



**Muraya & another v Njoroge & another (Suing as Administrators of the Estate of Morris Wandaka Mburu - Deceased) (Civil Appeal 107B of 2019) [2024] KEHC 14834 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14834 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 107B OF 2019  
JRA WANANDA, J  
OCTOBER 4, 2024**

**BETWEEN**

**EZEKIEL MURAYA ..... 1<sup>ST</sup> APPELLANT**

**WHITE SKY INVESTMENT LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMUEL MBURU NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**WANJIKU NJOROGE ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF MORRIS WANDAKA  
MBURU - DECEASED**

**RULING**

1. This Ruling deals with an interesting but unfortunate situation brought about by the persistent embarrassing scourge of “missing” or “lost” Court files. Fortunately, the Kenyan Judiciary is now embracing the digital space and once fully adopted, I believe, it shall be the end of such kind of scenarios whose result is to unfairly punish innocent litigants.
2. The background hereof is that dissatisfied with the decision made in Eldoret Chief Magistrate’s Court Civil Case No. 412 of 2017 whereby Judgment was entered in favour of the Respondents against the Appellants in terms of damages, being compensation for the death of the deceased, which arose as a result of injuries sustained in a road accident, the Appellants, through Messrs Kimaru Kiplagat & Co. Advocates, filed this Appeal on 19/07/2019. The Appeal is only against the quantum of damages awarded which the Appellants feel was manifestly excessive.
3. The Respondents had, on 31/08/2022, through Messrs Keter, Nyolei & Co. Advocates, filed the Application of the same date seeking dismissal of the Appeal for want of prosecution. The



Respondents filed a Replying Affidavit thereto deponing that the reason they have been unable to prosecute the Appeal was because, despite several reminders and constant follow-up, the trial Court had, to date, not supplied them with the typed proceedings of the case to enable them file a Record of Appeal before this Court. Needless to state, the typed proceedings of the case being appealed against is an integral component of any Appeal and constitutes one of the required items to be contained in a Record of Appeal before the Appeal is certified as ready for hearing (admission).

4. After listening to Counsels for the respective parties, I issued Summons to the Officer-in-Charge of the Civil Registry, Eldoret Magistrate's Court requiring him to attend Court to explain the inordinate delay in supplying the typed proceedings despite the constant follow-up. In obedience to the Summons, Ms Sarah Chepkemboi, a Representative of the Officer-in-Charge of the Civil Registry, Eldoret Magistrate's Court, attended Court on 4/05/2023 and informed the Court that the trial Court file could not be traced as all efforts to locate it had proved unsuccessful. She then informed the Court that for this reason, the Registry had since issued the Certificate of Loss dated 27/10/2022 formally confirming that, indeed, the trial Court file could not be found. She supplied the Court with a copy of the said Certificate.
5. In light of the developments cited above, I asked the Counsels to file Submissions giving their opinion and/or proposals on the way forward in this Appeal. However, instead of filing an "Opinion on the way forward" as directed, the Appellants' Advocates filed a formal Application by way of the Notice of Motion dated 17/08/2023 praying that this Court orders for a retrial of the lower Court suit, namely, Eldoret CMCC No. 412 of 2017. They also filed Submissions in support of the Application. On their part, the Respondents filed their "Opinion on the way forward" as directed by the Court. In the circumstances, I directed that, regarding the Appellants, their said Application and Submissions would serve as the Appellant's "Opinion on the way forward".
6. Regarding the Appellants, in the Affidavit in support of their said Application, sworn by one Martin M. Wanyonyi, the Managing Partner, Messrs Kimaru Kiplagat & Co., it is deponed that in the lower Court case, the Respondents were awarded Kshs 3,441,250/- as general damages and Kshs 71,250/- as special damages, plus costs, that upon this Appeal being filed, stay of execution of the Judgment was issued pending determination of the Appeal, that the Appellants have on a number of occasions applied to the trial Court for the typed proceedings thereof but have, to date, not received the proceedings, and that upon visiting the Registry, they were informed that the trial Court file was missing. Advocate Wanyonyi deponed that in the circumstances, the Appellants are unable to prepare a Record of Appeal and as a result, the Appeal cannot proceed to hearing. He therefore urged that it is in the interest of justice that there be a re-trial arguing that the Respondents will not be prejudiced in any way noting that the decretal sum is already secured as it is deposited in a joint account of the Advocates' firms on record.
7. As aforesaid, the Appellants' Counsel also filed Submissions in support of the Application. In the same, it was urged that the Judgment in the lower Court was delivered on 3/07/2019, that the Judgment in favour of the Respondents was for Kshs 2,925,062.50 as general damages, after a deduction of 15% agreed upon by consent as liability, and Kshs 71,250/- as special damages, plus costs and interest, and that the terms of the stay of execution issued was that the Appellants was ordered to deposit ½ of the decretal sum. Regarding the power to order for a re-trial, Counsel cited Order 42 Rule 26 of the Civil Procedure Rules, the case of David Kinya Maingi & 2 Others vs R [2013] eKLR and also the case of Selle & Another vs Associated Motors Boat Co. Ltd & Others (1968) E.A 123. He submitted further that this appellate Court would need the Judgment and proceedings of the lower Court to understand how that Court conducted the matter to arrive at the decision it did. He then submitted that the Appellants have in their possession, copies of documents to be relied upon and that the same



