



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 40 OF 2014

(An appeal from the Ruling of Senior Principal Magistrate, Embu in CMCC No. 156 of 2012 dated 5/12/2014)

SAMUEL NJAU.....1ST APPELLANT

JANE MUTHONI GICHUKI.....2ND APPELLANT

VERSUS

PAULINE NYAWIRA GITONGA.....RESPONDENT

J U D G M E N T

This is an appeal against the ruling of Embu Senior Principal Magistrate, in CMCC 156 of 2012 delivered on 5/12/2014 in regard to the appellants' application dated 3/11/2014. The application sought among other orders to set aside the final judgment of the court delivered on 4/8/2014 in which the respondent was awarded damages of Kshs.2,381,575/= all inclusive. The respondent had sued the appellants for damages under the Fatal Accident's Act and the Law Reform Act in the said suit.

This appeal was filed on 15/12/2014 by Messrs Kairu & McCourt for the appellants and served on J.K.N. Kamunyori for the respondent. The parties agreed to dispose of the appeal by way of written submissions.

The memorandum of appeal dated 9/12/2014 sets out four grounds as follows:-

1. *That the learned magistrate erred in fact and law in finding that the respondents were served with court summons but failed to enter appearance and defend the suit.*
2. *That the learned magistrate erred in law and in fact in failing to apply the correct principles in setting aside of judgment and therefore reached a wrong finding on the application by the applicants.*
3. *The learned magistrate erred in law and in fact by finding that the defendants were duly served but failed to enter appearance yet facts and circumstances of the case did not support such a finding.*
4. *The learned magistrate erred in law and in fact by refusing to set aside the judgment and holding the appellants liable for the accident yet they did not appear to defend themselves.*

It is noted that an Amended Memorandum of Appeal which is not dated was filed by the appellants whereas amendments have been made by hand. The memorandum is neither signed nor dated by the appellants. For this reason the original memorandum remains valid.

Together with the appeal, the appellants filed a notice of motion dated 15/12/2014 seeking *for stay of*

execution of the lower court ruling in CMCC No. 156 of 2012 delivered on 4/8/2014 and any subsequent orders issued in its furtherance, pending hearing and determination of the appeal.

The application for stay was presented before the Judge in chambers on 15/12/2014 and interim orders for stay granted pending hearing of application interparties.

The respondent filed an application dated 10/3/2015 seeking for orders that the ex parte orders granted on 15/12/2014 staying execution of the judgment and decree of the lower court Embu CMCC 156 of 2012 be vacated.

The parties later sorted out their applications by consent. Directions in this appeal were taken on 30/4/2015 by consent whereas it was agreed that parties file written submissions within 14 days. The case came for mention on 17/6/2015 but the appellants' submissions had not been filed. However, the appellant later filed submissions dated 3/6/2015 which bore a court stamp showing that they were filed on 11th . The month and the year were not visible on the stamp. However, there was a receipt attached to the submissions issued to Kairu & McCourt dated 11/6/2015. It can be therefore assumed that the submissions were filed on 11/6/2015.

The respondent in her submissions urged the court to strike out the memorandum of appeal on grounds that the record of appeal was not filed as required by the law. It was also argued that the appellants submissions were filed late after the deadline given by the court and should not be accepted. The respondent complained about the conduct of the appellant in his appeal. She stated that she was not served with the interim order for stay which was obtained on 15/12/2014. The application dated 15/12/2014 was never fixed for hearing by the appellant contrary to the directions given by the court. The appellants only claimed that they had obtained an order for stay. The respondent was not served with the submissions of the appellants purportedly filed on 11/6/2015 and which were not in the court file even on the 17/6/2015 when the case came for mention.

The appellants' submissions filed on 11/6/2015 dealt with the application seeking for stay dated 15/12/2014 which argued that they had an arguable appeal and urged the court to grant the orders for stay to prevent their appeal being rendered nugatory. As I have said earlier, the appellants' application for stay and the respondent's application seeking to set aside the stay orders were disposed of by consent of the parties even before directions for hearing of the appeal were taken. The submissions relating to the application were therefore misplaced and not relevant to subject at hand. It can be rightly put that the appellant did not file any submissions in regard to this appeal. The conduct of the appellant in this appeal portrays lack of seriousness and commitment to duty in regard to this appeal.

The first issue to determine in this appeal is whether it is properly before the court. Order 42 Rule 13 requires that the appellant file the record of appeal consisting the following documents:-

- i. *Memorandum of appeal;*
- ii. *The pleadings;*
- iii. *The notes of the trial magistrate made at the hearing;*
- iv. *The transcript of any official shorthand, typists notes electronic recording or palantypist notes made at the hearing;*
- v. *All affidavits, maps and other documents whatsoever put in evidence before the magistrate;*
- vi. *The judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.*

The court record does not contain the record of appeal apart from copies of some documents from the lower court file which include, the plaint, the application to set aside the final judgment, the ruling of the magistrate delivered on 5/12/2014 which were filed together with the memorandum of appeal and the application for stay pending appeal.

The word "record" is defined in Black's Law Dictionary 9th Edition as:-

The official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing (if any), and tangible exhibits.

It was held in the case of ***NJOROGE & 104 OTHERS (SUING IN REPRESENTATIVE CAPACITY FOR KARIOBANGI SOUTH CIVIL SERVANTS ESTATE TENANT PURCHASERS) VS SAVINGS & LOAN KENYA & ANOTHER [1990] KLR 78*** that the word “record” does not mean the judgment or the ruling alone and that –

“A record includes documents which are the basis of the decision as well as the statement of the decision itself”.

It was also held in the Court of Appeal case of ***MUNICIPAL COUNCIL OF KITALE VS FEDHA [1983] eKLR*** that:-

- a. *The failure to include the decree appealed from in the record of appeal rendered the appeal incompetent. The omission could not be cured by including the decree in a supplementary record. A supplementary record cannot comprise documents which ought to be included in the original record of appeal (Kiboro Vs Posts & Telecom Corporation [1974] EA 155)*
- b. *Where there is a defect in the record of appeal, it can only be corrected by making an application under Rule 4 to extend time to file the record of appeal afresh (Kamau Vs Kamau Civil Appeal No. 49 of 1982).*

The documents are filed together in the memorandum and the application for stay, were meant for the purpose of hearing and determining the application. The appellants were duty bound to file the record of appeal on admission of the appeal. The record is supposed to be served on the respondent to facilitate the preparation of their case. It is a primary document in an appeal and without it, the appeal may be said to be non-existent or still born.

I have perused the court record and note that the appeal was never admitted as required by the law. It was incumbent for the appellants to ensure that all preliminary procedural requirements were satisfied before directions were taken which they failed to do. Admission of an appeal is a critical procedural requirement which must be satisfied before the appeal can move to the next stage.

The conduct of the appellants in this appeal including the amendment of the unsigned and undated memorandum of appeal by hand; the failure to file submissions; the taking of directions and proceeding to have the appeal heard before admission; and failure to file the record of appeal demonstrates lack of seriousness and laxity on the part of the appellants. It is also an abuse of the due process of the court and a waste of precious judicial time.

In view of the failure to have the appeal admitted and to file the appeal record, I find that this appeal defective and is not properly before the court. For these reasons, the appeal is hereby struck out with costs to the respondents.

It hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF SEPTEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr Kamunyori for the respondent