



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CIVIL APPEAL 220 OF 1997
JOHN MUTHOMI KANYOIAPPELLANT

AND

1. PETER KAMANDE MUNGAI

2. JAMES KABII.....RESPONDENTS

**(Appeal from the judgment and decree of the High Court of Kenya
Nairobi (Mwera J) dated 26th January, 1993**

in

H.C.C.C. NO. 1802 OF 1987)

JUDGMENT OF THE COURT

The appellant was the plaintiff in *High Court Civil suit No. 1802 of 1987* in which he sued the two respondents to recover damages as a result of injuries sustained in a road traffic accident.

The appellant averred in the amended plaint filed in the superior court, *inter alia*, that on 23rd July, 1986, he was driving his motor vehicle Reg. No. KWP 093 along Karigu-in Muranga road; that the 1st respondent who was driving motor vehicle Reg. No. KSG 366 in the course of his employment with the second respondent negligently drove motor vehicle No. KSG 366 and caused it to collide with the appellant's vehicle as a result of which the appellant sustained injuries; that the first respondent was solely to blame for the accident and that second appellant was vicariously liable.

The respondents filed a defence denying negligence and attributed the accident to the negligent driving by the appellant.

By a judgment delivered on 26th January, 1993, the superior court (Mwera J) concluded:

“After carefully following the evidence and the judgment in the traffic case at Thika, this court agrees that the 1st defendant had no blame in that accident which should be a basis for liability here. Much would not be added to what has been quoted from the traffic case. The court

concluded that it was the plaintiff's pick-up which was driven across from its lane into that of the lorry driven by the 1st defendant. This was the right hand lane as one faces Thika and that is where most of the debris was (sic). It was broken glass which came from the pick-up, as it hit the lorry's rear right wheel. From that point the lorry was thrown off balance and it went to rest in a ditch on its side of the road leaving a trail of 144 feet of skid marks. There was no evidence that the lorry crossed over into the plaintiff's lane hitting and damaging the pick-up".

The superior court proceeded to dismiss the claim on liability with costs.

The appellant appealed to this Court against the judgment of the superior court on seven grounds which are set out in the memorandum of appeal.

When the appeal came up for hearing for first time on 28th January, 1998, A. M. Wahome, learned counsel for the appellant, informed the Court that the 2nd respondent was deceased and that there was need to join his legal representative as a party. The appeal was adjourned for that reason. The appeal was adjourned on three occasions thereafter to give the respective counsel a chance to verify the information about the death of the 2nd respondent and take the appropriate action but neither party took any action. When the appeal was ultimately listed for hearing for 15th June, 2009, Mr. Ongoya, learned counsel who was holding brief for A. M. Wahome applied for adjournment for two reasons, firstly, that the issue of the death of the 2nd respondent had not been sorted out, and, secondly that, the appellant's counsel had travelled to United Kingdom.

Miss Karanja, learned counsel for the respondents confirmed that the 2nd respondent indeed died in 1995 but opposed the application for adjournment.

The court thereupon made an order that the appeal against the 2nd respondent had abated under the provisions of **Rule 96 (2)** of the Court of Appeal Rules but rejected the application for adjournment and ordered the appeal against the first respondent to proceed. Faced with that situation, Mr. Ongoya stated that he had no capacity to prosecute the appeal and that he would not make any submissions in respect of the appeal.

In that event, Miss. Karanja applied for the dismissal of the appeal for non-prosecution under the Courts' inherent powers.

The Court of Appeal Rules do not provide for cases where, the appellant though present at the hearing of the appeal, fails to prosecute the appeal. The Rules only provide for cases where the appellant fails to appear at the hearing of the appeal in which case the Court is authorized to dismiss the appeal (see **Rule 99 (1)**) and for cases where the appeal does not lie or the appellant has committed procedural errors in which case the Court can strike out the appeal (see **Rule 80**).

Nevertheless, since the appellate proceedings of civil nature are adversarial, the Court has no duty or obligation in the absence of any law to the contrary to deal with the merits of the appeal which has not been prosecuted.

In our view, where an appellant or his advocate who is present at the hearing of the appeal opts not to be heard in support of the appeal, like in this case, he should be deemed to have abandoned the appeal with the consequence that the appeal should be dismissed under the Court's inherent jurisdiction.

Accordingly, in exercise of the Court's inherent jurisdiction under **Rule 1 (3)**, of the Court of Appeal Rules, the appeal against the 1st respondent is deemed as abandoned and is for that reason dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 19th day of June, 2009.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR