



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 10 OF 2017**

**(CORAM: HON. R.E. ABURILI - J)**

**ENOS WILLIS ODINDO.....APPELLANT**

**VERSUS**

**FRED OLUOCH OGOLLA.....RESPONDENT**

***(Being an Appeal against the Judgment and Decree delivered at Bondo Law Court vide Civil Suit No. 67 of 2015 dated 19/5/2017 before Hon. Obiero, PM)***

**JUDGMENT**

1. This appeal arises from the judgment and decree of M. Obiero, Principal Magistrate dated 19/5/2017 vide Bondo PM Civil Suit No. 67 of 2015.
2. By his Complaint dated 11/3/2015 and filed in court on 12/3/2015, the Plaintiff who is now the Respondent, Fred Oluoch Ogola sued the Defendant/Appellant herein **Enos Willis Odindo**, claiming for damages arising from an accident which arose on 25/9/2010 involving the deceased motorcyclist passenger James Aggrey Wamamba on Kingbird KMCG 3290D and motor vehicle Registration No. KAU 063Y Toyota Premio along Ndori-Luanda-Kotieno Road when the appellant's negligently drove, managed or controlled the said motor vehicle that he knocked the deceased Pillion passenger who succumbed to the injuries sustained.
3. The Respondent filed suit as the representative of the Estate of the deceased James Aggrey Wamamba. He claimed that as a result of the pleaded acts of negligence on the part of the defendant/appellant, the deceased lost his life and his estate and dependants suffered loss and damage for which the Respondent claimed for damages under the Law Reform Act and the Fatal Accidents Acts, costs of the suit and interests at court rates.
4. Upon the Respondent served upon the Appellant summons to enter appearance but the appellant neither entered appearance nor filed any defence hence the trial court entered interlocutory judgment in default of appearance and defence and set down the suit for hearing by way of formal proof but by a consent filed in court on 11/7/2016, signed by both parties' advocates, the interlocutory judgement entered and all consequential orders was set aside and the appellant was granted leave to file his defence within 30 days from the date of consent as filed. The Appellant also agreed to pay to the Respondent thrown away costs of Kshs. 5,000/=. The suit was then set down for hearing interpartes on 19/1/2017.
5. The Respondent testified and called one other witness to prove his claim against the Defendant. The Defendant called DW1 Daniel Odhiambo Oloo and closed his case.
6. In his judgement dated 19/5/2017, Hon. E.N. Wasike entered judgement for the Plaintiff/Respondent herein on liability against the Defendant/the Plaintiff by apportioning it between the plaintiff and defendant at 70% to 30% in favour of the plaintiff.
7. On damages, nothing was awarded to the Plaintiff on special damages as they were never specifically pleaded nor strictly proven.
8. On general damages, the trial court awarded the Plaintiff as follows: -

***(1) Pain & suffering: Kshs. 15,000/= as the deceased almost immediately after the accident.***

***(2) Loss of dependency Kshs. 1,444,000/= using a multiplier of 18 years as the deceased was aged 42 years. He used to earn Kshs. 1,500/= per day as a carpentry.***

