



**Kagia v Ngaruiya (Civil Appeal E054 of 2024)
[2024] KEHC 13656 (KLR) (Civ) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E054 OF 2024

RC RUTTO, J

OCTOBER 31, 2024

BETWEEN

HENRY CHEGE KAGIA APPELLANT

AND

JAMES KAHIGA NGARUIYA RESPONDENT

(Being an appeal from the judgment delivered by Hon. Rawlings Liluma (SRM) on 19th December 2023 in Chief Magistrates Court at Nairobi CMCC No. E6088 of 2020)

JUDGMENT

1. The suit before the lower court was that by a Plaint dated 16/9/2020 the Appellant was sued by the Respondent seeking the sum of Kshs 325,634/= as compensation following an accident that had occurred on 24th September 2017 involving Motor Vehicle Registration No. KCE 887Y (hereinafter referred to as the Respondent's Motor Vehicle) and Motor Vehicle Registration Number KAN 935A (hereinafter referred to as "the appellant's Motor Vehicle") along Uhuru Highway.
2. In its defence dated 6th May 2021, the Appellant denied the Respondent's allegations. He further claimed that he was surprised to learn that he was the registered owner of the motor vehicle involved in the alleged accident. That unknown individuals used his personal details to register the said motor vehicle, Registration Number KAN 935A, without his consent, knowledge, or authority.
3. During the hearing, the Respondent testified and called a witness while the Appellant did not present any evidence. After the consideration of the case, the trial court entered judgment against the Appellant for the total sum of Kshs 325,634, being Repair costs, Replacement car hire costs and investigation fees, along with costs and interest accruing from the date of filing the suit.



The Appeal

4. Aggrieved by the decision of the trial court, the Appellant lodged the appeal dated 15th January 2024 seeking that the trial court judgment delivered on 19th December 2023 together with all subsequent orders be set aside and the matter to start de novo. The Appellant also sought to submit a report from NTSA and to be allowed to call in the OCS Central Police Station to produce result from the police investigations as to the ownership of Motor Vehicle Registration No. KAN 935A.
5. The Appeal is premised on the following six (6) grounds as follows, that:
 - a. The Learned Trial Magistrate erred in fact and law by denying the Appellant the right to a fair hearing by denying the Appellant's application for adjournment to allow police investigation as to the actual ownership of the Motor Vehicle Registration No. KAN 935A.
 - b. The Learned trial Magistrate erred in law and in fact by denying the Appellant his right to a fair hearing by failing to acknowledge that counsel on record at the time of hearing ceased acting for the Appellant thereby causing him to be unrepresented.
 - c. The Learned trial Magistrate erred in fact and in law by proceeding with the main hearing of the suit while knowing that the Appellant's counsel on record ceased acting for him and the new counsel with instructions was not properly on record and therefore unable to proceed with the hearing.
 - d. The Learned Trial Magistrate erred in law and in fact by stating that at the time of the hearing the Appellant was represented yet the Learned Magistrate denied audience to the counsel as she was not properly on record.
 - e. The Learned Trial Magistrate erred in fact and law by closing the Defendant's case without allowing him to seek proper representation and further allowing him to defend his case.
 - f. The Learned Magistrate erred in law and in fact by finding the Appellant's application dated 21st February 2022 seeking to set aside proceedings and to be allowed to adduce evidence from the police investigation was not merited.
6. The Appeal was canvassed by way of written submissions. The Appellant's submissions are undated while the Respondent's submissions are dated 6/6/2024.

Appellant's submissions

7. The Appellant begins by outlining the background of the case, stating that the matter was scheduled for hearing on 8th February 2022. That on that date, the Appellant sought an adjournment, citing that the alleged Appellant's motor vehicle was under investigation by the DCI. The court, after considering the reasons for the adjournment, found them unmerited and proceeded with the hearing. Further, that when the Appellant's counsel informed the court of his intention to withdraw from the case due to lack of further instructions, the court nonetheless continued with the hearing as scheduled. That at the time of the hearing, another counsel was on record but was not granted an audience. The Appellant asserts that both parties' cases were closed without granting him the right to legal representation. He further submitted that he filed an application seeking, among other things, to have the proceedings of that hearing set aside, but the application was dismissed.
8. The Appellant submits on four grounds for determination as follows:
 - a. Whether the Appellant was entitled to an adjournment.



- b. Whether the Appellant was granted a fair trial and right to counsel.
 - c. Whether the Appellant should be allowed to tender in additional evidence.
 - d. Whether the appeal is merited.
9. On the first issue on whether the Appellant was entitled to an adjournment, the Appellant relies on the case of *Mary Syevutha Peter (also known as Mary Peter) v Senior Resident Magistrate, Kwale & 4 others* [2017] eKLR, where the court referred to *Faraj Mahaura v JB Martin Glass Industries & 3 others* [2005] eKLR and held that where there is an injustice, the appellate court should allow the appeal. Additionally, the Appellant cites *Okaka & Another (Civil Appeal E003 of 2022)* [2022] KEHC (KLR) (30 June 2022) (Judgment), in arguing that the trial court had the discretion to grant an adjournment in circumstances beyond the Appellant's control. He contends that although he was willing to proceed with the hearing, his counsel had abruptly withdrawn their representation.
 10. On the second issue, the Appellant relies on Article 50(1) of the *Constitution*, which guarantees the right to legal representation. He submits that he was taken by surprise when his legal counsel withdrew his representation from the suit, leaving him disadvantaged. He asserts that this occurred through no fault of his own and under circumstances beyond his control. Also, that he was not given an opportunity to seek alternative representation or present and defend his case by submitting witness statements and producing documents to support his position, thus infringing on his rights.
 11. On the third issue, whether he should be allowed to introduce additional evidence, the Appellant submits that the counsel on record at the time of the hearing sought an adjournment to allow the police investigate into the true ownership of the motor vehicle in question. That he has since received written confirmation via a letter dated 9th May 2022, confirming that his Personal Identification Number (PIN) was erroneously recorded in the system instead of that of the actual owner, who has a similar name. With this new evidence, the Appellant seeks to be allowed to present it. He relies on the case of *Hangover Kaakwacha Hotel Ltd v Phillip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR.
 12. On the fourth issue, whether the present appeal is merited, the Appellant relied on Order 12 Rule 7 of the Civil Procedure Rules, which grants the court discretion to set aside *ex parte* proceedings on terms that may be just. The Appellant further cites the cases of *Florence Nyaguthii Muchemim v Attorney General & Another* [2018] eKLR, *DWNM v SMM* [2019] eKLR, *Wachira Karani v Bildad Wachira* [2016] eKLR, and *Mureithi Charles & Another v Jacob Afina Nyagesuka* [2022] eKLR. He submits that the circumstances arising on 8th February 2022 are sufficient to warrant the court's discretion in allowing the appeal with costs.

Respondent's submissions

13. The Respondent also briefly introduced the facts of the case and subsequently addressed two issues namely: the competence of the appeal before the court, and whether it is merited.
14. The Respondent submitted that, the memorandum of appeal dated 15th January 2024, indicate that what is being appealed against is the judgment delivered by the trial court on 19th December 2023 however, the essence of the judgment delivered on 19th December 2023 has not been challenged. Instead, what is being contested are the decisions made on 8th February 2022 and 15th September 2023.
15. Regarding whether there is a competent appeal before this court, the Respondent argued that Section 79G of the *Civil Procedure Act* mandates that an appeal must be filed within 30 days from the date of



the decree or order being appealed against. Given that the decisions under challenge were made on 8th February 2022 and 15th September 2023, and none of the grounds of appeal contest the judgment delivered on 19th December 2023, the Appellant cannot purport to appeal the judgment while, in fact, challenging separate and earlier decisions of the court.

16. It is the Respondent's submission that, if the Appellant intended to appeal the decision of 15th September 2023, he had until 15th October 2023 to do so. Thus, the Appellant failed to lodge the appeal within the required time. The Respondent relies on the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR to argue that the appeal was filed hopelessly out of time and should therefore be dismissed.
17. Regarding whether the appeal is devoid of merit, the Respondent submits that even if the court were to overlook the incompetence of the appeal, there remains no meritorious case before it. He argued that in relation to grounds 1 to 5 concerning the refusal of adjournments, the Appellant's counsel confirmed during the pre-trial mention on 17th June 2021 that the Appellant had complied with all necessary requirements, and the matter was certified ready for hearing. Had there been any ongoing investigations, counsel for the Appellant ought to have raised them at that time hence the reason that there was no valid reason for seeking an adjournment.
18. He also submitted that, the trial magistrate was aware of previous attempts to delay the hearing on similar grounds, which had been rejected. Thus, the tactics employed by the Appellant on 8th February 2022 were perceived as attempts to secure an unmerited adjournment. The Respondent also notes that the Appellant was consistently aware of the hearing dates and had the option to apply for a stay of proceedings and re-opening of pre-trials, which he failed to do. Therefore, the Respondent submits that the trial magistrate cannot be faulted for declining to grant the adjournment, as she saw through the deception presented by the Appellant counsel.
19. Regarding ground 6 of the Appeal, on the dismissal of the application dated 21st February 2023, the Respondent submitted that the issues raised in the application had already been decided, and thus the appropriate course for the Appellant would have been to appeal those decisions at the relevant time.
20. The Respondent contends that the learned magistrate's conclusions are sound and that the appeal lacks merit. He therefore requests that the appeal be dismissed with costs.

Analysis and Determination

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
22. After careful analysis of the record of appeal and the submissions of both parties, this court notes two issues for determination as follows;
 - a. Whether the appeal is competent and has merit?
 - b. Whether the Appellant right to fair hearing was curtailed?
23. On the first issue of whether the appeal is competent, I note that the Appellant filed a Memorandum of Appeal dated 15th January 2024, purportedly against the judgment of the trial court delivered on 19th December 2023. In that judgment, the trial court entered judgment against the Appellant for the total sum of Kshs 325,634, being costs of repair of motor vehicle KCE 887Y, costs for replacement car hire and investigation fees, along with costs and interest accruing from the date of filing the suit.



Interestingly, none of the grounds of appeal addresses itself to the award of judgment. This thus, raise the fundamental question what is the subject matter of this appeal?

24. Upon reviewing the grounds of appeal as spelt out in the earlier paragraphs of this judgment, and the Appellant's submissions, it is evident that the appeal primarily challenges the court's proceedings and directions issued on 8th February 2022. Additionally, the grounds pertain to the application dated 21st February 2022, which sought to set aside the proceedings of the hearing of 8th February 2022. That application was heard and dismissed by the court in a ruling dated 15th September 2023.
25. A further review of the record shows that on 15th September 2023, following the delivery of the ruling, the Appellant informed the court of his intention to appeal. However, on the subsequent mention date, the Appellant abandoned the appeal and instead opted for the determination of the suit. Since that time, the Appellant did not appeal against either the court's directions of 8th February 2022 or the ruling delivered on 15th September 2023.
26. Section 79G of the *Civil Procedure Act*, provides that an appeal from a subordinate court to the High Court must be filed within 30 days from the date of the decree or order being appealed against. However, the court may admit an appeal filed out of time if the appellant provides a satisfactory explanation for the delay.
27. In this instance this court notes that the Appellant appeal is disguised as an appeal against the judgment delivered on 19th December 2023 and yet in reality it is one seeking to challenge the trial court's directions of 8th February 2022 and the ruling delivered on 15th September 2023. The court will not fall for this trap. Had the Appellant intended to Appeal these directions and ruling, he ought to have done so within 30 days of them being rendered. In the alternative, he should have sought leave of court to extend time to file the appeal out of time.
28. Based on the foregoing, it is evident that the appeal was not filed within the 30-days period prescribed by statute. In the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR it was clearly held that: -

“The Applicant however contended that it has a constitutional right to appeal. However, in *Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co.* [1957] EA 438, it was held that: “In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”
29. In this case, this court finds that the Appellant chose to abuse the court process and waste of judicial time by filing an appeal against the court's interim directions, while disguised as an appeal against the judgment delivered on 19th December 2023. This can also be perceived as a devise and strategy to delay the Respondent's enjoyment of the fruits of justice, such conduct cannot be condoned.
30. Consequently, this court finds the appeal incompetent and lacks merit, and it must therefore fail. Having found that the appeal is incompetent and lacks merit, the question of whether the appellant right to fair hearing was curtailed becomes irrelevant for determination.
31. In light of the above, I find no merit in the appeal and hereby dismiss it, with costs awarded to the Respondent.



Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER, 2024.

For Appellant:

For Respondent:

Court Assistant:

