



**Odhiambo v Lukuya (Civil Appeal E097 of 2023)
[2024] KEHC 1836 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E097 OF 2023
PJO OTIENO, J
FEBRUARY 26, 2024**

BETWEEN

DENNIS ODHIAMBO APPELLANT

AND

BENARD TOILI LUKUYA RESPONDENT

*(Being an appeal from the Judgment and Ruling of Hon. Sylvia A. Wayodi (RM)
in Kakamega SCCC Claim No. E080 of 2023 delivered on 22nd May, 2023)*

JUDGMENT

Background Of The Appeal

1. By a statement of claim filed on 3/3/2023, the appellant sought general damages, special damages of Kshs. 7270/-, costs and interest of the suit against the respondent.
2. The appellant's case was that on 1/3/2023 he was driving Tuk Tuk Registration Number KTWV 435 along Mumias Road when the respondent's Motor Vehicle Registration Number KCX 003A was recklessly driven thus ramming into the Tuk Tuk as a result of which he sustained injuries.
3. In the respondent's statement of defence dated 22/5/2023. The respondent denied the averments by the appellant and contended that the claimant was never entitled to any of the remedies sought and at all.
4. In a judgment of the trial court delivered on 31/3/2023, the appellant's claim was dismissed with costs to the respondent with the trial court noting that the medical documents in support of the appellant's injuries raised a lot of questions for the reason that the X-ray request form did not bear the name of the claimant but the name of a different person and that the P3 form was issued in Kakamega but filled by MOH Ahero and stamped by Ahero County Hospital.



5. The judgment aggrieved the appellant who then filed an application dated 25/5/2023, and sought an order for review of the judgment on the ground of discovery of new evidence. By a ruling of the trial court delivered on 16/6/2023, the trial court found that the application had not met the threshold prescribed under section 41(1)(e) of the *Small Claims Court Act* and dismissed the application for the reason that the imaging from Sonar Imaging Centre which had been introduced by the appellant had been prepared the day the court rendered its judgment.
6. Aggrieved with both the judgment and ruling on review by the trial court, the appellant lodged an omnibus memorandum of appeal dated 29th June, 2023 seeking to have the judgment and ruling set aside and that he be awarded damages. The appeal is premised on the sole ground that;

That the learned trial magistrate erred in law and fact in her finding on quantum, hence dismissing the appellant's case despite the overwhelming medical evidence provided both at trial and on review of the judgment proving the injuries he suffered as a result of the accident on a balance of probabilities.
7. The appeal has been canvassed by way of written submissions, and the appellant has offered submission to the effect that there is no law barring a victim of an accident from having a P3 form filled in a different government facility. He further submits that in his application for review he adduced an abdominal ultra sound report, an admission invoice from Kakamega Orthopedic Hospital and a Knee X-ray Report from Sonar Imaging Centre corroborating the injuries he had suffered and that he had been admitted two days after the judgment of the trial court.
8. On his party the respondent offered submission that the subject appeal was filed out of time without the leave of the court in that the appeal as lodged on 29/6/2023 against the judgment delivered on 22/5/2023. He further submits that the appellant failed to prove liability on the part of the respondent since the police abstract only indicated that "driver to blame" yet there were two drivers, the documents produced by the appellant were doubtful in that the police abstract and the P3 form captured the name of the appellant as Dennis Odhiambo whereas the MRI request form captured the name of the patient as Denzo Oreti. He therefore finds no error in the decision of the trial court.

Issues, Analysis and Determination

9. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the appellant and the respondent and identify the issues for determination to be as follows;
 - a. Whether the appeal was lodged out of time without the leave of the court and if not;
 - b. Whether one can appeal against review orders?
 - c. What is the fate of the appeal?
10. On whether one can appeal against an order passed on review, the law under Order 43 Rule 1 (8) leave no doubt that the law permit such an appeal as of right. It remains the law that right of appeal is granted by law. The flipside of that position is that once so granted, it's a right that cannot be taken away. It is the finding of the court, therefore, that the appeal against the ruling on review cannot be faulted but that against the judgment is untenable for it is not conceivable that a party can challenge a decision by



both review and an appeal. In coming to the conclusion, the court is persuaded by the decision in HA v LB [2022] eKLR where G.V.Odunga J (as he then was) held as follows;

- “ 12. Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the Civil Procedure Act under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out.”
11. Having struck out the appeal against the judgment and while not happy with the omnibus memorandum of appeal, the court must determine the merits of the appeal against the ruling on the application for review. For one to succeed in an application for review, he must fit himself within the confines of the law under Section 8 and as echoed in Order 45 Rule 1. In the matter at hand, the documents produced by the appellant were medical documents that were generated on the date of the judgment sought to be reviewed. The explanation was that his medical situation got worse and had to be admitted. To this court that was a subsequent occurrence that was not a consideration at the time the judgment was delivered. That happening had nothing to do with the occurrence of the accident which was the basis of dismissal. The documents did not discount the finding by the trial court that the documents produced at trial were suspect.
12. It is thus the finding by the court that there was no proof and demonstration that the documents were new and important matter of evidence germane to the question of involvement in the accident cause of action. The application for review was thus not merited and was properly dismissed by the court. There is no justification to interfere with the decision by the trial court.

Whether the appeal was lodged out of time without the leave of the court

13. This is a threshold question which if answered in the affirmative dismisses the appeal or a substantial limb of it. It is the starting point. The time limit for filing an appeal from the subordinate court to the High Court is stipulated under section 79G of the Civil Procedure Act to be thirty days from the date of the decree or order appealed against and if it is to exceed the thirty days' limit, then an appeal ought to be admitted with the leave of the court or a certificate of delay issued by the trial court and explaining delay to have been caused by need to prepare. The section is couched in mandatory terms.
14. In the instant case, the judgment of the trial court was delivered on 22/5/2023 while the appeal was filed on 29/6/2023 beyond the thirty-day limit. There is no record that leave was sought and obtained to appeal out of time. There is also no certificate of delay on record. For that reason, the court finds the appeal against the judgment to be improperly before court for having been filed out of time without leave and ought to be struck out. The court is guided by the Supreme Court decision in Teachers Service Commission v Simon P. Kamau & 19 others [2015] eKLR where the court held that it does not favoured the practice by parties of filing a document improperly, and struck the notice of appeal filed out of time.
15. In conclusion, the court finds that limb of the omnibus appeal challenging the judgment is struck out for having been filed out of time while the appeal against the ruling on review application is found to have merit and is dismissed. The Respondent having succeeded, he gets the costs of the appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF FEBRUARY, 2024.



PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Isiaho for Mukavale for the Respondent

No appearance for the Appellant

