



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: Mrima, J.]

CIVIL APPEAL NO. 110 OF 2017

ABUON JOSEPH GUMBA.....APPELLANT

-VERSUS-

G.M. SOMS LTD & 3 OTHERS.....RESPONDENTS

(Being an appeal from the Ruling by Hon. R. K. Langat, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Court Civil Suit No. 169 of 2010 delivered on 14/11/2017)

JUDGMENT

1. The Appellant herein, *Abuon Joseph Gumba*, instituted **Rongo Senior Resident Magistrate's Civil Suit No. 169 of 2010** (hereinafter referred to as '**the suit**') against *Al Hyder Company Limited*. The suit was heard. The trial court found in favour of the Appellant and entered judgment against *Al Hyder Company Limited* for Kshs. 1,895,500/=. That was on 27/02/2014.
2. Later the Appellant instituted execution proceedings by way of attachment of goods belonging to the judgment debtor.
3. The Respondents herein objected to the attachment. They eventually filed a Notice of Motion dated 18/07/2017. The Respondents sought that the attachments be lifted as the properties then attached were instead not the properties of the judgment debtor.
4. The application was opposed by the Appellant. The application was heard and a ruling delivered on 14/11/2017. The application was allowed as prayed.
5. Aggrieved by the decision the Appellant preferred an appeal. He filed a Memorandum of Appeal dated 07/12/2017 wherein he raised 7 grounds of appeal.
6. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly complied, but the Respondents did not despite having been given time to comply.
7. The appeal was against the ruling delivered on 14/11/2017.
8. I have carefully perused and understood the contents of the pleadings, the proceedings, the ruling under appeal, the record of appeal, the submissions and the decisions referred to by the Appellant.
9. I noted a grave anomaly on the record of appeal. Although the issue was not taken up by the parties I will still deal with it as it goes to the substance and competency of the appeal. It is about the absence of the formal order from the ruling appealed against from the record of appeal.
10. I have also perused the lower court file. I did not come across any formal order extracted from the ruling.
11. I will now deal with the effect of the absence of the formal order from the ruling appealed against.
12. Appeals from orders are provided for in **Sections 75 and 76 of the Act** and **Order 43 of the Rules**. **Order 42 Rule 1 of the Rules** provide that an appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.
13. Once an appeal is lodged aforesaid, a Record of Appeal is then filed. The contents of the Record of Appeal are provided for in **Order 42 Rule 13(4)** of the **Rules** 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).

14. A Record of Appeal is essentially supposed to be complete with all necessary documents. Courts have severally dealt with cases of incompleteness of Records of Appeal.

15. The Supreme Court in Civil Application No. 20 of 2014 Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others (2014) eKLR referred to its earlier finding in Law Society of Kenya vs Centre for Human Rights and Democracy & Others, Supreme Court Petition No. 14 of 2013 as follows: -

[16] For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:

An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal –

- (a) a petition of appeal;*
- (b) a record of appeal; and*
- (c) the prescribed fee.*

[17]

[36] The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the completeness of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition, the Record of Appeal, and the prescribed fee.

[37]

[38] 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.

16. The Court further held, at paragraph 39, that:

[39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of Rule 33(1) of the Supreme Court Rules.

17. Ngaah, J in Nyeri High Court Civil Appeal No. 51 of 2013 Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo (2016) eKLR dealt with how the Court of Appeal in Kyuma vs Kyema (1988) KLR 185 dealt with the interpretation of Section 79G of the Act. Before looking at what the Court said I will first reproduce the said Section.

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.

18. The Court of Appeal then held as follows: -

The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay” Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were the proceedings and judgment”.

19. Sitati, J in *Kakamega Election Petition Appeal No. 3 of 2018 Elvis Anyimbo Sichenga v Orange Democratic Movement & 4 Others (2016) eKLR* dealt with the same issue in an election petition appeal from the subordinate court. In that appeal the Record of Appeal did not include the decree of the judgment appealed against. The Learned Judge held as follows: -

32. What then am I saying about the failure by the appellant to attach a certified copy of the decree appealed from? I am saying that that omission is not a mere technicality for if it were so, the drafters of the rules would not have made its attachment a mandatory requirement. I am therefore satisfied that the applicant has satisfied this court that the said omission is fatal to the petition and I so find.

20. I will also add my voice on the subject. **First**, from the reading of **Order 42 Rule 13(4)** of the **Rules** it is the order thereof, and not the ruling, that is appealed from the subordinate court to the High Court. **Second**, under **Order 42 Rule 13(4)** of the **Rules** the memorandum of appeal, the pleadings and the judgment, order or decree appealed from and in appropriate cases the order giving leave to appeal cannot be dispensed with in the Record of Appeal. **Third**, the saving grace under **Article 159(2)(d)** of the **Constitution** is inapplicable in this case. That is because the provision only applies to matters relating to procedure or form and not the substance thereof. **Fourth**, despite clear provisions on extension of time the Appellant never sought for any extension of time to file the formal order neither did it explain any difficulty in obtaining the order.

21. The Record of Appeal is therefore incomplete. In the words of the Supreme Court in **Civil Application No. 20 of 2014 Bwana Mohamed Bwana** (supra) ‘such an appeal would be incomplete and hence incompetent.’

22. The formal order from the ruling under appeal is one of the most crucial documents. Its absence renders a void between the ruling and the appeal. The record of appeal is hence incomplete. That makes the appeal incompetent.

23. Having said so, there is no competent appeal for consideration. The appeal is therefore struck out with costs.

24. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. gsokoth@yahoo.com for Messrs. G. S. Okoth & Company Advocates for the Appellant.
2. odhiambooumaadv@gmail.com for Messrs. Odhiambo Ouma & Company Advocates for the Respondents.
3. Parties are at liberty to obtain hard copies of the judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE