



Njeru v Kaburu (Suing as the legal representative of the Estate of the Late Alfred Murithi Rufus - Deceased) (Civil Appeal E001 of 2020) [2022] KEHC 12587 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E001 OF 2020**

**LW GITARI, J
JULY 27, 2022**

BETWEEN

ANITA KAARI NJERU APPELLANT

AND

STELLA KABURU RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
ALFRED MURITHI RUFUS - DECEASED**

(Originating from Chuka CMCC No. 87 of 2019 made on 23rd September 2020)

JUDGMENT

1. This is an appeal against the decision of the trial court in Chuka CMCC No 87 of 2019 made on September 23, 2020.
2. The claim therein was for general damages for pain and suffering, special damages as well as costs and interests of the suit in respect of a road traffic accident that occurred on January 25, 2019.
3. The appeal is premised on the following grounds:
 - i. That the learned trial Magistrate erred in law in failing to properly apply the applicable law when determining the appellant's application.
 - ii. That the learned trial Magistrate erred in law in failing to adhere to principle of judicial precedent or *stare decisis*.
 - iii. That the learned trial Magistrate erred in law in failing to properly consider the appellant's submissions.
4. The appeal was canvassed by way of written submissions.



appellant's Submissions

5. The appellant filed his written submissions on March 14, 2022. It was his submission that her failure to enter appearance in Chuka CMCC No 87 of 2019 should be attributed to her insurer and not her. She relied on the cases of *G N Wabome vs HKM (a minor suing through her next friend and mother MMN) & another* [2021] eKLR and *Jimnah Mwangi Irungu vs Emily Wambui Wairimu* [2021] eKLR and prayed for this appeal to be allowed.

The respondent's Submissions

6. On her part, the respondent filed her written submissions on May 6, 2022. It was her submission that the record of appeal is incomplete for lacking the requisite documents filed in the lower court and for being unnumbered. It is the respondent's submission that the record of appeal lacks the following documents:
- i. Affidavit of service
 - ii. Request for judgment
 - iii. Notice of entry of judgment
 - iv. Judgment
 - v. Decree
 - vi. Bank guarantee
 - vii. Authorities annexed with submissions
 - viii. List of documents filed together with the plaint.
7. The respondent thus contends that the omission of the above documents from the record of appeal was deliberate and done with the sole intent of prejudicing the respondent. It is her submission that there is therefore no competent appeal for consideration by this court.

Issues For Determination

8. From the pleadings on record, the main issue for determination by this court is whether there is a competent appeal for consideration by this court and if so, whether the appeal is merited.

Analysis

9. As a first appellate court, this court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses firsthand. This duty was stated in the case of *Selle & another vs Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact



if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif vs Ali Mohamed Sholan* (1955), 22 EACA 270).”

10. This court is therefore under the duty to reconsider and re-evaluate the evidence on record and draw its own conclusions. In doing so, it is not open for this court, as the first appellate court, to review the findings of the trial court simply because it would have reached different results if it were hearing the matter for the first time. [See: *Peters vs Sunday Post Limited* [1958] EA 424; *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2004] eKLR]
11. From the record of the lower court, Interlocutory judgment was entered in this matter on September 9, 2019 after the appellant was duly served with the summons to enter appearance but failed to enter appearance or file her defence within the stipulated time. The matter proceeded for formal proof on November 20, 2019. The respondent herein testified as PW1. It was her evidence that her late husband was involved in fatal road traffic accident on January 25, 2019. She blamed the driver of motor vehicle registration number KCG 264C Toyota matatu for colliding with motor vehicle registration number KBE 992V lorry which her husband was on board. It was further her evidence that the deceased had two (2) children and was a farmer earning Kshs 500,000/= per year.
12. Judgment was entered in favour of the respondent on January 18, 2020 as follows:
 - i. Liability 100%
 - ii. Pain and suffering – Kshs 40,000/=
 - iii. Loss of expectation – Kshs 100,000/=
 - iv. Loss of dependency – Kshs 1,408,000/=
 - v. Special damages – Kshs 56,300/=Less double entitlement – Kshs 100,000/=
Total – Kshs 1,504,300/=
13. Dissatisfied by the said judgment, the appellant filed an application dated March 10, 2020 pursuant to section 3 and 3A of the *Civil Procedure Act* and order 10 rule 11 of the *Civil Procedure Rules* 2010 seeking for orders that:
 - i. The application be certified urgent.
 - ii. Pending the interpartes hearing of the application, there be a stay of execution of the judgment and decree made in the suit.
 - iii. The interlocutory judgment in default of appearance entered against the defendant in the matter be set aside.
 - iv. Costs of the application be provided for.
14. The application was based on the grounds on the face of it and supported by the affidavit sworn by the appellant who deponed that her insurance company is to blame for her failure to appoint an advocate to represent her in all matters related to the subject accident.
15. In a ruling delivered on September 23, 2020, the trial court dismissed the said application for want of merit. This appeal is against the said ruling. However, before considering the substantive merit of the



appeal, it is necessary to consider the issue raised by the respondent with regard to the completeness of the appeal.

Completeness of The Appeal

16. The Supreme Court in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (2015) eKLR referred to its earlier finding in *Law Society of Kenya vs Centre for Human Rights and Democracy & Others*, Supreme Court Petition No. 14 of 2013 as follows: -

“(38) The record of appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower court, without which the appellate court would not be able to determine the appeal before it.”

17. The court further held, at paragraph 39, that:

“(39) If an intending appellant were to present the court with a notice and petition of appeal, but without the record of appeal, and expect the court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent.”

18. In *Bwana Mohamed Bwana (supra)*, the Supreme Court held as follows in regard to the effect of a record of appeal being incomplete:

“(41) Without a record of appeal a court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by law, or the *Constitution*, where an appeal is incompetent. An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

Order 42 rule 13 (4) *Civil Procedure Rule* provides:

“(4) 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..”

The appellant failed to include crucial documents which the rules provides in mandatory terms that they be included, these are, memorandum of appeal, order appealed, decree, proceedings or judgment of the lower court. I wish to point out that a memorandum of appeal was filed. The respondent has pointed out that the affidavit of service request for judgment, notice of entry of judgment, Judgment, decree, bank guarantors, authorities annexed with submissions and list of documents. I have perused the record of appeal and it is true that though most of these documents are listed on the index they are



not included in the body of the record. The record is also not indexed. I need not belabour the point, it is clear that the record of appeal is incomplete and has not complied with order 42 rule 1314) Civil Procedure Rules. It is therefore incompetent.

19. In this case, the appellant was given time to file a record of appeal on several occasions including July 27, 2021, November 1, 2021, February 1, 2022, and March 14, 2022. Despite this, the appellant failed to attach all the necessary documents in his record of appeal. It is trite that a party is bound by its pleadings. Failure by the appellant to attach all the documents necessary for this court to be able to consider her appeal was in my view fatal to her case. Even if I were to exercise discretion and consider the appeal, the ruling by the trial magistrate is on sound grounds which found that the applicant was served with pleadings and did not tender evidence to prove that the documents were forwarded to her insurer. This finding of fact which this court cannot overturn in the absence of proof that it was based on no evidence which is not the case.

Conclusion

From the foregoing, I come to the conclusion that the appeal is incomplete and is therefore defective. I strike it out with cost.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF JULY 2022.

L.W. GITARI

JUDGE

