



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 208 OF 2006**

**(CORAM: VISRAM, NAMBUYE & MARAGA J.J.A)**

**BETWEEN**

**JOHN PETER KAMAU RUHANGI.....APPELLANT**

**AND**

**KENYA REINSURANCE CORPORATION.....RESPONDENT**

***(An Appeal from the ruling of the High Court of Kenya at Nairobi (Aluoch J) dated 11<sup>th</sup> December 2003***

***in***

***H.C.C.C. NO. 6813 OF 1991***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. This is an appeal against the judgment of Aluoch J (as she then was) delivered on 11<sup>th</sup> December 2003 in Nairobi HCCC No. 6813 of 1991. The brief facts of the case were that the Respondent was the financier of the purchase by the Appellant and at the same time the insurer of the residential house in Plainsview Estate in South B Nairobi known as **Title No. Nairobi/Block 93/865** (the house). On or about 23<sup>rd</sup> December 1998, the house was completely destroyed by a fire started by the Appellant's girlfriend whom he had jilted. Relying on a clause in the insurance policy, the Respondent refused to compensate the Appellant for the loss of the house whereupon the Appellant filed Nairobi HCCC No. 6813 of 1991 and claimed compensation. The Respondent counter-claimed for the balance of the mortgage sum. Aganyanya J (as he then was) heard the case and delivered his judgment on 11<sup>th</sup> December 2000. Being dissatisfied with part of that judgment, both parties evinced their intentions to appeal against it by filing notices of appeal. John Peter Kamau Ruhangi, the plaintiff in that case filed his on 21<sup>st</sup> December 2000 and the Kenya Reinsurance Corporation, the defendant filed its notice on 22<sup>nd</sup> December 2000. On 11<sup>th</sup> January 2001 the defendant withdrew its notice and on the same day it filed an application for review on the ground that the learned judge inadvertently failed to determine the counterclaim.

Somehow Justice Aganyanya was not able to hear that review application. Aluoch J (as she then was) heard it and delivered her ruling on 11<sup>th</sup> December 2003, granted it and entered judgment for the defendant as prayed in the counterclaim. Aggrieved by that ruling, the plaintiff appealed to this court. This judgment is on that appeal.

2. Pursuant to this court's order of 6<sup>th</sup> July 2010, the parties filed written submissions on the appeal and highlighted them on 29<sup>th</sup> February 2012. In his submissions, Mr. Machira for the Appellant arguing all the 14 grounds of appeal together contended that it is trite law that a relief not granted is deemed to have been denied or dismissed. He contended that Justice Aluoch therefore erred in finding that there was an error on the face of the record of Justice Aganyanya's judgment and entering judgment for the Respondent as prayed in the counterclaim.
3. Relying on several authorities, Mr. Machira argued that an error on the face of the record must be glaring. It should not be one that has to be fished out after intensive examination of the record. In this case Justice Aluoch had to review the evidence before coming to the conclusion that there was an error in Justice Aganyanya's judgment. The judgment Justice Aluoch entered for the Respondent in the colossal sum of Kshs.2,107,171.84 which as of 15<sup>th</sup> April 2010 had risen to KShs.9,564,801.75 was so monumental and so drastic that it amounted to a substitution of Justice Aganyanya's judgment. It amounted to a complete overhaul of the decree of Justice Aganyanya. It was unfair, unjust, biased and oppressive and it went beyond the scope and jurisdiction of review under **Order 44 Rule 1** of the **Civil Procedure Rules**.
4. Counsel cited several authorities on what amounts to an error on the face of the record and the premise of the review jurisdiction by arguing that in **Nyamogo & Nyamogo Advocates vs Kogo [2001] 1 EA 173** in which it was held that an error on the face of the record is not one which is to be established by a long drawn process of reasoning or on points where there could possibly be two opinions; an erroneous view of evidence or law is not an error on the face of the record; a point which may be a good ground of appeal is not a ground for review; in **National Bank of Kenya Ltd. Vs Ndungu Njau, civil Appeal No. 211 of 1996 (unreported)** it was held that an error or omission must be self evident and should not require an elaborate argument to be established; that a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground for review; in the Nigerian case of **Peter Cheshe & Another Vs Nikon Hotels Ltd. & Another, Appeal No. CA/A/83/M/98** the Nigerian Court of Appeal held that an error on the face of the record is one that can be corrected under the slip rule whose jurisdiction is limited to correcting errors, mistakes or omissions in the ruling or judgment and does not permit granting orders not made or extending the scope of the ruling; in **Touring Cars (K) Ltd Vs Mukanji [2002] 1 EA 261** where the application for review was premised on error on the face of the record, the Court of Appeal overturned the trial judge's decision which reviewed the decree on the unpleaded ground of discovery of new and important matter and that affidavit evidence in the review rendered false the evidence that had been tendered on oath at the trial; and lastly that in **Bank Fur Arbeit Und Wirtschaft A.G. Vs Attorney General, Civil Appeal No. 157 of 1995** the Court of Appeal held that a relief sought but not granted is deemed to have been refused.
5. In this case, counsel further submitted that, as is clear from the arguments made for both sides, during the hearing of the review application, counsel for the Respondent took the court through the evidence tendered before Justice Aganyanya and referred to the exhibits produced. He termed that a mini trial. In granting the counter-claim, Lady Justice Aluoch completely ignored the Appellant's amended reply to the amended defence and counterclaim in which the Appellant had vehemently denied owing any money to the Respondent.
6. Counsel further faulted Justice Aluoch for finding that the application for review had been filed within a reasonable time and yet there had been a delay of about four months. He concluded that Justice Aluoch's ruling went beyond the scope of the review jurisdiction and urged us to allow this appeal with costs and order that the Kshs.1,500,000/= the Appellant had deposited in the joint names of the advocates for the parties should be refunded to him.

