



REPUBLIC OF KENYA



**Munene v Njoka & another (Environment and Land Appeal  
E005 of 2021) [2022] KEELC 3876 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3876 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL E005 OF 2021  
EC CHERONO, J  
JUNE 10, 2022**

**BETWEEN**

**JOSEPH MURIITHI MUNENE ..... APPELLANT**

**AND**

**FRANCIS GITARI NJOKA ..... 1<sup>ST</sup> RESPONDENT**

**HELLEN KARAMBU GITARI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant herein, being aggrieved by the ruling of the trial court in CM-ELC Case No 62 of 2018 filed a memorandum of appeal dated February 18, 2021 raising six (6) grounds of appeal. He subsequently filed his record of appeal on December 23, 2021.
2. On January 31, 2022 the respondent filed a preliminary objection raising the following grounds;
  - a. That the record of appeal contravenes the provisions of order 42 rule 2 of the Civil Procedure Rules.
  - b. That there are no sufficient grounds for interfering with the ruling appealed against and the same ought to be rejected under the provisions of section 79B of the Civil Procedure Act.
  - c. The appeal ought to be dismissed with costs to the respondent.
3. The preliminary objection was canvassed by way of written submissions. The respondent submitted that there is no order/decreed attached in the record of appeal hence the appeal in its entirety is an abuse of the court process, bad in law, and should be summarily rejected.
4. The appellant submitted that he still has the opportunity to amend its record of appeal. That in Augustine Mulo Onyango v Migotiyo Plantations Limited & Anor Civil Appeal No 6 of 2017 & Toyota



*Tissue Products v Charles Wanga & Anor* (2020) e KLR the learned judges affirmed the position that it would be draconian to strike out an appeal on the basis of technicalities.

### **Analysis and Determination**

5. The main issue for the court's determination is whether the appellant's failure to attach the decree/order appealed against rendered the appeal defective/bad in law and the same ought to be summarily rejected.
6. 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.”
7. 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).”
8. From the provisions of order 42 rule 13, the court can dispense with the production of any documents which is relevant except the memorandum of appeal, the pleadings, the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal. The production of the order/decreed appealed against is therefore mandatory.
9. A decree is defined under section 2 of the *Civil Procedure Act*, cap 21, as follows:

“Decree means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of



the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91 but does not include— (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;” (emphasis added).

10. In *Elizanya Investments Limited vs Lean Energy Solutions* [2021] e KLR, the court held as follows;

“.....I am of the view that the use of the conjunction “or” means that an appellant is not mandatorily obligated to attach both the judgment and the decree. Further, a decree is an extract of the judgment appealed from..... In this court’s view, the failure to include a certified copy of the decree in the record of appeal should not invalidate the present appeal for reasons of non-compliance as this court has had the benefit of reading judgment which was rendered by the trial court.

32. It is the finding of this court that the lack of a certified copy of a decree does not in any way affect the appellant’s appeal and the right to be heard as enshrined under article 50 of the *Constitution*. It is thus incorrect for the respondent to assert that the appellant’s appeal is defective. I therefore decline to strike out the appeal on the said ground.....”

11. At what stage therefore, should the order/decree be produced? Ideally, the decree/order being appealed against ought to be presented as part of the record of appeal. As part of the bundle, the court will easily refer to it. Order 42 rule 2 however gives the appellant leave to file the same as soon as possible and preferably before the matter is set down for hearing. The appellant’s failure to file the same together with the record of appeal does not, therefore, render the record and in turn the appeal bad in law.
12. At this stage, the appeal herein is yet to be set down for hearing. I agree with the decision in *Augutine Mulo Onyango (supra)* that it would be draconian to strike out the appeal.
13. The upshot of this court’s determination is that the respondent’s preliminary objection lacks merit and the same is hereby dismissed with costs to the appellant.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 10<sup>TH</sup>, JUNE, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of;**

- 1) M/S Kiragu holding brief for Igati Mwai
- 2) Applicant—present
- 3) Respondent/Advocate-----absent
- 4) Kabuta – Court Assistant.

