



**SBM Bank (Kenya) Limited v Ongeri & another (Civil Appeal
E042 of 2021) [2022] KEHC 12218 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E042 OF 2021
REA OUGO, J
JULY 28, 2022**

BETWEEN

SBM BANK (KENYA) LIMITED APPELLANT

AND

NAHSHON BORURA ONGERI 1ST RESPONDENT

BRENDA NYAMBEKI MWANGI 2ND RESPONDENT

RULING

1. The applicant's notice of motion dated 22nd July 2021 seeks the following orders:
 1. Spent
 2. Spent
 3. That the Honourable court be pleased to strike out and dismiss the entire appeal herein as the order and or the decree being appealed against was never applied for; extracted and filed within the required time and leave of Honourable Court has not been sought to file the said order and or Decree.
 4. That the costs of this application and the appeal be borne by the Appellant/Respondent.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Brenda Nyambeki Mwangi. The background to the application is that a ruling that was delivered by the Principal Magistrate Honourable E.A Obina in matter Kisii CMCC No 380 of 2020 on the 14th April 2021. That the appellant dissatisfied with the aforesaid decision filed the Memorandum of Appeal in this Honourable Court on 28th April 2021 and a record of appeal on 4th June 2021. The applicant contends that the appeal is incompetent and bad in law as the order and decree that the appellant has appealed against has never been applied for, extracted and filed in court within 30 days



as provided by section 79G of the Civil Procedure Act, Chapter 21 Laws of Kenya as read with Order 42 Rule 2 and 13 (4) of the Civil Procedure Rules.

3. The application was opposed by the appellant and it filed a replying affidavit sworn by Jackline Wambua Kinjanjui a branch manager at the appellant's bank. She averred that once the court granted the appellant leave to file a supplementary record of appeal, they filed and served on the applicant a supplementary record of appeal containing the order appealed against. The appellant is of the view that the application has been overtaken by event.
4. Having considered the pleadings and submissions of the parties before the court, I am inclined to agree with the submissions of the appellant that the prayers sought in the notice of motion dated 22nd July 2021 have been overtaken by events upon the appellant filing the supplementary record of appeal. In any event, the applicants herein have not demonstrated to this court what prejudice they will suffer if the order and decree is not annexed in the Record of Appeal. The Court of Appeal in the case of Emmanuel Ngade Nyoka -v- Kitheka Mutisya Ngata Civil Appeal No.63/2016 (2017) eKLR. The court stated-

“According to the Judge, the record of Appeal before him had a certified copy of the Judgment of the court. Consequently, he reasoned, that the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record. We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was mere technicality that could not have sat well with the current constitutional dispensation that called upon courts to go to substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in Section 1A and 1B of the Civil Procedure Act.

Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.”

5. Consequently, the appellant having filed their supplementary record of appeal annexing the order appealed against, I find that the instant Appeal is not incompetent.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JULY 2022.

R.E. OUGO

JUDGE

In the presence of:

Mr. Alusa for Mr. Nyanganja For the Appellants

Respondent Absent

Ms. Aphline/Emily Court Assistant

