



**Methigo & 2 others v M’ugabi (Civil Appeal E057 of 2023)
[2024] KEHC 14568 (KLR) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E057 OF 2023
CJ KENDAGOR, J
NOVEMBER 18, 2024**

BETWEEN

DAVID WAHOME METHIGO 1ST APPELLANT

JANE KATHURE 2ND APPELLANT

CYNTHIA KATHAMBI 3RD APPELLANT

AND

STEPHEN GIKUNDA M’MUGABI RESPONDENT

*(Being an appeal from the Judgment and Order delivered by
Hon. E. Tsimonjero, Resident at Meru on 23rd March, 2022)*

JUDGMENT

Introduction

1. The Appellants claimed that on 1st January, 2013 they were involved in a road traffic accident along the Meru-Nanyuki road while travelling as fare-paying passengers aboard the Respondent’s Motor Vehicle. They claimed that the Motor Vehicle rammed into a stationary lorry, as a result of which they sustained injuries. They blamed the Respondent for the accident. They did not file the suit immediately and were caught up by the Statute of Limitation of Actions. In February, 2019 the Appellants sought leave of Court to file the suit out of time. The Court granted the Appellants leave on 19th March, 2019 and ordered them to file the suit within 14 days. They filed the suit on 10th April, 2019.
2. They claimed Special damages of Kshs.50,000/= and General Damages. They claimed to have sustained the following injuries;

1st Appellant- Contusion on the left side of the forehead, loose anterior lower incisor teeth, swollen tender left leg and comminuted fracture of the right mid mandible;



2nd Appellant- Laceration of the left eyelid and Fracture of left humerus;

The 3rd Appellant- Injuries on the neck, abdominal injuries, and laceration of the right big toe.

3. The Respondent filed a Defence in which he denied liability. He also argued that the Appellant's suit was fatally defective for having been filed outside the 14-day period granted by the Court and urged the Court to dismiss the same with costs to the Respondent.
4. The Court delivered the judgment on 23rd March, 2022 and made several findings. It held that the Appellant's suit was fatally defective for being time-barred and dismissed it. The trial Court nonetheless proceeded to determine the twin issues of liability and quantum as required. Regarding liability, the Court found the Appellants had failed to establish on a balance of probabilities that they were passengers in the subject motor vehicle. It held that had they established this fact, he would have found the Respondent 100% liable for the accident.
5. On quantum, it held it would have awarded the Appellants general damages as follows; 1st Appellant-Kshs.400,000/=, 2nd Appellant-Kshs.300,000/= and the 3rd Appellant-Kshs.200,000/=.
6. The Court declined to give the Appellants special damages as prayed for two reasons. First, it held that there was no breakdown of what it comprised. Second, it held that the receipts produced were not legible and appeared to have been produced in another case from the markings thereon.
7. The Appellants were dissatisfied with the judgment and appealed to this Court vide a Memorandum of Appeal dated 24th April 2023. They listed 7 Grounds of Appeal, which are as follows;
 1. That the Learned Magistrate erred in law and in fact in failing to consider the issue of time as a Preliminary issue and allowing the case to be heard till the end and then dismissing the suit for being time barred hence prejudicing the Appellants herein.
 2. That the Learned Magistrate erred in law and in fact in failing to consider that parties are bound by their pleadings and at no time did the Respondent herein raise any issue of the suit being time barred and hence further erred in law and fact in suo moto deciding the suit was time barred hence denying the parties herein justice.
 3. That the Learned Magistrate erred in law and in fact in failing to consider that a delay of only seven (7) days was not so inordinate to warrant a suit being dismissed for being filed out of time.
 4. That the Learned Magistrate erred in law and in fact in deciding that the Appellants had not proved to have been passengers in the subject motor vehicle hence failing to hold the Defendant fully liable for the accident.
 5. That the Learned Magistrate erred in and in fact in continuing to deliver a judgment on Quantum of damages to be paid to the Appellant whereas he has already dismissed the suit leaving the Appellants in a limbo on whether to execute the judgment or not.
 6. That the Learned Magistrate erred in law and in fact in failing to consider the gravity of the injuries occasioned on the Appellants and therefore arrived at an erroneous estimate of the general damages which was inordinately low as to be an unfair estimate.
 7. That the Learned Magistrate erred in law and in fact in failing to consider and appreciate the Appellants claim and pleadings more particularly the Plaintiff and Submissions and hence disregarding the nature of injuries and awarding damages that are very low.



