



**Waweru v Hebatula Brothers Limited & another (Civil Appeal  
E051 of 2022) [2024] KEHC 2994 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2994 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E051 OF 2022  
RE ABURILI, J  
MARCH 21, 2024**

**BETWEEN**

**RAPHAEL WAWERU ..... APPELLANT**

**AND**

**HEBATULA BROTHERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JOHN MWANZA MUTUKU ..... 2<sup>ND</sup> RESPONDENT**

*(Cited as being an appeal arising out of the Judgement of the Honourable R.S. Kipng'eno  
in the Senior Principal Magistrate's Court at Nyando delivered on the 1st March  
2022 and Ruling delivered on 29th March 2022 in Nyando SPMCC No. 303 of 2019)*

**JUDGMENT**

**Introduction**

1. The appellant Raphael Waweru sued the two respondents for general and special damages which included repairs, labour charges for the repairs and loss of earnings for 90 days following an accident that occurred on the 8<sup>th</sup> February 2019 along the Awasi – Ahero road when the 2<sup>nd</sup> respondent allegedly drove the 1<sup>st</sup> respondent's motor vehicle registration no. KCG 126L in a negligent manner causing it to collide with the appellant's motor vehicle registration no. KCN 254F Toyota Hiace.
2. The respondents filed their defence denying the allegations of negligence on their part by the appellant and put the appellant to strict proof while alleging contributory negligence on the part of the appellant for the occurrence of the material accident.
3. The trial magistrate in his judgment of 1<sup>st</sup> March, 2022 found in favour of the appellant and as prayed in the plaint. What was prayed for in the plaint was Kshs 49,850 being repair charges, Kshs 120,000 labour charges for repairs and Kshs 630,000 loss of earnings for 90 days @7000 per day all totalling Kshs 1,125,970.



4. The appellant subsequently filed an application dated 8<sup>th</sup> March 2022 in which he sought orders of review of the judgment of the trial court to specify the actual damages granted and that such further orders and or directions be given to the extent that the amounts payable by the defendant to the plaintiff be fully and finally determined. Vide a ruling dated 29<sup>th</sup> March 2022, the trial magistrate acknowledged the discrepancies in the judgement delivered on the 1<sup>st</sup> March 2022 but rendered himself functus officio in law to review the aforementioned judgment.
5. Aggrieved by the said ruling, the appellant filed a memorandum of appeal dated 7<sup>th</sup> April, 2022 on 14<sup>th</sup> June, 2022 as per the payment receipt contained in the court file Ref. No. QFE5PADC2X though stamped on 15<sup>th</sup> June, 2022 raising the following grounds of appeal:
  1. That the learned trial magistrate erred in law and in fact by failing to consider the evidence by the appellant, hence occasioning injustice to the appellant.
  2. That the learned trial magistrate erred in law and in fact by failing to consider the submissions of the appellant's counsel hence occasioning injustice to the appellant.
  3. That the learned trial magistrate erred in law and in fact by failing to consider the consent recorded by both parties on liability.
  4. That the learned trial magistrate erred in law and in fact by holding that the issue of loss of earnings had been exaggerated by the appellant.
  5. That the learned trial magistrate erred in law and in fact by failing to consider an award labour charges despite the same being supported by production of a receipt.
  6. That the learned trial magistrate erred in law and in fact by failing appreciate loss incurred by the appellant in payment and purchase of spare parts as against receipts produced in support thereof.
6. The parties filed submissions to canvas the appeal.

### **The Appellant's Submissions**

7. The appellant submitted that the the learned trial magistrate failed to consider the evidence on record in its totality hence occasioning an injustice to him despite the fact that he had demonstrated that the motor vehicle was being used as a matatu and would bring in an income at the end of the day. It was his submission that the Learned trial magistrate failed to award damages even where there were receipts in place to prove special damages incurred. Reliance was placed on the Court of Appeal decision in *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR where the Court awarded Kshs. 240,000 for loss of user as well as the case of *Martin Gicimu Kamanga v Board of Governors, St Anne's Junior School, Lubao* [2021] eKLR where it was held *inter alia* that there is a whole paradigm shift in jurisprudence here, where what is strictly a special damage under English Common law is now treated as general damage under Kenya Common law.
8. It was submitted that the Appellant lodged a claim for special damages for amount incurred in replacing parts and costs for repairs and subsequently produced receipts and invoices for the parts replaced and even called the makers of these documents who confirmed that the same were genuine. He submitted that the fact that they did not bear the name of the Appellant was irrelevant given the receipts bore the Registration Number of the motor vehicle subject matter of the accident and further called the mechanic who gave evidence on labour charges thus the learned trial magistrate's finding



that some claims were wholly exaggerated lacked any legal or factual basis given no witness was called to refute these figures.

