



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL 78 OF 1998

1. TOURING CARS LIMITED

2. CITY MERCHANTS (K) LIMITED..... APPELLANTS

AND

ASHOK KUMAR MANKANJI..... RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Kisumu (Justice Wambilyanga)

dated 3rd day of July, 1997 In H.C.C.C. NO. 23 OF 1997)

JUDGMENT OF THE COURT

This is an appeal against the ruling of Wambilyanga J. given on 3rd July, 1997, whereby, he reviewed his judgment of 30th May, 1997, in High Court Civil Case No. 23 of 1997, in which, after hearing evidence on oath, he dismissed the respondent's suit for a permanent injunction restraining the appellant from disposing of or retaining a motor car registration number KAG 270P which the respondent claimed as belonging to him.

The learned judge in this judgment had already and categorically concluded that:

"In the disclosed circumstances of the case I am constrained to accept the defendant's version to the effect that the plaintiff did not give any consideration for the suit vehicle. He only acquired possession of it under most dubious circumstances. His case therefore proceeded (sic) on a patently false and untenable premise. I am unable to find in his favour. I accordingly dismiss it with costs."

On 4th June, 1997, the respondent applied to the learned judge to review his judgment which was stated in the related Chamber Summons as having been dated "23rd day of May, 1997" and not 30th May, 1997, which made the application defective. This defect was still maintained in the supporting affidavit of 4th June, 1997, sworn to by the respondent's advocate, Mr. Kahi, wherein, after setting out the facts upon which he was relying to support the application, deposed as follows:-

"THAT The Plaintiff will suffer double payments and loss if the order of this Honourable Court made in this matter on the 23rd day of May, 1997 is not reviewed..."

The facts that Mr. Kahi deposed to in summary, are that in a suit filed by the respondent against Check-In-Motors Ltd (High Court Civil Suit No. 147 of 1996), on 21st May, 1996, some ten months before the High Court Civil Suit No. 23 of 1997, was filed, the respondent, had, having failed in High Court Civil Suit No. 147 of 1996, to obtain an injunction against the defendant therein, Check-In-Motors Ltd, from

selling the said motor car, KAG 270P, paid not to Check-In-Motors Ltd but to the Registrar of the High Court, the sum of 900,000/= being what he still owed them on the sale of the car to him. The order dismissing the respondents' application for injunction which was made by the High Court on 4th June, 1996, and which is worth setting out, is as follows:-

"IT IS HEREBY ORDERED:

I do not understand the Plaintiff's case. He should simply pay the Defendant what he owes the Defendant. He cannot retain the Motor Vehicle and at the same time not complete the purchase of the same.

I find the application frivolous and I dismiss it.

By consent letter ref:1081/HCC/147/96 dated 3rd June, 1996 signed by R. K. Somaia Advocate for the Plaintiff and Olago Aluoch Advocate for the Defendant the Temporary stay was granted in terms of application dated 20th May, 1996 pending inter-parte hearing."

Without mentioning that there had been no inter partes hearing of the Chamber Summons up to today, Mr. Kahi continued in his affidavit in support of the application for review, that the respondent paid the 900,000/= by way of a cheque, we think rather mischievously, not to Check-In-Motors Ltd as directed by the High Court, but rather to the High Court Registry on 8th April, 1997, some ten months after the order had been made, and most significantly, only after the respondent had filed his suit against the appellant in High Court Civil Suit No. 23 of 1997, in January, 1997, which is different from High Court Civil Suit No. 147 of 1996. Mr. Kahi then went on in the concluding paragraph of his affidavit which summarized the grounds on which the review application was based, and we are constrained to observe, to blatantly mislead in the following manner:

"THAT in view of the above it is clear that although the Court in subsequent pleadings was asked to look at the pleadings of Kisumu HCCCC (sic) No. 147 of 1996 and more particularly the affidavit of Mr. J.S. Bhamra and the defence it is clear that the court did not do so thus amounting a mistake on the face of the record before it."

An examination of the pleadings filed in High Court Civil Suit No. 23 of 1997 clearly establishes that no such request was made.

This uncandidness by itself renders the application for review most undeserving. Mr. Kahi's false assertion can only be a spurious attempt to divert attention from the more obvious but in the circumstances, unsupportable contention that the application for review could not have been successfully founded on the discovery of new and important evidence which as required by Order 44 r. 1(1) of the Civil Procedure Rules, could not be said to be one which, after the exercise of due diligence, was not within the knowledge of the respondent. In his submissions in the review proceedings, Mr. Kahi did not press his assertion in his affidavit that there had been a mistake on the face of the record. However, in his reply to the submissions made by counsel for the appellant in the review proceedings, Mr. Kahi urged the following:-

"Under Order 44 Rule 1. We have shown a new and important matter. The omission to call this evidence is excusable"

Here he was now clearly relying on the grounds of the discovery of new and important matter or evidence which had not even been pleaded.

The learned judge then in his ruling on the review application failed to consider what had been propounded in Mr. Kahi's supporting affidavit as the basis of the review application namely, that there was a mistake on the face of the record of the trial of the High Court Civil Suit No. 23 of 1997, but rather the issue of new and important evidence which did not form the basis of the application before him. In this regard, he observed that:

"In the light of all these new and important material evidence, I find and hold that there is sufficient cause why I should review my judgment."

And without considering at all, whether the new and important material evidence which, as required by Order 44 r. 1(1), was one which after the exercise of due diligence, was not within the knowledge of the respondent or could not be produced by him at the hearing of the High Court Civil Suit No. 23 of 1997, the learned judge went on to hold apparently, this time, "for any other reason" as follows:

"Now I hold that the evidence of Mr. Mitesh (DW2) which I relied on to arrive at the conclusion in that judgment must have been doctored. It was false evidence. I am satisfied that Order XLIV Rule 1 of the Civil Procedure Rules entitles me to review the judgment so as to avoid injustice and hardship being caused to an innocent party."

It would have been a different matter if the respondent had applied for the review on such grounds. Order 44 r. 1(1) provides three headings under which a review may be applied for namely:

"Any person considering himself aggrieved ... and who from discovery of new and important matter or evidence ... 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 ... may apply for a review ..."

The respondent's application for review before the learned judge was based only on account of some mistake or error on the face of the record and nothing else, and having failed to establish this, the matter should have ended there. It is not for the learned judge to go beyond the ambit of the application as was before him. But this he did by exploring matters which were not within the ambit of that application and even as he did so, and having concluded, that new and important material evidence had been produced, he did not go on as he should have, to have considered whether this evidence could not have been discovered by the respondent after the exercise of due diligence. What is also further disturbing is that after the hearing of the review application which was based on affidavits, the learned judge held that this type of evidence rendered the oral evidence on oath of Mr. Mitesh which was given during the hearing of High Court Civil Suit No. 23 of 1997, false.

However, since the learned judge found that there were new and important material evidence, that is if his exploration can be condoned, he had under this special and distinct heading to consider only whether the evidence could have been discovered after the exercise of due diligence or not, and not to convert as he did, the consideration of this issue which in the first place, had not been pleaded, into one under the heading of "for any other reason" which had also not been pleaded.

It does not therefore come as a surprise that the appellant appealed against the ruling of the learned judge. Among the grounds of appeal are the following relevant ones:

"1. THAT the learned judge misdirected himself and erred in preferring affidavit evidence to the direct evidence of the appellant's witnesses.

2. THAT on a proper reading of his ruling it is apparent that the learned Judge erred in that he did not apply the principles to be applied on an application for review."

The feeble response by Mr. Odunga, counsel for the respondent, was in summary that the learned judge was right in holding that there was new and important evidence which made his previous judgment untenable. This of course, the learned judge can do firstly, if the review is sought which was not the case, on the grounds that there was new and important material evidence and secondly, and this in the given circumstances of the matter before him, cannot by the widest stretch of the imagination be true, that the respondent could not with due diligence, have discovered this new and important material evidence during the hearing of High Court Civil Suit No. 23 of 1997 which the respondent himself, had subsequently filed after instituting High Court Civil Suit No. 147 of 1996.

For all the reasons set out above the appeal must succeed and the ruling of the learned judge given on 3rd

July, 1997, is hereby set aside and the respondent's application for review dated 4th June, 1997 is hereby dismissed. The judgment of the learned judge delivered on 30th May, 1997 is hereby restored. The appellant will have the costs of this appeal. It is so ordered.

Rather surprisingly, the respondent filed a cross appeal in which he sought the variation and the reversal of the ruling of the learned judge on the following grounds; that the learned judge failed to assess and award the respondent any damages for trespass, that he failed to award the respondent costs, and that he erred in finding that the appellant was entitled to 900,000/= when that had not been claimed.

Mr. Odunga abandoned the first ground of the cross appeal. He argued that on the second ground, the respondent was, upon the successful review, entitled to costs; and on the third ground, that the appellant had not counter claimed for the 900,000/= that was awarded to it. In the particular circumstances of the review application, we do not see anything wrong with the learned judge's order that the parties should each bear their own costs. Anyway, the appeal having succeeded for the reasons that we have already set out, we would, if the respondent had been awarded costs on the successful review, have reversed that order. As regards the award of 900,000/= to the appellant, this was not claimed by the appellant and should not have been awarded (See Abdul Rehman v R. H. Gudka [1957] E. A. 4). This was done presumably because the learned judge felt that if the respondent was to get possession of the car, the alleged outstanding purchase price of 900,000/= should be paid to the appellant even though its case was not based on the sale of the car to the respondent, but on the unlawful possession of stolen property. The cross appeal succeeds on this issue. However, having regard to the fact that we have set aside the ruling and that it was the respondent's counsel who had introduced this issue of the payment of the alleged outstanding purchase price by the respondent in his review application submissions, there will be no costs for the respondent.

It is so ordered.

Dated and delivered at Nairobi this 11th day of February, 2000.

A. M. AKIWUMI

JUDGE OF APPEAL

P. K. TUNOI

JUDGE OF APPEAL

E. O'KUBASU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.