



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MURANG'A

CIVIL APPEAL NO. 9 OF 2017

JOHN MAINA NDUNG'U.....1ST APPELLANT

WARAICH MOTORS.....2ND APPELLANT

VERSUS

PETER MUCHOKI MACHARIA.....RESPONDENT

[Appeal from the original decree of D.M. Kivuti, Senior Resident Magistrate,

in Kangema CMCC No. 39 of 2016 delivered on 2nd March 2017]

JUDGMENT

1. The *memorandum of appeal* raises two grounds: Firstly, that the award of general damages of Kshs 1,300,000 was exorbitant; and, secondly, that the learned trial magistrate disregarded the appellants' submissions.
2. The gist of the appellants' submissions in the present appeal is that the learned trial magistrate applied *wrong principles* in assessing general damages.
3. The retort by the respondent is that the damages were neither high nor founded on wrong principles.
4. A preliminary point was also taken that the appeal is *incompetent* for failing to attach a certified copy of the decree appealed against.
5. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic*; and, pursuant to the *Practice Directions* published in the *Kenya Gazette* of 17th April 2020 in Gazette Notice No. 3137 of 2020, this appeal was heard electronically on 12th May 2020.
6. The parties filed a consent dated 6th May 2020 agreeing that the appeal be determined by way of the written submissions on record; and, that the judgment be transmitted electronically. The appellants' submissions were filed on 2nd October 2019 while those by the respondents were lodged on 22nd January 2020.
7. This is a first appeal to the High Court. It is thus on both facts and the law. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123.
8. I will deal first with the failure to lodge a copy of the decree. The appeal was admitted for hearing on 19th September 2018. The parties were ordered to take a date for directions at the registry. The appellants were alive to the issue of the decree because on 29th July 2019, they sought time before the Deputy Registrar to file a *supplementary record of appeal* to include the decree.
9. By 7th August 2019 the appellants had still not complied. Despite remonstrations by the respondent, they were granted a further 14 days to lodge the supplementary record.
10. On 3rd September 2019, learned counsel informed the Court (*Ngenye-Macharia J*) that the appellants "*were abandoning the filing of the supplementary record of appeal and shall rely on the record of appeal dated 5/3/2018*". The parties took directions before the learned judge to canvass the appeal through written submissions.
11. Obviously, the record of appeal dated 5th March 2018 does not contain the decree appealed against. As indicated, no supplementary

record was filed notwithstanding the leave first granted on 29th July 2019 and extended on 7th August 2019. In a perplexing twist, the appellants' counsel on 3rd September 2019 elected *not* to file the decree. He trivialized the matter; and, authored the misfortune that now follows.

12. I find that failure to file the decree appealed against renders the appeal a *nullity*. The decree is a primary and *mandatory* document required by section 79G of the **Civil Procedure Act** as read together with Order 42 Rules 2 and 13 (4) (f) of the **Civil Procedure Rules**. See generally *Mary Rono v Ben Gathogo & another*, Nakuru High Court Civil Appeal 101 of 2014 [2019] eKLR.

13. My finding on that issue is sufficient to dispose of this appeal. The upshot is that the appeal is hereby *struck out*.

14. Costs follow the event and are at the *discretion* of the court. In the interests of justice and considering the predicament that has befallen the appellants, I order that each party shall bear its own costs in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 14th day of May 2020.

KANYI KIMONDO

JUDGE

ORDER

Notice of delivery of this judgment was transmitted to the parties' email addresses. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the Practice Directions issued by his Lordship, the Chief Justice dated 17th March 2020 and published in the *Kenya Gazette* of 17th April 2020 as Gazette Notice No. 3137, this judgment has been delivered to the parties by electronic mail. The parties filed a joint consent dated 6th May 2020 waiving compliance with Order 21 Rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

KANYI KIMONDO

JUDGE

Judgment read in chambers in the presence of:

Ms. Dorcas Waichuhi, Court Assistant.