them and addressed themselves to the fact that Osiemo, J had already clarified which judgment was the valid one. They had also observed, like we have done, that the judgment of Osiemo, J was never appealed against. To quote Azangalala, J (as he then was), he stated as follows:-

“On the validity of the judgment, it is my view that the plaintiff is being less than candid. The record reveals that as early as 25th November 2002, at the behest of the plaintiff, Osiemo J confirmed that the judgment was delivered on 29th May 2002. Indeed it was after that confirmation that the plaintiff sought by its application dated 27th November 2002 for extension of time within which to file and serve its notice of appeal against the same judgment. The plaintiff duly lodged the notice on 19th December, 2002 and should have filed its memorandum and record of appeal within 60 days of that date.... So as of now there is no substantive challenge to the judgment and decree given on 29th May 2002.”

According to Warsame J, the issue he was being called upon to determine had already been exhaustively determined by Kasango and Azangalala, JJ. According to the learned Judge –

“on the issue of the validity of the judgment alleged delivered (sic) or pronounced on 29th May, 2002 by Justice Osiemo, it would be preposterous and superfluous for me to make a different or contradictory determination. I think the issues at stake before me were properly and effectively answered in the rulings made by Justice Osiemo, lady Justice Kasango and his Lordship Justice Azangalala.”

We agree with the learned Judge on this observation. It is also instructive to note that the appellant did indeed file a notice of appeal against the judgment by Osiemo J after having been given extension of time to file the notice of Appeal on 19th December, 2002 (as stated by Azangalala, J). Having done so, it is not clear on what legal footing he engaged on reverse gear and went back to the High Court seeking the same orders of review, which Kasango and Azangalala, JJ had already declined to grant. If the judgment was never delivered as prescribed by the Civil Procedure Rules, then his recourse would lie in an appeal, as that is a point of law, and not an error on the face of the record that would justify a review. This Court has severally held that wrong exposition of the law cannot be a ground for review.

We are in total agreement with the three learned Judges in their findings and hold the view that Warsame J (as he then was), did not err in his finding that there was no error apparent on the face of the record as far as the judgment in question was concerned.

We further find that the learned Judge exercised his discretion judiciously, and was properly guided by the law as we have set out above in arriving at his Ruling, now impugned. We find this appeal devoid of merit and dismiss it with costs to the 1st respondent.

Dated and delivered at Nairobi this 4th day of November, 2016.

W. KARANJA

JUDGE OF APPEAL

H. M. OKWENGU

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR