



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CIVIL APPEAL NO. 137 OF 2019**

**CONSTANTINE NGIRACHA GIBAI.....APPELLANT**

**VERSUS**

**PETER BOKE NYAMOHANGA.....RESPONDENT**

*(Being an appeal from part of the judgment and decree by Hon. Ouko, S., Resident Magistrate in Migori Chief Magistrate's Civil Suit No. 1731 of 2018 delivered on 28/06/2019)*

**JUDGMENT**

1. The appeal subject of this judgment is on quantum of damages.
2. The Respondent herein, *Peter Boke Nyamohanga*, was involved in a road traffic accident on 09/04/2016. The accident occurred at Mabera area along Migori-Isebania road. The Respondent sustained injuries. He filed *Migori CMCC No. 1731 of 2018* (hereinafter referred to as '**the suit**') against the Appellant as the possessor, controller, owner and/or insured of the subject motor vehicle registration number KBZ 493E.
3. The suit was heard. Judgment was rendered on 28/06/2019. The parties agreed and settled the issue of liability by way of a consent. Liability was apportioned at 20% and 80% between the Respondent and the Appellant respectively. The trial court then assessed the quantum of damages at Kshs. 1,000,000/= on General Damages for pain, suffering and loss of amenities, Kshs. 1,000,000/= on loss of future earnings, Kshs. 200,000/= on future medical expenses, Special Damages were assessed at Kshs. 5,560/=. The Respondent was also awarded costs and interest at court rates.
4. Being dissatisfied with the part of the judgment on quantum of damages the Appellant preferred an appeal the subject of this judgment. The Appellant alleged that he was granted leave in *Migori Misc. Civil Application No. 58 of 2019* to institute the appeal out of time. The Memorandum of Appeal was filed on 29/10/2019.
5. In praying that the appeal be allowed and appropriate compensation be awarded the Appellant proposed the following 6 grounds of appeal:
  1. **The Learned Trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.**
  2. **The Learned Trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.**
  3. **The Learned Trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.**
  4. **The Learned Trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent, if any, and failed to apply precedents and tenets of law applicable.**
  5. **The Learned Trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.**
  6. **The Learned Trial magistrate failed to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.**

6. Directions were taken and the appeal was disposed of by way of written submissions. Both parties duly complied. Several decisions were referred to by the parties in support of their rival positions.

7. Generally, as the first appellate Court, this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**.

8. However, when the appeal is on quantum of damages, as in this case, an appellate Court is guided by two principles. Those principles were discussed by the Court of Appeal in **Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727** as follows: -

*The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*

9. This position was restated by the Court of Appeal in **Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101** and **Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR**.

10. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

11. In the course of going through the record I came across an issue which, although not raised by the parties, is so fundamental to the appeal and hinges on how the jurisdiction of this Court was invoked. It was the issue of the absence of the copy of the order granting leave to the Appellant to appeal out of time in the record of appeal.

12. I carefully perused the entire record including the lower court file but did not any such order. Although the Appellant indicated in the Memorandum of Appeal that he was granted leave to appeal out of time in *Migori Misc. Civil Application No. 58 of 2019* that file was and still is not part of the record before this Court. Further, the issue is complicated by the fact that the Memorandum of Appeal did not indicate which Court granted the leave to appeal out of time. The Memorandum of Appeal only stated that the leave was granted in *Migori Misc. Application No. 58 of 2019*.

13. With such a state of affairs I will now determine the legal position of the lapse on the part of the Appellant.

14. I recently discussed the twin-issues of failure to obtain leave of the Court to appeal and failure to annex a copy of the order granting leave to appeal in the record of appeal. That was in **Migori High Court Civil Appeal No. 110 of 2019 Sukari Industries Limited vs. Ezra Ododi Adero** (unreported). As I am still of the like position I will reproduce what I stated therein as under: -

**36. From the record, the Appellant did not seek or obtain the leave of the court to appeal. The inevitable question which comes to the fore is therefore whether leave ought to have been sought for and obtained in this matter.**

**37. Appeals from orders are provided for under Section 75 of the CPA and Order 43 of the Rules.**

**38. Section 75 of the CPA provides as follows: -**

*1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act-*

- a) Order 1 (parties to suits);*
- b) Order 2 (pleadings generally);*
- c) Order 3 (frame and institution of suit)*
- d) Order 4, rule 9 (return of plaint);*
- e) Order 7, rule 12 (exclusion of counterclaim);*
- f) Order 8 (amendment of pleadings)*
- g) Order 10, rule 11 (setting aside judgments in default of appearance).*
- h) Order 12, rule 7 (setting aside judgments or dismissal for non-attendance);*
- i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);*
- j) Order 19 (affidavits);*

