



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 710 OF 2017

CITI HOPPA BUS SERVICES LIMITED.....1ST PLAINTIFF

MESHACK MUSEMBI.....2ND PLAINTIFF

VERSUS

MARIA CLARA ROTA (Suing as the Administrator of the

Estate of Abrehet Aregay Kaysay (deceased).....DEFENDANT

(Being an appeal from the Ruling delivered by the Honourable G. Mmasi (Ms), Senior Principal Magistrate at Nairobi in Milimani in CMCC No 593 of 2011 on 4th December 2017)

RULING

INTRODUCTION

1. In her decision of 27th June 2017, the Learned Trial Magistrate, Hon G. Mmasi, Senior Principal Magistrate, found the Appellant to have been wholly liable for the injuries that were sustained by the deceased herein and delivered judgment in favour of the Respondent against the Appellant herein for a sum of Kshs 6,175,737/= made up as follows:-

Pain & Suffering Kshs 100,000/=

Loss of expectation of life Kshs 5,170,560/=

Special damages Kshs 905,177/=

Kshs 6,175,737/=

Plus costs and interest thereon at court rates.

2. Being aggrieved with the said judgment, the Appellant filed its Memorandum of Appeal dated 18th July 2019 on 19th July 2019. It relied on eight (8) grounds of appeal. This Memorandum of Appeal was filed in **HCCA No 362 of 2017**. The said Appeal was last before Sergon J on 8th March 2019 when he adjourned the hearing of the same and directed that parties fix a hearing date at the Registry.

3. A perusal of the Appeal herein **HCCA No 710 of 2017** showed that on 17th May 2018, the Appellant's Notice of Motion dated 3rd May 2018 was listed for *interpartes* hearing before Thurairira Jaden J when she deferred the hearing to 12th June 2018. She further directed that the said Appeal be placed together with **HCCA No 362 of 2017** for possible consolidation.

4. The said application came up in court before Githua and Sergon JJ on diverse dates and on 26th April 2019, Mbogholi J certified the Appeal herein, **HCCA No 710 of 2017**, ready for hearing before one (1) judge at Nairobi. The Appeal had been admitted for hearing under Section 79B of the Civil Procedure Act Cap 21 (Laws of Kenya) on 14th February 2019.

5. The Appeal was then fixed for hearing before this court on 24th June 2019. Parties informed it that they wished to have the Appeal heard by way of written submissions. The Appellant's Written Submissions and List of Authorities were dated 30th July 2019 and filed on 2nd September 2019 while those of the Respondent were dated 6th February 2019 and filed on 7th February 2019. The Judgment herein was therefore to be based on the said Written Submissions which the parties relied upon in their entirety.

6. However, at the time of writing its decision, this court noted that the said Written Submissions were in respect of the Judgment that was delivered in Milimani **CMCC No 593 of 2011** which was the subject of **HCCA No 362 of 2017** and not the Appeal herein, **HCCA No 710 of 2017**. Notably, the subject of the appeal in **HCCA No 710 of 2017** was an appeal from the Ruling delivered by the Learned Trial Magistrate, on 4th December 2017 in **Milimani CMCC No 593 of 2011**.

7. This therefore posed a great challenge to this court for the reason that the Appeal herein, **HCCA No 710 of 2017**, was admitted for hearing despite there having been no Record of Appeal. The Record of Appeal was in **HCCA No 362 of 2017**, which appeal had not been admitted for hearing.

8. It was apparent to this court that the confusion may have arisen when **HCCA No 362 of 2017** was placed in the Appeal herein, **HCCA No 710 of 2017**, following the directions of Thuranira Jaden J and there was no follow up on the issue of consolidation of the two (2) appeal files. The two (2) appeals relating to one (1) lower court file had also been handled by two (2) different courts.

9. In view of the fact that there was no Record of Appeal in **HCCA No 710 of 2017** and the aforesaid Written Submissions related to the Judgment which was the subject of **HCCA No 362 of 2017**, it was the considered view of this court that the present Appeal premature, the same not having been admitted for hearing.

10. It is unfortunate that the parties filed submissions for the wrong Appeal. Having said so, the onus was on the Appellant's advocates to have ensured that the Appeal herein had been admitted. If they were not keen on prosecuting the same, they ought to have withdrawn the same and proceeded with the Appeal against the Judgment of the lower court in **HCCA No 362 of 2017**. The manner in which they conducted the Appeal herein left a lot to be desired and showed lack of diligence on the part of the Appellant's advocates.

11. However, bearing in mind that courts should be slow to punish parties due to the negligence of their advocates, this court was not persuaded that it should dismiss the Appeal herein. There was need to give the Appellant an opportunity to canvass its Appeal herein on merits.

DISPOSITION

12. For the foregoing reasons, it is hereby directed that this file be placed before the Presiding Judge High Court of Kenya Milimani Law Courts Civil Division for mention on 4th June 2020 for his further orders and/or directions.

13. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May 2020

J. KAMAU

JUDGE