



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 47 OF 2017

JAMES MURAGE NGUYU.....APPELLANT

VERSUS

RNN (Minor suing through next of friend RNK).....1ST RESPONDENT

YUASA INTERNATIONAL LTD.....2ND RESPONDENT

J U D G M E N T

INTRODUCTION

- i. This is an Appeal from the Judgment of Honorable P.M. Kiama, delivered on 11/4/2017 in Wanguru Civil Suit No. 158 of 2010.
- ii. The appeal is against the judgement delivered by the trial court in the suit arising from a road traffic accident claim which was brought by the respondent for injuries she sustained while in the appellant's motor vehicle a matatu KAZ 290S that collided with Toyota Prado KBF 402U on the 15.11.2009 along Kenol-Sagana road at Kakuzi.
- iii. The Learned Trial Magistrate found that the defendant/2nd respondent was not liable as it had sold the vehicle prior to the accident. The court held the third party/appellant herein 20% liable to blame for the injuries suffered by the Plaintiff. The Trial magistrate gave an award on quantum at Kshs.100,000 general damages and Kshs.3,700 special damages. Judgement was entered against the appellant at 20% which interprets to Kshs.20,740/-. The appellant was dissatisfied with the judgment and filed this appeal.
- iv. The appeal was based on the grounds that the learned trial magistrate erred in law and fact:
- a) As he was unjust against the weight of evidence and relied on the wrong principles of law, thereby occasioning a miscarriage of justice upon the appellant.
 - b) In finding the appellant liable where there was no evidence in support of the same
 - c) In awarding general damages of Kshs.82,960/= an amount that was excessive and unjust in the circumstance considering the nature of injuries and the conventional awards.
 - d) In awarding general damages when there was no proof and evidence to support the same
 - e) By misdirecting himself when he failed to consider the appellant's submissions on liability and quantum
 - f) In finding that the third party should shoulder the defendant's costs
 - g) In finding that they were 80% liable for the accident
 - h) In duly disregarding the judicial authorities cited by the appellant and by instead relying on the authorities cited by the respondent and failing to take into account the facts in the 1st instance.

The Appeal sought for orders that it be allowed, to set aside the trial court's finding and dismiss the suit with costs to the appellant, that the court reassess quantum and liability awarded and issue costs of the appeal. The respondents opposed the appeal.

1. This matter was pending Judgment. I have carefully gone through the file and found as follows:-

1) This appeal was admitted on 5th April 2018.

2) Vide a letter by the Deputy Registrar dated 17th April 2018, the appellant was informed that the appeal had been admitted for hearing. He was therefore directed to prepare a record of appeal and file the same within 21 days of said letter.

3) The matter was listed to mention on 6th March 2019.

4) As of 6th March 2019 the appellant had not filed a record of appeal and indeed never filed the record of appeal at all.

5) The matter was listed for directions on 26th June 2019. On this day the parties appeared and took directions that the appeal be canvassed by way of written submissions

6) The parties filed submissions including the appellant despite the fact that he had not filed a record of appeal in court.

7) The parties appeared before me on 22nd January 2020 and confirmed that they had all filed the submissions. I proceeded to give a date for Judgment.

8) There is no revenue receipt showing that the appellant over paid court fees for filing a record of appeal.

2. This is a brief background of this appeal. The law requires that a record of appeal be filed within 21 days of receipt of the notice of admission of the appeal. **Order 42 Rule 12 Civil Procedure Rules** provides as follows:-

“ Where the Judge admits the appeal under Section 79B of the Act the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.”

3. The submissions by the 1st respondent indicates that a record of appeal was filed on 8th May 2018 and served on the 1st respondent on 29th October 2019. I however confirm that I have not come across any record of appeal on record. The question is whether I should proceed and deliver Judgment when the appellant has not filed a record of appeal.

4. Before I determine this issue, I will consider whether the appeal as filed is competent. 1st respondent has raised an issue that the appeal is incompetent as it was not filed within 30 days.

The 1st respondent in his submissions filed in this court on 20th January 2020 and is dated 16th January 2020 has submitted that this appeal purports to challenge the Judgment of Hon. P.M Kiama dated 11th April 2017. He submits that the appeal has not been filed within the stipulated period of thirty days.

5. He submits that the time for filing the appeal could have lapsed on 10th May 2017. He submits that the current appeal was filed on the 17th November 2017 which was completely outside the stipulated period. Counsel for the 1st respondent submits that the appeal filed does not contain the order granting the appellant leave to file the appeal outside the stipulated period. That this renders the entire appeal incompetent and an abuse of the court process. He prays that the appeal be struck out with costs.

The appellant did not address the issue in his submissions.

