Guardian Coach Ltd & another v Sirawa (Civil Appeal E091 of 2022)
[2024] KEHC 2579 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2579 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E091 OF 2022

DKN MAGARE, J

MARCH 7, 2024

BETWEEN

GUARDIAN COACH LTD ..... 1ST APPELLANT

GILBERT KIRUI ..... 2ND APPELLANT

AND

TERESIA AUMA SIRAWA ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and decree of the Honourable C.A Ogweno SRM given on 1/11/2022. The Appellants were the Defendants. The Appeal arose from Kisii CMCC No. 522 of 2021.

2. Contrary to the provision of Order 42 Rule 1, the Appellant filed a prolixious unseemly, repetitive and verbose Memorandum of Appeal with 10 grounds of Appeal. I need not regurgitate the same herein.

3. These grounds are not useful, considering the paucity of judicial time and economy of space. For example, the first ground is completely otiose. It is not a stand-alone ground, is part of what the court considered as an appellate court.

4. Regarding the 10 grounds there are only 3 issues raised:

   a. Provisions of Insurance (Motor vehicle Third Party) Risks Amendment Act 2013, Cap 405.

   b. Liability

   c. Quantum

5. Order 42 Rule 1 requires that the memorandum of Appeal be concise. The same provides as doth: -

   " 1. Form of appeal –

(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

6. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

7. In Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of Appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross v. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

Pleadings

8. The Respondent filed suit vide a Plaint dated 10/3/2021. Claiming General damages and special damages of Kshs. 95,430. This was a result of a road traffic accident on 31/1/2021 at Keroka-Sotik road involving Motor Vehicle Registration No. KCV 391 A. The particulars of injuries pleaded are as doth:-

    a. Fracture of the left proximal phalanx of the middle finger

    b. perforation of the right eye with traumatic cataract

    c. Deep cuts on the face, nose, chest and left breast

    d. 20% permanent disability

    e. Severe pain

9. Particulars of special damages were pleaded as follows: -

    a. Medical Report Kshs. 1,500

    b. Doctor's attendance Kshs. 5,000

    c. Police Officer attendance Kshs. 5,000

    d. Search certificate Kshs. 550

    e. Medical bills Kshs. 83,380

10. The plaint was accompanied by a witness statement dated 18/3/2021 and a list of documents dated 18/3/2021.

11. The Defendant filed Defence dated 5/8/2021. They denied ownership of the said motor vehicle. They state nothing on the driver of the said motor vehicle. They set for general particulars of negligence. It is said that the Appellants did not give cognisance of the fact that the Respondent was a passenger.

12. In all practical terms the defendant did not lay basis for the purported particulars. A negligence. For example, failing to follow traffic Rules has nothing to do with a passenger. Failing to wear a seat belt does not stop an accident. It only exacerbates injuries in a minor accident.

13. Failing to wear seat belt must be followed with an account that the same were provided. In other words, whether or not the defendant testified the particulars of negligence pleaded did not constitute negligence as we know the tort of negligence relates to breach of a duty of care. There can be no negligence for breach of non-existent duty of care.

14. The hearing finally kicked off on 9/5/2022 with Dr. Cyprians Okoth Orare testifying that the respondent suffered a cornel perforation of the right eye, fracture of the left middle finger at the proximal phalanx, deep cut on the chest left hand nose, left breast and face.

15. He pleaded incapacity of the eye at 20% and the left hand at 2%. He was examined whether he was an optician. The mater of the injury to the eye cannot be addressed by an optician or even an optometric doctor. An ophthalmologist would help. The Respondent testified that she was traveling from Nairobi to Homabay when the accident occurred. She adopted her statement. She stated that she still had an unhealed injury on the right eye.

16. PW3 was a senior clinical officer at Kisii Teaching and Referring Hospital. He produced the Medical Report. The Respondent had undergone lensectomy procedure. She also had the tract of the left middle finger. The Plaintiff closed their case as well as the Appellant.

17. The Appeal is on quantum only. Miss Mwangi argued the appeal before me stating that this damages of Kshs. 200,000/= was excessive. The Court ought to have awarded between Kshs. 100,000/= to Kshs. 150,000/=. To her this was erroneous and as such should interfere with the decision of the Court below.

18. Despite being served, the Respondent did not attend court. Nevertheless, this court, being a court of record is bound to consider evidence and arrived at a decision, notwithstanding the absence of some of the parties.

Analysis

19. 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 first hand.

20. In the case of Mbogo and Another vs. 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."

21. In the case of Peters vs 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..."

22. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held 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."

23. The Court is to bear in mind, that it did not see the witnesses. It is the trial court that had 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.

24. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

25. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

26. I have the original Court file before me with typed proceedings. I note that the said arose from an accident on 20th April, 2019 involving Motor Vehicle KCK 979K, MAN Bus/Coach and Motor cycle Registration No. KMEM 543 KTVS. Liability for the accident is not subject of this appeal.

