



**Mwangi & another (Suing as legal representatives of the Estate of Grace Wanjiku Mbuthia) v CIC General Insurance Co Limited & another (Civil Appeal E143 of 2021) [2023] KEHC 18014 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 18014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E143 OF 2021  
LW GITARI, J  
MARCH 30, 2023**

**BETWEEN**

**MARTIN MBUTHIA MWANGI ..... 1<sup>ST</sup> APPELLANT  
ANDREW WARUINGI MBUTHIA ..... 2<sup>ND</sup> APPELLANT  
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF GRACE  
WANJIKU MBUTHIA**

**AND**

**CIC GENERAL INSURANCE CO. LIMITED ..... 1<sup>ST</sup> RESPONDENT  
FIRST ASSURANCE CO LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The issue pending before me was raised by Mr. Karanja, the counsel appearing for the appellant on 27<sup>th</sup> March 2023. His contention is that they filed a memorandum of appeal dated 19<sup>th</sup> October, 2021 which is on an appeal against the ruling on an application dated 6<sup>th</sup> July, 2021 which was delivered by the learned trial magistrate on 9<sup>th</sup> September, 2021. He submitted that the counsel for the 2<sup>nd</sup> respondent filed a record of appeal. According to the learned counsel, the appeal was filed by the appellant and therefore the record of appeal filed by the 2<sup>nd</sup> respondent is not properly on record. He has urged the court to strike out the said record of appeal with costs.
2. On behalf of the 2<sup>nd</sup> respondent, learned Counsel Mr. Ngugi submits that when they appeared before the judge, it was found that the record of appeal was incomplete as there was an application to amend the plaint and a ruling was delivered. That the ruling was appealed against and the ruling was important in the determination of this appeal. That the judge gave them leave to file a record of appeal and that it is therefore properly on record. The counsel for the second respondent submits that the appellant will not suffer any prejudice as it contains the lower court record which is important in the determination



of the appeal. He further contends that there were other proceedings after the ruling was delivered which should be brought to the attention of this court as they are important in the determination of the appeal.

3. In response the appellant submits that their appeal is against the ruling which they have specified. He submits that the respondent cannot argue and at the same time defend the appeal.
4. I have considered the objection raised. The issue for determination is whether the record of appeal filed by the 2<sup>nd</sup> respondent is properly before this court.
5. I have considered the record. The parties appeared before Justice Muriithi on 12<sup>th</sup> December, 2022 when the judge directed that submissions be filed, supplementary record of appeal be filed within 30 days and directions to be given on 6<sup>th</sup> March 2023. When the matter came up on 6<sup>th</sup> March 2023, the judge directed that directions be given on 4<sup>th</sup> May 2023. However it appears that further directions were given by the judge “suo moto” on 14<sup>th</sup> March 2023.
6. The appellant has filed a record of appeal dated 22<sup>nd</sup> October, 2022. What the 2<sup>nd</sup> respondent has filed is a record of appeal dated 14<sup>th</sup> February, 2023 and not a supplementary record of appeal. In my view it is the appellant who could file a supplementary record as they had filed a record of appeal.
7. Order 42 of the *Civil Procedure Rules* deals with appeals. Order 42 Rule 13 (4) *Civil Procedure Rules* provides for the documents which the court should satisfy itself that they are on record. The Rule provides:-

“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say -

- (a) the memorandum of appeal;
  - (b) the pleadings;
  - (c) the notes of the trial magistrate made at the hearing;
  - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal: Provided that—
    - (i) a translation into English shall be provided of any document not in that language;
    - (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)”
8. It is the appellant who has a duty to comply with this section. It is the duty of the appellant to ensure that all the documents necessary to assist the court to determine the appeal are laid before it. Jurisdiction of the court to issue orders stems from the statutes. I have not come across any provisions that allows a respondent in an appeal to file a record of the appeal. The record of appeal filed by the 2<sup>nd</sup>



respondent was not sanctioned by the court. The order to file supplementary record of necessity and as provided under Order 42 of the *Civil Procedure Rules* must have been addressed to the appellant. The appellant has filed a record of appeal. I find that the record of appeal is not properly on record and no order could have been directed to the 2<sup>nd</sup> respondent to file a record of appeal as it is procedurally wrong for a respondent to file a record of appeal in an appeal filed against him.

9. In the circumstances, I find that the objection has merits. I order that the record of appeal filed by the 2<sup>nd</sup> respondent be struck out for it is not properly on record. Costs to the appellants.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF MARCH 2023.**

In the presence of

Mr. Ngugi for the respondent

Mr. Karanja for the appellant.

**L. GITARI**

**JUDGE**