can be used during the re-hearing at the lower Court. He cited the case of Fidelity Shield v Fred Nzomo Musongo [2020] eKLR. He also submitted that the Appellant should be awarded the costs of this Appeal.

8. On his part, Counsel for the Respondent in his “Opinion on the way forward”, submitted that that in the absence of the trial Court file, this Appeal is not capable of being prosecuted, and that it should therefore be marked as impossible to prosecute or abandoned owing to the prevailing circumstances. According to him, litigation ought to come to an end and the Respondents being the successful litigant in the lower Court, they ought to reap the fruits of the litigation. He submitted further that, in any event, the Appellants have not shown real interest in prosecuting the Appeal since they have not attended Court on various occasions as is evident from the record. He therefore reiterated that the Appeal ought to be marked as impossible to prosecute and/or abandoned and that the Respondents be allowed to access the decretal amount under deposit.

### **Determination**

9. It is evident that the issue for determination herein is “whether, in light of the disappearance of the trial Court file, this Appeal should be marked as impossible to prosecute and be therefore marked as abandoned or withdrawn or whether the lower Court suit should, in the circumstances, be retried”.
10. The issue of missing proceedings is more often one that arises in criminal matters. I shall therefore seek guidance from decisions made in both criminal matters as well as in civil matters, and apply the principles in this appeal as appropriate. I will begin with the Court of Appeal case of *Francis Ndungu Wanjau v Republic Criminal Appeal No. 187 of 2002* where the following was stated:

“.....[the] question to be answered must be whether the order proposed to be made is the one which serves the best interests of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a retrial, an acquittal must follow as a matter of court.”

The principle is thus now well established that in cases such as this, whatever order it is that has to be made, the interests of justice as a whole must be considered, but acquittal is not automatic.”

11. In an earlier Court of Appeal case, namely, John Ooko Otieno vs Republic, Cr. Appeal No. 137 of 2002 (UR), the entire records and files containing proceedings and judgment of the trial Court could not be traced and the Court of Appeal was urged, in the circumstances, to quash the convictions and set aside the sentences thus setting the appellant at liberty since his constitutional rights to a proper trial had been infringed. In declining this invitation, the Court stated as follows:

“Whereas the loss of files in the court registry is a common occurrence, the loss of all documents i.e. court files, judgment, police file and Attorney General’s file is a rare occurrence. It has however, occurred and this Court is not a stranger to such a situation. This Court has on more than one occasion in the past encountered such a situation. In the case of *Pius Mukaba Mulewa and Another vs. Republic, Court of Appeal Criminal Appeal No. 103 of 2001*, this Court, faced with that situation had the following to say: -

“What we can take from ZAVER’s (Haiderali Lakhoo & Zaver vs Rex (1952) 19 EACA 2464) case is that the court must try to hold the scales of justice and in doing so, must consider all the circumstances under which the loss occurred. Who stands to gain from the loss” Is it merely coincident that both the magistrate’s file and that of the police are lost”



Does the available evidence point to anyone as being responsible for the loss" And if so, can such a party be allowed to benefit from a situation of his own making" In the final analysis, the question to be answered must be whether the order proposed to be made is the one which serves the best interests of justice. We reject any proposition that in cases where a file has disappeared, and it is not reasonably feasible to order a retrial, an acquittal must follow as a matter of course."

