



**Simiyu & 2 others v Mabonga & another (Environment and Land Appeal  
7 of 2021) [2022] KEELC 3792 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3792 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 7 OF 2021**

**FO NYAGAKA, J  
JUNE 28, 2022**

**BETWEEN**

**EDWARD MAKOKHA SIMIYU ..... 1<sup>ST</sup> APPELLANT  
MARGARET NALIKA ..... 2<sup>ND</sup> APPELLANT  
ISAAC SIMIYU WAFULA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ISAAC MACHESO MABONGA ..... 1<sup>ST</sup> RESPONDENT  
JOSHUA MABONGA MACHESO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal arising out of the Judgement and Decree of Hon. C. M. Kesse  
(Principal Magistrate) Kitale in CMCC NO. 438 of 2019 delivered on 23/03/2021)*

**JUDGMENT**

1. The Appellants being aggrieved by the decision of the trial Magistrate in Kitale CMCC No. 438 of 2019 challenged the judgement and decree of the Court, delivered on 23/02/2021. The Appellants' Memorandum of Appeal filed on 01/04/2021 seeks to set aside the judgement of the trial court and that it be substituted with an order dismissing the suit with costs. He further prayed for costs of the present Appeal.
2. In their Memorandum of Appeal, the Appellants have raised eleven (11) grounds in support of the Appeal. In summary, the Appellants lamented that the trial court lacked jurisdiction to hear and determine the matter. The trial court failed to consider the beneficial interest of the deceased and her children wherein she had resided for many years. Ultimately, this was the deceased's only abode. That the trial court deliberately delayed the hearing and determination of the suit. That the trial court disregarded the Appellants' right to a fair trial. That the Respondent had failed to discharge his burden



of proof being on a preponderance of the evidence on record. They further accused the trial court for failing to consider the prevalent and applicable laws thereby arriving at an erroneous decision.

### Summary Of Submissions

3. Parties canvassed the Appeal by way of written submissions. According to the Appellants' submissions filed on 28/04/2022, the Appellants submitted that the trial court fallaciously determined land ownership instead of determining whether the Appellants had the right to bury the deceased on the suit land. According to the Appellants, the trial court disinherited the deceased person. As a consequence, she could not be buried on the suit land. They submitted that their right to a fair trial had been impeded post judgment because it took over one (1) for typed proceedings to be availed to the Appellants. They impugned the decision of the trial court in that it had failed to consider the relevant statutes in relation to the issue for determination. They faulted the court for determining ownership when instead the issues before the trial court were limited to matters of a burial dispute. They further submitted that the trial magistrate was biased.
4. The Respondent filed his submissions on 10/05/2022. He submitted that the matter was fully heard. He produced documents, at trial, supporting that he was the proprietors of the suit land. The Appellants on the other hand, failed to rebut this evidence. The Respondent endorsed the decision of the trial court and urged the present court to dismiss the Appeal with costs.
5. This court has considered the Amended Memorandum of Appeal and the rival submissions filed by parties. This court has also taken the time to scrutinize the record of appeal.
6. This court is a first appellate court. As such, this court must remind itself that as an appellate court, it will not normally interfere with the exercise of such discretion unless it has been shown that the discretion was not exercised judiciously. (*Kiriisa -vs- Attorney General & Another* [1990-1994] EA 244). Similarly, the appellate court will not interfere with the exercise of discretion of a court unless it is satisfied that it misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the court was clearly wrong in the exercise of the discretion and that as a result there had been injustice. The elements the trial court should take into consideration in dealing with the question of adjournment are the adequacy of reasons given for the application, how far, if at all, the other party is likely to be prejudiced by the adjournment, and how far such other party can be suitably compensated by the order against the applicant to pay costs. (*Mbogo & Another -vs- Shab* [1968] EA 93).
7. As stated earlier, this court has carefully scrutinized the entire record of appeal that filed on 14/02/2022. I have observed that two crucial and critical documents were omitted from the said record; the Plaintiff that was filed by the Respondent at trial and the decree arising out of the judgment of the trial court.
8. Before delving into the merits and demerits of the Appeal, I think it is salient to address the import of the incomplete record before me. Section 65 (1) (b) of the [Civil Procedure Act](#) provides:

“Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate court, on a question of law or fact.”
9. Order 42, Rule 2 of the *Civil Procedure Rules* provides:

“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.”

10. The above provisions dictate that it is critical to have the certified copy of the decree or order appealed against on record. In fact, the court is invited to reject the appeal summarily in its absence.

11. Order 42 Rule 13 (4) (b) and (f) of the Civil Procedure Rules appears to have an inclusive approach. It provides:

“Before allowing the appeal to go for hearing the judge shall be satisfied that inter alia, pleadings and the judgment, decree or order appealed 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.”

12. This means that once the judge is satisfied that the relevant documents listed in the said provision, including but not limited to a Plaint and judgment, order or decree appealed from is on record, it shall admit the appeal for hearing. The connotation is that any of the options is sufficient enough to allow an appeal. Notably, the language herein speaks of admitting an appeal for hearing and nothing further.

13. How then are we able to harmonize the above provisions? The Supreme Court of Kenya in the case of *Bwana Mohamed Bwana -vs- Silvano Buko Bonaya & 2 Others* [2015] eKLR held as follows:

“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.”

14. The Court of Appeal in *Chege -vs- Suleiman* [1988] eKLR had this to say:

“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.”

15. From the above superior court decisions, it is emphatic that a decree and a Plaint form an essential part of the record. Indeed, the Appellants failed, for reasons known to them to have the same captured in the record or supplementary record of appeal if need be.

16. The wordings of statute are unambiguous. It is my considered view that the Plaint, which formally instituted the proceedings at trial and the decree were critically omitted from the record. I have embarrassingly been placed to fact find on this Appeal in the absence of the Plaint. How will I even grasp the real issues for determination when the Appeal lies at the heart of the Respondent’s Plaint among other documents? The subsistence of a decree and a Plaint are at the heart of the Record of Appeal. In their absence, the said Appeal is rendered not only incompetent but also incomplete.

17. For the reasons give above, the instant appeal is incurably incompetent. Its only consequence lies in it being struck out with costs to the Respondent.

Orders accordingly.



**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON  
THIS 28<sup>TH</sup> DAY OF JUNE, 2022.**

**DR. *IUR* FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