8. They asked the Court to allow the appeal, set aside the judgment, and review the damages granted upwards.
9. The appeal was canvassed by way of written submissions.

The Appellants' Written Submissions

10. The Appellants submitted that the Trial Court erred in declaring the suit defective suo moto. They argued that the Respondent should have moved the court by way of preliminary objection. They submitted that the Respondent did not move the Court on this issue, and thus, the trial court had no business in declaring the suit defective suo moto. In the alternative, they also submitted that the 7-day delay was not so inordinate to prejudice the Respondent because he entered appearance and did not raise qualms about the delay. They submitted that the 7-day delay was a mistake by the advocate on record then and ought not to be visited upon an innocent litigant.
11. They also argued that the 7-day delay was a procedural technicality and that the Court should have disregarded it in line with its constitutional duty under Article 159 (2) (d) of *the Constitution* of Kenya 2010. They argued that the trial Court should have determined the case on its merits and demerits. They also argued that the trial Court violated their legitimate expectation because it allowed them to litigate only for the Court to inform them at the tail end that their efforts were futile. They submitted that by allowing the matter to proceed, the Court and parties purified, sanctioned, and verified the pleadings as good and ripe for trial.
12. The Appellants argued that they had provided enough evidence to show they were passengers in the suit motor vehicle. They submitted that their evidence, as contained in the Police abstracts, was not challenged, and thus, the Court should have found that they were indeed passengers in the motor vehicle. On the issue of the award of damages, they submitted that the awards were very low and urged the court to review the awards upward. On the issue of special damages, they argue that the lower Court should not have rejected the receipts because the Respondent did not challenge the same during their production.

The Respondent's Written Submissions

13. The Respondents argued that jurisdiction has to exist when proceedings are initiated, and in that regard, a limitation on the authority of the Court can be raised at any stage of the proceedings by any party or even the Court suo moto. He argued that, in any event, nothing barred the Learned Magistrate from determining the issue of limitation of time suo moto since, as a matter of practice, the Courts have a duty of jurisdictional inquiry to satisfy itself that it is appropriately seized of any matter before it.
14. The Respondent also argued that the suit was defective because the Appellants filed the same 8 days after the expiry of the extension period. He argued that the Appellants ought to have sought further extension of the leave to file the suit. He submitted that extension of time is a discretionary power and not a party's right and must be confined to rules of reason and justice. He argued that the Court gave the Appellants a conditional leave, but they failed to comply with the Court's directions.
15. Lastly, he submitted that the lower Court's finding that the Appellants had not proved they were victims of the accident was well founded in fact and law. He also submitted that none of the pleadings and documents filed by the Appellants at the lower Court was persuasive enough to prove that they were victims of the accident that allegedly occurred on 1st January, 2013. He argued that the abstract relied on by Appellants did not include their names among the names of persons injured during the alleged accident.



Issues for Determination

16. I have reviewed the grounds for appeal and submissions from both parties, the issues for determination are:
- a. Whether the Appellants' suit at the Lower Court was Defective.
 - b. Whether the Appellants' Failure to file the Suit within the 14 days granted can be cured under Article 159 of *the Constitution*.
 - c. Whether the Court could move Suo Moto on the Defect of the Appellant's Suit.
 - d. Whether the award of damages was proper.
17. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court re-evaluates the evidence, it must bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:
- “...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 ...”

