



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.1 OF 2018

SAMWEL ONGERA NYABUTI..... 1ST APPELLANT

EZEKIEL GEKARA NYANSAGERIA.....2ND APPELLANT

VERSUS

WOO (minor suing through

next friend of BOO)..... RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court Oyugis in Civil Suit No.222 of 2016 delivered on 22nd January, 2018 – Hon. J. Wesonga, SRM)

JUDGMENT

[1] By way of a plaint filed at the magistrate's court at Oyugis on the 13th December 2016, **WOO**, (plaintiff/appellant) through his father, **BOO**, sued **Samwel Ongera Nyabuti** (defendant/respondent) for general and special damages arising from a road accident which occurred on 11th February 2016 along the Oyugis-Sondu Riat at Kadada centre, involving the defendant's motor vehicle Reg. No. KBQ 941 J, which allegedly veered off the road and knocked down the minor plaintiff thereby occasioning him severe bodily injuries.

[2] It was pleaded that the defendant was the registered owner of the vehicle and on the material date, the vehicle was so negligently, carelessly and/or recklessly driven by his driver, servant, agent or employee such that it swerved and/or veered off the road and hit the plaintiff who was at the time lawfully walking off the road.

The plaintiff blamed the defendant for the accident and prayed for damages against him.

[3] However, in an amended plaint filed herein on 16th March 2017, the plaintiff enjoined **Ezekiel Gekara Nyansageria**, as the second defendant in this matter in his capacity as the beneficial or equitable owner of the material motor vehicle and held him together with the first defendant, directly and vicariously liable for the consequences of the accident.

The plaintiff therefore prayed for judgment against both defendants. They both denied the plaintiff's claim in their written statement of defence filed herein on 12th April 2017.

[4] At the trial, the plaintiff testified as **PW1** and called a witness, **Raymond Odhiambo Kuna (PW2)** and a Traffic Police Officer, **Cpl. Wilberforce Walubengo (PW3)** of Oyugis Traffic Base.

The defendants neither testified nor called any witness. Their case was marked as closed after their application to file a list of witnesses and relevant documents was rejected by the court which thereafter rendered its judgment on 22nd January 2018.

[5] However, the said judgment is not contained in the record of appeal dated 12th February 2018, and filed herein on 10th May 2019, a fact which was known to the appellants/defendants when the matter came up for directions on the 23rd September 2019, yet on the 14th October 2019, when the matter came up for hearing they indicated that they were ready to proceed by way of written submissions even without filing a supplementary record of appeal having earlier expressed an intention to do so.

[6] The failure to include the impugned judgment and decree in the record of appeal renders it defective together with all proceedings arising therefrom. The appellants were granted adequate opportunity to correct the omission by filing a supplementary record of appeal, but they instead embraced indolence.

Although this issue, pertinent as it is, was addressed by the respondents in their written submissions, the appellant feigned ignorance and failed to address it.

[7] Interestingly, the judgment in the court's record refers to a claim under the Fatal accidents and Law reform Act and involves the respondent, **WOO**, suing the appellant, **Samuel Ongera Omollo**, in his (respondent) capacity as the legal representative of the estate of one, **Tobias Ojwang Odhiambo** (deceased).

The award made by the court was special damages in the sum of Kshs.18, 644/= and general damages for pain and suffering in the sum of Kshs.1 (one) million.

If this is the impugned judgment, then, it would appear to be inconsistent and incompatible with the pleadings.

Seems that the court record is all jumbled up such that it is difficult to differentiate the head from the tail.

[8] **Order 42 Rule 2** of the **Civil Procedure Rules** provides for filing of decree or order and states that:-

“Where no certified copy of the decree or order appeal against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under Section 79B of the Act until such certified copy is filed.”

Under **Rule 3** of the said **Order**, the appellant may amend his memorandum of appeal without leave at any time before the court gives directions under **Rule 13**.

[9] Clearly, the appellants herein failed or neglected to take advantage of the foregoing provisions of the law. As such, they were not deserving of this court's discretion to allow them take a “second or third bite at the cherry” by giving them more time to file a supplementary record of appeal and undo the error prior to this court's verdict on the appeal.

It would therefore follow that the failure to file or include the impugned judgment in the record of appeal is an incurable defect. In the circumstances, it would be unnecessary to consider the appeal on its merit.

[10] In sum, the appeal is hereby struck out and dismissed for being fatally defective with costs to the respondents.

Ordered accordingly.

J.R. KARANJAH

JUDGE

20.11.2019

[Delivered and signed this 20th day of November, 2019]