



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 27 OF 2019

WILLIS J. OCHIENG.....1ST APPELLANT

JULIUS ODOL NOBERT.....2ND APPELLANT

VERSUS

SAMWEL ABONGO ASEMBO.....RESPONDENT

(Appeal from the Judgment and decree in Bondo PMCC No. 84 of 2015 delivered on 6th June, 2016 by Hon. E.N. Wasike – Senior Resident Magistrate)

JUDGMENT

1. The appellants herein **Willis J. Ochieng** and **Julius Odol Nobert** were the Defendants in **Bondo Principal Magistrate Civil Case Number 84 of 2015** whereas the Respondent **Samuel Abongo Asembo** was the plaintiff.
2. In the said suit, the Plaintiff, now Respondents, sued the Defendant, now Appellant vide Plaintiff dated 3rd June, 2015 seeking for general damages, special damages, costs of the suit and interest. That Plaintiff was amended vide a further amended plaintiff, dated 15.6.2017, with leave of Court granted on 26.5.2016 by the consent of all Parties' advocates.
3. The suit arose from a road traffic accident which occurred on 3rd April 2015, involving the Respondent then motor cyclist riding motor cycle Registration Number KMCZ 434P Yamaha along Bondo-Ndori Road and the Appellants owner/driver then driving motor vehicle registration Number KAG 353B.
4. The Respondent blamed the appellant for the material accident wherein the Respondent was seriously injured and he claimed for general and special damages.
5. In his judgment dated 14.6.2019, the trial Magistrate found the appellants 100% liable for the accident. He awarded the Respondent General damages in the sum of KShs.1,300,000 and KShs754,870 together with costs of the suit.
6. Aggrieved by the said judgment and decree, the appellants herein filed a Memorandum of Appeal dated **13th July, 2019** on **16th July 2019**, setting out eleven (11) grounds of appeal and urging this Court to allow the appeal, set aside the judgment on liability and quantum of damages awarded and order the Respondent to pay costs of this appeal and costs of the lower court.
7. This appeal was admitted to hearing on 18.9.2019, and on 10.2.2020, directions on the mode of disposal of the appeal by way of written submissions were given and a mention dated set for 17.3.2020 to confirm compliance with directions given under **Order 42 of the Civil Procedure Rules**. However, on 17.3.2020 the court was caught up in the Covid-19 outbreak situation which led to the official downscaling of all Judicial services countrywide.
8. The appeal was then mentioned on 29.6.2020, when Parties' advocates confirmed that they had filed written submission and exchanged them among themselves hence this judgment date was fixed by consent.
9. Before setting out the grounds of appeal and complying with **Section 78 of the Civil Procedure Act** on the duty of the first appellate court, this being a first Appeal, I must first and foremost make some preliminary observation which go to the jurisdiction of this court and as jurisdiction is everything, without which a Court of Law would be acting in vain if it determined the merits of the case without relevant jurisdiction.
10. I observe that judgment in the lower court was rendered on **14.6.2019**. The appellant had a right of appeal to file such appeal within 30 days of the date of the impugned judgment, in accordance with section 79G of the Civil Procedure Act.

11. The calendar for 2019 shows that **14.6.2019, fell on a Friday**. Thirty days stipulated in **Section 79G** of the Civil Procedure Act, within which an appeal from the judgment of the lower court ought to have been filed, lapsed on 14.7.2019 which was a Sunday. It follows that pursuant to **Order 50 Rule 3 of the Civil Procedure Rules**, this appeal ought to have been filed on 15.7.2019, which was the next working day and which was a Monday.

12. The said provision stipulates:

“Orders 50, rule 3. Time expiring on Sunday or day offices closed.

3. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

13. Instead, the Memorandum of Appeal which is dated 13th July 2019 was lodged in Court and paid for on **16.7.2019** a Tuesday, which was no doubt done outside the statutory stipulated period of 30 days from the date of the impugned judgment which was rendered on **14.6.2019**.