Whether the Appellants' suit at the Lower Court was Defective

18. There is no dispute that in February 2019, the Appellants sought leave of Court to file the suit out of time. The parties also agree that the Court granted the Appellants leave on 19th March, 2019 and ordered them to file the suit within 14 days. They all agree that the suit was filed on 10th April, 2019. Importantly, they all agree that the suit was filed after the expiry of the 14 days granted by the Court. The Appellants assessed that they were late by 7 days, while the Respondent assessed that the filing was late by 8 days.
19. The parties do not, however, agree on the legal implications of the delay or lateness. The Appellants argued that the 7-day delay is a mere procedural technicality that can be cured under Article 159 of *the Constitution* of Kenya, 2010. On the other hand, the Respondents argue that the delay is not a mere procedural technicality and goes to the root of the Court's authority to hear and determine the matter.
20. The jurisprudence around this issue is that documents filed without leave of Court, where such leave is required, are a nullity and cannot be regularized. In *Nickson v Collins & 3 others (Environment & Land Case 1 of 2024)* [2024] KEELC 1797 (KLR), the court held that:
- “This Court has, just like many others before, considered instances where documents are filed out of the time stipulated by law or order of Court without leave of court being sought. It has not minced its words that such documents are a nullity. They can neither be legalized nor sanitized. Leave, whether through an application that is determined first or extension of the time by the consent of the parties without application to court as provided for under Order 51 Rule 7 of the Civil Procedure Rules, MUST be granted first before a document is filed.”



21. The court went on to say:

“What is clear is that the Applicant did not comply with the directions of the Court. He went on a frolic of his own, actually. This is unacceptable.....16. That said, guided by the decision in the Salat case (supra) it is clear that where a document required to be filed within a certain period is not filed within that time, or where a document that ought not to be filed with leave of the Court is filed without it, it is a nullity: it is of no consequence and its place is nowhere than being expunged from the record.”

22. In *Neeraj Jayatilaiya Kalaiya v Cheruiyot & 5 others* (Environment & Land Case E394 of 2021) [2022] KEELC 2669 (KLR), the Court addressed this issue and held as follows:

“40. For clarity, it is not appropriate and/or legally tenable for such a Party to ignored and/or disregard the terms of the Court order and to file such documents and when confronted with an objection seeking to expunge same, to implore the Court to validate the irregularly filed documents.

41. To my mind, despite the provisions of Order 50 Rule 7 of the Civil Procedure Rules 2010, documents which are filed outside timelines and without Leave of the Court are a nullity and are thus amenable to be expunged.

43. The Jurisprudence flowing from the decisions alluded to in the preceding paragraphs, denote that any documents filed out of time and without leave of the court is therefore ipso jure a nullity and same cannot be condoned, irrespective of the excuse belying the lateness.”

23. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court of Kenya stated:

“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 need 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, the Court cannot do.”

24. Based on the above authorities, I hold that the Appellants’ suit at the lower Court was defective for want of Leave. Upon the expiry of the 14 days granted by the Court, the Appellants ought to have moved the court to extend leave to file the suit out of time.

Whether Article 159 of *the Constitution* can cure the Appellants’ failure to file the suit within the 14 days granted

25. The next issue is whether Article 159 of *the Constitution* can cure the Appellants’ failure to file the suit within the 14 days granted. A similar question arose in *Wanja v Kago* (Civil Appeal E006 of 2021) [2022] KEHC 10332 (KLR), where a litigant failed to obtain leave and sought refuge under Article 159 (2) (d) of *the Constitution*. The Court held that Article 159 cannot cure a litigant’s failure to seek leave where such leave is necessary. It held:

“14. The appellant has urged this court to find that failure to seek leave is a technicality that can easily be cured by this court invoking article 159 (2) (d) of



the Constitution and then make a finding in favour of the appellant. The Court in the case of Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR held that the objective of Article 159(2) (d) of the Constitution of Kenya was not to validate actions that are null and void but disguised as procedural technicalities. The Court further held that these provisions cannot be invoked by a party who has been indolent and fails to comply with the laid down provisions of the law to ride on a ground of a mere irregularity or procedural technicality.

15. Given the fact that the cause of action was brought under the given provisions of law, it was incumbent upon the appellant to seek leave before filing the suit herein; the same was not done, I therefore hold the view that this court cannot invoke its discretion to cure the defect.
 16. In the above premises, I find that the plaintiff suit was statute barred and no leave was sought to have the claim admitted out of time.”
26. The Courts have consistently held that Article 159 does not operate to negate statutory timelines and procedural rules. This principle was restated by the Court of Appeal in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR, where it held:
- “I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”
27. Based on the above authorities, I hold that Article 159 of the Constitution cannot cure the Appellants’ failure to file the suit within the 14 days granted. The 14-day timeline given by the trial Court went to the root of the Court’s jurisdiction and cannot be regarded as a mere procedural technicality.