7. On their part counsel for the Respondent dismissed the submissions on behalf of the Appellant that Justice Aluoch went beyond the scope of the review jurisdiction and came up with a different judgment which, in effect, amounted to sitting on appeal against Justice Aganyanya's judgment. They submitted that as attempts to have Justice Aganyanya hear the review application were unsuccessful Justice Aluoch had jurisdiction under **Order 44 Rule 4** to hear it. Moreover the parties had consented to the application being heard by any other judge.
8. Relying on the **Nyamogo case** (supra) counsel submitted that the Respondent filed an amended defence and counterclaim and one of the agreed issues was whether the Respondent was entitled to the amount claimed in prayer (2) of the counter-claim. The Appellant admitted in his evidence that he stopped paying the mortgage sum. The Respondents witnesses DW1 and DW2 testified on the amount claimed in the counter-claim. In his judgment Justice Aganyanya outlined the counter-claim and the evidence adduced on it. He thereafter dismissed the Appellants claim but made no mention of the counter-claim.
9. Counsel argued that that was a glaring error on the face of the record which Justice Aluoch was justified to correct as she did. She did not hear any further evidence but relied on what was on the record and entered judgment for the Respondent. He said the Nigerian case is distinguishable as **Order 5 Rule 3** of the **Nigerian Court of Appeal Rules** that was considered in that case is not in *parri materia* with our **Order 44 Rules 1 and 2**. Counsel also distinguished the **Touring Cars (K) Ltd. Case** (Supra). Unlike the instant case, there was no counterclaim in that case and the judge considered the ground of new and important matter which was not one of the grounds for review in this case.
10. Counsel for the Respondent further submitted that the reference to the evidence on the counterclaim was to demonstrate that the Respondent had proved its counter-claim but Justice Aganyanya inadvertently omitted to make a determination on it. That is not a mini trial as counsel for the Appellant claimed. Justice Aganyanya having not even commented on the counterclaim, counsel said it is wrong to accuse Justice Aluoch of having come to a different conclusion. And there being no decision on the counterclaim, the claim that Justice Aluoch sat on appeal on her colleague's judgment is also fallacious and unfair.
11. On the withdrawal of the notice of appeal by the Respondent, counsel said **Order 44 Rule 1** gives parties the option of either appealing or seeking a review. There is therefore nothing wrong in the Respondent withdrawing the notice of appeal and seeking a review.
12. Counsel for the Respondent further submitted that, in the **Bank Fur Case**, this court did not lay down any firm principle that a relief claimed but not granted is deemed to have been refused. He concluded that Justice Aluoch acted within the purview of the review jurisdiction and urged us to dismiss this appeal with costs.
13. We have considered these rival submissions and carefully read the record of appeal. As pointed out, this case was heard by Justice Aganyanya who omitted to determine the counter-claim. The Respondent which was the defendant in that case applied for review terming the omission an apparent error on the face of the record. There is no dispute that Justice Aganyanya did not determine the Respondent's counterclaim. It is also not in dispute that Justice Aluoch had jurisdiction to hear the Respondent's review application, Justice Aganyanya having declined to hear it. What is in issue in this case is whether or not, in hearing the application, Justice Aluoch, a Judge of coordinate jurisdiction with Justice Aganyanya, went beyond the purview of the review jurisdiction and in effect sat on appeal on Justice Aganyanya's decision.
14. To determine that issue it is important to bear in mind that **Order 44 Rule 1** of the **Civil Procedure Rules** sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other