14. The question that I must answer *suo moto* is whether an appeal which is filed out of the stipulated statutory period and without leave of court or extension of the expired time as contemplated in the proviso to **Section 79G of the Civil Procedure Act**, is an appeal that is competently before the court and therefore capable of being prosecuted and considered on its merits..

15. In **County Executive of Kisumu Vs. County Government of Kisumu and 8 Others [2017] eKLR the Supreme Court (Ibrahim & Wanjala, SCJJ. In Civil Appeal No. 3 of 2016 citing with approval the case of Nicholas Kiptoo Korir Arap Salat Vs. I.E.B.C. and Others [2014] eKLR (the Nicholas Salat case)** stated as follows regarding filing of appeals:

“[35] We are in total agreement with the Respondent that an appeal filed in this court out of time without leave of this Court is irregular and this court will not invoke such ‘novel’ principles as urged by the Applicant so as to validate that Petition and deem it properly filed. We buttress this court’s position in Nicholas Salat when this Court stated thus:

“ ... In his submission Counsel for the Applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.”

What we hear the applicant telling the court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the court. Pursuant to Rule 33 of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the Notice of Appeal. Under Rule 53 of the Court’s Rules, this Court can indeed extend time. 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.[emphasis added].[emphasis added]

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.”

16. The Supreme Court in the above cited case made it clear that:

No. Appeal can be filed out of time without leave of the Court. Such filing renders the “document” so filed a nullity and of no legal consequence.[emphasis added].

17. Consequently, this court will not accept a document filed out of time without leave of the court.

18. The above decision related to filing of appeal out of time with leave of Court and Under **Rule 53 of the Supreme Court Rules**. However, the principle captured and which applies universally is that no appeal can be filed out of time without leave of Court extending such time. That is why section 79G of the Civil Procedure Act has a proviso for such enlargement of time.

19. As earlier stated, the instant Appeal was filed out of time without first seeking and/or obtaining extension of time for its filing. Even after filing of the appeal out of time, the appellant never sought to have the appeal as filed admitted out of time so that it is validated. They continued prosecuting it as if the same was an appeal filed within the statutory period.

20. The right of appeal lapses the moment the statutory period for filing of such appeal lapses. Beyond that period, the law gives the court discretion to grant extension of time for filing of the appeal. However, the court has no power on its own motion to extend such time for the parties who have not sought for such leave as this is a jurisdictional issue. It is the parties to seek such extension from the court and make out their case for enlargement of time.

21. As this appeal was filed out of time without leave of court and if such leave was obtained then no order extending the expired time was cited or attached to the memorandum of appeal, as required by Order 42 Rule 13 of the Civil Procedure Rules, in my humble view, the ‘**appeal**’ as filed is incurably and fatally incompetent and is amenable for striking out *in limine*. It was the duty of the appellant to file an appeal within 30 days from 14.6.2019 as stipulated in **Section 79G of the Civil Procedure Act** and where for good reason as stipulated in the proviso to **Section 79G of the Act**, the appellant is not able to file the appeal within time as stipulated, then he/she should have sought for extension of time by way of an application to have the appeal admitted out of time. This was not the case in this appeal which was filed out of the 30 days stipulation in **Section 79G of the Civil Procedure Act** without leave being sought to extend the time or to have the

appeal as filed deemed to have been filed within the stipulated 30 days.

22. In **Patrick Kinya Kithinji Vs. Victor Mugira Marete [2015] eKLR** the Court of Appeal stated:

“In our view, whether or not an appeal is filed out of time goes to the jurisdiction of this court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159 of the Constitution.”

23. For all the above reasons, I find no reason why I should determine this appeal on its merits as to do so is tantamount to exercising jurisdiction where there is none.

24. Accordingly, on the Court’s own motion, I find and hold that this appeal having been filed out of time without leave of Court extending the lapsed time, the same is incurably, incompetent.

25. The “**appeal**” as filed on 16.7.2019 by the Appellants herein is hereby struck out.

26. Each Party to bear their own costs of the incompetent appeal as struck out.

27. File closed. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 5TH DAY OF OCTOBER, 2020

R.E. ABURILI

JUDGE

In the presence of:

The Respondent

Appellants and their counsel absent

CA: Brenda