12. H. Ongudi J, faced with an almost similar scenario as the one herein, in the case of *Fidelity Shield v Fred Nzomo Musongo* [2020] eKLR ordered the lower Court suit for proceed to retrial. In doing so, this is what she stated:
  26. This purely means that a first appellate court has a duty to re-analyze and re-evaluate the evidence on record and arrive at its own conclusion. The record to be examined in a civil case are the pleadings, proceedings and judgment if the matter proceeded to hearing. In this case, from the bits of handwritten proceedings, I have confirmed that the matter proceeded to full hearing.
  27. The Respondent will therefore require certified proceedings and judgment to enable it prepare a Record of Appeal. It is so unfortunate that the handwritten proceedings in the lower court file are now mixed up and uncoordinated. Even the handwriting is not the same. Whoever did this mix-up of the proceedings has inconvenienced the parties and even this court. If identified she/he should undergo disciplinary action.
  28. After seriously considering all that has transpired in this file and considering the High court's duty in an appeal, I find justice to demand for a retrial. In the event of the Respondent failing to get his original documents, he should be allowed to use the copies in the court file."
13. Applying the above principles, in my view, acceding to the Appellants' proposal to order for a re-trial on the ground that the lower Court file is "lost" will only arm dishonest losers in the lower Court who have filed weak Appeals to corruptly "cause" the lower Court files to "disappear". I say so because such "losers" will be confident that with the file "lost", the cases will return to the lower Court for retrial and thereby availing them a "second bite at the cherry" and with it, a chance to strengthen their cases and/or fill in weak points. The Appeal Court cannot allow itself to be misused in this manner.
14. Similarly, the proposal by the Respondent that the Appeal be declared as impossible to be prosecuted because the lower Court is "lost" and be therefore deemed as abandoned and/or withdrawn is also unacceptable and unjustified. Acceding to such proposal is likely to set a dangerous precedent where all a Respondent in an Appeal will have to do to "kill" the Appeal is to "cause" the lower Court file to "disappear" and voila! the Appeal is declared as impossible to prosecute. This will be akin to encouraging corruption in our Court Registries noting that most of the times, Court files do not just honestly "disappear" by themselves, human beings deliberately cause them to "disappear". Of course, I am not suggesting that this is what the Respondent herein has done in this case. All I am saying is that giving a verdict such as the one proposed by the Respondents will only motivate malicious Respondents in Appeals to operate in the manner hypothesised above.
15. In the instant case, it is clear that the lower Court file is "lost" and may never be recovered. It is however not in dispute that the Appeal is only against the quantum of damages awarded by the trial Court which quantum the Appellant deems to have been inordinately too high and ought to be reduced. There is also no dispute on the awards made by the trial Court. According to the Appellant, liability was agreed by consent at 75:25 in favour of the Respondents, a fact which was not challenged by the Respondent. I believe that it is in view of that consent that the issue of liability is not a subject of this



Appeal. I also believe that each of the parties is in possession of the pleadings and documents relied upon in the trial Court during the hearing of the lower Court suit. In the circumstances, I believe that if this Court is supplied with such pleadings, including the written closing Submissions, and documents, even in the absence of the typed proceedings, this Court will be in a position to rely on the same and determine the Appeal on merits upon analyzing comparable awards on quantum.

16. Unlike the case herein, in the case of *Fidelity Shield v Fred Nzomo Musongo* (supra), it is not clear whether the Appeal was against both liability and quantum. In any event, each case must be determined on the basis of its own peculiar facts and circumstances. Further, the said decision being of a Court with equal jurisdiction, though persuasive and though clearly well-reasoned, is not binding on this Court.
17. Further, the Judgment herein having been delivered in 2019, a whole 5 years ago and the accident the subject thereof having occurred even much earlier, I find that sending back the case for re-trial will only prejudice both parties and cause a serious injustice. There can be no certainty that the witnesses will still be available after such a long time and whether, even if available, they will still be willing to attend Court to testify. Sending the matter back for re-trial will also mean that the parties shall have to spend much more resources, including incurring fresh legal expenses. In the circumstances of this case, I do not find it to be in the interests of justice for a fresh trial to be ordered.
18. In the premises, I will direct the parties to compile whatever pleadings and documents that they filed at the trial Court and supply the same to the Court.

#### **Final Orders**

19. In the end, I hereby order as follows;
  - i. The Appellant shall within 21 days from the date hereof, file and serve upon the Respondents, a Record of Appeal containing copies of pleadings and documents that were filed in Eldoret CMCC 412 of 2017 by both parties and which the Appellants deem to be necessary and relevant for determination of this Appeal.
  - ii. Upon service, the Respondents, should they deem that any necessary and/or relevant pleading or document filed in the trial Court has been omitted in the Record of Appeal to be filed by the Appellant, shall have 14 days within which to file their own Supplementary Record of Appeal containing such omitted pleadings or documents.
  - iii. The parties shall thereafter appear before this Court on a date to be fixed, for the purposes of determining or taking directions on whether the respective Records of Appeal filed are correct and whether the same are capable of sufficiently guiding the Court to determine the Appeal on merits on the issue of quantum which is the subject of the Appeal, and for further directions.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 4<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**WANANDA J. ANURO**

**JUDGE**

Delivered in the presence of

Ms Orikodi for Ekisa for Appellant

Keter for Respondent



Court Assistant: Brian Kimathi