### **The Respondents' Submissions**

9. The respondents submitted that there was no provision in the Civil Procedure Rules for a party to appeal against a judgement and ruling on review as the appellant had done in the present case as an appeal must be filed against a decree or order of the court as provided for under Order 42 Rule 2, Order 42 Rule 13 (4) and Order 43 Rule 2 of the [Civil Procedure Rules](#).
10. It was submitted that the instant appeal was not filed within the stipulated period as the judgement was passed on the 1<sup>st</sup> March 2022 and the appeal ought to have been filed by the 30<sup>th</sup> March 2022 whereas the same was filed on the 5<sup>th</sup> June 2022 and further that if aggrieved by the ruling dated 29<sup>th</sup> March 2022, he had 30 days to lodge the memorandum which time lapsed on the 29<sup>th</sup> April 2022.
11. It was further submitted that the certificate of delay which related to the ruling confirmed that the fees for the ruling was paid on the 25<sup>th</sup> April 2022 and the ruling ready by the 26<sup>th</sup> May 2022 but the Memorandum of Appeal was filed on the 7<sup>th</sup> June which was after the period for lodging the appeal had lapsed.
12. The respondents further submitted that no leave was sought by the appellant as the appeal against the ruling dated 29<sup>th</sup> March which emanated from an application filed under section 3A and 80 of the [Civil Procedure Act](#).
13. The respondents further submitted that the appellant failed to produce the record of earnings in evidence as the same was marked for identification and thus the trial court could not consider the same.

### **Analysis and Determination**

14. The issue for determination is whether this twin appeal is completely before this court.
15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In [Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
16. This court is faced with a unique pleading in the sense that the appellant has stated in his memorandum of appeal that his appeal is against

“the two judgments dated 1st March 2022 and Ruling dated 29th March 2022 Civil Case No 303 of 2019 by the Hon. Principal Magistrate R.S. Kipngeno at Nyando.”
17. The question is whether this appeal is properly before court as raised by the respondents in their submissions.



18. Section 79G of the *Civil Procedure Act* provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

19. The judgement in the suit below was delivered on the 1<sup>st</sup> March 2022 and going by the provisions of Section 79G of the *Civil Procedure Act* the appeal ought to have been filed by the 30<sup>th</sup> March 2022.

20. The instant appeal was initiated vide a Memorandum of Appeal dated 7<sup>th</sup> April 2022 and the same was filed on the 14<sup>th</sup> June 2022, as per the court receipt quoted above. There is also a letter dated 22<sup>nd</sup> April 2022 from the appellant’s advocate seeking certified copies of proceedings for purposes of an appeal which was responded to vide the Certificate of Delay issued on the 6<sup>th</sup> June 2022 which still provides that the time taken to prepare the copies of proceedings and ruling was from 5<sup>th</sup> April 2022 to 26<sup>th</sup> May 2022.

21. In the circumstances, it is my finding that the appeal, if any does lie, against the judgment passed by the trial court on the 1<sup>st</sup> March 2022 was filed out of time without leave of this court under section 79G of the *Civil Procedure Act* and is thus not properly before court. This position notwithstanding, even assuming that the said appeal was filed within time and was covered by the certificate of delay, the question is whether the appeal lay to this court when there was already an application dated 8<sup>th</sup> March, 2022 seeking for review of the Judgment appealed from herein.

22. Order 45 of the *Civil Procedure Rules* provides the procedure and the conditions that an applicant must satisfy in an application for review and the Order equally makes it clear that a party cannot seek review of an order and appeal the same order: This provision is the procedural aspect of Section 80 of the *Civil Procedure Act* which provides that:

“Any person who considers himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

23. Order 45 rule 1(a) and (b) in addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party. Subrule (2) of Order 45 of the *Civil Procedure Rules* further makes the matter clearer.

