



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HIGH COURT CIVIL APPEAL NO. 30 OF 2015**

**(FORMERLY MACHAKOS HCCA NO. 215 OF 2012)**

**FIDELITY SHIELD.....APPELLANT/APPLICANT**

**-VERSUS-**

**FRED NZOMO MUSONGO.....RESPONDENT**

(Being an appeal from the Judgment of the Hon. Alfred Gethi Kibiru SPM

delivered on 04/12/2012 in Kitui SPMCC no. 64 of 2011).

**RULING**

1. The Respondent (***Fred Nzomo Musongo***) filed a suit in the lower court against the Appellant (***Fidelity Shield Insurance Company Limited***) seeking special damages, costs and interests arising from damages incurred when his motor vehicle registration no. KAJ 483F Toyota Sprinter was involved in an accident on 13<sup>th</sup> August 2009. His claim was based on an alleged insurer/insured relationship.
2. The case was heard and a judgment entered in favour of the Respondent in the sum of Kshs.250,000/= plus costs and interest on 4<sup>th</sup> December, 2012.
3. The Appellant/Applicant being dissatisfied filed an appeal being Machakos HCCA. No. 215/2012. It was later transferred to Kitui and acquired its current Kitui HCCA NO. 30 of 2015. The appeal has not been heard since the Record of Appeal has never been prepared and/or filed.
4. The Appellant/Applicant filed the Notice of Motion dated 21<sup>st</sup> June 2019 seeking the following orders: -
  - a. Spent
  - b. That, the judgment and decree in Kitui PMCC No. 64 of 2011 be set aside and a fresh trial be held.**
  - c. That, costs of this application be in the cause.**
5. The application is premised on the grounds on its face and the supporting affidavit of Jacqueline Ndirangu. The main ground is that it has not been possible to compile the Record of Appeal as the proceedings and judgment in PMCC No. 64 of 2011 seem to have been plucked from the court file by an unknown person/persons. That without the judgment and proceedings of the trial court, it is not possible to prosecute the appeal.
6. In her affidavit, Jacqueline deposes on the steps taken in trying to obtain the judgment and proceedings since filing the appeal. Annexed to her affidavit is a copy of a letter (JN1) requesting for the proceedings and judgment. She further avers that their advocates were later informed by the lower court registry staff that the handwritten proceedings and judgment were not in the file.
7. She deposes that the appeal has been mentioned severally and the court informed of the missing proceedings and judgment from the lower court file.
8. She has also annexed a copy of a letter their advocate wrote to the Judiciary Ombudsperson for its intervention in the matter. The letter is dated 20<sup>th</sup> March 2019 (JN2).

9. Their prayer is for the lower court case to be heard afresh as there are no chances of the handwritten proceedings and judgment of the lower court being traced.

10. The Respondent filed a replying affidavit through his advocate Mr. Ben Musundi Waliubah. He depones that after delivery of judgment, the Appellant/Applicant sought for stay of execution which was granted on condition that it deposits the decretal sum. He has not seen any evidence of such deposit.

11. He avers that after being granted stay, the Appellant/Applicant went into slumber forcing the Respondent to apply for dismissal of the appeal vide a Notice of Motion dated 24<sup>th</sup> July 2015 which was not pursued (BM3). He had the appeal fixed for hearing since the Appellant/Applicant had again gone to slumber (BM4). It was granted a last chance to file the Record of Appeal on 17<sup>th</sup> March 2016.

12. He was on 17<sup>th</sup> June 2016 served with a letter from the Appellant/Applicant counsel (BM5) indicating that they were unable to trace the lower court file and promised to move the court appropriately. It was not until 26<sup>th</sup> August 2019 that the Appellant/Applicant served him with the present application.

13. He depones that the Appellant/Applicant only requested for proceedings on 2<sup>nd</sup> October, 2018 when the matter had been fixed for dismissal on 11<sup>th</sup> July 2017 (BM6). He prays for dismissal of the application saying the Appellant/Applicant has been indolent.

14. He further avers that starting the matter afresh will be inconvenient to the Respondent who may not get his witnesses and exhibits produced in the lower court.

15. The application was disposed off by written submissions. Mr. K. Itonga on behalf of the Appellant/Applicant submitted expanding on the grounds and the supporting affidavit. He supported his arguments with the case of **David Kinya Maingi & 2 Others –vs R (2013) eKLR** where the Court of Appeal pronounced itself as follows: -

**“The trial process in civil or criminal case must ipso jure end in a judgment. Likewise, in appellate proceedings, the end product is a judgment. Judgment of the court is the penultimate product of the adjudication system. The purpose of judgment is to enable a court to clarify its thought; explain the decision to the parties and communicate the reason for the decision to the public.”**

16. He also referred to the cases of **Oraro & Rachier Advocates –vs Co-operative Bank of Kenya Ltd (2000) eKLR and National Bank of Kenya –vs- Thomas Owen Ondieki (2016) eKLR (CACA – Civil Appeal No. 116 of 2012).**

17. It's his contention that this court would need the judgment and proceedings to understand how the lower court conducted the matter to arrive at the decision it did. It's after that, that the court would address the grounds of appeal. He submits that this court has the discretion to set timelines and give conditions for the retrial in the interest of justice.

18. Mr. Musundi in his submissions on behalf of the Respondent contends that the Appellant/Applicant and his counsel have not been diligent in prosecuting this appeal. This he says is confirmed by their late request for proceedings and help from the Ombudsperson.

19. That the inordinate delay by the Appellant/Applicant has not been explained. Further that he has not satisfied the requirements for a new trial as it will be difficult for the Respondent to get witnesses and exhibits: He prayed for dismissal of the application.

20. The application before me is anchored on Order 42 Rule 26 Civil Procedure Rules which provides as follows:

**Power to order new trial.**

**“If upon the hearing of an appeal it shall appear to the court to which the appeal is preferred that a new trial ought to be heard, it shall be lawful for the said court, if it shall think fit, to order that the judgment and decree shall be set aside, and that a new trial shall be heard.”**

21. I have considered the application, affidavits, annexures, submissions and the authorities cited. I find the issue falling for determination to be whether the Appellant/Applicant has satisfied this court of the need to order for a retrial.

22. Both parties have deponed and also submitted on what has transpired in this case in respect to the filing of the Record of Appeal. The original lower court file its before me and I would wish to note my observations.

- Contrary to the Respondent's submission in respect to the non-compliance with the condition for the stay order the Appellant/Applicant deposited the decretal sum of Kshs.372,240/= in court on **30<sup>th</sup> April, 2013**.
- On **27<sup>th</sup> December, 2012** the Deputy Registrar Machakos High court called for the certified copies of proceedings and judgment following the filing of the Machakos HCCA. No. 215 of 2012. The letter was addressed to the Principal Magistrate Kitui.
- On **19<sup>th</sup> June 2013**, counsel for the Appellant/Applicant requested for certified copies of proceedings and judgment.
- On **8<sup>th</sup> September 2015**, this appeal was transferred from Machakos High court to Kitui High court.
- On **12<sup>th</sup> May 2016**, the Deputy Registrar Kitui High court again called for the lower court record.

- On **3<sup>rd</sup> June 2016** counsel for the Appellant/Applicant again requested for the proceedings and judgment from the Chief Magistrate Kitui.
- On **17<sup>th</sup> June 2016** the Respondent's counsel was notified of the challenges the Appellant/Applicant was facing in getting the proceedings.
- On **15<sup>th</sup> July 2016** the Deputy Registrar Kitui High court did a letter to the Deputy Registrar Machakos High court requesting him/her to see whether they could trace the lower court file herein, at their court.
- On **12<sup>th</sup> July 2017** the Deputy Registrar did a letter to the Chief Magistrate Kitui Law courts referring to previous communication calling for the lower file. The Chief Magistrate was then asked to forward the lower court file for placement before the Honourable judge.
- The Appellant's/Applicant's counsel had done a letter dated **20/03/2019** to the Judiciary Ombudsperson raising issues over the lack of proceedings and judgment.
- On **6<sup>th</sup> June 2019** the Kitui Senior executive assistant did a letter to the Deputy Registrar Kitui explaining that the file CMCC 64/2011 was now with a secretary but with the following challenges:

i. Handwritten proceedings seemed to be mixed up with proceedings of another file, and there was therefore lack of flow.

ii. The handwritten proceedings were tattered and not coordinated. He was therefore seeking direction on the way forward.

23. From the above it can be noted that counsel for the Appellant/Applicant did not only request for proceedings and judgment in 2018. He did so much earlier. Besides, him, the Deputy Registrar in both Kitui and Machakos made a follow up on the request for the proceedings and judgment as early as 2012 and 2013. In spite of these requests there is no indication that the proceedings were ever typed.

24. There are however clear indications that the file had been misplaced for a long time. When it was traced the handwritten proceedings could not be coordinated for purposes of typing. I have the file before me and I can attest to that. I can also see a typed copy of the lower court judgment in the file but that alone cannot form a Record of Appeal. The handwritten judgment is not in the file.

25. In the case of **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123** the Court of Appeal stated as follows:

**“an appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”**

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.

29. The upshot is that the application dated 21<sup>st</sup> June 2019 is allowed.

### **Orders**

**1. The judgment and decree in Kitui PMCC No.64/2011 is hereby set aside.**

**2. A fresh trial to be held within three (3) months of resumption of court sessions.**

**3. The deposit of Kshs.372,240/= made on 30<sup>th</sup> April 2013 will remain with the court pending the hearing and determination of the case, and/or other orders being made by the trial court.**

**4. Costs to be in the cause.**

Orders accordingly

**Delivered, signed & dated this 15<sup>th</sup> day of May 2020, in open court at Makeni High Court.**

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**H. I. Ong'udi**

**Judge**