27. The injuries were not contested since on cross examination the Respondent was asked whether she suffered a fracture, which she answered in the negative.

28. In one of the decisions used by the Appellant in the Lower Court, Justice D.S Majanja on 21st February, 2019 in Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR 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."

29. It is thus 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.

30. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows as paragraph 8.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

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

32. The High Court, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 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 an 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.

33. 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 vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs 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..."

34. 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.

35. 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 erroneous assessment of damages.

    c. The award is simply not justified from evidence.

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

37. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- 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 differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."
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> Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR,
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> > "Turning to issue No. 2, the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:
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> > > "The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to

> trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"

38. Regarding special damages, in the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> > "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

39. The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible."
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

40. The Respondent called 3 witnesses. Before the hearing the defendant raised a useless notice of preliminary objection which the court rightly dismissed. The cause of action was said to be in Keroka. The matatu was plying the Kisii route. There are matters of fact that waste the court's time, have delay in concluding this matter. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus The Board of Trustees of the Cashewnut Industry Development Trust Fund, where the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither

did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the Mukisa Biscuit case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

41. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra):-

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
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> > "....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
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> At page 701 paragraph B-C Sir Charles Newbold, P. added the following:
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> > A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

42. The Tanzanian Court of Appeal sitting in Dar es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

43. The Court analysed evidence and entered judgment as follows: -

a. 100% liability against the appellants.

b. General damages Kshs. 1,500,000/=

c. Loss of future earnings capacity Nil

d. special damages Kshs. 76,600

44. On liability the court considered in extensio the Appellants submission. The court noted that the 2nd Appellant was charged and convicted of the offence of driving without due care and attention. He was fined Kshs. 10,000 on 9/3/2020.

45. The court also considered the authority of Rosemary Wanjiku Kungu – vs- Francis mutual Mbuvi for another (2014) on the failure of the defence to tender evidence, the court relied on the case of Trust Bank Ltd. versus Paramount Universal Bank Ltd. and 2 Others (2009) eKLRin which the court relied on the case AUTAR SINGH BAHRA AND ANOTHER VS RAJU GOVINDJI HCCC NO. 548 of 1998(UR) Mbaluto J. held:

> " Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

46. This leads to 100% liability.

47. On quantum the court considered the defence authorities. The Court was bound by the Court of Appeal decisions in Stanley Maore -vs- Geoffrey Mwendwa (2024) eKLR. The court dismissed the decision relied on by the Appellant as being 2 decades old.

48. The other decisions were in relation to minor injuries. Using same decisions and inflation found that Kshs. 1,200,000/= would suffice.

49. On loss of earning capacity the court compared loss of earnings as opposed to loss of earning capacity as stated in the case of Buttler -vs- Butler (1984) KLR at 232 where Kneller JA stated:-

> " Sometimes it is impossible, though the justice of the case requires some award to be made or as Holreyd LJ said, in Daniel v Jones [1961] 1 WLR 1103, 1109:
>
> > "…. Arithmetic has failed to provide the answer which common sense demands."
> >
> > A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The English Court of Appeal made an award under this head in Ashcroft v Curtin [1971] 1 WLR 1731, and by now, it is not a new principle in that jurisdiction.

50. The court declined to award same. The court was plainly wrong in failing to award loss of future earning capacity. This is not an amount in special damages but general damages. Unfortunately, despite provision loss of future earning capacity, the Appellant did not Appeal the decision. I will not disturb it.

51. The Respondent was awarded a sum of Kshs. 1,500,000/=. This was based on old authority submitted by the Appellant. In Great Rift Express Shuttle Services Ltd –vs- Moses Kipchumba Kipkemoi (2020) eKLR, the court H.A. Omondi J, as she then was, considered an award of Kshs. 2,00,000/= on 22/5/2002. The Claimant therein had 20% disability with bruises open left tenure fracture with bone loss, cornea peroration of the right eye.

52. Excluding the fracture in the above case an amount of Kshs. 1,500,000/= is sufficient in the circumstances. The last issue relates to Cap 405. The said Act in its long title, is to "An Act of Parliament to make provision against third party risks arising out of the use of motor vehicles"

53. From the reading the Appeal is baseless and a waste of judicial time.

54. As I depart, I note that the Respondent undertook to file submission which were not filed. The same applies to the Appellant. It is not a good show of diligence.

Determination

55. In the circumstances I seek the following orders: -

    a. The Appeal on both quantum and liability lacks merit and is accordingly dismissed.

    b. Costs of Kshs. 90,000/= to the Respondent.

    c. The file is closed.

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

KIZITO MAGARE

JUDGE

In the presence of: -

Kimindo Gachoka & Company Advocates for the Appellant

Amuga & Company Advocates for the Plaintiff

Court Assistant - Brian