



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 27 OF 2020

LUCAS OTIENO MASAYE.....APPELLANT

VERSUS

LUCIA OLEWE KIDI.....RESPONDENT

(Being an Appeal against the decision and judgment delivered on the 25th July 2020

by Tamu senior resident magistrate, Honourable Onzere E.M in Tamu

SRMCC NO. 11 OF 2019)

JUDGMENT

BACKGROUND

The Appellant herein filed the suit at the lower court seeking a declaration that the Respondent herein held KISUMU/WANGAYA '1/3522 in trust for him amongst other orders. Vide a judgment delivered on 25/6/2020 the magistrate dismissed the suit on the ground that the issues ought to have been resolved in the Succession Cause that was pending at the High Court in Kisumu. **(KISUMU SUCCESSION CAUSE NO. 647 OF 2012)**. Dissatisfied with that judgment the Appellant has now proffered this appeal vide his Memorandum of appeal dated 13th July 2020 the Appellant outlined the following pertinent grounds of appeal;

1. The trial magistrate erred in law and fact by failing to appreciate the overriding interests created by Section 28 of the Land Registration Act, thus arriving at an erroneous conclusion.
2. The learned trial magistrate erred in law by applying Section 45 of Law of Succession Act.
3. The Magistrate erred in law and fact in failing to make any determination over the Customary trust claim hence occasioning a miscarriage of justice.
4. The learned Magistrate erred in law and in fact and law by failing to make a finding that the suit land was family land held by the Defendant's husband in trust for the benefit of future generations hence denying the Appellant his share of the land.
5. The Magistrate erred in law and fact by failing to address himself to the facts of article 162(2) of the Constitution as read with section 13 of the Environment and Land Court Act Cap 12A.
6. The Magistrate erred in law and fact by stating that the suit raises issues that ought to be resolved in the succession cause.
7. The Magistrate erred in law and Fact by failing to appreciate that the Succession cause is only limited to distribution of the deceased's estate and not determination of ownership. Thereby reaching an erroneous finding that he lacked jurisdiction.
8. The Magistrate erred in law and fact for failing to consider the evidence and the submissions of the Appellant.
9. The judgment was against the weight of the evidence adduced and the cited case laws.

For the above reasons the Appellant prays that this appeal be allowed and the lower court judgment be set aside.

SUBMISSIONS

As per the directions taken on 27/10/2021 the Appellant was supposed to file and serve submissions within 30 days while the Respondent was to file his submissions within 30 days of service. The only submissions on record are those of the Respondent.

RESPONDENT'S SUBMISSIONS

Vide his submissions dated 16th March 2022 the respondent contended that failure by the Appellant to attach a decree to the Record of appeal rendered this appeal incompetent. He called the Court's attention to the provisions of Order 42 Rule 13(4) of the Civil Procedure Rules 2010 on the strength of which he stated that this court could not overlook the omission of decree. He relied on the case of **KAKAMEGA ELECTION PETITION APPEAL NO.3 OF 2018 ELVIS ANYIMBO SICHENGA VS ODM & OTHERS (2016) eKLR**, where the court held that failure to attach a certified copy of the decree appealed from was not a mere technicality but fatal to the petition. He called for dismissal of the appeal with costs to the Respondent.

ISSUES FOR DETERMINATION

1. Duty of the court
2. Whether failure to attach a decree to the record of appeal is fatal.

DUTY OF THE COURT

As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by **Section 78 of the Civil Procedure Act** which espouses the role of a first appellate court which is to: '..... *re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.*' This was buttressed by the Court of Appeal in the case of **Peter M. Kariuki v Attorney General [2014] eKLR** where it was held that:

"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 (unreported)."

WHETHER FAILURE TO ATTACH DECREE TO RECORD OF APPEAL IS FATAL

It was the Respondent's submission that failure by the Appellant to attach a decree to the record of appeal was fatal to his case. A look at the Record of appeal clearly shows that a Decree has not been attached thereto.

Order 42 Rule 2 of the Civil Procedure Rules provides as follows: -

"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 as the court may order, and the court need not consider whether to reject the Appeal summarily under Section 79B of Act until a copy is filed."

Order 42, Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides;

"(4) 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).”

The Supreme Court of Kenya, in the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR* held as follows at paragraph 41:

“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.”

The Court of Appeal in *Chege v Suleiman [1988] eKLR* firmly stated that the issue of failure to attach the decree is a jurisdictional point, and held thus:

“But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the Civil Procedure Act which confers a right of appeal from the High Court to this Court from “decrees and orders of the High Court”. And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.”

CONCLUSION

From the foregoing it is clear that an appeal can be rendered fatally defective in the absence of a decree. The Appellant herein has not attached a copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF MARCH 2022.

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.