6. Determination as to whether the appeal is competent:

The appeal is challenging the Judgment of Hon. P.M. Kiama Senior Principal Magistrate which was delivered on 11th April 2017. Kairu & McCourt as Advocates for the 3rd party – Appellant filed a Memorandum of Appeal dated 17th November 2017 which was filed in court on 24th November 2017. Although the appellant has stated on the face of the Memorandum of Appeal that it is pursuant to court order of 13th November 2017, the order has not been annexed and was not filed together with the Memorandum of Appeal. The court was left to speculate the contents of the order. An appeal from the sub-ordinate court to the High Court is supposed to be filed within 30 days. However, the High Court has discretion to admit the appeal filed outside time if the appellant satisfies the court that he/she had sufficient cause to file appeal out of time. **Section 79G of the Civil Procedure Act** (Cap 21 Laws of Kenya) provides:

“ Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

7. It has not been demonstrated by the appellant that he had obtained leave to appeal out of time. From the wording of **Section 79G of the Civil Procedure Act** (Supra) an appeal filed out of time may be admitted provided that the appellant files an application together with the appeal to extend time and the court exercises discretion to extend time.

8. In the case of **Gerald M'Limbine -v- Joseph Kangangi (2009) eKLR**, Emukule J stated –

“ My understanding of the proviso to section 79G is that an applicant seeking “ an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time.

The provision does not mean that an intending appellant first seeks the court permission to admit a none existent appeal out of the stipulated period. To do so would actually be an abuse of the court’s process under section 79 B”.

A similar holding was made by Aburili, J in Martha Wambui -v- Irene Wanjiru Mwangi & Another (2015) eKLR where she stated that-

“In my view the use of the word admitted connotes both the Act of allowing an appeal to be filed out of time and also the Act of allowing or permitting an appeal already filed to be admitted out of time.”

9. The Court of Appeal has been emphatic that the position taken by the High Court when dealing with applications for extension of time to file appeal is the correct position. See Charles Karanja Kiiru -v- Charles Githinji Maigwa (2017) eKLR

10. The appellant filed the Memorandum of Appeal on 24th November 2017 from the decree delivered on 11th April 2017 six months the stipulated time. It was therefore filed out of time and the appellant did not seek leave of the court to file appeal out of time. **Section 79G of the Civil Procedure Act** requires that the appeal be filed and the appellant moves the court to admit the appeal out of time where he will be required to satisfy the court that he had good cause for not filing the appeal in time.

11. In this case the appeal was filed out of time and no leave was obtained from this court to file the appeal out of time. An appeal filed out of time and without leave of the court is incompetent. I find that the appeal is not properly before this court and is therefore incompetent.

Failure to file a record of Appeal.

12. 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 incompetent.

13. Failure to file a record of appeal

In the case of Rachel Wambui Ng’ang’a & Another -v- Rahab Wairimu Karau (2020) eKLR while considering the issue of failure to file a Record of Appeal Justice (Retired) Sitati stated that her hands were tied by the binding decisions which she quoted as follows. The Supreme Court of Kenya in the case of Bwana Mohamed Bwana -v- Silvano Buko Bonaya & 2 Others (2015) eKLR where the court held as follows at paragraph 41:-

“ Without the record of Appeal, a court cannot determine the appeal cause before it. Thus if the requisite bundle of documents is omitted the appeal is incompetent and defective for failing the requirements of the law. A court cannot exercise its adjudicatory powers conferred by the law or the constitution here an appeal is incompetent. An incompetent appeal directs a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

Order 42 rule 13 (4) (f) requires the court to satisfy itself that the Judgment, the order or appeal which is appealed from forms part of the court record. These are supposed to be included in the record of appeal. The record of appeal is supposed to ensure documents are filed in an orderly manner complete with an index for ease of reference. That is why the appellant is supposed to file such record. **Order 42 rule 13 (4) (f)** is couched in mandatory terms. Failure to comply with the rule renders the appeal incompetent and outs the jurisdiction of the court to determine the merits of the appeal. The consequence of failing to file the record is that the Judgment and the decree appealed against is not before the court as required under **Section 65 of the Civil Procedure Act** which provides that appeal to the High Court shall lie from the decree or part of the decree of the sub-ordinate court.

14. There cannot be any valid appeal where the decree and the Judgment against has not been filed in the record of appeal. In Ndegwa Kamau t/a Sideview Garage -v- Isika Kalumbo (2016) eKLR and Joseph Kamau Ndung’u -v- Peter Njuguna Kamau (2014) eKLR Justice Ng’aa struck out the appeals because the decrees that were being appealed from had not been annexed in the respective records of appeal. In the matters the records of appeal had been filed but the decrees were not. In Julia Wanjiru & 4 Others the Court of Appeal stated that failure to file the record of Appeal within the prescribed time rendered the same is fatally defective

15. In view of the above decisions the appeal herein is incompetent and this being a jurisdictional issue, I need not consider the merits of the appeal as there is no valid appeal before the court.

In conclusion:

The appeal is not properly before this court as it was filed out of time and no leave was obtained by the appellant to file the appeal outside the statutory time. 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.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 8TH DAY OF APRIL 2021.

L.W. GITARI

JUDGE