- k) Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);
- l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- m) Order 24, rules 5, 6, and 7 (legal representative);
- n) Order 25, rule 5 (compromise of a suit);
- o) Order 26, rules 1 and 5(2) security for costs);
- p) Order 27, rules 3 and 10 (payment into court and tender)
- q) Order 28, rule 4 (orders in proceedings against the Government);
- r) Order 34 (interpleader);
- s) Order 36, rules 5, 7 and 10 (summary procedure)
- t) Order 39, rule 2, 4 and 6(furnishing security);
- u) Order 40, rules 1, 2, 3 7 and 11 (temporary injunctions);
- v) Order 41, rules 1 and 4 (receivers);
- w) Order 42, rules 3, 14, 21, 23 and 35 (appeals)
- x) Order 45, rule 3 (application for review)
- y) Order 50, rule 6 (enlargement of time);
- z) Order 52rules 4, 5, 6 and 7 (advocate)
- (aa) Order 53 (judicial review orders)

2. An appeal shall lie with the leave of the court from any other order made under these Rules.

**39. I will also reproduce Order 43 Rules 1, 2, 3 and 4 of the Rules hereunder: -**

1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act-

- a) Order 1 (parties to suits);
- b) Order 2 (pleadings generally);
- c) Order 3 (frame and institution of suit)
- d) Order 4, rule 9 (return of plaint);
- e) Order 7, rule 12 (exclusion of counterclaim);
- f) Order 8 (amendment of pleadings)
- g) Order 10, rule 11 (setting aside judgments in default of appearance).
- h) Order 12, rule 7 (setting aside judgments or dismissal for non-attendance);
- i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- j) Order 19 (affidavits);
- k) Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);
- l) Order 23, rule 7 (trial of claim of third person in attachment of debts);

- m) Order 24, rules 5, 6, and 7 (legal representative);
- n) Order 25, rule 5 (compromise of a suit);
- o) Order 26, rules 1 and 5(2) security for costs);
- p) Order 27, rules 3 and 10 (payment into court and tender)
- q) Order 28, rule 4 (orders in proceedings against the Government);
- r) Order 34 (interpleader);
- s) Order 36, rules 5, 7 and 10 (summary procedure)
- t) Order 39, rule 2, 4 and 6(furnishing security);
- u) Order 40, rules 1, 2, 3 7 and 11 (temporary injunctions);
- v) Order 41, rules 1 and 4 (receivers);
- w) Order 42, rules 3, 14, 21, 23 and 35 (appeals)
- x) Order 45, rule 3 (application for review)
- y) Order 50, rule 6 (enlargement of time);
- z) Order 52rules 4, 5, 6 and 7 (advocate)
- (aa) Order 53 (judicial review orders)

2. An appeal shall lie with the leave of the court from any other order made under these Rules.

3. An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

4. Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refreshing such relief.

**40. From the foregone, the appeal from the ruling of the magistrate’s court delivered on 12/09/2019 to this Court did not fall within the appeals which could be preferred as of right under Section 75(1) of the CPA or Order 43 Rule 1 of the Rules.**

**41. The ruling on jurisdiction appealed against was hence caught up by Section 75(2) of the CPA and Order 43 Rule 2 of the Rules. The twin provisions are tailored in mandatory terms by the use of the word ‘shall’. It was hence incumbent upon the Appellant to seek and obtain leave of the court to appeal prior to filing the Memorandum of Appeal.**

**42. What is therefore the implication of filing an appeal without first seeking and obtaining leave of the Court as required under the CPA and Rules?**

**43. The Supreme Court in Civil Application No. 20 of 2014 Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2014) 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 where it had held as follows: -**

[36] The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.

**44. Recently, the Court of Appeal at Kisumu in Civil Appeal 96 of 2016 Rayleigh W. Wanyama v Lorna Mukhwana Wanyama & 3 Others [2020] eKLR had the following to say on the issue of leave to appeal: -**

... It is common ground that this appeal did not lie as of right. As such, it was trite that the appellant obtained leave of court before he could lodge it. Leave is a prerequisite to the assumption of jurisdiction by this Court. In the case of Kenya Commercial Bank Limited v Esipeya [2015] eKLR, this Court held that:

...having chosen to raise the limitation point by way of a preliminary objection under no particular Order under the Civil Procedure Rules, an appeal lay to this court only with the leave of the Superior Court which was neither sought nor obtained.