24. Order 45 Rules (1) and (2) provides as follows:

“(1) Any person considering himself aggrieved –



- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

25. A proper reading of Section 80 of the *Civil Procedure Act* and Order 45 Rules 1 and 2 of the *Civil Procedure Rules, 2010* makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the appellant filed for review of the judgment of 1<sup>st</sup> March 2022. Having done so, he could only appeal against the ruling for review and not to go back and appeal against the judgment which he already sought to be reviewed.
26. The memorandum of appeal is clear that the appeal is against the judgment of 1<sup>st</sup> March 2022 and the ruling of 29<sup>th</sup> March, 2022. No doubt, the appellant seeks to have a second bite of the cherry. He cannot be permitted to do so.
27. I must therefore at this stage make a finding on the competence of the appeal against the judgment of 1<sup>st</sup> March, 2022 and I find and hold without hesitation that the same does not lie and hence, it is hereby dismissed.
28. Venturing into the appeal from the ruling of 29<sup>th</sup> March, 2022, I observe that none of the grounds of appeal refers to any part of that ruling. Parties are bound by their pleadings. It is not enough to say that one is appealing against a particular decision. There must be a ground of attack of that particular decision. In the absence of any ground of appeal touching on the ruling of 29<sup>th</sup> March, 2022, I find that there is indeed no appeal against that ruling.
29. The above position notwithstanding, the ruling on the review application was delivered on 29<sup>th</sup> March, 2022. That being the case, an appeal ought to have been filed by the 28<sup>th</sup> April 2022. However, there is a certificate of delay that provides that Certificate of Delay was issued on the 6<sup>th</sup> June 2022, which provides that the time taken to prepare the copies of proceedings and ruling was from 5<sup>th</sup> April 2022 to 26<sup>th</sup> May 2022 thus indicating that time stopped running on the 5<sup>th</sup> of April 2022, a period of 7 days after the impugned ruling had been delivered. This simply means that from 26<sup>th</sup> May, the appellant had 23 days to file his appeal. The certificate of delay itself was prepared and issued on the 6<sup>th</sup> June 2022.
30. Accordingly, I find that the appellant ought to have filed his appeal by the 19<sup>th</sup> of June 2022. As indicated hereinabove, the instant appeal was filed on the 14<sup>th</sup> June 2022 and therefore, assuming that the appeal was against the ruling of 29<sup>th</sup> March, 2022, it would be properly on record. For that reason,



I will thus proceed to consider the merits of the ‘appeal’ in relation to the impugned ruling of 29<sup>th</sup> March 2022.

31. However, as earlier stated herein above, a perusal of the Memorandum of Appeal filed by the appellant reveals that the same is an appeal against the judgement of the trial court rendered on the 1<sup>st</sup> March 2022 which I have herein already held cannot be sustained as the same does not exist as it was filed after the application for review had already been filed, argued and dismissed.
32. Thus, there is, in essence no appeal against the ruling of 29<sup>th</sup> March, 2022 and the appellant having applied for review of the judgment of 1<sup>st</sup> March, 2022, he cannot be heard to be appealing against the same judgment that he had sought to be reviewed by the court that passed the Judgment.
33. The appellant had his day in court when he chose to seek a review of the judgment that he now purports to appeal against. Litigation somehow must come to an end and for the appellant, the end came when he applied for review and therefore he could only appeal against the decision made on the review application.
34. I reiterate that where a person opts for review of the judgment or decree, they cannot be allowed to appeal against the same judgment except where the review application only deals with a portion of the judgment while the appeal deals with a different portion of the judgment which could not be settled by way of review.
35. Litigation cannot be conducted on the basis of trial and error as is the case here. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the material before it. He had the opportunity to appeal the judgment, which opportunity he did not seize and instead chose to apply for review thereby placing the trial magistrate in a situation where he was to sit on appeal of his own judgment hence his refusal to review the judgment.
36. The upshot of the above is that the instant appeal is found to be devoid of merit and is in addition, fatally incompetent for all purposes. It is hereby dismissed with costs assessed at Kshs 50,000 payable by the appellant to the respondents within 30 days of today and in default, the respondent shall be at liberty to execute.
37. I so order

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2024**

**R.E. ABURILI**

**JUDGE**

