



REPUBLIC OF KENYA



**Pan Africa Insurance Limited v Tamre (Suing as the administrator of the Late Wycliff Cacine Omondi) & another (Civil Appeal 585 of 2019) [2023] KEHC 22685 (KLR) (Civ) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 22685 (KLR)

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

**CIVIL**

**CIVIL APPEAL 585 OF 2019**

**DO CHEPKWONY, J**

**AUGUST 24, 2023**

**BETWEEN**

**PAN AFRICA INSURANCE LIMITED ..... APPELLANT**

**AND**

**JACOB WAMBAYE TAMRE (SUING AS THE ADMINISTRATOR OF THE LATE WYCLIFF CACINE OMONDI) ..... 1<sup>ST</sup> RESPONDENT**

**APA INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> Respondent's/Applicant's Notice of Motion application dated January 20, 2022 brought pursuant to the provisions of Order 50 Rule 1 and 9, Order 2 Rule 15 (b), (c) and (d) both of the *Civil procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act*. The application seeks the following orders;
  - a. That the Record of Appeal dated December 2, 2021 be struck out.
  - b. That the Orders requested for in the application dated March 24, 2021 and restated in the orders made on October 7, 2021 do issue.
  - c. That costs of this application be provided for.
2. The application is premised on the grounds on its face and the supported by the affidavit of Dr Justry P Lumumba Nyaberi sworn on even date.
3. In his affidavit, the 1<sup>st</sup> Respondent through his advocate on record stated that he filed an application dated March 24, 2021 seeking for orders that the appeal filed be dismissed with costs and all orders of



stay granted be vacated, which court orders are that the amount deposited in Account No 1270xxxx in the names of Simba & Simba and Nyaberi & Co advocates are for settlement of the Judgment in CMCC No 7673 of 2014 and costs of the application.

4. Thereafter, the court made orders that the Appellant do compile and serve the Record of Appeal within sixty (60) days from October 7, 2021, and in default thereof, the application dated March 24, 2021 to stand as allowed.
5. The Record of Appeal was served outside the sixty (60) days granted by the court and in the circumstances, Order No 2 of the court orders dated October 7, 2021 should issue. He deposed that a perusal of the Record of Appeal reveals that the same fails to satisfy the minimum requirements of a Record of Appeal as the same is a mere assemblage of baseless documents.
6. In support to the application, the 2<sup>nd</sup> Respondent filed an affidavit in support dated March 22, 2022. He deposed that the application is not without merit considering that the Appellant not only failed to file and serve a Record of Appeal within 60 days as ordered by the court but the purported Record of Appeal is a sham since it does not comply with what legally constitutes a Record of Appeal.
7. The 2<sup>nd</sup> Respondent stated that the order issued on October 7, 2021 was very explicit to the extent that the blatant failure by the Appellant to comply meant that the 1<sup>st</sup> Respondent's application dated March 24, 2021 stood as allowed on December 6, 2021. There was no need for further court order required for the said order given on October 7, 2021 to take effect.
8. In opposition to the application, the Appellant filed a replying affidavit dated March 28, 2022. In her affidavit, she deposed that the 1<sup>st</sup> Respondent's application is unfounded and is an abuse of the court process only aimed at frustrating the Appellant. He also deposed that the court issued an order on October 7, 2021 directing the Appellant to compile and serve the Record of Appeal within 60 days. The Appellant complied and filed the Record of Appeal on December 3, 2021 but efforts to serve the 1<sup>st</sup> Respondent on December 3, 2021 and December 6, 2021 were futile as the counsel declined to accept the Record of Appeal.
9. According to the Appellant's counsel, upon realizing that the advocate has declined to accept service on December 7, 2021, counsel for the Appellant served the 1<sup>st</sup> Respondent's firm on email and the 2<sup>nd</sup> Respondent by personal service. Filing and service of the appeal was done within the period of sixty (60) days but the 1<sup>st</sup> Respondent's advocates declined to accept service of the said Record of Appeal so as to file the current application claiming that the same had been filed out of time.
10. She stated that this appeal was already admitted for hearing and the current application was filed after the said appeal had been admitted for hearing. Counsel for the Appellant further averred that the Appellant complied with the court order and then filed and served the Record of Appeal within sixty (60) days and the wilful refusal by the 1<sup>st</sup> respondent's advocates to receive the Record of Appeal was accentuated by malice to cause the Appellant's appeal to be dismissed.
11. The 1<sup>st</sup> Respondent filed a further affidavit dated April 25, 2022 sworn by Dr Justy P Lumumba Nyaberi largely reiterating the averments made in the affidavit in support to the application.
12. On March 22, 2022, this court issued directions that the application dated January 20, 2022 be canvassed by way of written submissions. The 1<sup>st</sup> Respondent complied and filed his submissions dated April 28, 2022 whereas the Appellant filed its submissions dated May 9, 2022. There are no submissions on record filed by the 2<sup>nd</sup> Respondent. However, it is worth-noting that it filed an affidavit in support of the application.



13. In their respective submissions, the 1<sup>st</sup> Respondent has urged this court to allow the application dated January 20, 2022 by striking out the Record of Appeal dated December 2, 2021 and that the order in the application dated 24<sup>th</sup> March, 2021 to the effect that the amount deposited in the names of the advocates at Kenya Commercial Bank (KCB) be released to the Firm of M/S Nyaberi & Co Advocates for settlement of the Judgment. On the other hand, the Appellant has urged this court to dismiss the 1<sup>st</sup> Respondent's application with costs.

### **Analysis and Determination**

14. In considered the 1<sup>st</sup> Respondent's application, the court has read through the response filed thereto, the written submissions in support and in opposition to the said application together with the authorities relied upon as well as the provisions of the law. The court finds the following sole issue emerging for determination being whether the Record of Appeal is incompetent and should therefore be struck out.
15. In his submissions, the 1<sup>st</sup> Respondent has urged that the Appellant failed to comply with the court order issued on October 7, 2021 as it served the Record of Appeal on December 7, 2021 as evidenced by the receiving stamp. The Appellant on the other hand submitted that they filed the Record of Appeal on December 3, 2021 and attempted to serve the 1<sup>st</sup> Respondent on 3<sup>rd</sup> and December 6, 2021 but the same was declined only to be accepted on December 7, 2021 after having been served with an advance copy on the same day via email.
16. On perusing the proceedings, it is noted that an affidavit by Noah Omondi Ongolo sworn on March 29, 2022, detailing the steps that were taken in serving copies of the Record of Appeal upon the Respondents. The record shows that the Record of Appeal was filed on December 3, 2021. From my computation of the 60 days period, the same lapsed on December 6, 2021. Therefore, the Record of Appeal was filed within the 60 days period granted by the court on October 7, 2021. It is the court's considered view that the explanation offered by the Process server in the affidavit of service dated April 22, 2022 is satisfactory and answers the question as to why the Record of Appeal was served upon the 1<sup>st</sup> Respondent on December 7, 2021.
17. The 1<sup>st</sup> Respondent has also submitted that the Record of Appeal as filed falls short of the provisions of Order 24 Rule 13 of the *Civil Procedure Rules* which has been consistently referred to both in the further affidavit and the submissions. This must have been typo error as counsel meant Order Order 42 Rule 13(4) of the *Civil Procedure Rules* since it is the relevant provision regarding the Record of Appeal.
18. Order 42 Rule 13(4) of the *Civil Procedure Rules* provides for the prerequisites to be complied with before an appeal can be set down for hearing. The said provision states as follows;
- “ 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).”

19. In the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2015] eKLR, the Supreme Court of Kenya held as follows;

“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.”

20. The Supreme Court of Kenya in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (supra)* while citing the case of *Law Society of Kenya vs Centre for Human Rights and Democracy & 12 others* Supreme Court No 4 of 2014, had this to state:-

“The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower court, without which the appellate Court would not be able to determine the appeal before it.”

21. Further, in the case of *Nyota Tissue Products v Charles Wanga Wanga & 4 Others* [2020] eKLR, the court held that;

“The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the “judgment, order or decree appealed from” and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances.”

22. It has been submitted by the Appellant that the appeal had already been admitted and certified ready for hearing. Having perused the record, the court finds there is no evidence that this appeal was admitted and certified ready for hearing. However, there is a Record of Appeal dated December 2, 2021 which in my view meets the provisions of Order 42 Rule 13(4) of the *Civil Procedure Rules*.

23. In any event, Article 159 (2) (d) of the *Constitution* is meant to cure any defects in the Record of Appeal if any as pointed out by the 1<sup>st</sup> Respondent. The *Constitution* guarantees the administration of justice without undue regard to procedural technicalities. Again, this court has discretion to invoke



the overriding objective principle for the benefit of any deserving party in the administration of justice. This is one of the peculiar cases in which this court is called upon to exercise such discretion.

24. In the circumstances of this case, the order that commends itself and which the court proceeds to make is that the 1<sup>st</sup> Respondent's application dated January 20, 2022 lacks merit and is hereby dismissed with the following orders issuing;

- a. The Appellant be and is hereby granted 21 days leave to set down this appeal for directions.
- b. In default of (i) above, the appeal shall stand struck out.
- c. Costs of this application shall await the outcome of the main appeal.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24<sup>TH</sup> DAY OF AUGUST , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