**45. As to whether such failure could be cured by the application of Article 159 of the Constitution, the Court stated as follows: -**

.. As to whether Article 159 of the Constitution can cure the failure by the appellant to obtain leave, we find instructive the observations of this Court in the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR that:

*The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2) (d) of the Constitution. We do not consider Article 159 (2)(d) of the Constitution to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation”.*

Similarly, in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 this Court rendered itself thus:

*In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1B of the Civil Procedure Act Cap 21 and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases.*

**46. The Court of Appeal in Nyeri Civil Appeal 17 of 2017 Lucy Wanjiku Nyaga v James Mwaniki Munyi & Another [2018] eKLR added its voice to the issue as follows: -**

*It is common ground that the appellant never sought or obtained leave to appeal against the rejection of the preliminary objection raised on points of law. That was a blatant breach of substantive law which section 75 is, not simply a procedural lapse. All the seven grounds of appeal laid before us relate to the decision on the Preliminary Objection. Only an order could have arisen from the decision of the ELC on such objection and it required leave of that court or of this Court, if sought, to confer the jurisdiction to hear the appeal. We agree with the respondents that the appeal is a non-starter and must be declared a nullity ab initio. We so find.*

**47. I will now deal with the aspect of the extracted order of the ruling appealed against. Whereas the impugned ruling was part of the record of appeal, the order pursuant to that ruling was not. I carefully perused and checked the lower court record and confirmed that the order was never extracted.**

**48. The contents of the Record of Appeal are provided for in Order 42 Rule 13(4) of the Rules as follows: -**

*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).

**49. The Supreme Court in Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (supra) held 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.*

[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. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.*

**50. The Court of Appeal in *Malindi Civil Application Nos. 48 & 62 of 2015, Salama Beach Hotel Ltd & 4 Others –vs- Kenyariri & Associates Advocates & 4 Others (2016) eKLR* cited with approval its previous decision in *Mombasa Civil Appeal Nos 145 & 146 of 2012 (consolidated) Floris Pierro & Another –vs- Glancario Falasconi (as the administrator) of the Estate of Santuzza Billion alias Santuzza (2014) eKLR* and observed as follows: -**

*...a cursory perusal of the record of appeal shows that the order impugned in the memorandum of appeal is indeed missing in the record. The same appears not to have been extracted and included in the record. The consequences of this can be found in the decision of *Chege v Suleiman [1988] eKLR*, which echoed the traditional position that failure to extract an impugned order renders the appeal fatally defective, with the only remedy being to strike it out. Counsel for the respondents has invited this Court to exercise leniency and discretion and find that the documents were proper, having been perused and approved by this Court's Deputy Registrar before they wound up before us. With respect, no legal provision allows for the exercise of this Court's discretion in such a manner. Besides, the fate of an appeal anchored on a non-extracted order has not changed, not even with the advent of the new liberal approach afforded by the overriding objective and the Constitution; which encourages dispensation of justice without undue regard to procedural technicalities. As held in *Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR*; an appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out, as the order or decree appealed from is a primary document in terms of Rule 87(1) (h) of this Court's Rules and must form part and parcel of the record of appeal. In that case, the Court delivered itself thus:*

***...The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree.***

***Accordingly, failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out. In any event an appeal can only be against a decree or an order and not against a judgment or ruling.***

**51. In *Nairobi Court of Appeal Civil Appeal 12 of 1987 Chege v Suleiman [1988] eKLR* the appeal had been lodged but did not contain the formal order of the Court appealed from as at the time the record of appeal was filed. Despite the order having been filed in a Supplementary Record of Appeal, the Learned Judges struck out the appeal and held as follows: -**

*But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from "decrees and orders of the High Court". And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.*

**52. In *Alibai v Raichura 20 EACA 24* the predecessor of the now Court of Appeal held as follows: -**

*An order is a formal expression of any decision of a civil court which is not a decree. An appeal does not lie from such decision where no formal expression of the decision has been filed.*

**53. The foregone analysis therefore yields a finding that the appeal against the ruling rendered on 12/09/2019 is in breach of the law and is rendered incurably incompetent on account of failure to obtain leave to appeal and failure to extract a formal order of the ruling appealed against.**

15. . I believe I have satisfactorily demonstrated that there is no competent appeal for consideration before this Court.

16. . The upshot is that the failure to include the copy of the order granting the Appellant leave to lodge an appeal out of time rendered the Record of Appeal incomplete. In the words of the Supreme Court in *Civil Application No. 20 of 2014 Bwana Mohamed Bwana* (supra) 'such an appeal would be incomplete and hence incompetent.'

17. Having said so, addressing the grounds of appeal would be only academic. I choose to end the discussion here.

18. The appeal is hereby struck out with costs.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 24<sup>th</sup> day of August 2020.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered electronically through: -**

1. **dancan@lgmenezes.com** for the firm of Messrs. L. G. Menezes & Company Advocates for the Appellant.
2. **roabisai@yahoo.com** for the firm of Messrs. Abisai & Company Advocates for the Respondent.
3. Parties are at liberty to obtain hard copies of the judgment from the Registry upon payment of the requisite charges

**A. C. MRIMA**

**JUDGE**