Elijah v Nyakundi (Civil Appeal 39 of 2020)
[2024] KEHC 1206 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1206 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 39 OF 2020

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

BENARD O. ELIJAH .... APPELLANT

AND

DOMINIC MOSOTI NYAKUNDI .... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Hon. N.S. Lutta, CM given on 11/06/2020 in Kisii CMCC 492 of 2018. The appeal was filed on 25/6/2020 as if it is an appeal from the decision given on 11/6/2020. cleverly, the Appellant filed an Amended Memorandum of Appeal.

2. However, the clearness ended with the purport to amend the date of the judgment to 11/12/2019. By filing an appeal out of time, the Appellant thought that courts are morons who will be mesmerised or dazzled by the half with amendments. This kind of conduct brings to mind, the words of Justice G V Odunga J (as he then was), in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N v N* [1991] KLR 685. The Learned Judge lamented as follows:

   > Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in *N v N* [1991] KLR 685 when he expressed himself in the following terms:
   >
   > > "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the

witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

3. Appeals to this court should be filed in tandem with section 79G of the *Civil Procedure Act*. The same provides as doth: -

> "79G. Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

4. The Appellant neither sought leave to file the Appeal out of time. Despite the fraudulent and highly irregular amendment, a record of Appeal was filed on 31/1/2022 indicating that the Appeal was from the Judgment made on 11/6/2020. No such judgment exists. The only judgment was that delivered by hon Shiundu on 11/12/2019.

5. The Respondent went ahead and filed submissions dated 25/4/2022. It is unnecessary to go through the said submissions.

6. The Appellant who was the defendant in the lower court and raised 5 grounds of Appeal:

   i. The Learned Trial magistrate ere din law and fact in holding that the Appellant was wholly liable, in negligence, for the injuries which the Respondent suffered in the accident in issue.

   ii. The Learned Trial magistrate erred in law and fact to find and hold that the Respondent contributed to the accident the subject of that suit, in spite of evidence tendered.

   iii. The Learned Trial Magistrate erred in law and fact in awarding the Respondent the sum of Kshs. 1,000,000/= as general damages, on 100% basis, which sum was inordinately and manifestly excessive in the circumstances of the suit, as to amount to an erroneous estimate.

   iv. The Learned Trial Magistrate erred in law and fact in applying wrong principles and ignoring the proper principles in assessing dmages, hence awarded the Respondent the sum of Kshs. 1,000,000 as general damages, which amount was inordinately and manifestly excessive.

   v. The Learned Trial Magistrate erred in law and fact in deciding the case, on the whole, against the evidence that was before him and thus arrived at a decision that was wholly erroneous.

7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

8. In the case of *Mbogo and another v Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to

> take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

9. Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, stated as follows: -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

10. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

11. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

12. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 others* (2019) eKLR, Justice DS Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

13. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

14. Finally, in deciding whether to disturb the quantum given by the Lower Court, the Court should be aware of its limits. Being an exercise of discretion the exercise should be done Judiciously conclusively circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

15. The Court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Servcie v A.M Lubia & another* 1987 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account irrelevant facts 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 damages.

16. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

17. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

18. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

19. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

20. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

21. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

22. The appeal was filed on 25/6/2020 against decisions made on 11/6/2020 on 20/12/2021 there was an amendment changing the date of Judgment from 11/6/2020 to 11/12/2019. This means that the judgment was delivered 6 months before the Appeal was filed.

23. The decision was appealed from the judgment made by the Hon. Nathiu Shiudu on 11/12/2019. I have perused the entire record of Appeal and the record of proceedings herein. There is no Order granting leave to Appeal out of time.

24. The appellant proceeded as if everything was in order. The court has no jurisdiction to hear an appeal filed out of time.

25. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

> "With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics."

26. The jurisdiction of the court is donated and set out in Section 79G of the *Civil Procedure Act*. Without leave to file the Appeal out of time there is no Appeal. It does not matter what the Appellant indicates. The actual date of delivery is paramount. It is even not relevant that there were reasons for filing late. It simply means there is no Appeal.

27. In the case of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR, justice R E Aburilli stared as doth: -

> "The Court of Appeal in the above stated case cited with approval Aburili J in *Martha Wambui vs Irene Wanjiru Mwangi & Another* (supra) where this court stated:
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>> "In my view, the use of the term "admitted" connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time......" see also *APA Insurance Ltd Vs Michael Kinyanjui Muturi* (*supra*).
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> The Court of Appeal went on to state;
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>> "This is the position this court has taken when dealing with applications for extension of time. We have always, and we believe lawfully so, deemed as fully filed applications without leave where leave is sought and subsequently granted. Learned counsel for the appellant submitted that this position as found to be untenable by the Supreme Court which pronounced itself as follows in the *Nicholas Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others* [2014]eKLR (Salat case):
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>>> "......counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the court is that he is acknowledging having file a 'document' he calls 'an appeal' out of time without leave of the court. Pursuant to Rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the Notice of Appeal. Under Rule 53 of the Court's Rules, this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such 'an appeal', is tantamount to moving the court to remedy an illegality. This, court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court." (Emphasis added).

28. In this case there was no attempt to extend time. Without such extension, the Appeal is a nullity. There is nothing we could add on a nullity.

29. In *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169, Lord Denning M.R. delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

30. In the circumstances, the Appeal is begging me to relieve it, from its own ignominy of its own incompetence. Who about costs. In the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR, Justice John M. Mativo was of the view that: -

> " Does the filing of the suit and the various steps taken by the parties and the intended resolution of this suit by recording the intended consent as aforesaid amount to an event as envisaged under section 27 *Civil Procedure Act* cited above. Justice (Retired) Richard Kuloba[13] in the earlier cited book states as follows:-
>
> > "The words "the event" mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the

> party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgement in the whole or in part"

At page 101 of the same book, Kuloba authoritatively states as follows:-

> "The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs- the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course"

31. Costs were no incurred by the respondent. There are thus no costs payable to the Respondent. It is the finding of the court that in the circumstances there is no appeal. The same is accordingly dismissed. The Respondent did not file a response.

32. Each party will have their own costs.

Determination

33. The Court has reached the following inevitable conclusion: -

    a. The appeal was filed out of time and is consequently struck out with no order as to costs.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Brian