



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NUMBER 101 OF 2014

MARY RONO.....APPELLANT

-VERSUS-

BEN GATHOGO.....1ST RESPONDENT

JOSEPH KANG'ETHE

T/A DIRECT O. SERVICE AUCTIONEERS.....2ND RESPONDENT

(Being and Appeal against ruling and order of Honourable M.A. Otindo Resident Magistrate delivered on the 10th June, 2014 in Nakuru CMCC No. 557 of 2012)

JUDGMENT

1. This appeal arose from the ruling and Order of the trial magistrate in Nakuru CMCC No. 557 of 2012 delivered on the 10th June 2014.

I have combed through the Record of Appeal as filed. It is dated the 27th November 2017 and filed on the same date. I have not seen a certified (or uncertified) copy of the order among the filed documents.

2. The Appellant concedes that no certified copy or otherwise of the order/Ruling appealed from is filed with the Records of Appeal and citing **Section 75 of the Civil Procedure Act** submits that there is no requirement that such order has to be filed together with the Record of Appeal.

I have considered the said legal provision. It is silent on the issue. It deals with Orders that may be appealed from as of right.

3. In his written submissions and highlights, the Appellant's advocate steered away from the issue, and proceeded to submit on the merits of the appeal despite the Respondents submissions that failure to extract an order from the ruling and filing the same renders the appeal incompetent, citing the case **Chege –vs- Suleiman (1988) e KLR** where the Court of Appeal rendered

“On construction of the Civil Procedure Act Section 66 of which confers a right of appeal from the decree or orders of the High Court to the Court of Appeal, no competent appeal could be brought unless such a decree or order was formally extracted the basis of the appeal.

Failure to extract the decree or order of a court before launching the Record of Appeal against the court's decision goes to the jurisdiction of the appellate court and not merely a point of procedure - Accordingly this appeal was incompetent.”

4. In furtherance to the above submission, it was urged that under **Order 42 rule 2 Civil Procedure Rules**, 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 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.”

5. There has been no explanation by the appellant for the apparent failure to extract and file the order from the ruling appealed from. The law as stated in the above legal provisions places a duty upon the appellant to file the certified copy before the appeal is set down for hearing, and therefore mandatory - **James Muchori Maina –vs- KPLC Ltd (2005) e KLR**.

6. The right to be heard is no doubt a valued right even under the **Constitution – Article 50** and it would be against the notions of justice if

such rights are prejudiced or affected by failure to afford such an opportunity to the party.

However, the right is subject to other party's rights, and are further premised on laid down procedural rules that ought to be adhered to give fair chances to being heard to all parties to a dispute.

7. I have rendered above that no explanation at all was offered by the appellant for the failure to extract and file the formal order appealed against; yet there are windows open under Section 79G Civil Procedure Act, for extension of time, as well as filing of a Supplementary Record of Appeal.

8. I have considered several pronouncements on the subject. In **Prime Rock Company –vs- Joseph Mwangi Ndegwa (2019) e KLR, Election Petition Appeal No.3 of 2018 at Kakamega Elvis Anyimbo Sichenga -vs- Orange Democratic Party Movement & 4 Others (2018) e KLR.**

Salama Beach Hotel Ltd & 4 Others –vs- Kenyariri & Associates Advocates & 4 Others (2016) e KLR where the **Court of Appeal** citing the case **Floris Pierro & Another –vs- Glancario Falasconi** (as the administrator) of the **Estate of Santuzza Billion alias Santuzza (2014) e KLR)**

“---The order embodies the court's decision. If it is not included, the Court of Appeal will be at a loss in determining that the High Court determined.

It cannot be the business of this court to toothcomb 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 Appeal to be fatally defective and liable to be struck out.”

9. I need not go further. By an analogy, if the trial court's order appealed against to the High court is not extracted and filed, that failure renders the appeal fatally defective. Thus an appeal that fails to include the extracted order or decree appealed from is incurably defective and a candidate for striking out.

10. To that end, I find the appeal to be incurably defective and incompetent.

I need not go into the merits or otherwise of the appeal.

I proceed to strike it out with costs to the 1st Respondent. The 2nd Respondent did not participate in the appeal proceedings. No costs are awarded to the said 2nd Respondent.

It is so ordered.

Delivered, Signed and Dated at Nakuru this 30th Day of July 2019.

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J.N. MULWA

JUDGE