



**Esther & another v Kinyua (Civil Appeal E1348 of 2023)
[2024] KEHC 16877 (KLR) (Civ) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1348 OF 2023

RC RUTTO, J

NOVEMBER 15, 2024

BETWEEN

NGARI WARUGURU ESTHER 1ST APPELLANT

ELIAS NGARI EZEKIEL 2ND APPELLANT

AND

GEOFFREY MUCHUI KINYUA RESPONDENT

RULING

1. The Appellants being dissatisfied with the judgment of the Honourable E. Wanjala Principal Magistrate delivered on 27th October, 2022 filed a memorandum of appeal dated 1st December, 2023. The grounds of appeal are as follows:
 1. The Learned Magistrate erred in law and in fact in failing to consider the Defendant's evidence by way of submissions on record.
 2. The Learned Magistrate erred in Law and in fact in awarding the general damages of Kenya Shillings One Million Three Hundred Thousand (Kshs. 1,300,000/=) which is excessive for the injuries suffered by the Plaintiff.
 3. The Learned Magistrate erred in law and in fact in making an award for general damages, which is too high in comparison with current awards for similar injuries as per the authorities in the Defence submissions.
 4. The Learned Magistrate erred in law and in fact in awarding general damages for loss of earning capacity when the same was not pleaded and proved.



5. The Learned Magistrate erred in law and in fact in awarding special damages of Kshs. 200,710/= when the same were not specifically pleaded and proved.
6. The Learned Magistrate erred in law and in fact in awarding future medical expenses when the same were not specifically pleaded, proved and prayed for.
2. The Appellants urged the court to set aside the judgment in the trial court and substitute the same with a judgment dismissing the Respondent's case with costs.
3. The Court on 21st June, 2024 admitted the appeal for hearing. When the appeal came up on 3rd July, 2024, for directions on its disposal, the Appellant informed the Court that the Respondent had filed a cross-appeal without the leave of court and urged for its expungement from the Court's record. On his part, the Respondent made an oral application to have the cross-appeal admitted on record. This court directed both parties to file their submissions on the application
4. The Respondent's cross-appeal is dated 15th June, 2024 and is based on the following grounds:
 1. The learned magistrate erred in fact and in law and misdirected herself thereon by finding as she did that an award of Kshs. 1,300,000 suffices as general damages for pain and suffering contrary to the prayer sought by the cross-appellant.
 2. The learned magistrate erred in fact and in law and misdirected herself in failing to correctly evaluate the evidence adduced before her.
 3. The learned magistrate erred in fact and in law and misdirected herself thereon by failing to follow the binding precedents in regards to the prayer for general damages for pain and suffering.
5. The Respondent/cross-appellant urged the Court to dismiss the appeal and allow the cross appeal by substitution the award of Kshs. 1,300,000 with an award of Kshs. 3,000,000.

The Respondent's submissions on the cross appeal

6. The Respondent's submissions dated 15th July, 2024 gave a brief background of the case and identified one issue for determination, whether the oral application to strike out the cross appeal dated 14th June, 2024 is merited.
7. He relied on Order 42 Rule 32 of the Civil Procedure Rules. It was his submission that he was served with a memorandum of appeal on 6th December, 2023 and a record of appeal on 11th June, 2024. He stated that he was only able to peruse the same within two days and consequently instructed his advocates on record to proffer a cross appeal. He further submitted that the Appellants went back to court to seek further extension of time to appeal when the Respondent moved the court vide an application for release of the security deposited in court having shown no interest to lodge an appeal.
8. He relied on the case of Ferruz Mahendan & 4 Others V Ahmed Mohammed Honey [2016] eKLR and submitted that he had provided sufficient cause for the delay in failure to file and serve its cross-appeal within a reasonable time.
9. He further submitted that there was no prejudice to the respondents to the cross appeal if the said cross appeal was to be heard and determined with the main appeal since they could have leave to put in supplementary submissions. It was also his submission that the appeal was yet to be placed for admission of the appeal. He added that the cross appellant stands to suffer irreparably if the cross appeal



is struck out on mere technicality as opposed to substantive justice provided for under Article 159 of *the Constitution*.

10. The cross-appellant relied on the case of West Kenya Sugar Company Limited V Silvanus Angayilwa Shikuya (Suing on behalf of the Estate of Zamarantha Ivasha Shikuya [2021] eKLR. He urged the court to dismiss the oral application by the cross-respondent to strike out the cross appeal and dismiss the same with costs to pave way for the hearing and determination of both the appeal and the cross-appeal as filed.

The Appellants' submissions on the cross- appeal

11. The Appellants' submissions are dated 8th July, 2024. They also gave a background of the case and identified one issue for determination, whether the cross-appeal should be struck out and/or expunged from court record.
12. They submitted that a party who wishes to file a cross-appeal out of time, ought to seek leave of court vide an application and relied on the cases of Bulsho Trading Company Ltd V Rosemary Likhola Mutakha & another [2020] eKLR, Diamond Trust Bank (K) Limited V Galaxy Ventures (K) Limited [2020]eKLR and Section 79G of the *Civil Procedure Act*.
13. It was their submission that the cross appeal was an afterthought by the Respondent after reviewing the Appellants' submissions. They cited the case of Adie V Jims Fresh Vegetable Growers and Exporters Limited (Appeal 221 of 2022) [2024] KEELRC 1145 (KLR) (17th May, 2024) (Ruling). They argue that the filing of the cross-appeal was aimed at causing reasonable delay since the Respondent were served with the Memorandum of Appeal on 6th December, 2023, over 6 months ago. He cited the case of Holiday Cars Travel & Tours Ltd V Blasio Eshitemi Lubanga & 2 Others [2021] eKLR.
14. It was their submission that the cross-appeal was not served upon the Appellants and that they only discovered the same while navigating the e-filing platform. They argued that the Respondent wanted to have the cross-appeal admitted and determined mischievously by failing to inform the Appellants of its existence.
15. The appellants relied on the case in Kayaya V Katungi (Civil Appeal E060 of 2021) [2023] KEHC 27283 (KLR) (26 September, 2023) (Judgment) and submitted that the Respondent had no intent of filing the cross-appeal. They concluded by submitting that admitting the cross appeal would be prejudicial to them since they already made submissions on the appeal only.

Analysis and Determination

16. Section 79G of the *Civil Procedure Act* clearly prescribes the period for filing of appeals from decrees or orders of the subordinate court to the High Court to thirty days from date of the decision or order. However, the said section also permits the admission of an appeal out of the statutory period of thirty days where there is sufficient or good cause shown as to why there was delay in such filing.
17. It is noted that despite the cross-appellant's submission that the appeal is yet to be placed for admission, the court on the 21st June, 2024 admitted the appeal to hearing before a single judge. It was also directed that the appeal be disposed by way of submissions. Subsequently, on 3rd July, 2024 when the matter came up for compliance and hearing of the appeal, both parties had filed their submissions to the appeal. It was brought to the attention of court that the Respondent had served the Appellant with a cross-appeal allegedly out of time and without leave of court.



18. To address this issue, I refer to the Supreme Court of Kenya case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR . (Nick Salat Case) which held as follows:

“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, the 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. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record. (Emphasis added)

19. Further, I make reference to the case of Nairobi Civil Appeal No. E017 of 2022 Brenda Jelagat Cheruiyot v Mediamax Network Limited & Others where this court while making reference to the above Nick Salat Case stated that;

Outrightly, drawing analogy and guidance from the above case where the supreme court frowned upon the untidy practice where a party files a matter out of time and without leave, and then moves the court to seek leave to file the same. This is akin to anticipating court orders where parties hold this notion that the court will sanitize their errors by issuing extension as a matter of course....

.....An act done beyond the time set out and without leave of court is a nullity. It is worth emphasizing that where time has lapsed, a party has to first seek extension of time and only after such extension has been granted, that which ought to have been done within the lapsed timeframe can now be done. Any act done without leave is a nullity.

20. It is the Respondent’s submission that the reason for the delay was that he was served the memorandum of appeal on 6th December, 2023 and a record of appeal on 11th June, 2024. It was his contention that he was only able to peruse the same within two days and instruct his advocates on record to prefer a cross appeal.
21. It is this Court’s view that the said reason does not hold since the Respondent knowing the procedure and timelines for filing appeals, had the liberty to make the requisite application before this court seeking extension of time to file the cross-appeal instead of ambushing the Appellants with a cross-appeal. Having been served with the memorandum of appeal in December 2023 and noting the grounds of appeal set out therein, nothing precluded him from instigating his cross appeal at the time as he did not require to await the record of appeal.
22. Consequently, the cross-appeal dated 15th June, 2024 is hereby struck out and expunged from the court record with costs as costs follow event.

It is so ordered.



RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 15TH DAY OF NOVEMBER 2024

For Appellants:

For Respondent:

Court Assistant:

