Chege v Lamba & another (Civil Appeal 25 of 2018)
[2024] KEHC 5785 (KLR) (Appeals) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5785 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

CIVIL APPEAL 25 OF 2018

HI ONG'UDI, J

MAY 17, 2024

BETWEEN

JOSEPH IRUNGU CHEGE ..... APPELLANT

AND

LAWRENCE LAMBA ..... 1ST RESPONDENT

BUSTRACK LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Judgment of Mr. Mburu Principal Magistrate in Milimani Commercial Court CMCC No. 1532 of 2010, delivered on 22nd December 2017)

JUDGMENT

1. This appeal arises from a judgment and decree entered in Milimani Commercial Court CMCC No. 1532 of 2010. In the said suit, the appellant (who was the plaintiff) sued the respondents (who were the defendants) for special damages amounting to Kshs.198,540/= arising from a road traffic accident in which he suffered loss and damage.

2. The 1st respondent was the driver of the motor vehicle registration No. KAH 258N which allegedly hit motor vehicle registration number KAP 887V being driven by the appellant along Juja Road at Mamba. The 2nd respondent is the registered owner of the motor vehicle driven by the 1st respondent. The claim was fully defended and the trial Magistrate delivered Judgment on 22nd December, 2017 in which he found that the appellant failed to proof liability against the respondents and therefore his claim for special damages amounting to Kshs.198,500/= was declined. Further, the trial magistrate found that loss of user was neither pleaded nor proved. He proceeded to dismiss the appellant's suit with costs to the respondents.

3. The appellant aggrieved by the whole judgment lodged this appeal on 19th January,2019 on the following grounds:

   i. The learned magistrate erred in finding that the appellant had failed to prove its case against the respondents despite empirical evidence of witnesses that this was clearly not so.

   ii. The learned magistrate further erred in arriving at a decision that was wholly against the weight of the evidence produced.

   iii. The learned magistrate failed to appreciate the degree of proof required in civil matters like the one before him especially where one witness is deceased.

   iv. The learned magistrate erred in failing to award the plaintiff the sums claimed in the suit which was as a result of the accident involving the defendant's vehicle.

4. The Appeal was canvassed through written submissions.

Appellants Submissions

5. The appellant's submissions were filed by Mogeni Advocates and are dated 20th March, 2024. Counsel submitted on the grounds as listed in the memorandum of appeal.

6. Regarding the first and second grounds, counsel submitted that the appellant was the registered owner of motor vehicle KAP 887V that was being driven by his driver (now deceased) George Kamau when it was hit from behind by the respondents' vehicle registration No. KAH 258N causing extensive damage to it. The said evidence was corroborated by the police who visited the scene and drew the abstract which blamed the driver of motor vehicle KAH 258N for the accident. He added that the said evidence remained uncontroverted since the respondent never called any witness to tender counter evidence or challenge the same.

7. Counsel Submitted further that the appellant's vehicle was taken for repairs at check point garage from the date of the accident 16th August 2003 where it stayed up to 22nd September 2008 a period of 1 month and a half. The said vehicle did taxi business from where he got a daily income of average Ksh.2,500/. The appellant testified that he had lost the receipts on the said amount but his testimony remained uncontroverted.

8. In support of that position, counsel relied on the case of *Nkuene Dairy Farmers v Ngacha Ndeiya* [2010] eKLR where the Court of Appeal held as follows;

   " In our view special damages in a material damages claim need not be shown to have actually incurred."

9. Counsel went on to submit that in *David Ba-ine v Martin Bundi* 1996 eKLR. The Court of Appeal held as follow;

   " The Assessors report was sufficient proof and the failure to provide receipts for any repairs done was not fatal to the respondent's claim.

10. Lastly, on grounds 3 & 4 counsel submitted that the trial court failed to appreciate that the degree of proof was much lower in Civil cases and with the evidence on record for all intents and purposes, the appellant had put forth his case on a balance of probabilities to warrant the court to allow his appeal as prayed.

Respondent's Submissions

11. The respondent's submissions were filed by Julia Kariuki Advocates and are dated 11th March, 2024. Counsel identified one issue for determination by this court that is; whether there is a competent and proper appeal record.

12. Counsel submitted that failure by the appellant to seek the leave of court to file the record of appeal outside the stipulated time rendered the appeal fatally incompetent and improper. In support of this position counsel relied on Order 42 rule 13(4) of the *Civil Procedure Rules 2010* and the case of *James Murage Nguyu v RNN (Minor suing through next of friend RNK) & another* [2021] eKLR where the court stated that:

> " The appellant was served with a notice on 17th April 2018 informing him that the appeal had been admitted for hearing. He was directed to prepare a record of appeal and file the same within 21 days of the said letter. The appellant does not seem to have complied with that notice as no record of appeal was filed. It is my view that failure to file the record of appeal within the prescribed time or at all rendered the appeal fatally as incompetent [...] The appeal is incompetent for failure by the applicant to file the record of appeal. I order that the appeal be struck out with costs."