***(3) On loss of expectation of life, Kshs, 100,000/= was awarded.***

*Total Kshs. 1,550,000/= less 30%*

*Total Award Kshs. 1,083,500/=*

9. Dissatisfied with the above judgment and decree, the appellant herein filed his Memorandum of Appeal dated **19/6/2017 on 20/6/2017** and paid court fees vide **Receipt No. 8273306** in the sum of Kshs. 15,000/= as assessed on **19/6/2017**.
10. The Memorandum of Appeal sets out 11 grounds of appeal urging this court to allow the appeal with costs, reassess the award of special and general damages afresh and set aside with costs the entire judgment of the lower court.
11. Essentially, reading through the 11 grounds of appeal reveals that they all challenge the award of quantum of damages. There is no challenge to the determination on liability as apportioned by the trial court.
12. However, before I delve into the merits or demerits of this appeal which challenges quantum of damages of Kshs. 1,088,500/= awarded to the Plaintiff/Respondent on various headings, I must deal with an issue which I have noted upon perusing the Memorandum of Appeal dated 19/6/2017 and the judgment of the trial court dated 19/5/2017.
13. The annual calendar which is recognized internationally shows that 19/5/2017 was a Friday.
14. Under **Section 79G of the Civil Procedure Act**, an appeal from judgment or decree of the lower court to the High court lies within 30 days of the date of judgment.
15. In this case, calculating the thirty days from 19/5/2017, excluding the date of judgement and including the last day, 30 days lapsed on 18/6/2017.
16. The Memorandum of Appeal which is dated 19/6/2017 was filed in court on 20/6/2017 as stated above.
17. Since 30 days lapsed on 18/6/2017 which was on a Sunday, the Memorandum of Appeal should have been filed in court latest on 19/6/2017 which was a Monday and not 20/6/2017, a Tuesday.
18. Accordingly, as the Memorandum of Appeal was filed out of the 30 days stipulated by **Section 79G of the Civil Procedure Act**, and as the court record does not show that any leave of court was sought and obtained to enlarge time within which the appeal ought to have been filed, this appeal is on the face of it incompletely filed and is amenable for striking out without delving into the merits thereof.
19. I say so because the appellant who was ably represented throughout the trial and on appeal, knew and ought to have known that jurisdiction of this court on appeal can only be invoked where the appeal has been lodged within the stipulated time frame or where leave to extend time for filing of the appeal has been sought and obtained from the court pursuant to the provisions of the proviso to **Section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya**.
20. The Supreme Court has pronounced itself in several decisions among them, citing **S.C. Appl. No. 38 of 2014 between TSC Vs. Simon Kamau and 19 Others**, adopting its earlier decision in **Nicholas Kiptoo Arap Korir Salat V. the IEBC & 7 Others SC Appl. No. 16 of 2014 Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others [2014] eKLR** where the Supreme Court of Kenya made it clear that no appeal can be filed out of time without leave of the court. The apex court stated:

*“To file an appeal out of time and seek the Court extending time is presumptive and inappropriate. No appeal can be filed out of time without leave of Court. Such filing renders the “document” so filed a nullity and of no legal consequences. Consequently, this Court will not accept a document filed out of time without leave of the Court. The S.C. further held that a document (Petition filed out of time without leave of Court is irregular and unknown in-law and the same should be struck out. Where one intends to file an appeal out of time, what he can do is to annex the draft intended Petition of Appeal for the Court’s perusal when making his application for extension of time, and not to file an appeal and seek to legalize it.”*
21. The Appellant never sought to obtain leave of court before filing the appeal herein out of time. In **CA 192/2014 Grace Waithera Muniu Vs. Teresia Wainana & Another [2017] eKLR** - Koome, Okwengu, Kiage JJA, the Court of Appeal held, inter alia that:

*“.....in arriving at the above conclusion, we have, as we should, taken note of the overarching objecting in the administration of justice as provided for under Section 1A and 1B of the Appellate Jurisdiction Act and indeed under Article 159 of the Constitution which gives unfettered authority to court to overlook procedural technicalities, that impede delivery of substance justice. We have nonetheless come to the conclusion that since the instant appeal was filed out of time, without the leave of court, it goes to the jurisdiction of the court. it is trite that a court has jurisdiction to entertain appeals filed within the time provided/or appeals filed out of time with leave of the court. thus in our view, even the overarching objectives in the administration of justice cannot aid the appellant because a proper appeal was not filed which is the premise upon which the jurisdiction of the court starts. This appeal is therefore incompetent, but before we pen off, we must deal with the other issues which were argued before us on merit....”*
22. The Court of Appeal in the above matter after considering the merits of the appeal nonetheless found that the appeal was devoid of merit as well as having no leg to stand as in the first place, it was filed out of time without leave of the court. The Court dismissed the appeal with costs to the Respondents on 23/6/2017.

23. I have found that the appeal herein is incompetent because it was filed out of time without leave of court. The order that commends itself therefore is an order striking out the appeal. I hereby proceed and strike out the appeal herein.

24. As the Respondent did not raise this important jurisdictional issue, I order that each party shall bear their own costs of this appeal.

**Dated, signed and Delivered at Siaya this 29<sup>th</sup> day of October 2019.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Ochanyo Advocate h/b for Mr. Nyanga Advocate for the Appellant

N/A for the Respondent

CA: Brenda and Modestar