



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal No. 31 Of 1999

KIREMA M'ARIMBA.....APPELLANT

VERSUS

JOSEPH KAJUKI.....RESPONDENT

(Being an appeal against the judgment in Maua Civil Suit No. 31 of 1997 dated 19/02/1999) delivered by Hon. M. N. Gicheru)

J U D G M E N T

1. The respondent was the plaintiff at the lower court. He had sued the appellant claiming general damages and special damages arising out of a traffic road accident involving the appellant's motor vehicle Reg. No. KNP 400 in which the respondent was a fare paying passenger.
2. The appellant filed defence denying the respondent's claim both on liability and quantum of damages. The appellant's counsel applied to cease acting for the appellant and upon the application being granted the appellant was served with hearing notice but failed to attend court. Consequently the suit proceeded *ex parte* and court entered judgment in favour of the respondent for general damages of Kshs.220,000/- with special damages of Kshs.5059/65.
3. That following judgment dated 19th February, 1999 the appellant filed an appeal dated 17th March, 1999 setting out 12 grounds of appeal as listed in his Memorandum of Appeal.
4. On 7th March, 2013 court gave directions that the appeal be determined by way of written submissions. The Counsel had filed their written submissions in advance. The appellant's submissions were filed on 5th May, 2009 whereas those of the respondent were filed on 30th September, 2009. The appeal was set down for highlighting on 17th July, 2014.
5. Mr. Omari learned advocate for the appellant submitted that the appellant had put up 12 grounds of appeal which he consolidated and argued them as one ground of appeal. He urged the respondent did not proof negligence against the appellant urging further that the respondent did not prove his case on balance of probabilities. Mr. Omari submitted that the fact that there was an accident do not mean that the appellant was negligent referring to the evidence of the respondent.
6. Mr. B. G. Kariuki, learned advocate for the respondent on his part submitted that the appellant's appeal is incompetent as the case proceeded *ex parte*. He urged that the appellant's remedy as of then was under order IX Rule 8 of the Civil Procedure Rules(repealed) in which the appellant, if

he was aggrieved by the judgment, he should have sought to set aside the ex parte judgment. He urged the issue of liability was not challenged at the trial stage and urged the court to dismiss the appeal.

7. I have carefully considered the appellant's ground of appeal and submission by the appellant's counsel and submissions in opposition to the appeal by the respondent's counsel. The appellant's grounds of appeal revolve around the trial court's analysis and evaluation of evidence as well as to how the proceedings were conducted. This court noted that the suit at the trial court proceeded ex parte and thereafter court issued judgment based on the evidence on record.
8. The appellant did not challenge the issue of liability and quantum at the time of the hearing of the matter because it proceeded ex parte. The option that was open to the appellant was not to appeal but to apply for setting aside the ex parte judgment under by then order 1X Rule 8 of the Civil Procedure Rules(repealed now Order 12 rule 7 of the Civil Procedure Rules which provides:-

7. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the Judgment or order upon such terms as may be just.

9. It should be noted that after a party has had his application seeking to set aside ex parte judgment is heard and determined, that is when a party has right of appeal; otherwise before then a party who is aggrieved by an ex parte judgment has no right of Appeal. **Order 43 Rule (1) (h) of the Civil Procedure Rules** provides:-

1. (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—

(h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);

In view of the foregoing I have come to the conclusion that the appellant's appeal is incompetent as the appellant did not have right of appeal. The appeal is therefore dismissed with costs of appeal to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. MR. Omari for the appellant
2. Mr. B. G. Kariuki for the respondent

J. A. MAKAU

JUDGE