provision of law is no ground for review. All these are grounds of appeal.

15. In this case we are mainly concerned with review on the ground of error apparent on the face of the record. As Mr. Machira correctly submitted, an error apparent on the face of the record is not one which is to be established by a long drawn process of reasoning or on points where there could possibly be two opinions. This Court made that quite clear in the case of **Nyamogo & Nyamogo Advocates vs Kogo [2001] 1 EA 173**. An error apparent on the face of the record includes an omission which must also be glaring and self evident. It is not one that requires an elaborate argument or serious scrutiny of the record to be established-- **National Bank of Kenya Ltd. Vs Ndungu Njau, civil Appeal No. 211 of 1996 (unreported)**. As was stated by the Nigerian Court of Appeal in the case of **Peter Cheshe & Another Vs Nikon Hotels Ltd. & Another, Appeal No. CA/A/83/M/98** that an error on the face of the record is one that can be corrected under the slip rule whose jurisdiction is limited to correcting errors, mistakes or omissions in the ruling or judgment and does not permit granting orders not made or extending the scope of the ruling.
16. In this case it is clear to us that there is an error apparent on the face of the record which is that Justice Aganyanya omitted to determine the Respondent's counter claim. Mr. Machira relied on this Court ruling in the case of **Bank Fur Arbeit Und Wirtschaft A.G. Vs Attorney General, Civil Appeal No. 157 of 1995** that a relief sought but not granted is deemed to have been refused. We do not share that view. We agree with Mr. Ligunya for the Respondent that in that case this Court did not lay down any firm principle that a relief claimed but not granted is deemed to have been refused. That issue was not live in that case. The Court was dealing with an application for leave to file a record of appeal out of time and in passing merely referred to counsel's remark that a relief sought but not granted is deemed to have been refused. In the circumstances, we hold that Justice Aluoch had jurisdiction to deal with her colleague's omission to determine the Respondent's counter-claim.
17. The remaining issue is whether, as Mr. Machira argued, in granting the Respondent's counter-claim, Justice Aluoch went overboard, held a mini trial or, in effect, sat on appeal on her colleague's decision. With respect we find no merit in that argument. Justice Aluoch did not overturn any of Justice Aganyanya's findings. The issue of sitting on appeal on her colleague's decision does not therefore arise. She never held a mini trial either. She did not hear any further evidence in the matter. She simply relied on what was on the record and entered judgment for the Respondent. The respondent had called evidence in support of its counterclaim. That evidence was not controverted. Justice Aluoch was therefore justified in entering judgment for the Respondent.
18. Mr. Machira's argument that the judgment for a colossal sum of Kshs.2,107,171.84, which as of 15<sup>th</sup> April, 2010 had risen to Kshs.9,564,801.75 was so monumental and so drastic that it amounted to a substitution of Justice Aganyanya's judgment has no basis. The Respondent claimed that sum in the counter-claim. If Justice Aganyanya had considered that claim, as he was under duty to do, in view of the evidence on record, he would have had no choice but to grant it. If he did not, an appeal from such decision would have been granted. Mr. Machira's last argument was that Justice Aluoch ignored the Appellant's defence to the counter-claim in which he vehemently denied owing any money to the Respondent. Mere denial is not enough. The Appellant did not call any evidence to prove that he had fully repaid the mortgage sum. As stated above he did not controvert the Respondent's evidence in support of the counter-claim. The upshot of all this is that we find no merit in this appeal and we accordingly dismiss it with costs. Orders accordingly.

**DATED and delivered at Nairobi this 20<sup>th</sup> day of April 2012.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**I certify that this is a true**

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**DEPUTY REGISTRAR**