



Gem Motor Wash Limited v Blueflame Energy Solutions Limited (Civil Appeal E1271 of 2023) [2024] KEHC 15318 (KLR) (Civ) (22 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1271 OF 2023

JM OMIDO, J

NOVEMBER 22, 2024

BETWEEN

GEM MOTOR WASH LIMITED APPELLANT

AND

BLUEFLAME ENERGY SOLUTIONS LIMITED RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. Kiongo Kagenyo Adjudicator/Resident Magistrate delivered on 27th October, 2023 in Nairobi Milimani SCCOMM No. E048 of 2023)

JUDGMENT

1. The Appellant herein seeks to upset the judgment and decree rendered on 27th October, 2023 in Nairobi Milimani SCCOMM No. E048 of 2023. The grounds raised in the Memorandum of Appeal dated 2nd October, 2023 are as follows:
 1. That the learned Magistrate erred in law by failing to appreciate the various causes of action for determination thereby principally ending up to an unjust decision.
 2. That the learned Magistrate erred in both law (sic) by failing to consider in totality the pleadings, documents, facts and submissions of parties thereby arriving to the unjust decision.
 3. That the learned Magistrate erred in both law (sic) by allowing a counterclaim which failed to honour the provisions of Order 7 rule 5(a) of the Civil Procedure Rules as read together with Order 4 rule 6 of the Civil Procedure Rules.
 4. That the learned Magistrate erred in both law (sic) by attempting to enforce the warranty clause under the contract yet the contract had been rescinded for breach.



5. That the learned Magistrate erred in both law (sic) by holding that the Respondent was entitled to the amount prayed for in the counterclaim despite not fulfilling all its duties under the impugned contract.
 6. That the learned Magistrate erred in both law (sic) by failing to declare that the Respondent had breached the contract and failing to make appropriate orders thereto.
 7. That the learned Magistrate erred in law and misdirected himself that the Appellant's claim was premature.
 8. That the learned Magistrate erred in both law (sic) by failing to consider all the evidence filed by the Appellant in support of his claim.
2. The Appellant proposes that the appeal be allowed and the judgement of the lower court be set aside and be substituted with judgement in favour of the Appellant in the following reliefs:
- i. A declaration that the Respondent herein breached the contract.
 - ii. An order directing the Respondent refund (sic) the contractual consideration being Ksh.448,728/-.
 - iii. The costs of the appeal and that of the Honourable Small Claims Court be granted to the Appellant.
 - iv. General damages for breach of contract.
 - v. Interest on (ii), (iii) and (iv) above at court rates.
 - vi. Any other relief this Honourable Court may deem fit to order.
3. Apart from the prayer seeking that the judgement of the lower court be set aside and that of costs, I am irresolute that any of the other prayers or reliefs sought by the Appellant can be granted on appeal as they were not in the first place sought before the lower court.
4. A first appellate court is mandated under Section 78 of the *Civil Procedure Act* to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.
5. This court is therefore empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 in which Sir Clement De Lestang observed that:
- “This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
- However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
6. Going to the trial court's record, the Appellant (the Claimant in the Small Claims Court), presented the suit vide a Statement of Claim dated 6th January, 2022 based on breach of contract, seeking the following reliefs against the Respondent:



- a. Judgement be entered in favour of the Claimant in the sum of Ksh.448,728/- plus costs and interest at court rates from the date of breach of the contract.
 - b. Other appropriate relief the Honourable Court deems fit in the circumstances of this case.
7. The Respondent filed its Response to the Statement of Claim and Counterclaim by way of Set-Off dated 22nd February, 2023. The Respondent wholly resisted the Appellant's claim and sought that the same be dismissed, denying all liability. In its Counterclaim, the Respondent sought the following reliefs against the Appellant:
- a. Judgement in favour of the Respondent against the Claimant on the Counterclaim/Set-Off in the sum of Ksh.143,968/-.
8. From the record of the trial court, the matter was slated for hearing on 24th August, 2023 before Hon. S.G. Gitonga, Adjudicator/Senior Resident Magistrate. The record bears the proceedings recorded on that day to be thus:
- Opiyo for the Claimant.
Gitonga for the Respondent.
Opiyo: I pray that we proceed via written submissions.
Gitonga: I agree.
Court: Parties' documents are hereby adopted. Parties to file written submissions within 14 days.
Mention on 29th September, 2023. Court is on transfer.
Signed
Hon. S.G. Gitonga.
9. When the matter was placed before the court (Hon. K. Kagenyo) on 9th October, 2023, the parties confirmed that their respective submissions had been filed and it was on the basis of the two sets of submissions and the respective filed witness statements and lists of documents that the court went ahead and rendered its judgement on 27th October, 2023.
10. The intention of the court was, perhaps, to take proceedings in line with Section 30 of the [*Small Claims Court Act*](#). Let us read it:
30. Proceeding by documents only;
Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.
11. From the record thus, no witness testified for either side.
12. My interpretation of the above provision is that an Adjudicator, in the course of taking proceedings is required under the said Section to consider the documents that the parties present to the court (i.e. ordinarily the witness statements and copies of the documents in the parties' respective lists of documents) to be the evidence that is presented and/or adduced by the parties and proceed to make a determination on the basis of those documents.