Whether the Court could move Suo Moto on the Defect of the Suit

28. Lastly, the Appellants submitted that the issue about the defect of the Appellants case was not properly moved or raised because the Respondents did not raise it. They argued that the court was not mandated to raise the issue on its motion. I disagree with the Appellants. It is now a well-settled principle that Courts can, on their own motion, raise jurisdictional issues even where parties have not raised them.



29. In *Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib* [2015] eKLR, the Court of Appeal held that the court has authority to act on its own motion on such a crucial question such as the jurisdiction of the court even where the parties have not raised it:

“...the determination of the appeal turns on the issue of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it was an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.”

30. Similarly, in the case of *Mwangi v Mattan Construction Ltd (Civil Appeal 10 of 2017)* [2024] KEHC 5964 (KLR), the Court stated:

“The parties did not raise the issue with this court. I have agonised on whether I am at liberty to raise the issue on my own motion. In my view, jurisdiction is such an important issue in a case that it can be raised by the court even on its own motion. In *Bona Vacantia Properties (K) Limited v Mwanzia (Environment & Land Case 11 of 2021)* [2023] KEELC 17964 (KLR) (30 May 2023) (Ruling), it was held as follows:

Jurisdiction is fundamental; indeed, central in any matter before a Court of law. It does not have to be raised by any party. The Court may as well pick it out on its own motion.”

31. The upshot is that the trial Court had the inherent mandate to move *Suo Moto* on the defect of the Appellants’ suit.

32. I am guided by the decision in *Bwire v Wayo & Anor; Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) regarding the address of the additional grounds of appeal, where a finding on defective pleadings has already been made, as outlined in the preceding paragraphs;

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.”

33. I have thus examined the additional grounds of appeal regarding whether the appellants proved they were passengers in the motor vehicle and the matters of liability and damages. I reviewed the record and found that the Police Officer who testified as PW4 presented police abstracts confirming that an accident occurred. The witness provided the names of those injured, and the names of those who sustained fatal injuries were recorded in the abstract. The officer indicated that the names he provided were recorded in the police occurrence book. PEX4 (b) is signed by the Base Commander and lists the names of individuals who sustained both severe and minor injuries; the names of the respondents are included in this excerpt. The reference details in this extract are the same as those in the police abstracts produced. Although it would have been preferable for their names to be included, it is not detrimental to their case that their names were not explicitly indicated in the abstract. Additional evidence was submitted through Ex 4(b) indicating their involvement in the accident. There are medical documents detailing the treatment received as a result of the accident. Based on the available evidence, I find that there is proof on a balance of probabilities that they were passengers in the motor vehicle KAN 096Z.



34. Regarding liability, the respondents were passengers in the vehicle and did not have control over it. The police officer confirmed that the report indicated the driver was at fault for the accident. This information is also reflected in the police abstracts. There were no third-party proceedings nor evidence presented attributing blame to the driver of the motor vehicle KAU 358L noted in the police abstract. Liability would thus have been held at 100% against the defendant.

35. It is an established principle that an appellate court should not interfere with the assessment of damages by a trial court unless it can be shown that such an assessment is contrary to the well-established guidelines. In the case of Butt –v- Khan (1981-88) KLR 349 the Court held as follows:-

“The appellate court cannot interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates.”

The trial Court considered the medical reports, and the assessment of general damages was consistent with comparable cases duly cited.

36. Special damages were not explicitly pleaded for each respondent in the plaint. I concur with the trial Court’s observation that some receipts were faded. The respondents should have specifically pleaded the special damages for each plaintiff. The trial Court’s decision regarding liability and damages was well-founded. As the Court of first instance, the trial Court was obligated to assess damages, even if the final outcome was a dismissal.

37. I find that the Appellants’ suit in Meru Civil Suit 87 of 2019 was fatally defective for want of leave, and the prayers sought cannot be granted.

38. The Appeal is hereby dismissed with costs to the Respondent.

It is hereby ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICRO SOFT TEAMS ONLINE PLATFORM ON THIS 18TH DAY OF NOVEMBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Mafumbo Advocate for Respondent

Mr. Sandi Advocate for Appellant