13. Counsel submitted further that failure by the appellant to file complete record of appeal made the appeal defective for failing the requirements of the law. He urged the court to strike out the appeal with costs.

Analysis and Determination

14. This being a first appellate court, I am guided by the *dictum* in the case of *Selle & another vs. Associated Motor Boat & others Co. Ltd.* [1968] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances. It was stated:

> " I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally *(Abdul Hammed Saif v Ali Mohamed Sholan (1955)*, 22 EACA 270).[emphasis added]

15. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I opine that the issues for determination are:

    i. Whether there is a competent appeal on record.

    ii. Whether the appellant proved his case on a balance of probabilities.

16. On the first issue it is the respondents' contention that failure by the appellant to seek the leave of court to file the record of appeal outside the stipulated time rendered the appeal fatally incompetent and improper. They argued further that failure by the appellant to file a complete record of appeal made the appeal defective for failing the requirements of the law.

17. In *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 Others* [2011] eKLR, the Court of Appeal (Omolo, Bosire and Nyamu JJA) observed that:-

> " The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...
>
> In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the *Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the *Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion." (emphasis added).

18. Having looked at the courts record, this court notes that the trial court judgment was delivered on 22nd December 2017 and the memorandum of appeal was filed on 19th January 2018. This was 27 days after the delivery of the judgment which is well within the 30-days period provided for under section 75G of the *Civil Procedure Act*. The delay was on the filing of the record of appeal which was filed on 10th June 2022 which is approximately seventy-one (71) days from 25th March 2022 when the appellant was granted 30 days leave to file and serve the record of appeal. The respondents in their submissions have referred to orders issued on 24th March 2022 but this court notes that no such orders were issued on the said date.

19. In view of the authority cited above, it is evident that courts should balance the interest of the parties. This is not to say that this court would condone or forgive inordinate delays but that it must do whatever is necessary to rectify mistakes where it serves the interests of justice. This court further notes that on 31st July 2023 the court issued directions whereby the appeal was admitted to hearing and the appeal was to be disposed of by way of written submissions. The respondents did not raise any objections to this or raise the issue of the appeal not being properly on record.

20. Upon the above consideration, I opine that in the interest of justice the delay in filing the record of appeal was not inordinate and the same cannot bar this court from determining the appeal on merit. Having said that, I find that there is a competent appeal on record.

21. The second issue is whether the appellant proved his case on a balance of probability.

22. The learned trial magistrate in his judgment found that the appellant had failed to prove liability against the respondent and therefore dismissed the suit with costs to the respondents.

23. In civil cases, the onus is on the plaintiff or any other claimant to prove the position he or she postulates on a balance of probabilities. This position is anchored under section 107 of the *Evidence Act* which provides guidance in this area, it states as follows: -

Section107 of the *evidence Act* states that;

i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

24. The Court of Appeal in the case of *Karugi & Another v. Kabiya & 3 Others* (1987) KLR 347 stated that:

> " The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

25. In the instant case, it was incumbent upon the appellant to prove the occurrence of the accident as well as the ownership of the accident motor vehicle. The appellant's witness PW1 PC Jesee Mwololo No. 28xxx testified on behalf of the investigating officer. He told the court that according to the police abstract the diver of motor vehicle registration number KAH 258U was to blame for the accident. The said abstract and OB were produced as Pexh 1a and b respectively. The respondent did not call any evidence to challenge the said exhibits or the ownership records from Kenya Revenue Authority produced as Pexh 2(a).

26. In view of the above, I find that the appellant proved through the police abstract that his motor vehicle registration number KAP 887N was involved in an accident. Additionally, that the 1st and 2nd respondents being the driver and owner of motor vehicle registration number KAH 258U were to blame for the said accident. No evidence was adduced by the respondents challenging the same despite them having entered appearance and filing a defence. To this end, I opine that the appellant proved his case against the respondents on a balance of probabilities and the learned trial magistrate erred in not finding as such.

27. On the claim for special damages, it is trite law that the same ought to be specifically pleaded. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* (1992) KLR 177 stated that:-

> " ..... Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

28. Further, in *Nkuene Dairy Farmers Co-operative Society & Another vs. Ngacha Ndeiya* [2010] eKLR, also relied on the Court held:

> " In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."

29. In the instant suit the special damages that were pleaded and proved amounts to Kshs. 161,840/= as for loss of user the same was pleaded but not proved.

30. I therefore allow the appeal and set aside the lower court Judgment and substitute it with a Judgment for Ksh 161,840/= plus interest at court rates from date of filing suit.

    (b) The Appellant is awarded costs both in lower court and High Court.

31. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 17TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

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H. I. ONG'UDI

JUDGE