13. The procedure of hearing claims before the Small Claims Court, which includes the examination of witnesses and production of documentary evidence is provided for under rule 23(1), (2) and (3) of the Small Claims Court Rules, 2019. The said rule is comprehensive on how a trial should proceed in court including the recording and production of evidence as follows:
23. Form of hearing and expert report
- (1) On the date fixed for hearing of the claim, the Court shall take oral and documentary evidence (if any) adduced by the parties or their witnesses.
 - (2) The parties or their witnesses shall give oral evidence on oath or affirmation.
 - (3) Nothing in this rule prohibits a party from introducing a report containing an expert opinion without calling the maker where—
 - (a). the party seeking to introduce the report in support of their claim or response has filed and served a copy of the report to the other parties at least fourteen days prior to the date set for hearing;
 - (b). the parties' consent to the introduction of the report; or
 - (c). on hearing the parties, the Court directs that the report be admitted in evidence at the trial without calling the maker.
- (Underlined emphasis).
14. Considering that Section 30 does not state how the documents referred to thereunder are to be presented to the Small Claims Court for consideration, my view is that the court must then abide by Rule 23 which governs the procedure that should be followed in adducing evidence and production of documents.
15. Under the said Rule, the parties or their witnesses are required to give oral evidence on oath or affirmation and are then presented to the opposing sides for purposes of cross examination.
16. Of course, we have in our jurisdiction embraced the practice of witnesses adopting the contents of their written statements as their testimonies but even then, the witnesses are either first sworn or take an affirmation before adopting the contents of their statements as their evidence in chief and are then subjected to cross examination, if the opposite party so wishes to cross-examine them.
17. Under the same rule, documents must be presented and/or produced either by the witnesses themselves or by the consent of the parties. So that when the parties in the Small Claims Court wish to rely on documents and submissions only (as provided for under Section 30), such documents must first be produced either by the witnesses in the matter or by the consent of the parties.
18. While the Small Claims Court is permitted under Section 17 of the Act to have control of its procedure in the determination of claims before it, and to exclude strict rules of evidence under Section 32 of the same statute, the Court, in exercise of that control must have regard to the principles of natural justice which include giving the parties an opportunity to challenge the evidence presented by the opposite side, inter alia through cross examination.
19. Section 30 must therefore be read and considered together with Rule 23. It is doubtful then, I opine, in light of the foregoing that any material presented without proper production (i.e. not produced by witnesses or by the consent of the parties) purportedly through the procedure under Section 30 of the



- Small Claims Courts Act (as was the case in the matter before the lower court) can be considered to be evidence.
20. Certainly, such material cannot aptly be subjected to re-evaluation and re-assessment under Section 78 of the *Civil Procedure Act* by the appellate court in determining whether or not to allow the appeal as the same is not properly before the court and cannot therefore amount to evidence.
 21. I am therefore of the view that the learned Adjudicator Resident Magistrate misapprehended the import of Section 30 of the *Small Claims Court Act* to understand the same to mean that the court can determine a claim before it on the basis of documents even without their formal production either by witnesses or by the consent of the parties.
 22. I say so because if one is to go by the plethora of decisions that are available from superior courts in which holdings have been made that documents, unless produced by witnesses or by consent are not evidence, then a matter in which Section 30 is applied in the manner in which the learned Adjudicator/ Resident Magistrate applied it (which in my view was incorrect) would have no evidence in its record that is capable of being subjected to the test espoused in *Selle* (supra) on appeal. If that was to be the intention of the legislature, then Rule 23 would not have existed, in the first place.
 23. I will move on to address the validity of the appeal as presented. On that, I cannot help noticing that the record of appeal as filed is incomplete. Order 42 Rule 13 of the Civil Procedure Rules makes provisions on the documents that must mandatorily form part of the record of appeal, which include the judgement, order or decree appealed from and the proceedings of the court where the appeal is preferred from.
 24. I note that the instant record of appeal does not contain the judgement of the lower court and the decree emanating therefrom. Even the lower court’s proceedings were not included in the record.
 25. The questions that then call for answers are; how is an appeal that fails to include the judgement and decree appealed from to be treated? Is there a valid appeal in such a situation?
 26. The answers to these questions are to be found, happily, in a number of previous judicial pronouncements of superior courts.
 27. In the case of *Lucas Otieno Masaye v Lucia Olewe Kidi* [2022] eKLR Ombwayo, J. stated thus:

“It was the Respondent’s submission that failure by the Appellant to attach a decree to the record of appeal was fatal to his case. A look at the record of appeal clearly shows that a decree has not been attached thereto.

Order 42 Rule 2 of the Civil Procedure Rules provides as follows:

“Where no certified copy of the decree or order appealed 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 a time as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed.”

Order 42, Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides;

“

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—



- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

The Supreme Court of Kenya, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR held as follows at paragraph 41:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

The Court of Appeal in *Chege v Suleiman* [1988] eKLR firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus:

“But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of Section 66 of the *Civil Procedure Act* which confers a right of appeal from the High Court to this Court from “decrees and orders of the High Court”. And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.” (Note the emphasis)

28. In conclusion, Ombwayo, J. held as follows:

“From the foregoing it is clear that an appeal can be rendered fatally defective in the absence of a decree. The Appellant herein has not attached a copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs to the Respondent.”



29. The omission of a judgement and decree from the record of appeal was also discussed in the case of Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata [2017] eKLR, where the Court of Appeal considered the issued and stated:

“Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 2 of the Civil Procedure Rules which provides inter alia:

“Where no certified copy of the decree or order appealed 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.”

However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from.”

(Underlined emphasis).

30. In the case of Floris Pierro & another v Giancarlo Falasconi (as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) [2014] eKLR the Court of Appeal made the following observations:

“It is common ground that the Appellants filed their respective records of appeal on 10th April, 2012. It is also common ground that in the said records, the Appellants failed or omitted to incorporate certified copies of the order appealed against as required by Rule 87(1)(h) of this Court's Rules. An order appealed from is a primary document in terms of the aforesaid rule which must form part and parcel of the record of appeal. The order embodies the Court's decision. If it is not included, the Court of Appeal will be at a loss in determining what the High Court determined. It cannot be the business of this Court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out.”

31. Lastly, in the case of James Murage Nguyu v RNN (Minor suing through next of friend RNK) & another [2021] eKLR the High Court (L.W. Gitari, J.) stated thus:

“There cannot be any valid appeal where the decree and the Judgment against which the appeal is preferred has not been filed in the record of appeal. In Ndegwa Kamau t/a Sideview Garage -v- Isika Kalumbo [2016] eKLR and Joseph Kamau Ndung'u -v- Peter Njuguna Kamau [2014] eKLR Justice Ngaah struck out the appeals because the decrees that were being appealed from had not been annexed in the respective records of appeal. In the matters the records of appeal had been filed but the decrees were not.”

32. The above decisions guide me in reaching the finding that as the decree, judgement and even proceedings from the Small Claims Court do not form part of the record of appeal, the record of appeal as filed herein is fatally defective and there is no valid appeal capable of being determined. I proceed to strike it out with costs to the Respondent, which I assess at Ksh.30,000/-.



33. Orders accordingly.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 22ND DAY OF NOVEMBER, 2024.

JOE M. OMIDO

JUDGE

For The Appellant: Mr. Mburu For Mr. Opiyo.

For The Respondent: Mr. Gitonga.

Court Assistant: Ms. Njoroge.

Mr. Mburu: I seek leave to appeal and 30 days stay of execution.

Mr. Gitonga: No objection.

Court: Stay of execution is granted for 30 days.

