



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CIVIL APPEAL NO. 10 OF 2014**

**ALLEN A LELEKUTI.....APPELLANT/RESPONDENT**

**-V/S-**

**SAMUEL THUMBI..... RESPONDENT/APPLICANT**

**RULING**

**Application**

1. By an application dated 10<sup>th</sup> June 2021, the Respondent/Applicant sought that the Memorandum of Appeal and the Supplementary Record of Appeal filed by the Appellant/Respondent be struck out, and costs of the application be provided for.
2. The Application was supported by the grounds on the face of the application and the Affidavit sworn by Mwazighe Micar, an advocate of the High Court of Kenya and who has the conduct of the suit on behalf of the Respondent/Applicant.
3. The grounds and averments in the Supporting Affidavit were to the effect that the Appellant/Respondent has faulted the Record of Appeal and the Supplementary Record of Appeal as filed for lack of inclusion of the certified copy of the decree. That the Appellant/Respondent also failed to include all the pleadings and exhibits tendered in evidence at the trial by the parties. That the effect of the foregoing is that the record of appeal and the supplementary record of appeal filed are incompetent and incurably defective and should therefore be struck out.

**Response by Respondent**

4. The application was opposed by the Replying Affidavit of Patrick Mutinda sworn on 23<sup>rd</sup> June 2021 in which he stated that the requirement for a certified copy of decree is not mandatory and as such the lack of it in a record of appeal is a procedural technicality which is curable and hence does not by itself render the appeal defective.
5. The Appellant/Respondent argued that the failure to annex the pleadings filed in the court being appealed from does not also go to the root of the appeal but it is as well a procedural technicality as the court will have the benefit of reading the judgment of the court which is based on the pleadings presented before the court being appealed from.
6. The Appellant/Respondent further argued that the record of appeal filed in this appeal contains a judgment of the court being appealed from which is sufficient material for consideration by this honourable court and not extracts of decisions in form of a decree.
7. The Appellant/Respondent argued that the lack of a certified copy of decree as well as pleadings does not itself invalidate this appeal and further does not affect the Appellant's right to be heard hence the appeal ought to be determined on merit.

**Further Response by Applicant**

8. The Respondent/Applicant through Mwazighe Micar, the advocate having conduct of the suit on behalf of the Respondent/Applicant swore a Further Affidavit on 8<sup>th</sup> December 2021 and argued that he was informed by the Respondent/Applicant that when the judgment was delivered, there were threats of execution as the Appellant opted to execute against the Appellant and not the insurer.
9. The deponent argued that the Respondent/Applicant's vehicle was about to be attached and he had to settle the decretal sum and after the Appellant consumed the decretal sum to the last coin, he has now filed this frivolous appeal that the amount awarded was too small, and that the same should not be allowed by this court.

## **Applicant's Submissions**

10. The Respondent/Applicant in submitting stated that this is an old matter being an appeal filed in the year 2014 and that the appeal is clear that it is against the judgment and decree which shows the tabulation of the amount the party was awarded. That the Appellant failed to attach the said copy to the record of appeal for the court to peruse as the law dictates.

11. The Respondent/Applicant submits that the Appellant actually executed by attempting to attach the Respondent's vehicle and he was duly paid. The Respondent/Applicant cited Order 42 Rule 13 (4) which is clear that the record of appeal will not be complete without the decree or order appealed against. Further, he submitted that the importance of the decree or the order appealed against in an appeal to the High Court is also mirrored in Order 42 Rule 2 of the Civil Procedure Rules which states that:-

*'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 the court may order, and the court need not consider whether to reject appeal summarily under Section 79B of the Act until copy is filed'.*

12. The Respondent/Applicant further cited Section 79G of the Civil Procedure Act which states 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 of a copy of the decree or order'.*

13. The Respondent/Applicant cited the case of *Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo* [2016] eKLR where the court held that:-

*"Coming back to this appeal, there is no evidence that the Appellants ever applied for the decree appealed against, let alone filing it as part of the record of appeal. Without belabouring the point, this failure is fatal to the appeal; sheer failure to comply with the foregoing mandatory statutory and procedural provisions renders this appeal incompetent and of no consequence. It is hereby struck out with costs."*

14. On the issue of costs, Section 27(1) of the Civil Procedure Act was cited as follows:-

*'Subject to such conditions as may be prescribed, and to the provision of any law to the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise to those powers.'*

The case of *Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others* [2014] eKLR was further cited on how costs are awarded by the court.

## **Respondent's Submissions**

15. The Appellant/Respondent in submitting stated that the issue that arises for determination is whether this appeal is defective for failure to include pleadings and the decree appealed from, in the Record of Appeal. The Appellant/Respondent stated that he filed a Record of Appeal dated 10<sup>th</sup> March 2021 which included a Memorandum of Appeal dated 16<sup>th</sup> October 2014, Certified copies of the Lower Court proceedings and the lower court judgment delivered on 17<sup>th</sup> September 2014 by Hon. R. K. Ondiek (PM). A Supplementary Record of Appeal was filed 25.05.2021 which included the Medical Report dated 3.8.2011.

16. The Appellant/Respondent submits that Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010 is specific that what is required at the appellate stage is the judgment, order or decree appealed from. That the Appellant in the present appeal attached a certified copy of the lower court judgment in compliance with the said provisions. That it is apparent from a reading of the above provision that it is not a mandatory requirement for an appellant to include both the judgment and the decree of the lower court in the Record of Appeal. It would however not be useful to attach a decree and leave out the judgment of the trial court.

17. The Appellant/Respondent cited the case of *Nyota Tissue Products v Charles Wanga Wanga & 4 Others* [2020] eKLR where it was 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 be too draconian to strike out the appeal in these circumstances."*

18. The Appellant/Respondent submits that the record of appeal herein has with it, attached the lower court's judgment being appealed against and that the judgment is sufficient material for consideration of the appeal by this honourable. That non-inclusion of pleadings and exhibits in the Record of Appeal does not render the appeal defective and neither does it affect the Appellant's appeal and the right to be heard enshrined in Article 50 of the Constitution of Kenya, 2010. In submitting further, the Appellant/Respondent states that Article 159(2) (d) calls upon the honourable court to ensure that justice is administered without undue regard to procedural technicalities. The

Appellant/Respondent cited the case of *Phillip Chemwolo & Another v Augustine Kubende* [1982-1988] KAR 103 at 1040.

**Determination**

19. I have considered the application and taking into the account the position that the current Appellant's advocate has activated the appeal by filing the records of appeal which includes the judgment of the trial court, this court finds that the appeal should not be struck out on the basis of procedural technicality which does not go to the substance of the appeal. The Appellant is hereby granted leave to regularize the records and prosecute the appeal within the next three months. The Applicant will however have the costs of this application.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 17TH DAY OF FEBRUARY 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Ogwel- Court Assistant

Mr. Wambura Advocate holding brief for Mr. Mutinda for Appellant/Respondent

Mr. Mwazighe Advocate for Respondent/Applicant

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**